THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

John Doe 2 ..... Appellant,

v.

The Citadel ..... Respondent.

APPENDIX VOLUME IV OF V

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S.C. SUPREME COURT

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Table of Contents

Volume I

October 29, 2015 Record on Appeal
filed in the South Carolina Court of Appeals....1

Volume II

October 29, 2015 Record on Appeal
filed in the South Carolina Court of Appeals....494

Volume III

October 29, 2015 Record on Appeal
filed in the South Carolina Court of Appeals....988

Volume IV

October 29, 2015 Record on Appeal
filed in the South Carolina Court of Appeals....1482

Volume V

October 29, 2015 Filed Final Brief of Appellant....1906

October 28, 2015 Filed Final Brief of Respondent....1952

a. Exhibit A....2011

b. Exhibit B....2027

November 13, 2015 Amended Final Brief of Respondent....2042

August 2, 2017 Opinion No. 5504....2103

August 23, 2017 Filed Petition for Rehearing....2115

September 5, 2017 Filed Return to Petition for Rehearing....2145

September 12, 2017 Filed Reply to Return to Petition for Rehearing....2158

September 27, 2017 Filed Order....2167

September 27, 2017 Refiled Opinion No. 5504.....2169

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

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RECORD ON APPEAL

VOLUME IV OF IV

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INDEX

Order Denying Defendant's [The Citadel] Motion for Summary Judgment, December 9, 2014 3

Form Order, June 5, 2015 70

Order Granting Defendant's [The Citadel] Renewed Motion for Summary Judgment, July 6, 2015 71

Complaint, March 19, 2012 84

Answer, June 20, 2012 106

Hearing Transcript, April 18, 2014 119

Hearing Transcript, June 5, 2015 144

Notice of The Citadel's Motion for Summary Judgment, March 6, 2014 171

The Citadel's Memorandum in Support of Motion for Summary Judgment, April 17, 2014, and all exhibits thereto 176

Doe 2's Memorandum in Opposition to Motion for Summary Judgment, April 18, 2014, and all exhibits thereto 478

Doe 2's Reply in Opposition to Motion for Summary Judgment, April 18, 2014, and all exhibits thereto 1335

Doe 2's Supplemental Response in Opposition to Motion for Summary Judgment, April 18, 2014, and all exhibits thereto 1355

The Citadel's Supplemental Memorandum in Support of Motion for Summary Judgment Concerning the Existence of a Duty of Care, April 28, 2014, and all exhibits thereto .1535

The Citadel's Notice of Motion and Renewed Motion for Summary Judgment, April 24, 2015, and all exhibits thereto 1575

Doe 2's Memorandum in Opposition to Renewed Motion for Summary Judgment, June 4, 2015, and all exhibits thereto 1825

The Citadel's Supplemental Memorandum in Support of Renewed Summary Judgment, June 4, 2015, and all exhibits thereto 1877

the fact like, Oh, my goodness, I let him stay there for free, and no one knew. No parents -- no one could see it. I mean, this guy -- I can't even explain it, but this guy, when you left the room, you liked him; he never did anything wrong. Everything he said to anyone, like -- he was likable. No one didn't like him. I didn't meet a single person or a parent that didn't like Skip. I mean, he fooled -- he, what, said 51 kids he preyed on? It could be that. I don't know. But he fooled 51 sets of parents. He was a master at it. He had it down to a science. This guy was a freak. He drew you in. Everyone. Everyone he talked to, like everyone. It didn't matter. He was just that good at what he did. I don't know.

Q. All ages?

A. All ages. Everyone. I mean -- I don't know. It's crazy to think about. He was that good at what he did and all -- all these kids got hurt, all these families.

This could be -- you think -- you think I'm normal right now? No, no. Not even close. How am I going to cope with my kids? Am I going to let my kids go to overnight camps? I don't know. This is going to be a cluster fuck. Excuse

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my language. It's a cluster fuck. All these families, it's going to keep progressing. I mean, it's going to stop somewhere, but I don't know how long it's going to be. It's not going to stop for me. Every day. Every day I get upset about it.

Q. Are you -- are you getting help? I mean --

A. I hate talking about it. I hate it. I hate talking about it. I really do. And like, with me, like it makes me more upset because I was so confused and so young, like, and I brought all these kids in and, like, even my own brother; I feel guilty for it.

Q. Well, you need to take advantage of the help that's available. And I know in reading your reports that you -- that you have toughed this thing out a lot on your own.

A. Yeah.

Q. And that's extremely admirable; it's extremely brave.

A. Yeah.

Q. On the other hand, never be embarrassed or hesitant about asking for help. Because it's just like any other -- any other injury, you go to a doctor.

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A. Yeah.
Q. You just can't see what you have. It's not a bleeding wound on your arm or your leg.
A. Okay.
Q. Okay?
MR. STONEY: All right. It is twelve o'clock. Do you all want to -- do you all want to take a lunch break?
THE WITNESS: Yeah.
MR. STONEY: Why don't we do that.
(The deposition went off the record.)
BY MR. STONEY:
Q. Mr. {John Doe #2}, we took a lunch break, and you and your lawyer went to lunch. You didn't talk about your testimony, did you?
A. No, sir.
Q. Didn't figure you would.
A. We talked about the Final Four.
Q. I'm going to try to get my portion of this wrapped up and whether or not your counsel has questions, we'll -- remains to be seen. But I'm going to try to go through just a couple of areas that I want to touch on. And let me tell you that I apologize if it sounds like I'm kind of jumping around a little bit, but there's some

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points I want to make certain that I understand on.

Going back to those times that you went to The Citadel -- and I think we've talked about each time was some sort of a sporting event; is that correct?

A. Yes, sir.

Q. And sometimes you went with your father?

A. Yes, sir.

Q. And anybody else?

A. My brother would tag along sometimes.

Q. And then there were times you went with Skip ReVille?

A. Yes, sir.

Q. Was there anybody that went with you all when you and ReVille went?

A. No, sir. Just us.

Q. And do you remember what the purpose of your going when you would go with ReVille was?

A. He just wanted to take me to a basketball game and basically show me what those guys did differently than me, like what they did and show me like -- just show me -- like point out things when they did something.

Q. So it was -- you would go to watch The

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Citadel basketball game at McAlister Field House?

A. Yes, sir.

Q. And it was kind of an instructive nature so that ReVille could show you, as a coach, what the basketball team was doing?

A. Yes, sir.

Q. Did that help you understand the game or improve your game any, do you think?

A. I definitely think so, yes, sir.

Q. Did you go anywhere else on campus other than the McAlister Field House with ReVille?

A. He drove me around campus one time, yes, sir. Just like that square area.

Q. The quadrangle?

A. Yes, sir.

Q. Or the parade ground?

A. Yes, sir.

Q. It's got a missile on one corner and a tank?

A. Yeah. He drove me around there and showed me everything.

Q. But you didn't get out of the car and go into any classrooms or any --

A. No, sir. No, sir.

Q. So the only building you ever went in on

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The Citadel campus was the gymnasium?

A. Yes, sir.

Q. And that was either with ReVille or your dad?

A. Yes, sir.

Q. And I would imagine that this was obviously when ReVille was coaching you. Do you remember if this was when he was living with your parents or --

A. One of the games definitely was when he was living -- that was the one I remember. He took me to the game, and we watched the game, and before the game, like, we parked and, like, he grabbed me in an inappropriate manner and kind of played with me a little bit, and then we went in.

And then after the game, two cadets came with us to get Wendy's, and they were "killers" when they were younger as well. And one was the older {Family C} boy I was talking about, and one I don't remember the name. But he was one of the older {Family C} boy's friends. And they were talking about all the stuff they did and like all the stuff that happened. So we took them to Wendy's and we just talked about like the "killer" stuff.

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Then he took them back and they went on campus and he started like touching me again or whatever, and then it continued on the way home.

Q. Did you ever get out of your car, other than to go with him to a basketball game that time?

A. No, sir.

Q. And these other boys that were "killers," how old were they?

A. They were freshmen cadets.

Q. And that was -- that was when ReVille was living at your house or --

A. Yes. ReVille was living at my house, yes, sir. It was at basketball season. It was the end of the basketball season that year.

Q. Was this before he had benched you?

A. It would have been around the same time, actually. A little before, yes, sir. I believe. Not much before it, no, sir, not much. It was before that, yes, sir. Because the end of college basketball season would be March, like, 15th-ish. That's when the tournament -- or -- yeah, March, like, 20th. It was before that time, so it would have been before.

Q. Because I thought I understood your

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testimony that the reason -- the reason he benched you, he didn't play you, was you had broken it off and you had -- because of your girlfriend -- you had a girlfriend --

A. Yes.

Q. -- and you quit dealing with ReVille as far as his deviant acts were concerned?

A. Not all of them, but broke off -- away from, like, almost every night; yeah, still occurrences, yes, sir.

Q. Do you remember in -- during that time period, and I want to -- I don't want to put words in your mouth, but I want to understand the nature -- the specifics of the abuse. He would manipulate you, he masturbated you; is that correct?

A. Yes, sir.

Q. And he would perform oral sex on you?

A. Yes, sir.

Q. And he would make you do that to him?

A. Yes, sir.

Q. And then that was what involved the peanut butter?

A. Yes, sir.

Q. These activities had begun when he --

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had already begun when he moved into your parents' house?

A. Yes, sir. Begun before we (sic) moved in?

Q. Right. Before he moved in.

A. The oral sex began before he moved into the house.

Q. After he moved into your house, to your guesthouse, was there anything different about your activity, or was it pretty much the same?

A. The same.

Q. And did it pretty much remain the same until you moved to Atlanta?

A. Yes, sir.

Q. So the pattern and the specific acts, once he got to a level, stayed that way fairly constantly?

A. Yes, sir.

Q. And you mentioned that he touched you improperly that one time you were down here with him at The Citadel basketball game?

A. Yes, sir.

Q. Was there any other time when you were with him on The Citadel that he did the same thing, that you remember?

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A. No, sir. It was just that one time.
Q. That one time?
A. Yes, sir.
Q. And was there any other time that you went to The Citadel to watch a basketball game with Skip ReVille?
A. Yes, sir. At that High School Hoop Classic, yes, sir.
Q. And the High School -- and when was that?
A. That's normally in December, I believe. It's in the winter, I'm pretty sure. Yeah.
Q. All right. Was that before this time that you just relayed -- the December --
A. Yes. This was before. The High School Hoop Classic was before it, yes, sir.
Q. Other than that time in the car that we've just talked about while you were on the campus of The Citadel, were there any other places that ReVille abused you other than his house at Pine Forest and your parents' guesthouse?
A. On the way to AU tournaments, he would bring porn magazines and he would jack me off in the car driving down the highway.
Q. He would be driving?

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A. And I would be jacking off, and he would reach over and do it sometimes, and I would jack off, and he would reach over sometimes.

Q. How many times did that happen?

A. Over 20 occurrences on the highway stuff.

Q. And that would have been when you were playing AU; is that right?

A. And he still would do it like when we would, like, go places and stuff.

Q. We talked about ReVille coming to see you in Sumter when he was playing tennis or coaching tennis up there, and that was when you were in high school?

A. No. He was helping out Bishop England. That's when he was coaching their team.

Q. The tennis team?

A. Yeah, Bishop England.

Q. I mean, it was a tennis tournament?

A. Yes, sir. Yes, sir. Yes, sir.

Q. Before that, before that time, when was the last time you remember seeing ReVille?

A. When I moved.

Q. And do you remember anything about -- any details about --

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A. The tennis match?

Q. No. The last time you saw him, when you moved.

A. I was helping him move into his apartment down -- it was near the Isle of Palms sign, I remember, when he moved to Mt. Pleasant, I believe it was. And I'm pretty sure -- actually, I'm almost positive it was right next to that. I remember that sign. You turn right at the Isle of Palms sign and it was on the left over there. I'm pretty sure, like almost a thousand percent sure. And I was helping him move in, and it was just me and like he set up porn in a room. And I went and jacked off, and he came in there and, like, gave me head and stuff, and that was one of the last times.

Q. And you were --

A. Now, well --

Q. Go ahead.

A. Not one of the last times, but that's -- that's, like -- I can't explain it. That's the vivid image I remember. Like I remember that occurrence. I remember some of the occurrences better than others. Do you know what I'm saying? And I remember that one. That would have been

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right before I moved.

Q. And you helped him move from --

A. He was already -- a lot of his stuff was already moved in. I was like helping him out. I had helped him move in, and I was helping him, like, decorate the house and stuff, yeah, in Mt. Pleasant.

Q. When he moved out of your parents' guesthouse to -- let me ask you this: Did he move from your parents' guesthouse to this location over at the Isle of Palms connector?

A. Yes. Yes, sir.

Q. Did you help him do that?

A. I helped him a good bit moving and stuff.

Q. Did he rent a truck or --

A. He did a lot of it in his car, yes, sir. And I helped.

Q. And that was the last time -- the last vivid time --

A. Still -- occurrences still after that, yes, sir. But that's the last, like, vivid, vivid one I remember. And his moving, like, took him -- I remember it took him a long time. Like -- he would, like, move a load a day type thing, like in

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his car, just like it took a long time to almost, like, get out of the house. Because I remember it was but -- the occurrences definitely kept going on until -- I mean, right before I moved, literally. I mean -- and then he would still text me and be, like -- just ask me questions, like, How are you doing, and stuff like that. And what -- How is your girl life? And he would like say, Miss hanging out with you and doing the stuff we did, and stuff like that.

Q. Did your parents ever mention anything about him? Did you all ever talk about him?

A. No, sir.

Q. Like, Gee, I miss Skip, or, I miss having Skip around?

A. Not really, no. They would ask me, Have you heard from Skip? That was about it. Stuff like that. Have you heard from Skip? What's he up to? This and that.

Q. Do you know if they stayed in touch with him at all?

A. I'm pretty sure, like, him -- I'm pretty -- he invited them to the wedding and all that stuff, so I think they stayed in contact enough.

Q. Do you know if they went to the wedding?

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A. I don't think they did. I don't know. I don't know.

Q. Were you invited to the wedding?

A. I forget when the wedding was. It might have been during golf season, and that's why I couldn't go or something.

Q. Would you have gone if you could have?

A. I don't know.

Q. That's a good answer. So everything, basically, whatever he did to you, oral sex and otherwise, pretty well continued until you moved to Atlanta?

A. Yes, sir.

Q. These two cadets that were freshmen, that would have been, I guess, in 2007, that spring. Does that make sense?

A. Yeah. It would have been their second semester of their freshmen year.

Q. Right. What did they talk about? What do you remember --

A. Just like the incidents with them and basically like telling how close they were and all the crazy things they did growing up with the other "killers" and stuff like that. Just like basic stories type thing, like kids' stories.

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Q. Were the stories that they were telling -- that you heard, were they just growing up adventures, or were they of a sexual nature?

A. They were like with sex -- like with Skip's nature. They weren't, like, buddy-buddy growing up adventures, no.

Q. Like normal?

A. Like normal, no. They weren't normal.

Q. What -- what did they -- do you remember any of them?

A. I remember them talking about, like, the Truth or Dare games they used to have, like -- with like four of them and Skip and some of the stuff they used to do with the doughnut and trying to jack off, to see if anybody could get hard watching gay porn and stuff like that. Yeah.

Q. Do you know how these boys came to know ReVille?

A. I'm pretty sure -- not the older {Family C}, the other boy, was one of his -- one of his camp students, I'm almost positive. And the older {Family C} boy, he lived with them out back in the shed. And what I want to say is he was one of the camp students but was friends with the older {Family C} boy.

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Q. When you say he lived with him out back --

A. Skip lived with the {Family C's} out back. Like they had a house and they had a bachelor suite. This was well before me. Well before -- it was before Pine Forest. And he lived behind their house.

Q. Like he did with you all?

A. Yeah. But mine was connected, of course. Theirs wasn't connected.

Q. Did he rent it or --

A. He rented it from them.

Q. So it was a similar circumstance to his arrangement with your parents?

A. Yes.

Q. So that family obviously knew him too?

A. And always talked great things to my family about him. Because they played AU basketball. They were the group above me. I was in this league. {John Doe TC}, the younger one, was one step above me, and they always said great things about Skip to my family.

Q. Do you know the {Family C} family?

A. They were very nice people.

Q. Were they friends of your parents?

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A. I would say they were parents that knew each other through basketball.

Q. Not --

A. Not drinking buddies or party buddies, stuff like that.

Q. And you heard them speak very highly of Skip ReVille?

A. Everyone did. Yeah, everyone did. Everyone.

Q. And to your knowledge, he lived on their property too for a while?

A. Yes, sir.

Q. And was it after he -- after he lived with them that you all came to know him and --

A. Yes.

Q. And that's when the {Family C's} gave the recommendation to your parents?

A. Not a recommendation. They didn't say, Oh, yeah, it's fine. They just talked highly -- everybody from Pinewood talked highly of Skip.

Q. Do you know if he did -- or ever did anything in addition to what we've talked about, oral sex, peanut butter, Truth or Dare, doughnut game, was there anything -- was there anything that we have not talked about that ReVille did

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that you know of?

A. Are we talking about like having sex with a kid or raping them or something like that?

Q. That --

A. I haven't heard of anything more than what I have told you, I have not, no, sir.

Q. And, specifically, I mean any sort of penetration?

A. No, sir.

Q. No anal sex or --

A. No.

Q. -- digital penetration?

A. No.

Q. And again, I think we've talked about this, but the -- these times of abuse, if -- there may be a group -- there might have been a group of "the killers" together, but you all would go one by one to watch the porn and masturbate or --

A. Not all the time, no, sir. When the guys would come over or have sleep-overs and stuff, we all watched together and jacked off right next to each other, and he would jack us off right there. I saw him touch other kids, absolutely. Numerous occurrences.

Q. And those are those boys' names that

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you've given us; is that right?
A. Yes.
Q. You have to say --
A. Yes, sir. And {John Doe KZ}.
Q. {John Doe KZ}?
A. {John Doe KZ} --
Q. {John Doe KZ}?
A. -- would be one too.
Q. And, again, so the last time you saw ReVille, other than that time in Sumter, was right before you all moved to Atlanta?
A. Yes.
Q. Have you seen him since that time in Sumter?
A. No, sir.
Q. No contact with him?
A. No. Let me clear -- I never saw him jack {John Doe KZ} off. I saw him touch him in an inappropriate manner.
Q. When you say touch in an inappropriate manner, he put his hands in his private area?
A. Yes. Or down his pants or something inappropriate; not jacking off. I never saw that.
Q. You -- the reports indicate that you did not like living in Atlanta.

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A. I didn't.
Q. How about your brother, did he?
A. I never really asked him, but I don't know if he really liked it either. I mean, it was tough for us, because, like, we moved, like, towards the end of the summer. And I mean, we made a couple friends, but we didn't really make a lot of friends. Me and him basically just hung out a lot together. So --
Q. Do you have any explanation for why you didn't like it? Is there any --
A. I just didn't like anything at that time, period, to be honest. I was so, like, confused and, like, angry at everything.
Q. And tell me a little bit about your confusion. Did it have to do with ReVille?
A. Yeah, it did.
Q. Were you questioning yourself?
A. Yes. Yes, sir.
Q. You know, again, in the reports they indicate that you are -- you're confident in your heterosexuality --
A. Yes, sir.
Q. -- is that fair?
A. Yes, sir.

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Q. That's correct?
A. Yes, sir.
Q. But was that part of the confusion and the questions that you were going through?
A. I guess so, yes, sir.
Q. I mean -- well, you had somebody that you really looked up to, that everybody trusted, that had basically violated you --
A. Yeah. Yes, sir.
Q. -- in a way that was abnormal; it was deviant?
A. Yes, sir.
Q. It was evil?
A. Yes, sir.
Q. Once you -- were you able to kind of work through that to some degree? Not that you're not still, but, I mean --
A. Yeah. Like, I definitely -- I would be hooking up with a girl sometimes and images would like come back, like. And so sometimes it would be like really awkward if I was doing things with a girl in my later high school days and an image would come up or something would feel weird and remind me of that, and it would freak me out kind of thing. Like not to the point where I would

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stop and be like, Oh, my goodness, stop, you know. It would just be like -- I would keep it to myself, but it would be awkward for me.

Q. And do you feel like you have a comfortable relationship with your girlfriend now?

A. I mean, it's really hard for me to trust people, to the point, like, I really have trust issues. And I know that, and I'm dealing with it. It's hard. But I think me and her relationship is the best I've ever had, yes, but I still to this day have a really hard time trusting people.

Q. Have you talked to her at all about this?

A. Yeah. She knows.

Q. Is she supportive?

A. Yes.

Q. Good. There was an incident when you were at Newberry. Were you in a fraternity?

A. I was going to join a fraternity.

Q. Which one?

A. KA.

Q. Did you pledge Kappa Alpha?

A. I got a bid to. It was my bid night. Do you want me to just tell you the incident? I can.

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Q. Sure.

A. Basically, that freshman year is when the Skip thing came out. It was I think right after my birthday. And I broke down a week later and told my parents or whatever. I always, like, wanted to be --

Q. Hold on. I'm sorry. How did you find out about ReVille?

A. It came over the news, and my parents called me and were like, Have you seen the news? And I was like, Yeah. They were like, Did he ever do anything to you? And I denied it for a week; I was like, No. And then, finally, I was like, you know what, I'm just going to tell them. And so I told them, and we went on from there.

But, basically, with the whole fraternity thing, I wanted to be accepted. I always had doubts that people didn't like me or doubts that I was different or doubts that, you know, I just wasn't like everybody else. So KA gave me a bid, and, I mean, I was already kind of -- I was doing really well in school, but I wasn't really enjoying the college experience. I really wasn't.

And so they gave me a bid. And

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basically what happened is they gave us a handle of vodka for three guys, just three guys. And they were like, You all have an hour to finish this. At bigger schools, you have like 18 to 40 pledges, which one handle of vodka for 40 guys is nothing. There's two shots, three shots apiece. But with three guys, it was rough.

And the other guys -- like, they made us stand on this bench, and they were like, You have an hour to finish it; don't step off the bench. And the other two couldn't drink at all. Every time they sipped it, they were like throwing up. And I have no gag reflex or anything.

Q. Why is that?

A. I don't --

Q. You just don't?

A. I just don't. I don's throw up. So I stepped off the bench one time with the handle in my hand, and, basically, the fraternity was like, What are you doing? Get back up. And I was like, Screw all of you all; I'll just finish it real quick.

They were dogging me, and I was like, What the heck? This sucks. So I just chugged a handle of vodka in eight minutes and woke up in a

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coma 30 hours later. My blood alcohol content was .52. And I just wanted to be accepted by someone. It was one of those times that I just -- I felt like I was different. I felt like everybody was different than me and someone was, like, trying to give me a bid and be a part of them. I wanted to go out of my way to be accepted.

Q. Have you -- do you drink alcohol now?

A. Very rarely, no, sir. If I do, maybe a beer or two at dinner and that's it. Not every night, though, no, sir.

Q. You don't smoke cigarettes?

A. No, sir. I did another kind of thing I tried to be accepted for. When I moved to Sumter, everybody dipped. That was the cool thing. So I dipped for five years, and I gave it up this fall.

Q. What about any other recreational drugs or marijuana?

A. I mean, I smoked in my high school days a little bit. But since in college, we get drug tested, so I don't do any drugs.

Q. I guess as a condition of your scholarship --

A. Yeah. I get -- it would be one warning, and then I would miss a tournament. But it's just

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not worth it. He could drop my scholarship and stuff like that if he feels like I'm not benefitting the team.

Q. You've never had a warning, have you?

A. No, sir. No, sir, never.

Q. In March of 2012, there was a record where you went to the ER for chest pains. Do you remember that?

A. Yes.

Q. What was that?

A. It was pleurisy, the swelling of my lungs. I don't know. That's all they said. Yeah, it was pleurisy, yes, sir. It was pretty painful, and I was kind of like -- I was kind of uptight about it because it felt like it was in my stomach, and it was just after the incident -- a month after the alcohol, so I thought something was seriously wrong with me. So I just went there, and it was just some swelling of the lungs or something. It wasn't something major.

Q. Did you get a prescription?

A. Yes. Yes, sir.

Q. I wanted to ask you -- you mentioned when we were talking earlier -- and this goes back to your relationship with your father -- that he

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could be -- or that he popped you on the head a couple of times on the golf course and that sort of thing. Was he physical with you generally?

A. I would say like spanking with a belt and smacking me across the head and stuff like that. We never got really physical until high school. That's when we really went at it a couple of times and stuff, just because I was so angry at everybody and stuff.

Q. But growing up, when he would discipline you --

A. He would pop me a couple times. I wouldn't say -- are we talking about someone back-talks you and you give them a little backhand? He never punched me when I was younger.

Q. Never with a closed fist?

A. No, not when I was younger. He definitely smacked me a couple of times, but never close fisted until I was in high school.

Q. But when you were in high school, you all actually squared off?

A. Yeah. We squared off a couple of times.

Q. How did that end up?

A. Not good. Not good. It was pretty bad. My dad is a pretty big guy.

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Q. That hasn't happened since then?
A. Not since I've been in college, no, sir.
Q. I think there was -- sometime in the late summer or early fall of 2010, you and your father got into it to the point that the police came?
A. Yes.
Q. And you moved out of the house for a while?
A. Yes, sir.
Q. And you all went through some therapy and --
A. Yes, sir.
Q. -- have been working to get things back together?
A. Yes, sir.
Q. But there hasn't been any -- you all haven't had any physical altercations since then, have you?
A. No, sir. No, sir.
Q. You told me -- we talked about ReVille helping your younger brother with his writing. Was that in the spring of 2007; is that what you remember?
A. Yeah.

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Q. And that would have been when your brother was 11 years old --

A. Uh-huh (indicating an affirmative response).

Q. -- is that right?

A. Is that how old -- he wouldn't be that old, would he?

Q. Well, I'm just looking.

A. Would he have been that old? He would have been about 10, 11.

Q. He was born February 14 of 1996?

A. So he would have been 11.

Q. Yeah.

A. Yes, sir, I think that's right.

Q. And that's when you think ReVille started abusing him?

A. Yes, sir.

Q. Have you talked with your brother about this much?

A. We're so close, but we really don't talk about it that much. We hunt and fish together. He plays golf with me every once in a while.

Q. Has he ever told you what ReVille did to him?

A. No, sir.

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Q. Do you know what ReVille did to him?

A. Well, he kind of told me. He said, He probably did the same stuff to me as you. That's what he said. So I'm sure it's everything that I went through.

Q. Do you know -- did you know -- or would you have been aware of when ReVille would have had an opportunity to abuse your brother?

A. I guess all the time, because I'm in golf practice in the afternoon. And my brother is home alone sometimes because my mom is teaching. And the bus would have taken my brother home because he was in elementary school. So all that afternoon Skip is there with him, because Skip is not working anymore. And my brother is coming home on the bus; I'm playing golf. So it could have been just every afternoon.

Q. Would your mother -- at 11 years old, would your brother have stayed at home by himself?

A. I mean, we lived in a gated community, so probably. I don't know -- Skip would have probably been like home. My mom was like, Hey, Skip, are you going to be home? And Skip would have said, Yeah, I'll be home. So I'm guessing that's probably what happened.

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Q. She would have relied --

A. She didn't let me baby-sit {John Doe AW} or {Jane Doe NW} until I was 13, if that's what you're asking. I don't know for a fact. I couldn't tell you. I know that Skip would have been home most of those days.

Q. And would he have taken care of your brother and your sister for your mother, you think, possibly?

A. Just my brother.

Q. Where was your sister?

A. Because my sister would have been with my mom, I'm pretty sure, because {John Doe AW} went to a different elementary school than where my mom taught, I'm pretty sure. He went to Fort Dorchester. Because I switched over. Third grade I started going to Fort Dorchester Elementary and not Oakbrook anymore because it was a nicer school. And I'm pretty sure my sister just went to -- would she have been in preschool then? Or daycare? How old would she have been?

Q. Let's see. She was born --

A. She would have been 7.

Q. -- in June of 2000, so she would have probably been --

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A. Kindergarten.

Q. -- in first or second grade -- first grade, I would think. Well, she would have turned 6 in June of 2007.

A. She would have been in kindergarten -- or, no, she would have been in the first grade. I'm pretty sure that she rode the bus to Oakbrook with my mom or something. She didn't go home, I know that. She would go to either daycare or ride the bus to Oakbrook and stay with my mom and get, like, I want to say, like, tutoring lessons from a lady. I don't know for a fact. I know she didn't go home.

Q. And they may have had extended care at Oakbrook?

A. Yeah, or something like that. I'm not entirely positive.

Q. Were there occasions when Skip ReVille would be there with you and your brother and sister or with your brother and your sister without your mother?

A. Yeah.

Q. Your mother felt comfortable --

A. Yes.

Q. -- leaving you all with him?

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A. Yes.
Q. I believe you told me -- and this, again, is jumping around a little bit -- but you never played basketball after that --
A. Never.
Q. -- spring of 2007; is that right?
A. Yeah.
Q. And why was that?
A. It just brings back memories. I don't like doing it anymore.
Q. You just quit all --
A. Quit.
Q. When the season ended in March --
A. Quit.
Q. -- that was it?
A. I've probably played legitimately since I was 14 -- I'm 21 now -- I've probably picked up a basketball maybe five times, maybe.
Q. Why did you quit?
A. I just didn't like it anymore. I hated it.
Q. Did you finish the season?
A. No.
Q. It's something you have a natural aptitude for, correct? You were talented, weren't

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you?

A. Yeah. I was pretty good.

Q. You were a good ball --

A. I'm pretty good at anything I've ever done, to be honest with you. Anything I've ever done, I'm pretty good at.

Q. What made you stop so immediately?

A. Just psychologically.

Q. In what sense?

A. Skip was involved with that, and I just didn't want to be involved with it anymore, I guess.

Q. Did you just not want to be involved with Skip?

A. It wasn't that. It just -- I just didn't like it. I guess he took the fun away from it. I didn't like it. I didn't enjoy it.

Q. Did you still enjoy being around Skip?

A. He had such a hold on me at that point. I was probably so blind from everything, literally.

Q. Would -- have you ever thought about -- well, have you ever thought about volunteering? And I think you did somewhat with the Special --

A. Olympics.

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Q. -- Olympics?
A. Yes, sir.
Q. Do you do that sort of thing regularly?
A. I did it for that full year, but I have not done it since, no, sir. I enjoyed it, though.
Q. Would you do it again?
A. Oh, yes, sir.
Q. Would you volunteer as a coach for middle school or to help young people learn golf?
A. Yes, sir, I would.
Q. Would you volunteer to -- you know, to coach basketball if you decided you liked it again?
A. I don't want kids to go through the same thing I went through, so --
Q. Well, do you think --
A. I enjoy helping kids, I do.
Q. Not that I have them yet, but if I had grandchildren that were 8, 9, up to 12 years old, should I feel comfortable leaving them in your care?
A. Yes, sir.
Q. And if you volunteered teaching -- giving some points on golf, that would be something that you would be interested in?

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A. I do camps every summer up in Florence.
Q. You do?
A. Yes.
Q. Where?
A. At Florence Country Club. I help out with the camps.
Q. What age?
A. Anywhere from 4 years old to 8 years old. And then I mentor a lot of the 14-year-olds; I play with them all the time. Tell them, you know, If you want to be great, these are little things you can do better.
Q. How long have you been doing that?
A. All my life.
Q. Do you enjoy it?
A. Not all my life. But since I've been in college, basically.
Q. Do you get gratification from that, helping the young people?
A. Yes. I guess I'm like so mad about what happened to me, that I want them to have a good role model. Yeah. I want them to be like -- look up to me and me be good to them, not ruin them. I definitely enjoy helping kids, though, that's for sure. I thought about teaching. That's what my

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degree was when I first started, was teaching.

Q. You have a talent that you are sharing; is that a fair statement?

A. Yeah.

Q. Let me ask you a difficult question.

A. Yeah.

Q. And this is going to be a hard question to ask and a hard one to answer.

A. Yes, sir.

Q. But if you could somehow in your mind look at Skip ReVille and totally remove the perverted acts -- in other words, you look at him just as a teacher, as a coach, as a writing counselor or instructor, as a --

A. A person?

Q. -- a person, how would you rate him as a role model?

A. He was a great person. He was. If you could take away that one sick thing he did to that many kids, I mean, everything he did was good. He was nice. He didn't drink, didn't smoke, Bible study leader, helped kids. But then he had that sick habit. It ruined so many kids. That's why I feel like it was so hard. Like people never knew, because he was so straightforward and so -- such a

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good guy on the outside, that no one knew what he really was.

MR. STONEY: I think I'm about done. Let me take just a few minutes and time for me to go to the men's room. So we'll be at ease for a few minutes.

(The deposition went off the record.)

BY MR. STONEY:

Q. Just one quick follow-up. That time when you came down to The Citadel with ReVille and you all went to the basketball game and the two cadets got in the car with you, did I understand that one of them's last name was {Family C}?

A. Yes.

Q. And they were both freshmen?

A. Yes.

Q. And you don't remember the other boy's name?

A. I do not.

Q. Do you remember anything about him, what he looked like?

A. He would have had blond hair, if he had any.

Q. Were you introduced to them by their first names or their last names?

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A. First names.
Q. Would {John Doe BK} sound familiar?
A. Do you know his last name?
Q. I think it's {John Doe BK} or another one is {John Doe K}.
A. It's {John Doe K}, I'm pretty sure.
Q. Last name {redacted}?
A. {John Doe K} would have been older; {John Doe K} was like Skip's age.
Q. No, not this boy.
A. {John Doe BK} and {John Doe K} -- I definitely heard both of those names before from Skip. It might -- it might be {John Doe K}. I can't be a hundred percent certain.
Q. If you don't know, you don't know?
MR. STONEY: Thank you very much.

CROSS-EXAMINATION

BY MR. ROBERTS:

Q. I'm just going to have a few questions for you, {John Doe #2}, and then we'll get you out of here; enjoy your weekend, hopefully. I want to go back to you playing golf. Obviously, that's probably a favorite topic to ask. As far as the mental challenges of golf, how -- why is it that you feel like you excel at the sport?

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A. I'm naturally gifted. Anybody that ever sees me hit a golf ball, they're amazed. I have people at Florence Country Club -- I'll be on the first tee and hit a ball, and I'll have people watching and look down. And people are like, Goodness, that kid's 140 pounds and he moves it 320 yards. They're amazed.

Q. When did you start playing golf?

A. When I was 8, and I was good right away. Naturally gifted. In every sport I've ever played, like any time I pick up a ball, I've been good at it. I can't explain it. I've just been good at it. If I was six-foot-five, 220 pounds, I'd probably be playing basketball in March Madness right now, because I could shoot better than all of them when I played.

Q. Have you felt like your golf game has ever been affected by the experiences that you went through with Skip ReVille?

A. Absolutely.

Q. And how is that?

A. I mean, I get down on myself really bad. I mean, examples -- like my temper is terrible on the golf course. Sometimes I get really mad. I feel like me being angry at myself a lot and angry

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at everything that happened has a lot to do with that. Do you know what I'm saying? I mean, even this weekend I -- it still affects me because I'm going through all this stuff. This weekend I had a golf tournament, I played terrible, because my mind is on this -- everything that's going on. Everything has affected me, definitely. Do I think I would be a better golfer if the Skip thing didn't happen? I think I would.

Q. You had mentioned earlier that -- that there was two incidences that you and Skip ReVille went to The Citadel and watched basketball games on campus; isn't that right?

A. Yes, sir.

Q. And when were those two times; do you recall?

A. One would have been my eighth grade year, I guess winter, when the High School Hoops would have been around. And the other would have been my -- my eighth grade year as well, in the spring or -- not spring, but towards the end of the basketball season for college basketball.

Q. And at the time, where was Skip ReVille working; do you recall?

A. He would have been at The Citadel.

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Q. And when you went to McAlister Field House, you had mentioned -- was it the second game that you all parked in the parking lot?

A. Yeah. Or -- it was like next to that tank because I remember -- I remember getting out of the car, and it was next to that -- it was next to some statue or a tank or something.

Q. And in the car, Skip had fondled you --

A. Yes.

Q. -- or engaged in inappropriate physical sexual contact?

A. Yes.

Q. And before -- before all of this -- all of these things took place or before it really came out publicly, you and your dad had gone to Citadel games as well?

A. Yes, sir.

Q. And why is that? Your dad didn't go to The Citadel, did he?

A. He just loved basketball. And, I mean, The Citadel is just known as a good college down here.

Q. You all had held The Citadel in a high esteem?

A. Yeah, definitely.

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Q. And you enjoyed going over there to the games?

A. Yeah. I liked seeing the cadets cheer and all that stuff. I thought it was neat.

Q. Have you agreed to be seen by people with expert knowledge of sexual abuse and its effect on victims?

A. Have I been counseled?

Q. Yes, by experts or doctors.

A. Yeah.

Q. And with regards to the side effects or the aftereffects of being sexually abused, would you defer to their judgment as far as knowing the details of the lifelong effects of being sexually molested?

A. Yeah. I think they're right. They're experts.

Q. Has it been difficult to maintain relationships since the summer between the eighth grade and ninth grade years, since moving to Atlanta?

A. Do I have trust issues with lots of people? Even my best friends? Yes. And girlfriends. It's hard to trust people.

Q. Do you recall when Skip was no longer

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employed by The Citadel? Do you recall about what time that was?

A. It would have been after basketball season, probably like the end of April, probably.

Q. And was he living in -- with you all at the time in the house attached to you all's house?

A. Yes. Yes. He was still living there.

Q. And at this point in time, had you -- you were in the eighth grade --

A. Yes, sir.

Q. -- is that correct? And this would have been in 2007?

A. Yes.

Q. Had you -- you had mentioned {Jane Doe AL}, your first girlfriend. Had you all broken up at this point?

A. If not broken up, a very soon breakup. We broke up before -- anywhere close to the end of the school year. So, yes, we were broken up.

Q. And this would have been after the basketball season, where you mentioned earlier Skip benched you for a game or two?

A. Yes.

Q. And do you recall when you would have gotten out of the eighth grade -- when you all

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would have wrapped up the academic year?

A. What day?

Q. I definitely don't expect you to remember what day. But as far as, do you know what month --

A. Like the beginning of June.

Q. -- was it June or May?

A. End of May, beginning of June.

Q. And at that point, what was your schedule like when you got out of the eighth grade before moving at the end of the summer to Atlanta?

A. All I did was stay at home and play golf, because the golf course was right there.

Q. And Skip was there --

A. All -- like all the time.

Q. Was he working?

A. I don't think so, no.

Q. Was he looking for work?

A. Yeah. He was looking for work, for sure.

Q. You had recalled -- you had mentioned earlier that your mother had cut rent for Skip?

A. Numerous -- I think definitely a couple months, yeah.

Q. And was that during -- was it during

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that time that she cut rent for Skip?

A. Yes, sir. I believe so.

Q. And why is that?

A. Because he was helping out with the family and helping out with me and {John Doe AW} and things like that.

Q. So were you all spending every day together?

A. He -- I was his best friend, for sure. I worked out with him. Basically everything. We did everything -- like when I say everything, he had a hold on me. I was like his little pet almost. He had me that --

Q. And from the incidences of sexual abuse that you've talked about today, did those occur during that time period of the summer of 2007?

A. Yes, sir.

Q. You had mentioned -- and I don't want to bring all these things back up, but you had mentioned, let's -- I'll just refer to it as the peanut butter incident. Were there peanut butter incidences that occurred in this time period --

A. Yes, sir.

Q. -- in 2007?

A. Yes, sir.

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Q. Were there doughnut incidences that occurred during this time in 2007?

A. Yes, sir.

Q. Were there these Truth or Dare games that occurred during this time in 2007?

A. Yes, sir.

Q. And were there incidences of masturbation and blow jobs that were occurring during this time period in 2007?

A. Yes, sir.

Q. I know you had mentioned a couple of times earlier that you never picked up a basketball again after that season. But what type of -- I'm just trying to get a picture of what type of activities that you and Skip would do during that summer when you all were together, as you say, just about every day?

A. Like, we would work out together, watch movies; he would, like, teach me how to cook things; like, a lot of physical activity stuff, like we would go running, go swimming and stuff like that.

Q. Why do you think Skip moved in, or why do -- let me rephrase that. Why do you think your mom and -- parents had allowed Skip to move in in

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the fall of 2006?

A. I mean, I think him being a Citadel graduate, definitely. Like I said, me and my dad went to Citadel games because -- it's the college down here and how respected people are when they graduate. And everybody talked -- had a high opinion of him, a graduate from there, and they didn't think -- thought he was of a higher standard. They thought he was a really good, stand-up guy.

Q. And this is when your dad had just moved through work down to Georgia?

A. Yes, sir.

Q. And your mom needed some extra help around the house?

A. Exactly, yes, sir.

Q. When Skip stopped working and you wrapped up the eighth grade year, this would have been in the spring of 2007, into the summer of 2007, you had mentioned earlier that these incidences of sexual abuse occurred prior to that time period; a lot of incidences occurred prior to that time period. The fact that you all were together on a more regular basis, how did that affect the physical abuse? Did it increase, or

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did it decrease -- if you all were seeing each other every day during that time period, I'm just trying to paint a picture or find out how frequently the physical abuse took place.

A. It occurred more, I would say, and basically every day. More as in, like, let's say we had nothing to do that day, he would, like, masturbate me like that whole day and things like that. Because once I got out of school, if I didn't want to play golf or it was raining one day, what did I have to do? You know what I'm saying? So we would just sit and watch porn all day. So the occurrences definitely went up.

Q. And Skip wasn't working, and you would be home?

A. Yes.

Q. Out of school?

A. Yeah.

Q. So there would just be more contact?

A. Exactly.

Q. At that time period, had Skip ReVille been reported for allegations of being a sexual pedophile, would he have been kicked out of your house?

MR. STONEY: Objection.

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A. Absolutely, without question.
Q. So had your mother known, do you think she would have tolerated --
A. No.
Q. -- Skip at the house?
A. No.
MR. STONEY: Objection.
Q. Okay. And do you hope Skip had been reported?
MR. STONEY: Objection.
A. Repeat the question.
Q. Do you hope Skip had been reported --
MR. STONEY: Objection.
Q. -- for committing acts of sexual abuse?
A. Do I think he was reported, or do I think he wasn't?
Q. Do you hope that he had been reported?
A. Yeah, I hope he would have been.
MR. STONEY: Objection.
Q. Is there a day that goes by, {John Doe #2}, that you do not think about or have these memories of being sexually molested by Skip ReVille?
A. No, not a day.
Q. And how has this affected you, in your

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life?

A. It's affected everything. My trust in people, my mood -- my moods, my attitude, how I deal with things, emotions, relationships.

MR. ROBERTS: That's all I've got right now.

MR. STONEY: That's it.

(The deposition concluded at 2:25 p.m.)

Electronically signed by Eve Wilbanks (101-177-349-6970)

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

COUNTY OF CHARLESTON:

I, EVE WILBANKS, Registered Professional Reporter and Notary Public, State of South Carolina at Large, certify that I was authorized to and did stenographically report the foregoing deposition; and that the transcript is a true record of the testimony given by the witness.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

WITNESS MY HAND AND OFFICIAL SEAL this 30th day of March, 2014, in the City of Charleston, County of Charleston, State of South Carolina.

Eve Wilbanks

Eve Wilbanks,
Registered Professional Reporter
and Notary Public

My commission expires:
December 16, 2014

Electronically signed by Eve Wilbanks (101-177-349-6970)

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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.)	
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.)	

2014 APR 28 PM 1:54
JULIE J. ARMSTRONG
CLERK OF COURT
BY

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT CONCERNING THE EXISTENCE OF A DUTY OF CARE

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 Supplemental Memorandum in Support of Motion for Summary Judgment Concerning the Duty of Care with regard to the claims asserted by Plaintiffs John Doe 2 ("Doe 2") and Mother Doe on behalf of John Doe 3 ("Doe 3"):

ARGUMENTS

The Plaintiffs argue that The Citadel owed John Doe 2 and John Doe 3 a duty of due care, even though they had no affiliation with The Citadel and Skip ReVille's abuse of them had nothing to do with his employment at The Citadel. The Citadel has fully briefed the law of South Carolina, which makes it clear that no such duty could exist as a matter of law. The Citadel specifically incorporates its previous brief by reference and addresses below only certain issues that Plaintiffs have raised in opposition to the motion for summary judgment.

Plaintiffs Doe 2 and Doe 3 Cannot Show Any Facts Supporting the Imposition of a Duty of Care Flowing to Them

As set forth in The Citadel's prior filings, The Citadel did not owe Doe 2 or Doe 3 a duty of care. As the Supreme Court held in *Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002), the general rule is that there is no duty to control the conduct of a perpetrator or to warn a potential victim of danger from such a perpetrator as ReVille. However, limited exceptions to this rule exist: (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.

Although The Citadel has already discussed (and will discuss further herein) why none of these "exceptions" apply, it first wishes to direct the Court to several cases where courts in other jurisdictions have refused to impose common law duties of care on defendants to protect unknown future victims of a sexual abuser.

In *MacGregor v. Walker*, 2014 WL 292829 (Utah. Jan. 28, 2014) (attached hereto as Ex. A), the plaintiff alleged that the defendant church voluntarily assumed a duty by creating a "help line" to provide clergy who become aware of abusive situations with information about legal duties and counseling options. The plaintiff claimed that the church voluntarily undertook a duty to help her and other victims of child abuse, and further alleged that Walker breached the duty by failing to call the help line regarding her case. The court held that the church did not assume a duty under Restatement Section 323 because "neither the creation of the Help Line nor Walker's alleged failure to use it increased the risk of harm to MacGregor. In other words, *Walker's alleged negligent performance did not put MacGregor in a worse position* than she would have been in had the Church never created the Help Line." *See id.*, 2014 WL 292829, at *5 (emphasis added).

In *R.C. v. Diesfeld,* 6 Misc. 3d 205, 785 N.Y.S.2d 325 (2004), child A.C. was sexually abused by an older brother, and her mother reported the abuse to defendant. Defendant physician failed to report the abuse to authorities. Infant plaintiff R.G. was also sexually abused by the same perpetrator, which plaintiff alleged would not have occurred if defendant had properly reported the abuse of A.C. The defendant argued he had no duty of care to R.G., who was never his patient, and the court agreed:

> A treating psychiatrist is not liable to someone who is victimized by the psychiatrist's patient; such an extension could potentially make a psychiatrist liable to huge numbers of people who had no relationship to the psychiatrist and would discourage a mental health professional from attempting to treat such a patient. Similarly, the failure to report the sexual abuse of a patient should not make Dr. Diesfeld or any similarly situated person, liable to anyone the perpetrator abuses in the future.
>
> Moreover, the "but for" factor also seems to weigh against extending the duty owed to the lengths sought by plaintiff. Even had the initial abuse been reported, could it ever be shown that the subsequent abuse would not have occurred? The claim that "but for" the failure to report, someone else would not have been abused, is far too speculative to support a cause of action.

See id., 6 Misc. 2d at 207, 785 N.Y.S.2d at 327.

In *Marceletti v. Bathani*, 198 Mich. App. 655, 500 N.W.2d 124 (Mich. Ct. App. 1993), a child allegedly injured by a baby-sitter brought negligence action against a physician who failed to report alleged abuse of *another* child by that baby-sitter. The court granted the physician summary judgment, and the plaintiff appealed. The Michigan Court of Appeals held that the physician owed *no* duty of care to the injured plaintiff under the reporting statute. *See id.*, 198 Mich. App. at 128, 500 N.W.2d at 661. Moreover, the court also held that no common law duty of care existed:

> Plaintiffs did not allege that Dr. Bathani had any direct control over either Lux or Andrew. On the pleadings before the court, Bathani was neither Lux's physician nor Andrew's. *We decline to extend to physicians a common-law duty to warn unidentified persons who are not patients but who are potential victims* concerning their suspicions of child abuse. Indeed, the recognition of such a broad duty would run afoul of our notions of privacy in the physician-patient relationship. . . . After "weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution," we conclude as a matter of law that the proposed duty should not be imposed. Summary disposition was properly granted.

See id., 198 Mich. App. at 130, 500 N.W.2d at 665-66.

In *S.I. v. Sennott*, 2005 WL 2875379 (Mass. Ct. App. Nov. 2, 2005) (attached hereto as Ex. B), plaintiffs alleged that the defendant school and employees were negligent in failing to prevent the abuse of a student by an older boy (non-student). Plaintiffs alleged that the defendants knew that the perpetrator engaged in sexual activities with an underaged classmate of the plaintiff, but did not report that activity to the Department of Social Services. Plaintiffs claimed that, as a result of the failure to report, the perpetrator was enabled to engage in sexual activity with the plaintiffs' minor daughter at their home. The court affirmed the grant of summary judgment on, *inter alia*, grounds that no common law duty of care existed:

> In sum, the defendants were without the ability to control either Jane, Sawyer, or the environment where the harm occurred. Under these circumstances, we cannot view Jane's expectation of protection as comparable to that of the students in *Mullins* or *Alter* [(involving abuse occurring on school property)]. Therefore, we find no common law duty on the part of the defendants to protect Jane at home, under these circumstances.

See id., 2005 WL 2875379, at *2-*3.

The cases make clear that, notwithstanding courts' natural sympathy for the victims of abuse, there are definite limits to the scope of a standard of care in the context of an alleged failure to prevent abuse. The claims of Doe 2 and Doe 3 fall well outside the contours of any duty of care ever recognized under South Carolina law.

A. There Is No Special Relationship with ReVille That Would Support the Imposition of a Duty of Care

As The Citadel has previously shown,, at the time of its alleged negligence, there was no special relationship with ReVille that would support a duty of care. By the time Camper Doe made his report on April 23, 2007, ReVille had finished his limited work in The Citadel's writing lab. In any event, there is no evidence that ReVille's employment with The Citadel had any relation whatsoever to the abuse ReVille committed upon Does 2 and 3.

In support of their argument that The Citadel had a special relationship with ReVille, Plaintiffs rely on *Bishop v. South Carolina Dep't Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998). There, it was alleged that a child was abused by her mother, following her mother's release from involuntary commitment. The plaintiff further alleged that the defendant was negligence in its release of the victim's mother. The South Carolina Supreme Court held that a duty of care did exist under the facts of this case because of the state's special relationship with the mother, who had been involuntarily committed:

> Here, the Department had a special relationship with mother because the Department had custody and control of mother. Thus, 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. . . .
>
> 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.

See id., 331 S.C. at 89, 502 S.E.2d at 82. On the other hand, in this case, there is no evidence of such control over ReVille at the relevant time. The Citadel did not have custody over ReVille. It was not able to control ReVille's conduct. Rather, ReVille's actions were all independent of any relationship he had with The Citadel. Certainly, there is no evidence of specific threats made directed toward Doe 2 and Doe 3 specifically, which is the lynchpin of a duty to protect someone from criminal acts by a third party.

Therefore, it is clear that no duty should be imposed because of a claimed special relationship between ReVille and The Citadel.

B. Plaintiff Has Not Proffered Any Evidence to Support a Duty of Care Based on a Voluntary Assumption of Duty

Again, The Citadel has already shown that The Citadel did not assume a duty of care flowing to Doe 2 and Doe 3. Nothing in Plaintiffs' Oppositions would allow the Court to impose a duty of care on this basis.

Plaintiff relies on *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), where a mentally retarded resident of a treatment center sued the center and the Department of Disabilities and Special Needs, alleging that the defendants breached a duty of care by failing to properly supervise her, leading to sexual abuse by male residents. There, the Supreme Court held, *inter alia,* that the defendants assumed a duty of care to plaintiff:

> Babcock Center had a special relationship with Appellant because she was a client with special needs and disabilities admitted for care and treatment at the center. Babcock Center voluntarily undertook the duty of supervising and caring for Appellant as provided in its contractual relationship with Department. Babcock Center allegedly acted negligently in creating the risk of injury to Appellant by not properly supervising her and allowing improper sexual contacts between Appellant and men. Furthermore, the center had a statutory duty to exercise reasonable care in supervising Appellant. [Citations omitted.] In short, Babcock Center undertook a duty, for consideration, to render services to Appellant which the center should have recognized as necessary for the protection of Appellant. Thus, Babcock Center had a duty to control Appellant's conduct to the extent necessary to prevent her from harming herself or to prevent others from harming her while staying at the center.

See id., 371 S.C. at 137, 638 S.E.2d at 657.

In *Madison*, the controlling fact was the defendant's contractual undertaking of a duty – *for consideration* -- to protect and supervise the victim in a custodial arrangement. In that case, the defendant was paid to protect a vulnerable person and utterly failed in that undertaking. The instant case is easily distinguishable from *Madison*, in that there is not a scintilla of evidence that The Citadel undertook *any* duty *to Doe 2 or Doe 3*. There is no evidence of any relationship between The Citadel and Does 2 and 3. There is no evidence that anyone at The Citadel knew of the abuse of Does 2 and 3 prior to this lawsuit. There is no evidence that The Citadel intended to protect Does 2 and 3. There is no evidence that Does 2 and 3 were ever led to believe that The Citadel was acting to protect them from abuse by ReVille.

Plaintiffs also cite *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), in support of their argument of a voluntarily assumed duty of care. In *Miller*, a textile plant operator constructed a dam adjacent to its plant, which it conveyed to the City. The City used the reservoir to supplement its water supply, and the plant operator was permitted to draw water for production. The City agreed to maintain the lake levels at approximately the level of the spillway. If the water level got too high, the plant operator (when its boiler room flooded) would contact the City to open the sluice gates. After an Army Corps of Engineers report deemed the dam unsafe, employees of the plant and City attended a meeting with the Land Resources Commission. Although the plant operator indicated that it did not own the dam, it attended the meeting and included its employees on the Land Resources Commission's emergency notification forms as personnel assigned to monitor the dam. A heavy rainfall caused the lake to overtop the dam, causing injury to the plaintiffs. The plaintiffs sued the City and plant operator. The plant operator obtained summary judgment, arguing that no duty of care existed. The Court of Appeals reversed, and the Supreme Court affirmed, holding that there were issues of fact as to whether the plant operator voluntarily undertook a duty of care:

> The facts indicate a Kendall employee was listed on the Land Resources emergency notification form and Kendall had an employee present at the meeting during which an emergency plan was formulated. . . . We find more than one inference can be drawn from this evidence. Whether these facts establish that Kendall volunteered to monitor the lake level for the benefit of *third parties* or was simply facilitating its own arrangement with City is an issue that should be resolved by the jury.

See id., 329 S.C. at 315, 494 S.E.2d at 815 (emphasis in original). The Court clarified in a footnote that it was not creating a duty of care beyond the context of a volunteer arrangement for the benefit of a third party:

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

See id., 329 S.C. at 315, 494 S.E.2d at 815 (emphasis added).

Unlike *Miller*, in this case there is not a scintilla of evidence that could support the conclusion that The Citadel intended – through its investigation of Camper Doe's accusations – to benefit Does 2 and 3. Correspondingly, there is not a scintilla of evidence that Does 2 and 3 relied in any way upon The Citadel's assumption of any duty. Again, as The Citadel has noted, there was never any relationship between The Citadel and Does 2 and 3. Plaintiffs' argument that The Citadel assumed a duty broadens the concept of the voluntary assumption of a duty far beyond its recognized bounds.

The law in South Carolina is clear on the fundamental point that a voluntary undertaking of a duty of care requires that the duty be undertaken specifically *to the plaintiffs*. The law also requires that the specific plaintiff act in reliance on the undertaking of a duty of care for his benefit. The law does not recognize a duty undertaken to the general public (or even to some broad subset of the general public). In *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006), the South Carolina Court of Appeals held that a duty could not be voluntarily assumed under Section 323 where *the plaintiff* had no knowledge of the defendant's alleged

assumption:

> While Taylor did trim the tree occasionally for the purpose of clearing the stop sign and his failure to trim the tree might have increased the risk that the sign would be obstructed, *neither Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so.* Therefore, Taylor's occasional trimming of his tree did not create a duty for which he can be held liable. Additionally, even if Taylor had assumed a duty to trim the trees, he could have abandoned the duty at any time so long as his actions did not increase any risk that might have existed.

See id., 367 S.C. at 218-19, 625 S.E.2d at 239. Thus, in the absence of a specific connection between *the undertaking at issue and the plaintiff at issue*, there could not be a voluntarily assumed duty of care.

On yet another occasion, the Court of Appeals recognized that "voluntary assumption" of a duty requires either that the plaintiff rely on the undertaking or that the Defendant actually create the danger:

> [S]ection 323(a) mandates that Staples prove either that Duell's policy of searching for dead trees increased her risk of harm or that she detrimentally relied on Duell's policy. First, Staples presents no evidence that Woddle's act of simply patrolling the area looking for dead trees increased her risk of harm. Duell's policy of inspecting for dead trees did not hasten the decay of trees or affect when and where dead trees might fall. Second, Staples made no allegation that she knew of the policy of searching for dead trees before the accident. Without previous knowledge of the policy, Staples could not have relied on the policy. Thus, Duell's policy of looking for dead trees did not create a duty for which he could be held liable.

See Staples v. Duell, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997).

In this case, it would be wholly unwarranted to find an assumed duty of care, because there is no evidence that The Citadel specifically acted to protect *Does 2 and 3*. *See Thorson v. Mandell*, 402 Mass. 744, 525 N.E.2d 375, 378 (1988) ("The creation of a policy against gymnastics in the auditorium was not an undertaking to render services for the protection of its users."); *Charleston v. Larson*, 297 Ill. App. 3d 540, 231 Ill. Dec. 497, 696 N.E.2d 793, 801 (1998) ("[P]laintiff's voluntary undertaking theory . . . fails at the outset because plaintiff never

alleged that defendant undertook services for *plaintiff*. . . .") (emphasis in original).

Contrary to Plaintiffs' suggestion, a Defendant cannot voluntarily assume a duty of care in a vacuum to the world in general. There must be a specific intent to assume the duty to protect the specific plaintiff. Moreover, there must by specific reliance by the plaintiff upon that undertaking. Neither element is present in the instant case.

C. Plaintiffs Have Not Presented a Scintilla of Evidence Supporting the Imposition of a Duty of Care Based Upon a Creation of Risk

Plaintiffs' Oppositions to The Citadel's Motions for Summary Judgment do not refute The Citadel's assertion that there is no evidence that it negligently or intentionally created the risk to Does 2 and 3. The risk – abuse by ReVille – existed irrespective and independent of any alleged negligence of The Citadel. The Citadel did not "create" this risk; rather, Plaintiffs allege that it failed to eliminate a risk that existed through an agency outside of its control.

In one of the few South Carolina cases imposing a duty on this basis, the Supreme Court has held that a duty may exist where the defendant is actively involved in staging and creating the situation in which an act of violence occurred:

> Respondents were well aware of Baker's unrelenting violent tendencies toward Edwards. Edwards had called the sheriff's office to report Baker's harassment on numerous occasions, and the sheriff's office arranged for Edwards to stay in a hotel after one of the incidents. The sheriff's office and the County, through its agent Howland, arranged the bond revocation hearing at the magistrate's office with no security present. Despite Respondents' awareness that Edwards feared Baker and was reluctant to attend the bond revocation, Respondents strongly encouraged Edwards' presence.
>
> Respondents cannot claim lack of knowledge of Baker's violent tendencies towards Edwards since the reason they were seeking to revoke Baker's bond was due to his failure to obey the no-contact order, which was issued as a direct result of his violent actions. We hold Respondents created a situation in which it was foreseeable that Baker would harm Edwards. *Compare Miletic v. Wal-Mart Stores, Inc.*, 339 S.C. 327, 529 S.E.2d 68 (Ct. App. 2000) (holding Wal-Mart had no duty to protect a customer from a parking lot attack because Wal-Mart had no notice that the crime would occur).

> We hold that Respondents owed Edwards a duty solely as a result of the unique facts of this case, i.e., "special circumstances." Respondents created a situation that they knew or should have known posed a substantial risk of injury to Edwards.

See Edwards v. Lexington Cty. Sheriff's Dep't, 386 S.C. 285, 293-94, 688 S.E.2d 125, 130 (2010). Unlike *Edwards,* in this case, The Citadel did not create a scenario in which Does 2 and 3 would be subject to attack and then fail to take reasonable security steps. Instead, notwithstanding Plaintiffs' efforts to recast the nature of the case, this is a garden-variety claim of failure to protect.

Plaintiffs cannot dispute that the Supreme Court has already held that a failure to *stop* abuse by a third-party is *not the same as creation of the risk of abuse* and does not warrant the imposition of a duty of care. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011) ("Wal-Mart did not negligently or intentionally create the risk of the father's sexual abuse."). This conclusion is logical, since a contrary ruling would effectively gut the general rule that no duty exists to protect a victim from a third person. If the Court finds a "creation of danger" here, such "creation of danger" would exist in every case in which plaintiff claims that the defendant failed to prevent abuse. Aside from the *ipse dixit* of counsel, Plaintiffs cite no authority finding that a mere failure to prevent abuse is a creation of a risk warranting the imposition of a duty of care. In *Staples v. Duell*, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997), cited in the previous section, the Court of Appeals observed the difference between violating one's policy of patrolling for dead tree limbs and *creating* dead tree limbs: "First, Staples presents no evidence that Woddle's act of simply patrolling the area looking for dead trees increased her risk of harm. Duell's policy of inspecting for dead trees did not hasten the decay of trees or affect when and where dead trees might fall." 329 S.C. at 510, 494 S.E.2d at 643. Again, if this Court accepts Plaintiffs' invitation to impose a duty of care under a "creation of the risk" theory, it will result in the imposition of a duty of care in nearly all "failure to protect" cases based solely on the linguistic characterization of the failure to protect as a creation of a danger.

In support of their contention that a duty of care should be imposed upon The Citadel because of its creation of a risk of harm, Plaintiffs rely upon *Greenville Memorial. Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990). In *Greenville Memorial Auditorium*, a patron at a rock concert was struck by a bottle thrown from a balcony of the defendant auditorium. The evidence showed that during the concert, the auditorium only had 14 guards to control a crowd of 6,000. There was no reserved seating on the main floor, where patrons simply stood before the band. Multiple witnesses testified that patrons were openly drinking out of liquor bottles. There was testimony that there were liquor bottles and pieces of glass on the floor of the auditorium during the concert. The crowd was also unruly, with patrons pushing and shoving each other. The auditorium argued that it was immune from liability under S.C. Code § 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 held that this statute did not insulate the auditorium from liability, because the claim against the auditorium was not simply for the act of the person throwing the bottle:

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

See id., 301 S.C. at 247, 391 S.E.2d at 549. This case is inapposite for several reasons. First, *Greenville Memorial Auditorium* does not address the existence of a duty of care. Rather, it deals with whether a specific exception to liability under the South Carolina Tort Claims Act applies, which is not at issue in the instant motions. Second, *Greenville Memorial Auditorium* concerns actions taking place on the defendants' property, under its supervision and in such circumstances that it plainly was required to provide for the safety of attendees. In this case, (aside from the mere coincidental presence of Doe 2 on campus with ReVille to attend a

basketball game discussed *supra*), there is no evidence that ReVille abused Doe 2 or Doe 3 at The Citadel or in the context of a formal Citadel activity. As such, *Greenville Memorial Auditorium* is unavailing to Plaintiffs.

D. Plaintiffs' Claims That Abuse Occurred on The Citadel's Campus Are Unavailing

At oral argument and in a supplemental memorandum, Plaintiffs argue that a duty of care should exist because one of the Plaintiffs, Doe 2, was abused on The Citadel's campus. Plaintiff's assertion in this regard is disingenuous, because the *only* evidence is that any presence of Doe 2 on The Citadel's campus was as a member of the public attending a basketball game with ReVille, *after his abuse had already begun and while ReVille was actually living with Doe 2's family*. Plaintiff does not allege that The Citadel knew or should have known that he was even on campus or in ReVille's company. That part of ReVille's misconduct might have occurred during an excursion to a basketball game in no way creates a relationship between The Citadel and Doe 2 that would give rise to a legal duty.

Doe 2 testified that he would, on occasion, go to Citadel basketball games with ReVille, to help educate him about basketball to assist with his performance on the AAU team ReVille coached. (*See* Deposition of Doe 2, previously submitted to the Court by Plaintiffs, at pp.130:12-131:9). On one occasion, ReVille drove Doe 2 around the campus, but they did not exit ReVille's vehicle or go into any buildings. (*See id.*, at p.131:10-24). In fact, the *only* building on The Citadel's campus that Doe 2 ever entered with ReVille was the gymnasium. (*See id.*, at pp.131:25-132:5). Thus, it is clear that any visits Doe 2 made to The Citadel with ReVille were rare trips as a spectator watching Citadel basketball games, as any member of the public could have done.

The only abuse that Doe 2 claims occurred on The Citadel's campus took place in ReVille's car while attending a game:

> A: One of the games definitely was when he was living -- that was the one I remember. He took me to the game, and we watched the game, and before

the game, like, we parked and, like, he grabbed me in an inappropriate manner and kind of played with me a little bit, and then we went in. . . .

When he took them back and they went on and he started like touching me again or whatever, and then it continued on the way home.

Q: Did you ever get out of your car, other than to go with him to a basketball game that time?

A: No, sir.

(*See id.*, at pp.132:10-133:7). Plaintiff does not claim that this conduct was observed, or was observable, by anyone connected with The Citadel. It was just like the abuse that occurred at other locations, including Doe 2's own home: It occurred as a result of a relationship that ReVille cultivated with him and his family, entirely independent of any connection to The Citadel.

Under the authorities previously briefed, including *Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 711 S.E.2d 908 (2011), and *Doe v. Marion,* 373 S.C. 390, 645 S.E.2d 245 (2007), there is *no* basis to impose a duty of care upon The Citadel as to Doe 2 or Doe 3 (or any other victim of abuse by ReVille outside of the context of the summer camp itself).

E. Plaintiffs' Claims Are Improper Under *Degenhart*

The Citadel anticipates that Plaintiffs might argue that it should be held liable for ReVille's actions prior to the end of his employment. This theory is without merit. Under South Carolina law, an employer owes a duty to supervise employees who are acting outside the scope of their employment only in narrowly limited circumstances, none of which exist 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 is only liable for negligent supervision if the employee "intentionally harms another" *when* the employee: (1) is upon the premises of the employer, or is using a chattel of the employer; (2) the employer knows or has reason to know that it has the ability to control its employee; and (3) the employer knows or

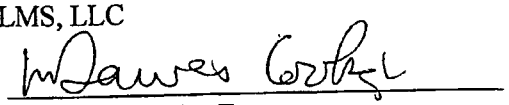
should know of the necessity and opportunity for exercising such control. *Degenhart*, 309 S.C. at 116-17, 420 S.E.2d at 496, (adopting the *Restatement (Second) of Torts* § 317 (1965)) (emphasis added); *see also Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 644-45, 598 S.E.2d 717, 722-23 (Ct. App. 2004). There is no evidence supporting the imposition of liability under *Degenhart* in connection with Doe 2's sporadic visits to campus with ReVille as a spectator to watch basketball games or for any other reason. There is no evidence that The Citadel was aware Doe 2 was ever on its campus or that it needed to control ReVille's conduct with respect to Doe 2 or Doe 3. Plaintiff can simply proffer no evidence supporting this potential theory of recovery.

CONCLUSION

As The Citadel argued in its previous brief – which it incorporates here by reference – the fundamental fallacy of Plaintiffs' position is that the only basis they assert for imposition of a duty running from The Citadel to Does 2 and 3 is that it was reasonably foreseeable that an inadequate investigation of allegations of wrongdoing when he was employed at The Citadel would enable him to remain at large and abuse children, including the Plaintiffs. Yet, "foreseeability of injury, standing alone, does not give rise to a duty." *Oblachinski v. Reynolds,* 391 S,C. 557, 562, 706 S,E,2d 844, 846 (2011) (refusing to find that a physician who negligently conducted a sexual abuse physical examination owed any duty to third parties foreseeably injured by the examination). Research reveals no case in which a court has recognized the duty that Plaintiffs ask this Court to adopt. For the reasons set forth above (and in The Citadel's prior filings), this Court should grant Defendant The Citadel summary judgment in the cases captioned above.

[SIGNATURE ON FOLLOWING PAGE]

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Dated: April 25, 2014
Charleston, South Carolina

CERTIFICATE OF SERVICE 12-CP-10-1858

The undersigned hereby certifies that a true copy of the **DEFENDANT'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT CONCERNING EXISTENCE OF DUTY OF CARE** were served upon all counsel of record via ELECTRONIC MAIL AND FIRST-CLASS MAIL on this 25th day of April, 2014.

ATTORNEY FOR PLAINTIFFS DOE 2 AND DOE 3: W. Mullins McLeod, Jr., Esquire James B. Moore, III, Esquire McLeod Law Group, LLC P.O. Box 21624 Charleston, SC 29413	

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

BY: _____
Julia G. Childers, Legal Assistant

Exhibit A

--- P.3d ----, 2014 WL 292829 (Utah), 753 Utah Adv. Rep. 14, 2014 UT 2

Judges and Attorneys

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Utah.
Kareena MacGREGOR, Plaintiff and Appellant,
v.
Douglas WALKER, individually and in his official capacity as Bishop of the Willow Canyon 4th Ward, Sandy Utah East Stake of the Church of Jesus Christ of Latter-Day Saints; Corporation of the President of the Church of Jesus Christ of Latter-Day Saints, A Utah Corporation sole et al.; Defendants And Appellees.

No. 20120452.
Jan. 28, 2014.

Background: Parishioner, who was victim of sexual abuse, filed a personal injury suit against church pastor and church, alleging that pastor owed her a duty of care based on her status as a member of his congregation and that pastor negligently failed to report the abuse. The Third District, Salt Lake, Glen K. Iwasaki, J., granted summary judgment in favor of pastor and church, and parishioner appealed.

Holding: The Supreme Court, Parrish, J., held that church's creation of professionally staffed help line did not give rise to duty to aid abuse victims.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

⇦30 Appeal and Error
⇦30XVI Review
⇦30XVI(F) Trial De Novo
⇦30k892 Trial De Novo
⇦30k893 Cases Triable in Appellate Court
⇦30k893(1) k. In general. Most Cited Cases

⇐272 Negligence KeyCite Citing References for this Headnote
⇐272XVIII Actions
⇐272XVIII(D) Questions for Jury and Directed Verdicts
⇐272k1692 k. Duty as question of fact or law generally. Most Cited Cases

Determination of whether a legal duty exists falls to the court, and it is purely a legal question and is therefore reviewed de novo.

[2] KeyCite Citing References for this Headnote

⇐272 Negligence
⇐272II Necessity and Existence of Duty
⇐272k210 k. In general. Most Cited Cases

Essential element of every negligence action is the existence of a duty of care owed by the defendant to the plaintiff.

[3] KeyCite Citing References for this Headnote

⇐272 Negligence
⇐272II Necessity and Existence of Duty
⇐272k210 k. In general. Most Cited Cases

Duty exists where defendant has an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.

[4] KeyCite Citing References for this Headnote

⇐272 Negligence
⇐272II Necessity and Existence of Duty
⇐272k210 k. In general. Most Cited Cases

In most situations, tort law imposes a general duty to exercise reasonable care to minimize the risk of harm from one's actions, but a person ordinarily has no affirmative duty to act to protect another from harm, unless an exception applies.

[5] KeyCite Citing References for this Headnote

⇐332 Religious Societies
⇐332k30 k. Torts. Most Cited Cases

To establish a negligence claim against church based on a theory of voluntary

undertaking, parishioner, who was victim of sexual abuse, had to show (1) that the church, by means of help line, which provided church clergy who become aware of abusive situation with information about legal duties and counseling options, undertook to render a service to her; and (2) that the church failed to exercise reasonable care in its administration of the help line, thereby either increasing parishioner's risk of harm or causing her harm through her reliance on the help line. Restatement (Second) of Torts § 323.

[6] KeyCite Citing References for this Headnote

⇐332 Religious Societies
⇐332k30 k. Torts. Most Cited Cases

Church's creation of professionally staffed help line, which provided church clergy who become aware of an abusive situation with information about legal duties and counseling options, did not give rise to duty to aid abuse victims because, regardless of whether the church voluntarily undertook to render a service to abuse victims by virtue of the help line, a clergy member's failure to use the help line did not increase a victim's risk of harm; parishioner, who was victim of sexual abuse, did not claim that she relied on the help line, neither the creation of help line nor pastor's alleged failure to use it increased the risk of harm to parishioner, and public policy disfavored the imposition of a duty when it would discourage organizations from providing services that may ultimately benefit victims of abuse.

[7] KeyCite Citing References for this Headnote

⇐272 Negligence
⇐272II Necessity and Existence of Duty
⇐272k217 Voluntarily Assumed Duty
⇐272k218 k. In general. Most Cited Cases

Before a duty arises under Restatement of Torts section governing negligence claims based on a theory of voluntary undertaking, a plaintiff must establish not only the existence of a voluntary undertaking, but also that (a) the undertaking increased plaintiff's risk of harm, or (b) the harm suffered by the plaintiff resulted from plaintiffs reliance on the undertaking. Restatement (Second) of Torts § 323.

[8] KeyCite Citing References for this Headnote

⇐272 Negligence
⇐272II Necessity and Existence of Duty
⇐272k217 Voluntarily Assumed Duty
⇐272k218 k. In general. Most Cited Cases

Mere failure to facilitate the prevention of harm that occurred through other causes is insufficient to show change of conditions that increased the risk of harm to the plaintiff under Restatement of Torts section governing negligence claims based on a theory of voluntary undertaking. Restatement (Second) of Torts § 323.

[9] KeyCite Citing References for this Headnote

⇦115 Damages
⇦115III Grounds and Subjects of Compensatory Damages
⇦115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
⇦115III(A)2 Mental Suffering and Emotional Distress
⇦115k57.13 Negligent Infliction of Emotional Distress
⇦115k57.14 k. In general. Most Cited Cases

⇦272 Negligence KeyCite Citing References for this Headnote
⇦272XIV Necessity and Existence of Injury
⇦272k461 k. Nature of injury. Most Cited Cases

By its very terms, Restatement of Torts section governing negligence claims based on a theory of voluntary undertaking requires physical harm from the negligently rendered services; psychological or emotional harm is insufficient. Restatement (Second) of Torts § 323.

[10] KeyCite Citing References for this Headnote

⇦92 Constitutional Law
⇦92XIII Freedom of Religion and Conscience
⇦92XIII(B) Particular Issues and Applications
⇦92k1327 Religious Organizations in General
⇦92k1328 k. In general. Most Cited Cases

⇦92 Constitutional Law KeyCite Citing References for this Headnote
⇦92XIII Freedom of Religion and Conscience
⇦92XIII(B) Particular Issues and Applications
⇦92k1327 Religious Organizations in General
⇦92k1340 Clergy; Ministers
⇦92k1340(1) k. In general. Most Cited Cases

Delicate balance between First Amendment's freedom to exercise religion and the demands placed on all persons (clerical and others) by civil law requires courts to proceed cautiously in a controversy where courts are asked to hold that a

religious institution's reliance on its own written policy gives rise to liability under civil law. U.S.C.A. Const.Amend. 1.

William M. Fontenot, Bountiful, for appellant.

L. Rich Humphreys, Karra J. Porter, Alexander Dushku, Justin W. Starr, Salt Lake City, for appellee.

Justice PARRISH, opinion of the Court:

*1 ¶ 1 We are asked to decide whether a church's creation of a help line for the benefit of its clergy gives rise to a duty to parishioners who counsel with clergy. Specifically, we are asked to determine whether, pursuant to section 323 of the Restatement (Second) of Torts, the Church of Jesus Christ of Latter-day Saints (LDS Church or Church) and its clergy voluntarily assumed a duty to aid abuse victims by virtue of its "Help Line." This professionally staffed Help Line provides Church clergy who become aware of an abusive situation with information about legal duties and counseling options. We conclude that the Church's creation of the Help Line did not give rise to such a duty because, regardless of whether the Church voluntarily undertook to render a service to abuse victims by virtue of the Help Line, a clergy member's failure to use the Help Line does not increase a victim's risk of harm. Moreover, public policy disfavors the imposition of a duty where it would discourage organizations from providing services that may ultimately benefit victims of abuse.

FACTUAL AND PROCEDURAL BACKGROUND

I. THE CHURCH'S HELP LINE

¶ 2 In 1995, the Church established the Help Line, a 1–800 number that bishops and other Church clergy can call when they become aware of possible abuse. The Help Line is available 24 hours a day, 365 days a year and is staffed by legal and counseling professionals who "provide guidance to the bishop on how to protect the [victim] from further abuse, and how to deal with the complex emotional, psychological, and legal issues that must be addressed in order to protect the victim." In some cases, attorneys are also available to "advise bishops on legal issues to ensure compliance with reporting statutes."

¶ 3 The Help Line is available only to Church ecclesiastical leaders. Help Line employees neither learn the names of potential victims, nor do they communicate with the victims. In cases where Church leaders use the Help Line, they still have the discretion to proceed as they believe appropriate under the circumstances.

II. MACGREGOR'S ALLEGATIONS AGAINST THE CHURCH DEFENDANTS

A. MacGregor's Relationship with Her Teenage Neighbor and Interactions with Clergy

¶ 4 Beginning at the age of twelve and continuing until age fifteen, Kareena

MacGregor engaged in regular sexual touching with her neighbor Matthew, who was four years older than she. MacGregor's parents, Matthew's parents, and the police each became aware of MacGregor and Matthew's relationship. When MacGregor was either fourteen or fifteen, she also met and became sexually involved with Gregory, who was seventeen at the time.[FN1]

¶ 5 During this time frame, MacGregor alleges that she met and counseled with her and Matthew's LDS bishop, Douglas Walker, on two separate occasions.[FN2] MacGregor allegedly told Walker that she wanted the relationship with Matthew to stop and that she wanted to repent. According to MacGregor, Walker told her to pray, read her scriptures, and stop seeing Matthew. MacGregor never informed Walker of her relationship with Gregory. Walker was aware of the Help Line and had used it on other occasions, but he did not call the Help Line "about any issue relating to [MacGregor]."

B. MacGregor's Personal Injury Suit Against the Church Defendants

*2 ¶ 6 In April 2008, MacGregor filed a personal injury suit against Walker, the Church (collectively the Church Defendants), and several other defendants.[FN3] MacGregor initially premised her claim against the Church Defendants on the theory that Walker owed her a duty of care based on her status as a member of his congregation and that Walker negligently failed to report the abuse as required by Utah Code section 62A-4a-403(3)(a) (Reporting Statute). She also alleged that the Church was vicariously liable for Walker's negligent conduct under the doctrine of respondeat superior.

¶ 7 The Church Defendants moved for summary judgment, asserting that they owed no duty to MacGregor. Specifically, they argued that the reporting statute imposes criminal penalties only and does not give rise to a duty that would support a negligence claim. The Church Defendants also argued that there is no "special relationship" between a church and its members that would impose on it a duty to protect its members against the criminal acts of third parties. In response, MacGregor disclaimed any suggestion that the Church's duty arose by virtue of the Reporting Statute or a special relationship between the Church and its members. Instead, she argued that, by creating the Help Line, the Church voluntarily undertook a duty to help MacGregor and all other Church members who are victims of child abuse. She further alleged that Walker breached that duty by failing to call the Help Line regarding her case.

¶ 8 Because MacGregor did not raise this voluntary undertaking theory in her complaint, the district court found the claim was not properly pled. But it nevertheless chose to address the claim "in an effort to decide the matter on its merits rather than a technicality." After considering supplemental briefing regarding the Help Line, the district court granted summary judgment in favor of the Church Defendants. In granting summary judgment, the district court did not

rely on the voluntary undertaking theory; instead it reasoned that the Church Defendants were immune from suit under the First Amendment in the U.S. Constitution.

¶ 9 MacGregor appeals the dismissal of her claims against the Church Defendants. She contends that the Church voluntarily assumed a duty by virtue of the Help Line and that the district court erred in concluding that the Church was immune from suit under the First Amendment. We do not reach the issue of First Amendment immunity because we find that even if the Church Defendants voluntarily undertook to render a service to MacGregor by virtue of the Help Line, the existence of the Help Line did not increase MacGregor's risk of harm. We have jurisdiction pursuant to Utah Code section 78A-3-102(3)(j).

STANDARD OF REVIEW

[1] ¶ 10 "The determination of whether a legal duty exists falls to the court. It is purely a legal question" and is therefore reviewed de novo. *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 14, 143 P.3d 283.

ANALYSIS

*3 [2] [3] ¶ 11 An essential element of every negligence action is the existence of a duty of care owed by the defendant to the plaintiff.[FN4] *B.R. ex rel. Jeffs v. West*, 2012 UT 11, ¶ 5, 275 P.3d 228; *see also Young v. Salt Lake City Sch. Dist.*, 2002 UT 64, ¶ 12, 52 P.3d 1230. ("Absent a showing that the defendant owed any duty, the plaintiffs claim has no merit...."). A duty exists where defendant has "an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another." *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 321 (Utah 1997) (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed.1984)).

[4] ¶ 12 In most situations, tort law imposes a general duty to exercise reasonable care to minimize the risk of harm from one's actions. Dan B. Dobbs, The Law of Torts, § 251 (2d ed.2011). But a person ordinarily has no affirmative duty to act to "protect another from harm," unless an exception applies. *Gilger v. Hernandez*, 2000 UT 23, ¶ 15, 997 P.2d 305. Here, MacGregor argues that the Church Defendants owed her an affirmative duty to act under section 323 of the Restatement (Second) of Torts. Section 323 provides:

> 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.

[5] ¶ 13 We adopted section 323 in *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433, 436 (Utah 1983), but we later explained that "the nature of this rule requires the Court to narrowly construe the scope of any assumed duty." *Weber ex rel. Weber v. Springville City*, 725 P.2d 1360, 1364 (Utah 1986). Therefore, to establish a negligence claim based on a theory of voluntary undertaking under section 323, MacGregor must show (1) that the Church, by means of the Help Line, undertook to render a service to her; and (2) that the Church Defendants failed to exercise reasonable care in their administration of the Help Line, thereby either increasing MacGregor's risk of harm or causing MacGregor's harm through her reliance on the Help Line. We do not reach the merits of the parties' respective arguments under the first prong of section 323 because we conclude that MacGregor has not met her burden under the second prong. We also conclude that public policy does not support the imposition of a duty in this case. We therefore affirm the district court's order granting the Church Defendants' motion for summary judgment.

I. REGARDLESS OF WHETHER THE CHURCH UNDERTOOK TO RENDER A SERVICE TO MACGREGOR, ANY SUCH UNDERTAKING DID NOT INCREASE MACGREGOR'S RISK OF HARM

***4** ¶ 14 MacGregor argues that, by establishing the Help Line, "the Church has undertaken [a] duty categorically for its child members," including herself as a victim of abuse. The Church Defendants disagree, arguing that the Help Line exists solely to assist Church clergy. Specifically, they argue that the Help Line "renders internal Church services only and thus provides only indirect benefit to victims."

¶ 15 In support of their position, the Church Defendants rely on a line of cases that interpret section 323 to apply "only when the defendant undertakes to provide a service *directly* to the person injured." *Russell v. United States*, 631 F.Supp. 1, 2 (D.Utah 1983) (emphasis added); *see also Thorson v. Mandell*, 402 Mass. 744, 525 N.E.2d 375, 378 (1988) ("The creation of a policy against gymnastics in the auditorium was not an undertaking to render services for the protection of its users."); *Charleston v. Larson*, 297 Ill.App.3d 540, 231 Ill.Dec. 497, 696 N.E.2d 793, 801 (1998) ("[P]laintiffs voluntary undertaking theory ... fails at the outset because plaintiff never alleged that defendant undertook services for *plaintiff*....") (emphasis in original). The Church Defendants argue that the Help Line was created for the direct benefit of Church clergy only and that abuse victims are merely potential indirect beneficiaries. They therefore assert that the Help Line does not give rise to a duty to mitigate any harm suffered by abuse victims.

¶ 16 There is, however, a second line of cases that provides for a more generous reading of section 323. In *Wark v. United States*, for example, the Tenth Circuit held that for section 323 to apply, a plaintiff must first show that the defendant "through its affirmative acts or through a promise to act, undertook to render a

service that was *reasonably calculated* to prevent the type of harm that befell the plaintiff." 269 F.3d 1185, 1189 (10th Cir.2001) (emphasis added); *see also Jefferson Cnty. Sch. Dist. R-1 v. Justus ex rel. Justus*, 725 P.2d 767, 771 (Colo.1986) (en banc) (same). Under this interpretation of section 323, it could be argued that the Church's creation of the Help Line was reasonably calculated to prevent the type of harm experienced by abuse victims like MacGregor.

¶ 17 The plain language of section 323 could arguably sustain a third interpretation that neither party has argued. Section 323 states that a duty arises only when one undertakes "to render services to another *which he should recognize as necessary for the protection of the other's person or things.*" (Emphasis added). Under this provision, a duty would arguably arise only if MacGregor could show that the Church Defendants should have recognized that calling the Help Line was *necessary* for her protection.

[6] ¶ 18 But we need not consider these alternative interpretations of section 323 because, regardless of whether the Church Defendants undertook to render a service to MacGregor, MacGregor has not met her burden of showing that this alleged undertaking increased her risk of harm.

***5** [7] ¶ 19 Before a duty arises under section 323, a plaintiff must establish not only the existence of a voluntary undertaking, but also that (a) the undertaking increased plaintiff's risk of harm, or (b) the harm suffered by the plaintiff resulted from plaintiffs reliance on the undertaking. MacGregor does not claim that she relied on the Help Line. We therefore consider whether the Church's creation of the Help Line increased her risk of harm.

[8] ¶ 20 In *Alder v. Bayer Corp. AGFA Division*, we held that subsection (a) of section 323 "requires some change in conditions that increases the risk of harm to the plaintiff over the level that existed before the defendant became involved." 2002 UT 115, ¶ 30, 61 P.3d 1068 (internal quotation marks omitted). A mere failure "to facilitate the prevention of harm that occurred through other causes" is insufficient. *Id.* (internal quotation marks omitted).

¶ 21 *Fishbaugh v. Utah Power & Light, a Division of Pacificorp* illustrates the application of subsection (a). 969 P.2d 403 (Utah 1998). In *Fishbaugh*, a pedestrian was injured when he was hit by a car on an unlighted street. *Id.* at 404. The city had installed street lights, but the lights malfunctioned and were not lit at the time of the accident. *Id.* The plaintiff acknowledged that the city had no duty to provide lighting but argued that, having chosen to do so, the city had a duty to maintain the lights in working order. *Id.* at 406.

¶ 22 We rejected this argument, reasoning that "liability under ... section [323] is generally limited to instances where the failure to exercise reasonable care in the

undertaking has placed the injured party in a worse position than he would have been in had the undertaking not occurred." *Id.* at 407. Because the city's decision to install lighting made the plaintiff no worse off "than if the street lights had never been installed," the city had no duty "to maintain the streetlights simply because it installed them." *Id.*

¶ 23 This interpretation of section 323 is consistent with that of other courts. For example, in *Jain v. State,* the Iowa Supreme Court concluded that section 323(a) "applies only when the defendant's actions increased the risk of harm to plaintiff relative to the risk that would have existed *had the defendant never provided the services initially.*" 617 N.W.2d 293, 299 (Iowa 2000) (emphasis added) (internal quotation marks omitted). In other words, "the defendant's negligent performance must somehow put the plaintiff in a worse situation than if the defendant had never begun performance." *Id.* (internal quotation marks omitted).

¶ 24 MacGregor's claim does not satisfy subsection (a) because neither the creation of the Help Line nor Walker's alleged failure to use it *increased* the risk of harm to MacGregor. In other words, Walker's alleged negligent performance did not put MacGregor in a worse position than she would have been in had the Church never created the Help Line.

***6** [9] ¶ 25 MacGregor argues that "the psychological impact resulting from Walker's inaction 'launched a force or instrument of harm' and was not merely a 'failure to facilitate the prevention of harm that occurred through other causes' " (quoting *Alder,* 2002 UT 115, ¶ 30, 61 P.3d 1068). But section 323, by its very terms, requires "physical harm" from the negligently rendered services. Psychological or emotional harm is insufficient.

¶ 26 We hold that even if the Church had undertaken to protect MacGregor and other potential abuse victims by virtue of the Help Line, MacGregor's risk of harm was not increased relative to the risk she would have faced had the Church never created the Help Line in the first place. Thus, MacGregor's section 323 claim fails.

II. IMPOSING A DUTY IN THIS CASE IS CONTRARY TO PUBLIC POLICY [FN5]

¶ 27 MacGregor also argues that general notions of public policy support the imposition of a duty on the Church Defendants. Specifically, she reasons that "public policy does not favor holding persons or institutions harmless for the kind of claim that [MacGregor] is bringing against Walker and the Church." We disagree. Contrary to MacGregor's argument, public policy would actually *disfavor* imposing a duty in cases such as this for fear that imposition of a duty would chill efforts to prevent abuse and assist victims. Creation of programs and resources that have the potential to benefit victims of abuse should be encouraged, not discouraged by the threat of potential liability. *See, e.g., Pytlewski v. United States,* 991 F.Supp. 1043, 1050 (N.D.Ill.1998) ("A finding that such a manual or policy in and of itself

created a legal duty on the part of the business ... would discourage businesses from producing or formulating such guidelines, which would be detrimental to the general public's best interest.").

¶ 28 We rejected the assertion of a duty in *AMS Salt Industries, Inc. v. Magnesium Corp. of America* for similar policy reasons. 942 P.2d 315, 324 (Utah 1997). In that case, Magnesium Corp. built a dike to protect its own land from flooding. *Id.* at 317. The dike also benefitted other owners, until it failed. *Id.* at 317–18. Flood victims filed suit against Magnesium Corp., alleging it had a duty to protect neighboring property from flooding. *Id.* We held that imposing a duty on Magnesium Corp. as to other property owners would be "absurd" because it would threaten landowners with "potential liability to every owner of property for miles beyond." *Id.* at 324. As a result, "no one would ever dare to take measures to protect against flooding." *Id.*

¶ 29 The Church, through its Help Line, provides a service intended to assist its ecclesiastical leaders in counseling abuse victims. It is certainly not the only organization with internal policies, procedures, training, and resources designed to reduce the risk of abuse and assist victims. To hold that the creation of such policies and programs gives rise to a duty under tort law would discourage organizations from creating these beneficial programs.

*7 [10] ¶ 30 Moreover, we must be even more sensitive when assessing a religious organization's internal policies. "The delicate balance between the freedom to exercise religion and the demands placed on all persons (clerical and others) by civil law requires us to proceed cautiously in a controversy where we are asked to hold that a religious institution's reliance on its own written policy ... gives rise to liability under civil law." *Petrell v. Shaw*, 453 Mass. 377, 902 N.E.2d 401, 409–10 (2009). Because imposing a duty on the Church in this case would be contrary to public policy, we decline to do so.

CONCLUSION

¶ 31 We affirm the district court's entry of summary judgment in favor of the Church Defendants. The Church's creation of the Help Line did not give rise to a duty to MacGregor because, regardless of whether the Church undertook to render a service to MacGregor by virtue of the Help Line, the existence of the Help Line did not increase her risk of harm. The risk MacGregor faced was the same as that she would have faced had the Church never created the Help Line. And the imposition of a duty based solely on the creation of the Help Line would be contrary to public policy because it would discourage organizations from providing such services.

Justice PARRISH authored the opinion of the Court, in which Chief Justice DURRANT, Associate Chief Justice NEHRING, Justice DURHAM, and Justice LEE joined.

FN1. In September 2002, at the age of fifteen, MacGregor gave birth to Gregory's baby in her home. MacGregor alleged that she did not know she was pregnant until after giving birth. The baby died after MacGregor put him in a window well. *See State ex rel. K.M.* for a more thorough recitation of the facts surrounding MacGregor's pregnancy and the baby's death. 2007 UT 93, 173 P.3d 1279.

FN2. In their motion for summary judgment, the Church Defendants denied that Walker had any knowledge of the abuse, but they assumed knowledge solely for summary judgment purposes.

FN3. MacGregor also named Gregory, Matthew, Matthew's parents and brother, Deseret Memorial Inc., and Holbrook Funeral Chapel Inc. as defendants in the suit.

FN4. In addition to establishing a duty, a plaintiff must also establish "(2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiffs injury, and (4) that the plaintiff in fact suffered injuries or damages." *Torrie v. Weber Cnty.*, 2013 UT 48, ¶ 9, 309 P.3d 216 (internal quotation marks omitted).

FN5. A court may look to general policy considerations when determining the existence of a duty. *AMS Salt Indus., Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 321 (Utah 1997). As Dean Prosser famously noted, "duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." W. PAGE KEETON ET AL, PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed.1984).

Utah,2014.
MacGregor v. Walker
--- P.3d ----, 2014 WL 292829 (Utah), 753 Utah Adv. Rep. 14, 2014 UT 2

Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Durham, Hon. Christine M.**
State of Utah Supreme Court
Salt Lake City, Utah 84114-0210
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Durrant, Hon. Matthew B.**
State of Utah Supreme Court
Salt Lake City, Utah 84114-0210
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- **Iwasaki, Hon. Glenn K.**
State of Utah District Court, 3rd District
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- **Nehring, Hon. Ronald E.**
State of Utah Supreme Court
Salt Lake City, Utah 84114-0210
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- **Parrish, Hon. Jill N.**
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Exhibit B

65 Mass.App.Ct. 1102, 836 N.E.2d 350 (Table), 2005 WL 2875379 (Mass.App.Ct.)
Unpublished Disposition

NOTICE: THIS IS AN UNPUBLISHED OPINION.

Appeals Court of Massachusetts.
S.I. & another,[FN1]

FN1. M.I. Both plaintiffs sue individually and on behalf of their daughter, Jane (a pseudonym).

v.

Kathleen SENNOTT & others.[FN2]

FN2. Maureen Marr and Academy of Notre Dame at Tyngsboro, Inc.

No. 04-P-118.
Nov. 2, 2005.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiffs appeal from the grant of summary judgment against them in their negligence action against their daughter's school and two of its employees. The thrust of the plaintiffs' claim is that the school was negligent for failing to report to the Department of Social Services (DSS) allegations of underage sexual activity between their daughter's schoolmate and an older boy (who was not a student), essentially enabling that older boy to later engage in sexual activity with their underage daughter. Largely for the reasons set forth in the memorandum of decision on the defendants' motion for summary judgment, we affirm the judgment of the Superior Court.

Background. Jane, the daughter of the plaintiffs, attended the Academy of Notre Dame at Tyngsboro, Inc. (Academy), from August, 1999, to June, 2002. (RA 12-13, 23) From November, 2000, to December, 2000, twenty-two year old Jason Sawyer committed various sexual acts on the then fifteen year old Jane. (RA 149-150) Sawyer is the older brother of a classmate of Jane's. (RA 145) Sawyer was subsequently indicted and convicted of these crimes. (RA 149-150) Besides the Academy, the other defendants are Kathleen Sennott (the campus minister and religion department chair) and Sister Maureen Marr (the principal of the Academy). Sennot and Marr held those positions at all times relevant to the incidents.

The plaintiffs claim that the events at issue occurred due to the Academy's

negligence in failing to report information to DSS about Sawyer's improper relationship with another student that Academy employees learned of prior to the assaults on Jane. The plaintiffs do not contend that Sennott and Marr knew of the relationship between Jane and Sawyer and failed to report that relationship. Rather, they claim that well before Jane and Sawyer developed a relationship, Sennott and Marr became aware of a sexual relationship between Sawyer and the other student and/or sexual abuse by Sawyer of his younger sister, who also attended the Academy.

The plaintiffs claim that these incidents triggered the Academy's reporting requirements under G.L. c. 119, § 51A. Section 51A requires various persons, including teachers and educational administrators like Sennott and Marr, to immediately report to the DSS any "reasonable cause to believe" that a child is suffering from abuse, followed by a written confirmation within forty-eight hours.[FN3] Failure to report, as well as filing a frivolous report, results in a fine of not more than one thousand dollars. *Ibid.* The plaintiffs assert that the failure to report was a breach of the duty owed to Jane by Sennott and Marr, enabling Sawyer to engage in an unlawful sexual relationship with Jane.

FN3. General Laws c. 119, § 51A, as amended through St.1993, c. 50, § 23, in pertinent part states: "Any ... public or private school teacher, [or] educational administrator ... who, in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering physical or emotional injury resulting from abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth, shall immediately report such condition to the [DSS] by oral communication and by making a written report within forty-eight hours after such oral communication.... Any such person so required to make such oral and written reports who fails to do so shall be punished by a fine of not more than one thousand dollars. Any person who knowingly files a report of child abuse that is frivolous shall be punished by a fine of not more than one thousand dollars."

Discussion. The judge did not err in granting summary judgment for the defendants. He correctly concluded that the plaintiffs had no reasonable expectation of establishing the existence of any duty owed by the defendants to Jane relevant to the plaintiffs' negligence claim.[FN4] See *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991) (summary judgment burden may be satisfied by proving other party has no reasonable expectation of proving an

essential element).

FN4. To recover for negligence, a plaintiff must prove that the defendant acted, or failed to act, in violation of a duty that the defendant owed the plaintiff, resulting in harm to the plaintiff. See *Cottam v. CVS Pharmacy*, 436 Mass. 316, 320 (2002). The existence of a duty is a question of law for the judge. *Davis v. Westwood Group*, 420 Mass. 739, 743 (1995).

***2** 1. *Duty to Jane.* The plaintiffs were required to prove that the defendants owed a relevant duty to Jane. See *Luoni v. Berube*, 431 Mass. 729, 730–732 (2000). See also Bishop, Prima Facie Case § 17.2, at 514 (5th ed. 2005) ("An essential element of tort liability is the existence of a duty imposed in favor of the person injured and on the person whose conduct produces the injury"). As the Superior Court judge noted, a person does not generally owe a duty to protect another from the wrongdoing of a third party. See *Mullins v. Pine Manor College*, 389 Mass. 47, 50 (1983); *Luoni v. Berube*, 431 Mass. at 731. Thus, to prove the existence of such a duty, the plaintiffs had to demonstrate the existence of a special relationship between the defendants and Jane, founded either upon common law or upon a statutorily defined standard of care. See *Mullins v. Pine Manor College*, 389 Mass. at 50–51 (describing special relationship based on common law); *Luoni v. Berube*, 431 Mass. at 731–732 (stating that special relationships may exist through statute or common law). As noted above, the judge concluded that the plaintiffs could not establish either circumstance, and we agree.

2. *Common law duty.* The plaintiffs first attempt to demonstrate a special relationship created by common law. They argue that the special relationship between a student and her school has already been recognized by Massachusetts courts, citing *Mullins v. Pine Manor College*, 389 Mass. at 50–56, and *Alter v. Newton*, 35 Mass.App.Ct. 142, 145 (1993). While it is true that we have recognized special relationships between students and their schools, these relationships are not the same as the relationship at issue here. The resulting duty in both cases cited was also narrower in scope than what is contemplated here. In both cases the duty was limited to providing reasonably safe school premises, a duty that arose largely as a result of each school's foreseeable responsibility over its own property. See *Mullins v. Pine Manor College*, 389 Mass. at 51–52; *Alter v. Newton*, 35 Mass.App.Ct. at 145. For example, the *Mullins* court took note of the fact that the harm occurred on the school campus, where the plaintiff lived. *Mullins v. Pine Manor College*, 389 Mass. at 51–52. At that location, the school was the only party that had the ability to control the risk of harm to the plaintiff. See *id.* at 51 & n. 6. The school also charged students a security fee to offset the cost of protecting them against the exact kind of risk that ultimately harmed the plaintiff. *Id.* at 53. Consequently, the *Mullins* court concluded that the school was sufficiently aware of

the risk and recognized the expectation that it would protect its residents from that risk. See *id.* at 51–52.

None of these factors was present in the relationship between Jane and the defendants. The defendants were not in control of the persons or locations where the harms occurred to Jane. She was away from school property and under her parents' control when Sawyer harmed her. Thus, the defendants could not have better protected her through precautionary measures. Sawyer was not an agent, employee, or even a student of the defendants, meaning they had no authority to direct or control his actions when he was not on school property. See *Westerback v. Harold F. LeClair Co.*, 50 Mass.App.Ct. 144, 146 (2000) ("Most decisions in which proprietors have been held liable to their patrons for criminal acts of others are those in which the proprietor fails to provide reasonably needed security precautions in or just outside the premises ...").

***3** In sum, the defendants were without the ability to control either Jane, Sawyer, or the environment where the harm occurred. Under these circumstances, we cannot view Jane's expectation of protection as comparable to that of the students in *Mullins* or *Alter.* Therefore, we find no common law duty on the part of the defendants to protect Jane at home, under these circumstances.

3. *Statutory duty.* Besides attempting to demonstrate a special relationship based on common law, the plaintiffs also allege a statutory duty of care running to Jane, founded upon G.L. c. 119, § 51A. We again disagree with their contention. In the Superior Court judge's words, "any notion that [§ 51A] creates a duty on the Academy to protect an unknown victim from potential abuse of a third person is entirely too remote."

A statute may create a duty of care by prescribing the standard of conduct of a reasonable person in a given situation. See *Irwin v. Ware*, 392 Mass. 745, 757 (1984); Prosser & Keeton, Torts § 36, at 220 (5th ed.1984). However, for the plaintiffs to rely on § 51A for the existence of a duty, they are required to show that Jane is among the class of persons the statute was intended to protect. See Prosser & Keeton, *supra* at 224. See also *Irwin v. Ware*, 392 Mass. at 756–758 (analyzing precedent to determine whether plaintiff was in the class of persons to which a statute creates a duty). This is because the statute could hardly be said to prescribe the standard of conduct required of the defendants towards Jane if the statute was not intended to benefit Jane.

Addressing this issue, the judge found that § 51A "does not create a duty on the Academy to protect [Jane] from Sawyer simply by virtue of the fact that the Academy allegedly knew that Sawyer may have abused other students." In making this finding, the judge properly looked to the legislative purpose of the statute to determine the class of persons protected by the statute. See *Irwin v. Ware*, 392

Mass. at 757–758; Prosser & Keeton, *supra* at 225.

We agree with the judge that § 51A is focused upon a particular child who is potentially at risk. For example, looking at the text of the statute, § 51A requires various persons to report any "reasonable cause to believe that a child under the age of eighteen years is suffering physical or emotional injury resulting from abuse ... or from neglect." G.L. c. 119, § 51A. It has strict time requirements for both written and oral reports to DSS, as well as a requirement that the reports contain specific information about the circumstances of the suspected harm. *Ibid.* Additionally, § 51B directs DSS immediately to investigate the § 51A report, which would include a visit to the child's home. G.L. c. 119, § 51B(1). Section 51B commands DSS to evaluate the child's safety and take action if deemed necessary, including the offering of services to the family, removal of the child from the home, and notification to the district attorney's office for prosecution. G.L. c. 119, § 51B(2)-(5).

***4** Each of these requirements concerns the reporting of information about the living conditions of a specific child. Each then prescribes procedures designed to remedy the problems of a specific child. Section 51A does not focus on unnamed, potentially at-risk children in the abstract.

Furthermore, c. 119, § 1, as inserted by St.1954, c. 646, § 1, clearly states that the purpose of the chapter is to "insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children." Thus, the legislative aim of c. 119 is to protect a specific child that a reporter or DSS has reasonable cause to believe is at risk. It is not targeted at any child outside the particular family setting who might potentially be at risk in the future, in the speculative opinion of the reporter. The judge was therefore correct to conclude that Jane was not within the class of persons protected by § 51A. [FN5]

FN5. The plaintiffs attempt to rely on a general allegation by the other student's mother that Sawyer, "used his sister ... to establish contact with these girls," as a basis for a claim that § 51A required the defendants to file a report with DSS concerning Jane, and ostensibly all other girls at the school. Section 51A is designed to protect specific children from ongoing harm by providing DSS the opportunity to render services and assistance. See *Matter of a Grand Jury Investigation*, 437 Mass. 340, 352–353 (2002). Because the other student's mother's statement was only based upon her daughter's experience, it cannot reasonably have been a "presentation of facts which create a *suspicion* of

child abuse" towards Jane, such that it would create a duty to report it to DSS. See *id.* at 353, quoting from *Care & Protection of Robert*, 408 Mass. 52, 63 (1990).

Conclusion. The Superior Court judge correctly granted summary judgment in favor of the defendants. The plaintiffs cannot demonstrate that a duty exists from the defendants to Jane relative to the negligence alleged. For these reasons, we affirm the judgment of the Superior Court.[FN6] We deny the defendants' request for appellate attorney's fees.

FN6. Given our agreement with the judge's rationale, we need not address the defendants' argument, not discussed by the judge, that the plaintiffs would be unable to establish that the alleged negligence of the defendants caused the harm to Jane.

Judgment affirmed.

Mass.App.Ct.,2005.
S.I. v. Sennott
65 Mass.App.Ct. 1102, 836 N.E.2d 350 (Table), 2005 WL 2875379 (Mass.App.Ct.)
Unpublished Disposition
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April 25, 2014

1516
The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, South Carolina 29401

RE: John Doe Camper vs. The Citadel; Civil Action No.: 2012-CP-10-1860
John Doe 2 vs. The Citadel; Civil Action No.: 2012-CP-10-1858
Mother Doe, on behalf of John Doe 3 vs. The Citadel; Civil Action No.: 2012-CP-10-1859
BWPH File No.: 1.516

Dear Julie:

Enclosed please find the original and one (1) copy of Defendant The Citadel's Supplemental Memorandum in Support of Motions for Summary Judgment Concerning the Existence of A Duty of Care regarding the above-referenced matters. 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 Supplemental Memorandum upon Plaintiffs' counsel.

Sincerely,

Dawes Cooke

M. Dawes Cooke, Jr.
John W. Fletcher

MDCjr/JWF/jgc
Enclosure (as stated)

cc: W. Mullins McLeod, Jr., Esquire
The Honorable R. Markley Dennis, Jr.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2012-CP-10-1858

JOHN DOE 2, Plaintiff,
vs.
THE CITADEL, Defendant.

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

Plaintiff's Attorney:	Defendant's Attorney:
W. Mullins McLeod, Jr., Bar No. ____ Address: P.O. Box 21624, Charleston, SC 29413 Phone: (843) 277-6655 Fax ____ E-mail: mullins@mcleod-lawgroup.com Other: ____	M. Dawes Cooke, Jr., Bar No. 1376 Address: P.O. Drawer H, Charleston, SC 29402 Phone: (843) 577-7700 Fax (843) 577-7708 E-mail: mdc@barnwell-whaley.comOther: ____

☒ **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 Renewed Motion for Summary Judgment
Estimated Time Needed: 30 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.

Signature of Attorney for ☐ Plaintiff /☒ Defendant — April 24, 2015 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $____
☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ 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.
☐ Other: ____

JUDGE CODE ____
Date: ____

CLERK'S VERIFICATION

Collected by:____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

SCCA 233 (11/2003)

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,	)	**NOTICE OF MOTION AND RENEWED**
v.	)	**MOTION FOR SUMMARY JUDGMENT**
	)	
THE CITADEL,	)	
	)	
Defendant.	)	

FILED
2015 APR 24 PM 3:31
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, hereby move this Court 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[1] are that:

INTRODUCTION

This is a suit by a young man whom Louis "Skip" ReVille abused[2] over a course of years,

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[1] The Citadel incorporates by reference, as if set forth at length, any and all Motions for Summary Judgment (and supporting memoranda) it has submitted previously in this case or in the cases captioned: (a) *Mother Doe A v. The Citadel,* (Case No. 2011-CP-10-9200); (b) *Mother Doe on behalf of John Doe 3 v. The Citadel,* (Case No. 2012-CP-10-1859); (c) *John Doe Camper v. The Citadel,* (Case No. 2012-CP-10-1860); and (d) *Camper Doe 6 v. The Citadel,* (Case No. 2013-CP-10-5247).

[2] One of the cornerstones of Plaintiff's lawsuit is the idea that those who sexually abuse minors almost always reoffend. Therefore, Plaintiff contends, when Camper Doe came forward with his accusations against ReVille, The Citadel knew or should have known that ReVille would abuse other children. However, a September, 2007 report on "Recidivism Among Sex Offenders in South Carolina," which was the product of a number of South Carolina governmental agencies, undermines Plaintiff's suggestion. (*See* Tab DD). That report indicates, among other things, that in 2001 only 6.5% of imprisoned child molesters had been previously arrested for sex offenses against a child. (*See id.*, at 11). The report further showed that, among child molesters released from prison in 2001, within three years only "2.5% were re-arrested for a new sex crime and 1.5% were reconvicted of a new sex crime." (*See id.*, at 26). Of those recidivist sexual molesters, fewer than half of the subsequent arrests were for sexual crimes against children. (*See id.*, at 38). Simply put, contrary to Plaintiff's assertions, one cannot assume that a person who sexually abuses a minor on one occasion will re-offend.

beginning in 2005 and continuing until the summer of 2007, when Plaintiff's family moved to Atlanta. Plaintiff's exposure to ReVille had no connection to The Citadel. In fact, long before anyone at The Citadel heard any allegations about ReVille, ReVille was renting a guest apartment at Plaintiff's home, supposedly helping care for Plaintiff and his brother when their father was away. All the while, ReVille was abusing them instead.

The Citadel (in this and other lawsuits stemming from allegations of sexual abuse by ReVille) previously filed a Motion for Summary Judgment arguing, *inter alia*, that Plaintiff's claims fail because The Citadel did not owe — and therefore could not breach — a duty of care to Plaintiff. The Court denied those motions, observing at oral argument that the Supreme Court might be poised to change the law concerning the duty of care. The Court considered granting those Motions to enable the appellate courts to provide guidance on important controlling legal issues. The Citadel files the instant Renewed Motion for Summary Judgment, which provides the Court another opportunity to position this case for adjudication of controlling legal issues before the parties are required to endure – perhaps unnecessarily — a difficult and harmful trial. This Court has aptly observed that a public trial will benefit no one, especially if the law does not recognize Plaintiff's claim.

A. Background Facts and Timelines

The following timeline of the key events underlying this action will help the Court place this Motion into context:

DATE	DESCRIPTION
1998	ReVille entered The Citadel as a cadet.
May, 2001	ReVille begins working at the summer camp as a CCQ (Counselor in Charge of Quarters)
August, 2001	"Evaluation" of ReVille recommends ReVille as senior counselor for 2002 camp but states "ReVille needs to learn to distance himself from campers"

DATE	DESCRIPTION
May, 2002	ReVille graduates from The Citadel
June 16-July 6, 2002	ReVille begins role as Senior Counselor at the camp, replacing Chris Poston
June, 2002	ReVille allegedly views pornography with Camper Doe and encourages him to masturbate
Between July 14-August 3, 2002	Jenni Garrott allegedly sees ReVille sitting on a couch next to a camper and admonishes him about being alone in a room with campers.
April 15, 2003	ReVille submits application to work at summer camp again containing "walks on the beach" language
June, 2003	"Icy Hot" incident → Jenni Garrott observes ReVille applying Icy Hot to the leg of a 16 year old counselor during daytime hours in a room with the door open
August, 2003	Second session of camp ends. This is the end of ReVille's employment at the camp
Early summer, 2005	ReVille, then a teacher at Pinewood Prep, meets Doe 2 through AAU basketball. (See March 28, 2014 Deposition of John Doe #2 (Tab A), at 75:16 to 78:3). During that summer, ReVille began "grooming" John Doe 2, showing John Doe 2 pornography, and encouraging Doe 2 to masturbate. (*See* Tab A, at 80:4-17, 87:16 to 88:3).
Late summer, 2005	***ReVille started abusing Doe 2 at ReVille's home, including masturbating him, performing oral sex on him and touching him. (See Tab A, at 90:4 to 91:10).***
2005-06 School Year	During Doe 2's seventh grade year (2005-06), ReVille continued to abuse him at ReVille's home and created the group "The Killers" as a fraternity of his victims. (*See* Tab A, at 100:23 to 102:14).
August 22, 2006	ReVille begins working in The Citadel's writing center working with college students.
Into fall of 2006	ReVille's abuse of Doe 2 continued and escalated through 2005 and 2006, with ReVille actually moving into a bachelor suite at the home of Doe 2 and his family in as early as May of 2006, when Doe 2's father was working in Atlanta. (*See* Tab A, at 91:19 to 92:8, and 94:21 to 95:6; Tab B, at 292:22-24). ReVille moved into the family home, in part, to assist with family duties. (*See* Tab A, at 113:13 to 114:7). There is no evidence that The Citadel had any knowledge that ReVille was living on the same property as Doe 2.

DATE	DESCRIPTION
2006 and on ...	Following ReVille's move into the guest house, ReVille's abuse continued essentially until the family moved out of state at the end of summer of 2007. (*See* Tab A, at 134:25 to 135:14).
November, 2006	ReVille listed John Doe 2's mother as a reference on a November, 2006 job application. (*See* Tab C).
March 22, 2007	ReVille resigns his employment at The Citadel's writing center (*See* Tab CC)
April 19, 2007	ReVille's last day working in The Citadel's writing center
April 23, 2007	***Camper Doe first contacts The Citadel***
Spring, 2007	ReVille moves from Camper Doe 2's home to Mount Pleasant
July 1, 2007	Attorney Brandenburg interviews Camper Doe
Late Summer 2007	Doe 2's family moved to Georgia. (*See* Tab A, at 122:8-15). ReVille testified that Doe 2 moved to Georgia "well before school started." (*See* June 3, 2014 Deposition of Louis N. ReVille (Tab B), at 299:20-23). The abuse of Doe 2 ended when he and his family moved to Georgia.

When the actual incidents of abuse of Doe 2 are charted, three key facts become apparent: (1) ReVille met and began abusing Doe 2 approximately two years *after* ReVille stopped working at the summer camp and as much as two years before Camper Doe made his 2007 report to The Citadel; (2) the overwhelming majority of ReVille's abuse of Doe 2 took place before either Camper Doe's report or Brandenburg's interview of Camper Doe; and (3) ReVille's access to Camper Doe 2 had no connection to The Citadel.

DATE	DESCRIPTION
2005	ReVille abused Doe 2 at least 12 times at his home and in his car. (*See* Tab B, at 289:2 to 291:20).
2006	ReVille abused Doe 2 "three, four times a week" in 2006. (*See* Tab B, at 295:17 to 297:2). Thus, during that year there would have been approximately 200 times that ReVille abused Doe 2.
2007 (prior to April 23, 2007)	ReVille testified that, prior to April 23, 2007, he was abusing Doe 2 approximately "two to three times a week." (*See* Tab B, at 301:25 to 302:4). This would have been a total of at least twenty incidents of abuse of Doe 2 prior to April 23, 2007.

DATE	DESCRIPTION
April 23, 2007	**Date of Camper Doe's call to The Citadel**
May, 2007	ReVille only had two or three interactions with Doe 2 in May, 2007. (*See* Tab B, at 300:12-20, 301:3-15).
June, 2007	ReVille only had six to eight interactions in June of that year. (*See id.*).
July 1, 2007	**Interview of Camper Doe**
July, 2007	ReVille only had four to six interactions with Doe 2 in July of 2007. (*See id.*).
August, 2007	ReVille does not believe he abused Doe 2 in August of 2007. (*See* Tab B, at 300:21-23). ReVille does not believe he abused Doe 2 at all after July of 2007. (*See* Tab B, at 301:16-24).

Notably, ReVille testified that, in the face of hundreds of incidents of abuse prior, he only abused Doe 2 approximately twelve times between May, 2007 and the time Doe 2's family moved out of state. (*See* Tab B, at 298:15-25).

These are the only facts necessary to grant The Citadel summary judgment in this case. While Plaintiffs attempt to use superfluous facts to incite emotion against The Citadel, the issues in this case are actually quite simple. For the reasons discussed below, Plaintiff cannot create a genuine issue of material fact in support of his claims.

B. Plaintiff's Causes of Action

A. Negligence/Gross Negligence

B. Outrage

RENEWED MOTIONS FOR SUMMARY JUDGMENT

I. The Court Should Enter Summary Judgment as to Plaintiff's Negligence Count, Because The Citadel Did Not Owe a Duty of Care

A. Under any legal theory, South Carolina law has never recognized a duty of care to protect others from the criminal acts of a third party where, as here, the potential victim was not *specifically identified or a member of a limited group.* "The concept of duty in tort liability will not be extended beyond reasonable limits." *See Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003) (citation omitted).

"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.

Ravan v. Greenville Cnty., 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993).

Imposing a duty of care to the public at large (as Plaintiff requests) would open a Pandora's box of potential liability, which the South Carolina Supreme Court has never before opened. Plaintiffs argue that because ReVille was a known child molester, The Citadel owed a duty to all children he might ever encounter at any time in the future, because they are an identifiable class of potential victims. This is far too general a threat to create a duty under prevailing law or any reasonable extension of prevailing law. There are more than seventy-two thousand children in Charleston County and more than a million in South Carolina. (*See* U.S. Census Bureau - Census 2010 (Resident Population under Eighteen Years), censtats.census.gov). No authority exists for the proposition that The Citadel owed a duty to protect every child in Charleston County or South Carolina as a whole from ReVille into perpetuity.

1. In its most recent case addressing the existence of a duty of care in a sexual abuse case, the Court of Appeals held that the spouse of a sexual abuser — who allegedly knew of her husband's predilections — did not owe a duty of care to a minor that her husband abused *in her home.* The Court rejected the "special relationship" theory (discussed below) because "the record contains no evidence Respondent had knowledge of a specific threat of harm to a specific individual." *See Doe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014), *cert. granted* (Jan. 16, 2015) (*see* Tab D).

   The Supreme Court has granted *certiorari* in *Bibby,* but *Bibby* presents facts far more favorable to the plaintiff than those here. The plaintiff in *Bibby* is arguing on appeal that the record contains evidence that the defendant specifically knew that the plaintiff child was a guest in her home and, in fact, invited her into the home, and also that she knew that her husband had a history of child sexual abuse. The plaintiff asks the Supreme Court to find that these facts created a duty to the plaintiff under existing precedent, including under premises liability law. The Supreme Court's grant of *certiorari* should not be seen as a sign that the Court intends to change the well-established law in this area or to impose a duty in cases such as this, where the defendant had no relationship with a remote victim and had no way of knowing that he was a potential victim.

2. In *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007) (*see* Tab E), the plaintiff alleged that he had been sexually abused by Marion, his pediatrician. Marion had received psychiatric treatment from the defendant for a "predilection for child molestation." The plaintiff alleged that Dr. Graf was negligent in failing to notify proper authorities of Marion's proclivity toward sexual abuse. The Court refused to impose a duty of care,

holding in part that:

> 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."

See id., 373 S.C. at 400-01, 645 S.E.2d at 250-51 (emphasis added)

3. In *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006) (*see* Tab F), the Supreme Court held that, if a dialysis center knew that its patient could experience ill effects following dialysis, it could owe motorists a duty to warn patient of the risks of driving home from the treatment. In doing so, the Court recognized a "very narrow" duty to third parties that was co-extensive to the medical provider's duty to a patient, "to warn of the dangers associated with medical treatment" when it knows a treatment "may have detrimental effects on a patient's capacities and abilities." *See id.*, 370 S.C. at 516, 636 S.E.2d at 631-32. Of course, in that case, the risk was immediate, occurring directly after treatment. As a result, there would be a very limited class of individuals at risk, as defined on a temporal basis.

4. In *Bishop v. South Carolina Dep't of Public Health*, 331 S.C. 79, 502 S.E.2d 78 (1998) (*see* Tab G), the Supreme Court held that a duty to warn *did* flow from the institution discharging a mother who later harmed her child where the mother had made specific threats to harm *that particular child*: "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." *See id.*, 331 S.C. at 88, 502 S.E.2d at 82. However, the Court held that the plaintiff's claims failed because there was an intervening superseding cause: "the Department could not reasonably foresee grandmother would allow mother to visit with victim unsupervised since only three days earlier grandmother had mother involuntarily committed because mother was threatening to harm victim." *See id.*, 331 S.C. at 90, 502 S.E.2d at 84.

5. In *Rogers v. South Carolina Dep't of Parole and Community Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995) (see Tab H), the Court held that the defendants did not owe a duty to warn the plaintiff that they were releasing Vandroff on a furlough, even though he was being jailed for burglarizing *plaintiff's home*. The basis for the Supreme Court's decision was that "there was no evidence presented that Vandroff ever made a specific threat to harm Doris." *See id.*, 320 S.C. at 256, 464 S.E.2d at

332.

6. In *Gilmer v. Martin*, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996) (*see* Tab I), the Court of Appeals held that a psychiatrist did not owe a duty of care where he knew that a patient with suicidal tendencies worked with vulnerable nursing home patients: "Gilmer concedes Martin 'did not know of a specific threat against Mallie S. Gilmer individually,' but claims there should be a duty to warn all 'foreseeable' victims, such as in this case, where an identifiable threat exists to a specific, small group of individuals. Gilmer in essence requests this Court to adopt a rule of liability for the same generalized threat of harm already rejected by our Supreme Court. This we cannot do."

7. In *Rogers v. South Carolina Dep't of Mental Health*, 297 S.C. 363, 377 S.E.2d 125 (Ct. App. 1989) (*see* Tab J), the court did not impose a duty on a doctor to warn family members of a patient's risk of violence. *See id.*, 297 S.C. at 366, 377 S.E.2d at 126 ("[T]here is no evidence that Corley made specific threats against Harrison or any other family member while she was being treated by the two doctors. . . . We therefore hold, as a matter of law, that Corley's doctors owed no duty to Harrison in this case. Whether a duty to warn exists when there is an apparent danger to a specific individual who would otherwise be unaware of the potential harm we do not decide, since that case is not before us.").

8. In *Sharpe v. South Carolina Dep't of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987) (*see* Tab K), the court refused to impose a duty of care on a therapist to warn of a patient's violent propensity where there was no specific threat to a specific person. *See id.*, 292 S.C. at 14-15, 354 S.E.2d at 780 ("There was no identifiable threat to Bobby Sharpe on these facts. In fact, the decedent, Bobby Sharpe, did not move into the trailer park where Sevits lived until after the defendants discharged Sevits. Nothing in the record indicates Sevits and Sharpe knew each other prior to Sevits's discharge.").

9. The crux of these cases is clear and simple: South Carolina has never recognized a duty of care flowing to the victims of violence committed by a third person, unless there is evidence that the defendant knew of a specific threat to that specific person or specific limited group. South Carolina law has never recognized a private cause of action arising out of a duty owed to the public at large.

B. There is no duty to control a third person or to warn a potential victim of a risk from a third-person; however, there are limited 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 actor; (3) where the defendant voluntarily undertakes a duty to the victim; (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, 566 S.E.2d 536 (2002).

1. The Citadel had no "special relationship" with Doe 2.

a. There is no evidence whatsoever that anyone at The Citadel knew Doe 2 or that he was exposed to ReVille in any way.

b. There is no evidence that The Citadel had the ability to monitor, supervise or control Doe 2. *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.") (*see* Tab L).

2. The Citadel had no "special relationship" with ReVille.

a. There is no evidence that The Citadel had the ability to monitor, supervise or control ReVille. *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.") (*see* Tab L).

b. There is no evidence that The Citadel was aware of a specific threat by ReVille to harm Doe 2. *See Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007) ("Petitioner's claim fails to allege a specific threat against James Doe necessary to create a duty to warn.") (*see* Tab E).

3. The Citadel did not voluntarily undertake a duty to Doe 2.

a. To date, the South Carolina Supreme Court has only recognized a voluntary undertaking of a duty of care in limited the circumstances of the Restatement (Second) of Torts § 323:

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

See Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (limiting "voluntary undertaking" doctrine to Section 323 formulation) (*see* Tab M). "'Section 323(a) simply establishes a duty on one who undertakes to render services for the protection of another to use due care to avoid increasing the risk of harm.'" *Sherer v. James*, 290 S.C. 404, 407-08, 351 S.E.2d 148, 150 (1986) (*quoting Curry v. Summer*, 136 Ill.App.3d 468, 91 Ill.Dec. 365, 371, 483 N.E.2d 711, 717 (1985)).

b. Plaintiff has cited the testimony of Mark Brandenburg for the proposition that The Citadel voluntarily undertook a duty to him:

Q: What were your goals for the investigation?

A: To find out what had happened.

Q: Would you agree with me that preventing harm to other young boys or victims was a goal of the investigation?

A: Sure.

Q: Would you agree with me that by undertaking the investigation, that The Citadel was aiming to prevent harm to potential victims?

A: I *assume* so.

(*See* Tab Q). This testimony does not suggest, in any way, that The Citadel intended to render services to Doe 2 so as to undertake a duty to him under the Restatement (Second) of Torts § 323. It does no more than acknowledge the obvious fact that a goal of any investigation of alleged wrongdoing is to prevent reoccurrence. This truism does not give rise to a duty owed to all potential future victims.

c. There is no evidence that any alleged undertaking by The Citadel increased the risk of harm to Plaintiff. As set forth above, ReVille was abusing Doe 2 for years before Camper Doe's report in 2007. There is not a scintilla of evidence that The Citadel created the risk that ultimately befell Doe 2. *See Staples v. Duell*, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997) ("Duell's policy of inspecting for dead trees did not hasten the decay of trees or affect when and where dead trees might fall.") (*see* Tab O).

d. There is no evidence that Doe 2 relied on any undertaking by The Citadel. *See Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006) ("While Taylor did trim the tree occasionally for the purpose of clearing the stop sign and his failure to trim the tree might have increased the risk that the sign would be obstructed, neither Underwood nor Coponen knew that Taylor trimmed the tree, and *thus they did not rely on his doing so.*") (emphasis added) (*see* Tab N); *Staples*, 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.") (*see* Tab O).

4. The Citadel did not negligently or intentionally create the risk.

a. Application of this exception to the no-duty rule in this case would cause the exception to swallow the rule, because anyone who fails to prevent an injury would be said to have created an enhanced risk of the injury. The Citadel did not create ReVille's desire to abuse children or encourage ReVille to abuse children. Moreover, it did not control ReVille or have custody over Doe 2. *See Doe ex rel.*

Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011) ("Wal-Mart did not negligently or intentionally create the risk of the father's sexual abuse.") (*see* Tab L). Semantics aside, Plaintiff's claim is simply that The Citadel failed to stop ReVille from abusing him.

b. Plaintiff cites no authority imposing a duty in similar circumstances, where The Citadel did not create the risk in the first instance.

5. No statute imposed a duty upon The Citadel to protect the Plaintiff from ReVille. The General Assembly and Congress have specifically spoken on the duty to report or otherwise respond to suspected child abuse or other sexual crimes, and it is clear that The Citadel owed the Plaintiff no statutory duty to protect him from ReVille.

a. In the first instance, the child abuse reporting statute in effect in 2007 did not apply to college officials. *See* S.C. Code § 20-7-510 (2007) (repealed).[3] Moreover, that statute would not be triggered where, as in this case, an adult comes forward with accusations of abuse that occurred during his childhood. *See* June 30, 2014 Office of the Attorney General Opinion ("[T]his Office believes a court will conclude that a mandatory reporter would not have to report . . . when an adult discloses being abused in the past as a child, as long as the adult is not mentally incompetent, as long as there is no information that another child (who is, at the time of the disclosure, under the age of eighteen as defined in 63-3-20(3)) has been or may be abused or neglected . . . .") (*see* Tab P). Finally, even if the mandatory reporting statute did apply, the Supreme Court has held that it does not create a duty of care. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 248, 711 S.E.2d 908, 912 (2011) ("Wal-Mart's duty to report under the Reporter's Statute cannot give rise to civil liability.") (*see* Tab L); *accord Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007) (*see* Tab E).

b. The Jessica Horton Act does not apply because it was not in effect until after Camper Doe's report. *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) (citation omitted) ("[W]here a statute ... creates new obligations [or] imposes a new duty ... it will be construed as prospective only."). The Jessica Horton Act[4] also was not

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[3] By its terms, that statute only imposed obligations on 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." Nowhere did the statute apply to college officials or summer camp personnel.

[4] S.C. Code Ann. § 59-154-10(B) provides, "The chief of the campus police of an institution of higher learning, or his designee, immediately shall notify the State Law Enforcement Division if there is a death

triggered because a) the chief of The Citadel's campus police did not know about the Camper Doe report; and b) Camper Doe did not allege that ReVille ever touched him and therefore did not report "criminal sexual conduct" as that offense is defined under South Carolina law[5].

c. "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*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007) (see Tab E).

d. Under the "public duty rule," public officials are generally not liable to individuals for their negligence in discharging public duties, because the duty is owed to the public at large rather than anyone individually. *See e.g., Trask v. Beaufort Cty.*, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (Ct. App. 2011) (*see* Tab R); *Brown v. Brown*, 360 S.C. 7, 11, 598 S.E.2d 728, 731 (Ct. App. 2004) ("None of the statutes implicated by Woodrow's claims identify any particular class of victims or any particular harm that would create a special duty exception to the general rule.") (*see* Tab S).

e. The Clery Act plainly states that it does not "[e]stablish a standard of care." *See* 20 U.S.C. § 1092(f)(14)(A).

f. The OCR Guidance upon which Plaintiff relies to establish a duty of care under Title IX may not be used to establish an actionable violation of Title IX. *See, e.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

II. <u>There is no Basis for Liability For Acts of Abuse Occurring *Before* Camper Doe's Report and Interview</u>

A. As set forth in Section I, *supra*, the great majority of ReVille's abuse of Doe 2 occurred *before* The Citadel knew about Camper Doe's report (April 23, 2007) or interviewed him (July 1, 2007).

B. With regard to those acts of abuse, Doe 2's only potential basis for liability is that The Citadel breached a duty based on its dealings with ReVille while he was working at the camp.

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resulting from an incident occurring on the property of the institution or 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."

[5] An element of each of the offenses of criminal sexual conduct (S.C. Code Ann. §§16-3-652 through 656) is the commission of a "sexual battery." "'Sexual battery' means 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, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h).

C. Specifically, Plaintiff seems to posit that The Citadel should be held liable to him for failing to identify, years before the Camper Doe report, that ReVille was a pedophile who might abuse minors at locations away from the camp. Plaintiff relies upon the following incidents, which he contends should have placed The Citadel on notice of the danger ReVille posed to him in 2005 and thereafter:

- An "evaluation" of ReVille stating that ReVille was a "[d]efinite rehire — senior counselor material if he learns to distance himself from campers, works well with younger kids."

- Jenni Garrott allegedly saw ReVille sitting on a couch next to a camper and admonishes him about being alone in a room with campers.

- ReVille submitted an application to work at summer camp again, which listed his qualifications as including: "5/11, brown hair, brown eyes, athletic; can cook, recite poetry, dance; enjoys walks on the beach."

- Jenni Garrott observes ReVille applying Icy Hot to the leg of a 16 year old counselor during daytime hours in a room with the door open.

D. Plaintiff cannot proffer a scintilla of evidence that *any* of these incidents had any sexual component at all. To the contrary, these incidents — irrespective of whether they violated any internal policies — could not have placed The Citadel on notice that ReVille was a danger to Doe 2.

E. South Carolina law would not recognize a claim for the abuse of Doe 2, even if The Citadel still employed ReVille at the time of his abuse. The law provides that an employer owes a limited duty to supervise employees who are acting outside the scope of their employment (as a child abuser certainly would be) only in narrow circumstances that do not exist here. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992) (*see* Tab T); *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 only 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).

F. Plaintiff cannot cite — and we cannot find — any South Carolina authority imposing a duty from an employer to a victim of abuse by an employee occurring after the employment relationship has terminated.

G. Case law from other jurisdictions demonstrates that Plaintiff's claim cannot succeed to the extent it is based on abuse occurring prior to the time The Citadel could have acted on Camper Doe's report.

1. *Roe No. 1 v. Children's Hosp. Med. Ctr.*, 16 N.E.3d 1044 (Mass. 2014) (*see* Tab U) → "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."

2. *Evans v. Ohio State Univ.*, 680 N.E.2d 161 (Ohio Ct. App. 10th Dist. 1996) (*see* Tab V) → " 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."

3. *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.").

4. *Philips v. TLC Plumbing, Inc*, 172 Cal. App. 4th 1133, 91 Cal. Rptr. 3d 864 (Cal. App. 4th Dist. 2009) (*see* Tab W) → "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."

III. Plaintiff Cannot Show Proximate or Actual Cause

A. As set forth above, ReVille began abusing Plaintiff *years before* Camper Doe ever came forward to The Citadel. Only a very small percentage of the incidents of abuse occurred after Camper Doe's report and interview.

B. Plaintiff cannot show that The Citadel was a proximate cause of his injury where the evidence establishes that ReVille abused Plaintiff for years before The Citadel ever possibly could have had reason to know about his potential for sexual abuse of minors.

IV. The South Carolina Tort Claims Act Bars Plaintiff's Outrage Claim

A. The South Carolina Tort Claims Act bars these claims because they involve allegations of intent to harm and intentional infliction of emotional distress. *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"); S.C. Code § 15-78-30(f) (noting that a "loss" under the Act "does not include the intentional infliction of emotional harm"); *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.") (*see* Tab X); *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.") (*see* Tab Y); *see also Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.").

V. Plaintiff's Outrage Claim Also Fails Because There Is No Evidence That The Citadel Knew and Intended to Harm Doe 2

A. The South Carolina Supreme Court has held that an outrage claim does not exist where Defendant's conduct was not specifically directed at Plaintiff. *See Upchurch v. New York Times, Inc.*, 314 S.C. 531, 536-37, 431 S.E.2d 558, 561-62 (1993) (*see* Tab Z) ("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.*") (emphasis added); *Roberts v. Simmons*, 2014 WL 7005250, at *6 (D.S.C. Dec. 11, 2014) (*see* Tab AA) ("[I]t 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) ("[T]he conduct ... is not tortious conduct that was specifically directed towards Plaintiff.").

B. The South Carolina Court of Appeals has held that the 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 them. *See Doe v. Rojas*, 2007 WL 8327520, at *4 (Ct. App. April 26, 2007) (*see* Tab BB) ("[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.").

CONCLUSION

For the foregoing reasons, this Court should grant The Citadel summary judgment. This will allow the parties to pursue a prompt appellate resolution of the important legal issues this case presents.

BARNWELL, WHALEY, PATTERSON, AND HELMS, LLC

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Dated: April 24, 2015
Charleston, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of April, 2015, a true copy of **Defendant's Notice of Motion and Renewed 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:

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{00533580 DOC 1 }

a.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOHN DOE 2, Plaintiff, vs. PRESIDENT JOHN W. ROSA, INDIVIDUALLY, Defendant.	)	CIVIL ACTION NO: 2:12-cv-00794-RMG
MOTHER DOE, Plaintiff, vs. PRESIDENT JOHN W. ROSA, INDIVIDUALLY, Defendant.	)	CIVIL ACTION NO: 2:12-cv-00795-RMG
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	THE COURT OF COMMON PLEAS CASE NO. 2011-CP-10-9200
MOTHER DOE A, Plaintiff, vs. THE CITADEL, Defendant.	)	

DEPOSITION OF JOHN DOE #2

TAKEN MARCH 28, 2014

Electronically signed by Eve Wilbanks (101-177-349-6970) c691b439-1779-4a01-bed8-1290052be3

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.)

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.

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
)
COUNTY OF CHARLESTON) CASE NO. 2013-CP-10-5247

Electronically signed by Eve Wilbanks (101-177-349-6970)

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CAMPER DOE 6,

Plaintiff,

vs.

THE CITADEL,

Defendant.

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON) CASE NO. 2013-CP-10-4770

JOHN DOE, A MINOR, BY HIS GUARDIAN AD LITEM, JOHN ROE

Plaintiff,

vs.

THE CITADEL

* * * * * * * * * * * * * * * * * *

DEPOSITION OF: JOHN DOE #2

DATE TAKEN: Friday, March 28, 2014

TIME: 9:00 a.m.

PLACE: Barnwell, Whaley, Patterson & Helms
288 Meeting Street, Suite 200
Charleston, South Carolina

REPORTED BY: EVE WILBANKS
Registered Professional Reporter, Certified LiveNote Reporter and Notary Public

* * * * * * * * * * * * * * * * * *

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Electronically signed by Eve Wilbanks (101-177-349-6970)

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subject of choice.

A. Yeah.

Q. As we said, just again, so that you feel comfortable, although we are making a record in this case, at this point, everything is protected.

A. Yes, sir.

Q. So I want you to feel comfortable in that sense.

A. Yes, sir. I would have met Skip ReVille between my sixth and seventh grades summer.

Q. And if I stop you to ask you a question, that will help me, as opposed to my writing down a question and coming back later and having to go through it again. So --

A. Yes, sir.

Q. So you met him between your --

A. Sixth grade and seventh grades summer.

Q. So that would have been when you were 12 years old?

A. Yes, sir.

Q. Just before your 13th birthday?

A. Yes, sir.

Q. And that would have been in, what, 2005?

A. Let's see. I would have started high school in '08, we said, right? '08, '09; '09,

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'10? No. I would have started high school in '07, '08. So it would have been '05, I guess. You're right, yeah.

Q. So you started high school in '07; you started eighth grade in '06; seventh grade in '05?

A. So it would have been in '05. Because it was that summer.

Q. So it was after -- you finished sixth grade in the spring of '05 and began seventh grade in the fall of '05?

A. Yes, sir.

Q. And that's when you met ReVille?

A. Yes, sir.

Q. How did you come to meet him?

A. He started helping out with the [redacted] team and helping -- because it was in Pinewood's gym. We practiced in Pinewood's gym. Basically, we met. He -- I guess I was playing up for my age; I was playing with the seventh grade team or eighth grade team, because I was pretty talented. And I guess he took a liking in me, I guess. And basically just started coaching, like -- he was really nice to me, like I had fun. He'd talk to me; it was really nice. And then --

Q. Do you know if he -- did he know either

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one of your parents at that point?

A. He had met my mom and dad, yeah.

Q. How had he met them?

A. Through practice, like them picking me up, Hi, I'm Skip ReVille. He would like compliment me and say, Your kid is great, great kid, this and that. And so he had met them, yes, sir.

Q. So to your knowledge, they didn't know each other before you met him through him coaching the [redacted] basketball?

A. They would have met the first day of practice.

Q. But they didn't know him before that?

A. No, sir.

Q. So you and your mom and your dad met ReVille --

A. Yes.

Q. -- at the same time?

A. Yes, sir.

Q. And do you know where he -- what he was doing at that point?

A. He was teaching at Pinewood, yes, sir.

Q. So this was after the school had let out for the summer of 2005?

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c691b439-1779-4a01-bed8-1290052be3

A. Yes, sir.
Q. He was still at Pinewood?
A. Yes, sir.
Q. Did you know anybody at Pinewood?
A. I knew a couple -- just the kids that played on the [redacted] team.
Q. All right. So you had finished your sixth grade year, but were good enough to qualify to play up?
A. Yes.
Q. And he was a coach and recognized you as a talented player; is that fair?
A. Yes, sir.
Q. So tell me -- tell me about that summer. Just walk me through --
A. Basically, like that summer, we were just like getting to know each other, like basically the grooming process is what I would say would, like, go on. Like we would get to know each other. And then I started like going to his house at Pine Forest and helping him out with yard work, this and that.
Q. Were there any other members of the team that would --
A. Go with me?

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Q. So this was in 2005.

A. Uh-huh (indicating an affirmative response).

Q. So tell me, then, what took place. And let me ask you, tell me what a normal day would be like when you were in the summer of --

A. Sixth and seventh grade?

Q. Sixth and seventh.

A. I mean, basically, I'd go over, and he would cook my favorite foods and I'd help him out with yard work. He was building an oyster pit, so that's what we did that summer, and got weeds up and did stuff like that. And, like, then towards the end of the summer, like, he started, like, having inappropriate conversations with me, just talking about, Hey, have you ever -- what have you done with a girl, this and that?

Q. And I want to hear all about that, but I want to go back. Because what my question was -- and this is more of a general question.

A. Yeah.

Q. But when you were between sixth and seventh grade year, give me a typical day. In other words, is your mother -- your mother is not working. What time would you get up? Would you

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parents know him fairly well at that point?

A. I would say, yeah, pretty well, yeah.

Q. Did they exhibit any hesitation in letting you go with him?

A. No.

Q. What about other parents; did --

A. No one knew. He's an upstanding guy from The Citadel. Who would have thought?

Q. And he appeared to be --

A. No one caught him for years. Yeah, no, no one knew.

Q. All right. So you would go over to his house and you did -- it sounds like you worked in the yard?

A. Yeah.

Q. Tell me how he began to change the paradigm.

A. Yeah. We would be doing yard work, and he would be talking to me about what I'd done with girls, this and that. Then we'd start, like, talking about porn and if I've ever watched it and this and that. And he said that if I wanted to watch it, he would let me go up in the loft in his house and I could just watch it and whatever. I mean, that's when I -- like up in that loft,

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that's where I learned how to masturbate, I guess you would say. I never masturbated before I went to that loft.

Q. And let me ask this question: When you were at that stage in your life, what -- to what degree were you knowledgeable -- or educated is probably a stronger word, but -- were you aware, is a better word, of the relationship of a man and woman and general things of a sexual nature?

A. I mean, I never had "the talk" with my parents. I never asked; they didn't talk. But I --

Q. Where did you learn about the birds and the bees?

A. I think -- it would have been my sex ed class at [redacted]. It would have either been -- maybe seventh grade year, I want to say.

Q. Okay. So it was after this?

A. The class could have been sixth or seventh grade. I don't know. I think at that time when stuff started happening -- I think I knew a boy was supposed to be with a girl, if that's what you're asking, obviously.

Q. Yeah. But also just the -- kind of the

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Q. So tell me, then --

A. How did it progress?

Q. Yes.

A. Basically, towards the end of the summer, I'd go up to the loft, this and that, and then it just started, like, progressing, like one time he would come up there and, like, look at me, and then he started, I mean, touching me and -- like the end of the summer, towards seventh grade year, and started just, like, masturbating me, like, this and that. And so basically -- I mean, the best way I can say it is the occurrences started happening in the summer, like with him showing me pornography, him taking me to the loft; towards the end of the summer on, he would start masturbating me or telling me to think about one of those girls, and he'd masturbate me or jack me off or whatever. And then -- do you want me to keep going? I can explain it real --

Q. Yeah. I'll stop you if I have a question.

A. Okay. Yes, sir. Basically, seventh grade year, it kept going into that, progressing, progressing; he started jacking me off, this and that. He started making me touch him. And then

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c691b439-1779-4a01-bed8-1290052be3

seventh grade, it was basically the same as sixth grade, just him masturbating me, me starting to touch him, lots of occurrences still. Seventh grade summer to eighth grade summer I played [redacted] again, and it started not escalating yet, but it was still touching; I was touching him.

And then, basically, he would have started giving me head, whatever. And when he moved into my house, he was there all -- I mean -- he was there. So it started progressing more.

Q. And let me tell you that we can use terms of street vernacular, you know. That's okay. You tell me -- you use the term that you understand.

A. Okay.

Q. For instance, we don't have to say, He performed fellatio on me. You can say, He gave me head. Okay?

A. Yeah. Basically still grooming, getting progressively worse, seventh and eighth grade summer. He moves in with me that fall of the eighth grade year. My dad had taken a job in Atlanta, like I told you, and was living there, commuting back on the weekends. Well, my mom was a teacher with three kids and, you know, Skip is

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an upstanding guy, everyone loved him, everybody thought he was great, from The Citadel, this guy is great. My mom needed help; my mom was one parent to three kids. I mean, that's impossible when you're working, you know. She needed help.

So she talked to Skip; my parents talked to Skip, said -- because we had a bachelor -- a bachelor suite that connected to our house.

Q. Did you ever have anybody --

A. My grandmother lived there. My grandmother remarried and moved to another house, so it was open; there was nobody living in there.

Q. I want to step off of this subject, but I want to come right back to it. I want to ask you just from a geographical standpoint now, the loft at Skip ReVille's house that you've talked about was over the garage?

A. Yeah. It -- yeah, it would have been over the garage.

Q. Now, I want to -- just for my own understanding, there is a description called -- they call it a FROG, which is a finished room over the garage.

A. Yeah.

Q. And it's accessed out of the main house.

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A. Yeah. There was a separate exit, yes.
Q. So it had a separate front door, for lack of a better description?
A. Yeah.
Q. Or a separate entrance?
A. Yeah.
Q. So that when your grandmother was there, she could come and go without you knowing it?
A. Exactly.
Q. And you all could come and go without her knowing it?
A. Yes, sir.
Q. So do you remember the -- let me ask it this way: Where had ReVille lived before he moved to your house in the fall of --
A. He was in the Pine Forest house.
Q. Okay. So did he -- did he rent the Pine Forest house; do you know?
A. I don't know that for sure. I know he was living there, though.
Q. So this is the fall of 2006 you're beginning your eighth grade year and your father is working in Atlanta?
A. Yes.
Q. And your parents make an agreement with

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Skip ReVille --

A. Yes.

Q. -- to move into --

A. Yes.

Q. -- quarters at your residence?

A. Yes, sir.

Q. Did he move furniture and clothes and --

A. Yeah. It was big enough where he could move everything pretty much.

Q. So he did not keep the Pine Forest house?

A. No.

THE WITNESS: Can I use the restroom real quick?

MR. STONEY: Certainly. We've been going another hour. Let's take -- we'll take a break. And don't use it quick; take your time.

(The deposition went off the record.)

BY MR. STONEY:

Q. I think we were talking about the fall of 2006, which would have been your eighth grade year, and Skip ReVille had moved to your family house. I wanted to go back -- I wanted to ask you, just because I can't remember what you told

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school?

A. Yes.

Q. Did you ever ride the school bus?

A. Well, the school bus couldn't come pick me up since I went to [redacted] in [redacted]. It's an [redacted] school, and the school bus wouldn't have picked me up at [redacted]

Q. It's a what school?

A. [redacted]

Q. Okay.

A. So the school buses wouldn't have come to my neighborhood, so I couldn't have ridden the school bus.

Q. And I'm asking. I don't know. So in other words, schools of [redacted], parents have to get the children --

A. Yes, sir.

Q. There is no school bus service?

A. Exactly, yes, sir. Yes, sir.

Q. Is that general public school, or is that a school you have to qualify to get into?

A. You have to qualify to get in, yes, sir.

Q. So over the course of your seventh grade year, this pattern continued where ReVille was available to help out --

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A. Yes.
Q. -- and would pick you up from school?
A. Yes, sir.
Q. You'd go to his house?
A. Yes, sir. He would perform acts on me. Some days he would, some days he wouldn't. But most of the time, he would, basically. And then it started getting to the point, like, if he was boxing me out, he'd grab my nuts, touch me. It escalated to that. Then he started talking to me about "the killers." Have you heard anything about that?
Q. And this is the winter of your seventh grade year or the academic --
A. This would be during the basketball season.
Q. Okay.
A. This is --
Q. All right. So this is at [redacted]?
A. This is at [redacted].
Q. And you mentioned "the killers"?
A. He started talking to me about how many kids he had groomed, telling me stories, you know, fun stories about them, what they had done, this and that. So I guess trying to make me feel like

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it was normal for all this stuff to be happening.

Q. Let me stop you and I want to ask you a couple of questions.

A. Yeah.

Q. "The killers," what was the -- what was the criteria for being one of "the killers" and what did you understand it to be?

A. Basically, how I looked at it, it was a fraternity. And basically, I was the head of my class, basically. I was the President; I was the guy that brought kids, like, Oh, come to Skip's house, this and that. And then we would talk to them about it, and they would go up to the loft, do whatever, and come back down. So basically --

Q. Hold on a minute, because I want -- there are a couple of things I want to ask you about. First of all, it's important if -- when you tell me that "they" would go up to the loft to do "whatever" --

A. The names?

Q. I want to know who, and I also want to know whatever. I want a definition of "whatever."

A. Okay.

Q. And so that's -- who would do it, what they would do, and, lastly, whether or not this

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A. Yes. It wasn't the last time I had contact with him, no.

Q. I'll come back to that. All right. We've now got -- "the killers" are established. We have the same pattern followed -- the summer following your seventh grade year, which would have been 2006.

A. Yeah.

Q. And you began your eighth grade year in the fall of 2006 and finished in the spring of 2007?

A. Yes, sir.

Q. So it was at this point, sometime in the fall of 2006, that your parents -- how did that come about? Did they -- do you know if they approached Skip or he approached them? How --

A. I think what happened was -- I guess Skip wasn't teaching at Pinewood anymore. And my parents just said, you know, if you don't want to live in that big house, you can -- we have an extra room. I don't exactly know what the encounter was like. I don't. I can't tell you what their meeting was like. I don't know. I don't know how he came about renting my house. Because I was too young to understand that kind of

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talk.

Q. Sure.

A. But I know that my dad leaving and having a job in Atlanta, my mom was like, Oh, you know, Skip can live here, help out, drive {John Doe #2} to basketball practice, help out with the family, stuff like that.

Q. Did either your mother or your father talk to you and say, We're thinking about inviting Skip to move into the quarters? What do you think?

A. They never asked me.

Q. It just happened?

A. It just happened.

Q. All right. So tell me about that. How -- when he moved into --

A. Well, I helped him move out that whole time. Like, I helped him a lot. The occurrences were still the same.

Q. When you say you "helped him a lot," did you actually help him physically move from Pine Forest to your house?

A. Yes, I helped him. And the occurrences were the same, still a lot. And he moves in. I would start, like, going over there, and we would

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I was so upset about it, like couldn't even deal with it.

I felt terrible, because all of the feelings I was feeling, like he could be feeling the same thing. And it just like made me mad, like really mad. So that was hard when I found that out.

Q. So when was the last time -- let me ask this: Do you recall how long ReVille continued to live at your family's house?

A. It was into the summer.

Q. Do you remember when he moved?

A. It would have been -- not much before when we moved out, to be honest. It would have been into the summer, for sure.

Q. When you got a girlfriend -- and I think you told some of the counselors this -- when you got a girlfriend, things stopped with ReVille?

A. No, no. They didn't stop. The occurrences still happened. I started breaking away is probably what I said. Is that what it probably said?

Q. Let me see.

A. Because that's what I meant to say. They definitely didn't stop. Do you want me to

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testimony that the reason -- the reason he benched you, he didn't play you, was you had broken it off and you had -- because of your girlfriend -- you had a girlfriend --

A. Yes.

Q. -- and you quit dealing with ReVille as far as his deviant acts were concerned?

A. Not all of them, but broke off -- away from, like, almost every night; yeah, still occurrences, yes, sir.

Q. Do you remember in -- during that time period, and I want to -- I don't want to put words in your mouth, but I want to understand the nature -- the specifics of the abuse. He would manipulate you, he masturbated you; is that correct?

A. Yes, sir.

Q. And he would perform oral sex on you?

A. Yes, sir.

Q. And he would make you do that to him?

A. Yes, sir.

Q. And then that was what involved the peanut butter?

A. Yes, sir.

Q. These activities had begun when he --

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had already begun when he moved into your parents' house?

A. Yes, sir. Begun before we (sic) moved in?

Q. Right. Before he moved in.

A. The oral sex began before he moved into the house.

Q. After he moved into your house, to your guesthouse, was there anything different about your activity, or was it pretty much the same?

A. The same.

Q. And did it pretty much remain the same until you moved to Atlanta?

A. Yes, sir.

Q. So the pattern and the specific acts, once he got to a level, stayed that way fairly constantly?

A. Yes, sir.

Q. And you mentioned that he touched you improperly that one time you were down here with him at The Citadel basketball game?

A. Yes, sir.

Q. Was there any other time when you were with him on The Citadel that he did the same thing, that you remember?

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B

B.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JOHN DOE 2, Plaintiff, vs. PRESIDENT JOHN W. ROSA, INDIVIDUALLY, Defendant.	)	CIVIL ACTION NO: 2:12-cv-00794-RMG
MOTHER DOE, Plaintiff, vs. PRESIDENT JOHN W. ROSA, INDIVIDUALLY, Defendant.	)	CIVIL ACTION NO: 2:12-cv-00795-RMG
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	THE COURT OF COMMON PLEAS CASE NO. 2011-CP-10-9200
MOTHER DOE A, Plaintiff, vs. THE CITADEL, Defendant.	)	

VOLUME II DEPOSITION OF LOUIS "SKIP" ReVILLE

TAKEN JUNE 3, 2014

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.	)	
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.		
STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO. 2013-CP-10-5247

CAMPER DOE 6,
Plaintiff,
vs.
THE CITADEL,
Defendant.

STATE OF SOUTH CAROLINA) THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) CASE NO. 2013-CP-10-4770

JOHN DOE, A MINOR, BY HIS GUARDIAN AD LITEM, JOHN ROE
Plaintiff,
vs.
THE CITADEL

* * * * * * * * * * * * * * * * *

VOLUME II
DEPOSITION OF: LOUIS "SKIP" ReVILLE
DATE TAKEN: Tuesday, June 3, 2014
TIME: 9:00 a.m.
PLACE: Perry Correctional Institute
430 Oaklawn Road
Pelzer, South Carolina
REPORTED BY: EVE WILBANKS
Registered Professional
Reporter, Certified LiveNote
Reporter and Notary Public

* * * * * * * * * * * * * * * * * *

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summer.

Q. Prior to the latter months of the school year in 2005, had {John Doe 2} ever come to your house for any reason, or was that the first time?

A. It would have been the first time.

Q. So what occurred at your house in 2005?

A. I believe after a few times coming over, I had told him that I had a room upstairs where he could go be by himself, lock the door, watch pornography and masturbate if he wanted to.

Q. Do you know whether he watched the pornography and masturbated?

A. I know that he watched it, and I have all reason to believe that he did masturbate.

Q. Did you ever observe him masturbate in 2005?

A. Not in -- not at that time, at my house. That first time was later on that summer, I was taking him to a basketball game, I believe it was somewhere around Columbia, and we were in the car and I had brought some magazines.

Q. When would this have been? Was this the summer of 2005?

A. Correct.

Q. And what happened in your car in the

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summer of 2005?

A. I encouraged him to masturbate. I had the same aloe gel that I used with the campers, I offered it to him and brought magazines.

Q. And did [redacted] -- did he do -- did he masturbate?

A. He did.

Q. How often did that occur in 2005?

A. When -- the car -- after that -- at that point and after, I don't recall, but it was multiple.

Q. During the remainder of 2005, what interactions did you have with [redacted]?

A. He would continue to come over to the house, and I had started to coach -- or helped coach his basketball team for his school, [redacted], and the same abuse would take place.

Q. And where would this happen?

A. Either in my house or in the car.

Q. And where was your house at this point? What was the address?

A. 102 Bay Colony.

Q. And during the balance of 2005, how many times did you abuse {John Doe 2}?

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A. At least a dozen.
Q. So of those dozen times, would they mostly occur at your house or your car? Can you recall a breakdown of where they would happen?
A. No. I can't. It may as well be half and half. I'm remembering in the car, at least during that 2005 time, I touched his penis with my hand probably three or four times.
Q. So you touched him while you were in your car?
A. That's correct.
Q. Did you ever touch him while you were at your house?
A. No. I don't think so. Not that year.
Q. Did you ever touch him any place other than his penis?
A. No.
Q. During 2005, did he ever touch you in any way?
A. No. I don't think so.
Q. Looking at 2006, what was your interaction with {John Doe 2} during 2006, starting at the beginning of the year?
A. The school basketball season was still going on, and I was still abusing him. And then

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he went into golf season that spring. But that's also when I had been terminated from Pinewood. And so knowing him and knowing the family, I told them that I was going to move, and they had offered their mother-in-law's addition. And I had accepted and moved in there, I believe in the month of May.

Q. When did you tell the family that you had been terminated from Pinewood? Do you recall?

A. Earlier that spring. It would have been in March or April.

Q. And did you indicate to them why you had been terminated?

A. Yes. I'm sure I gave the reason that the English department head and I had conflicting personalities.

Q. And what was their response to that?

A. As far as I know, they believed me.

Q. So you moved into their home -- what was the address of that house; do you recall?

A. [redacted].

Q. And you moved in with them in May of 2006?

A. I believe that's the right month.

Q. What was the living arrangement there?

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[redacted] brothers in their house? When did that occur or did it occur?

A. It started in early June. I remember they had -- in the main house, they had their floors redone. And so the family went to stay with a relative, I think their grandparents, for a few days. And they went, but [redacted] stayed back and stayed with me in that -- in the mother-in-law's addition.

Q. And this is June of 2006?

A. I believe so.

Q. And what occurred in June of 2006 with {John Doe 2}?

A. I abused him every night, and I believe that was the first time that I made oral contact with his genitals.

Q. What was your process of grooming {John Doe 2} for abuse? How did you go about doing that?

A. Well, I -- by this point, in 2006, I had known him for over a year. And as was typical, I would start talking to them (sic), first about usually dating, something to do with dating or girls and what their thoughts were, what they were attracted to, so on and so forth. And then I

would escalate the conversation from there, and usually on to pornography. And then show them pornography, encourage them to masturbate, I'd masturbate with them, and then touch him and then go from there.

Q. And how often did this occur during 2006 with {John Doe 2}?

A. Often. I would say at least three, four times a week.

Q. And these times where you would abuse {John Doe 2}, would it always involve oral contact, or would it vary; different times, different things would happen?

A. It would vary.

Q. Did you always show him pornography before you abused him?

A. No.

Q. Did this abuse occur during the day or night or both?

A. Both.

Q. Was it more prevalent, one or the other, day or night?

A. It usually depended on -- during 2006, usually it was during the day. Because his father would be at work and his mother would be out

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running errands or with one of the other two children.

Q. Were there ever any other boys present during {John Doe 2's} abuse?

A. Yes.

Q. And how often was that?

A. Maybe six or seven times.

Q. And were these boys part of "the killers" club?

A. Yes. If I recall, that name stemmed from the summer camp. I don't remember using it much after that camp, after the -- after 2003. But, yes, they were all together.

Q. And what would happen with these other boys at the [redacted] home?

A. I would show pornography when they would come over, and I would encourage them to masturbate, and they would.

Q. Was there ever any oral contact with these other boys?

A. No, not during those times and not in a group setting like that.

Q. Did the boys know that the other boys were masturbating?

A. Yes.

Q. In 2006, did the abuse continue into the fall with {John Doe 2}?

A. Yes.

Q. Can you tell me what happened in the fall of 2006 with {John Doe 2}?

A. Much of the same.

Q. So he would come to your room, the mother-in-law's suite in the house, and you would show him pornography, and you all either masturbated --

A. Yes.

Q. -- or other forms of sexual abuse; would that be correct?

A. Yes, that's correct.

Q. What about 2007; what occurred with {John Doe 2} in 2007?

A. Into the -- from winter into spring, the abuse occurred, I would say, regularly. And then after that meeting with Colonel Trez and Mark Brandenburg, the abuse was scaled back tremendously. And then I moved that summer down to Mt. Pleasant. And so over the course of the summer, I think May on until they moved, the [redacted] family moved to Georgia, I abused him maybe a dozen times.

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Q. Mr. ReVille, when did you move out of the [redacted] house?

A. Um, my guess is May. I don't rightly recall. I know that it was before June, but something tells me that it was after -- I know it was after the meeting with Colonel Trez and Mark Brandenburg. Because after I left The Citadel that day, I had driven up to North Charleston, so I must have still been there in the latter week of April. So it was sometime in that month of May.

Q. And where did you move?

A. To --

Q. Highway 17?

A. -- Mt. Pleasant, Highway 17, yeah.

Q. Did you have a lease at that --

A. Yes.

Q. Do you recall the name of the management company over there?

A. Meridian.

Q. When did the [redacted] move to Georgia?

A. I can't recall. At some point that summer in 2007. It would have been well before school started.

Q. And when was the last time that you stayed overnight at the [redacted] house on [redacted]?

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A. It would have been in May.
Q. How much furniture did you have to take to your place in Mt. Pleasant?
A. A good bit, everything that I had.
Q. How long did it take you to move? Did you rent a truck or did you --
A. I rented a truck. It probably took two days.
Q. And that would have occurred sometime during the month of May of 2006 (sic)?
A. Probably, yes.
Q. What interactions did you have with {John Doe 2} during the month of May of 2006 (sic)? How many times did you abuse him?
A. Probably twice. Two or three times.
Q. What about June of 2006 (sic)?
A. Probably a few more than that, probably six to eight times.
Q. What about July of 2006 (sic)?
A. Four to six times.
Q. Did you abuse him at all in August of 2006?
A. Not that I recall.
Q. Where would the abuse occur during May, June and July of 2006 (sic)?

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A. It probably would have happened at that apartment, that condo on Highway 17.

Q. I believe I just misspoke. We were talking about 2007; is that correct? You moved out in 2007?

A. That's correct.

Q. I apologize. So in May of 2007, how many times did you abuse {John Doe 2}?

A. Three to four.

Q. And how about in June of 2007, how many times?

A. I'd say eight.

Q. And what about in July of 2007, how many times did you abuse him?

A. Four to six times.

Q. Mr. ReVille, do you recall the last date that you abused {John Doe 2}?

A. No.

Q. Would it be fair to say that it was during the month of July of 2007?

A. That sounds right.

Q. Did you ever abuse {John Doe 2} after July of 2007 at any point in time?

A. No. I don't think so.

Q. You stated earlier that after your

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meeting with Mark Brandenburg, that your abuse scaled back tremendously. How often were you abusing {John Doe 2} prior to April 23rd, 2007?

A. Probably two to three times a week.

Q. And where was this occurring?

A. At [redacted].

Q. The abuse that occurred in May, June and July of 2007, where did that happen?

A. 17 -- Highway 17.

Q. Do you recall taking {John Doe 2} to a Citadel basketball game in 2007?

A. I remember taking him to a basketball game. I'm not sure if it was 2006 or 2007, but, yes.

Q. And do you recall ever taking him to Wendy's with two cadets in 2007?

A. Uh-huh (indicating an affirmative response).

Q. Who were those cadets?

A. More than likely, it would have been {John Doe KA} and {John Doe JC}.

Q. And do you recall that meeting between yourself, Mr. [redacted], Mr. [redacted] (sic) and Camper Doe 6?

A. It was {Family C}.

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C

C.

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☑ Criminal History Form (signed)	☑ Direct Deposit Form (+ cancelled check)	☐ CERTIFIED SUBSTITUTE
☑ Guidelines Agreement (signed)	☑ Drivers License	☐ NURSE SUBSTITUTE
☑ W-4 (complete & signed)	☑ Social Security Card	☐ SHADOW ONLY SUBSTITUTE
☐ I-9 Form (complete & signed)	☑ Tuberculin Skin Test (current / negative)	☐ COLLEGE STUDENT (proof of fulltime status)

11/16/06

DORCHESTER SCHOOL DISTRICT TWO

Joseph R. Pye, Superintendent

Division of Personnel Services
102 Greenwave Boulevard
Summerville, SC 29483

Linda G. Huffman
Director of Personnel
Phone (843) 873-2901

APPLICATION FOR SUBSTITUTE or AT-WILL EMPLOYMENT

11.15.06
Date

Last Name	First Name	MI	Maiden Name
RE VILLE	Louis	N	

[redacted]
Address City State Zip

[redacted] [redacted]
Phone Social Security Number

Are you a certified teacher? ☐ Yes ☑ No

If you are not certified, number of undergraduate college credit-hours completed? _____

Certificate Number: _____ State(s) in which certified: _____

Years of Experience: _____ Expiration date of certification: _____

Area(s) of certification: _____

Area you prefer to substitute: Elementary (K-5) _____ Middle (6-8) X High (9-12) X

____ Special Ed. ____ Music ____ Art ____ Foreign Language ____ Library ____ PE ____ Clerical

Other: _____

School preference(s): AMS, RSA, FDHS, SHS, OMS

Dorchester School District Two is an Equal Opportunity Employer and does not discriminate against any applicant on the basis of any characteristic that is protected by state or federal law.

EDUCATIONAL RECORD

	Name/Address	Years Attended	Area of Study	Degree / Major
High School	MTN. BROOK, AL	4	General	ADVANCED
College*	The Citadel, SC	4	ENGLISH	B.A.
Other Education	Villanova, PN	1	BUS./LEADERSHIP	

Work/Volunteer Experience

Employer	Dates of Employment	Position
The Citadel	May 2000 - Aug. '03	SUMMER CAMP DIRECTOR
Pinewood Prep. School	May 2002 - Jun. '06	TEACHER MS, HS
The Citadel	Aug. 2006 - present	ACADEMIC CONSULTANT/PRESENTER ADJUNCT PROF.
CAPE Training	July 2006 - present	FOUNDER, PERSONAL/TEAM STRENGTH COACH

REFERENCES

Please include you last immediate supervisor.

Name	Address	Profession
Lucia Campbell	[redacted]	Real Estate
[redacted]	[redacted]	Teacher
Chris Fudge	[redacted]	Director

DECLARATION OF EMPLOYMENT

I authorize investigation of all statements contained in this application for employment as may be necessary in arriving at an employment decision. Any false or misleading information given in this application may result in discharge.

I hereby understand and acknowledge that my employment relationship with this organization is limited to part-time work. No contract or benefits will be offered with this position. *Signing this will not prohibit your chances of obtaining a full-time job in the district.*

I understand that my employment will be contingent on my providing valid proof of identity and eligibility to work and proof of a tuberculin skin test within the last five years.

Signature Lucia Revelle Date 11.15.06

This application is not complete without a signature.

D.

410 S.C. 287
Court of Appeals of South Carolina.

Jane ROE, as parent and natural guardian of Judy Roe, James Roe, and Joyce Roe, Minor Children Under the Age of Eighteen, Appellants,
v.
Daniel BIBBY Sr. and Michelle Bibby, Defendants,
Of whom Michelle Bibby is the Respondent.
Appellate Case No. 2012–213350.

No. 5273. | Heard June 11, 2014. | Decided Oct. 1, 2014. | Rehearing Denied Oct. 23, 2014. | Certiorari Granted Jan. 16, 2015.

Synopsis

Background: Mother, as parent and natural guardian of child sexual abuse complainants, asserted negligence and wrongful infliction of emotional distress claims against the wife of neighboring sex offender, claiming the wife had a duty to warn of her husband's admitted prior sexual abuse under the special relationship exception and premises liability theory. The Circuit Court, Berkeley County, R. Markley Dennis, Jr., J., entered summary judgment in favor of offender's wife. Mother appealed.

Holdings: The Court of Appeals, Lockemy, J., held that:

[1] offender's wife had no duty to warn under the special relationship exception, and

[2] wife had no duty to warn under premises liability theory.

Affirmed

Williams, J , issued dissenting opinion

West Headnotes (17)

[1] **Appeal and Error**
⇦ Extent of Review Dependent on Nature of Decision Appealed from

When reviewing an order granting summary judgment, an appellate court employs the same standard applied by the trial court under the summary judgment rule. Rules Civ.Proc., Rule 56.

1 Cases that cite this headnote

[2] **Judgment**
⇦ Presumptions and burden of proof

In determining whether any triable issue of fact exists so as to preclude entry of summary judgment, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. Rules Civ.Proc., Rule 56(c).

1 Cases that cite this headnote

[3] **Negligence**
⇦ Elements in general

In order to establish a claim for negligence, a plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages.

Cases that cite this headnote

[4] **Negligence**
⇦ Necessity and Existence of Duty

An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.

Cases that cite this headnote

[5] **Negligence**
⇦ Necessity and Existence of Duty

Without a duty, there is no actionable negligence

Cases that cite this headnote

[6] **Negligence**
⇦ Duty as question of fact or law generally

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The existence of a duty owed, an element of negligence, is a question of law for the courts.

Cases that cite this headnote

[7] **Negligence**
⇦ Protection against acts of third persons
Negligence
⇦ Duty to warn

In context of negligence, there is no general duty to control the conduct of another or to warn a third person or potential victim of danger.

Cases that cite this headnote

[8] **Negligence**
⇦ Protection against acts of third persons
Negligence
⇦ Duty to warn

Courts recognize five exceptions to general rule under which courts, in negligence cases, recognize no duty to control the conduct of another or to warn a third person or potential victim of danger: (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.

Cases that cite this headnote

[9] **Negligence**
⇦ Duty to warn

Wife of sex offender had no special relationship with neighboring child sexual abuse complainants, as was necessary to give rise to duty for her to warn of her husband's admitted prior sexual abuse under the special relationship exception, absent showing that she had the ability to monitor, supervise, or control offender's conduct or the knowledge of a specific threat of harm to a specific individual.

Cases that cite this headnote

[10] **Negligence**
⇦ Protection against acts of third persons
Negligence
⇦ Duty to warn

The defendant in a negligence action may have a common law duty to control the conduct of another or to warn a third person or potential victim of danger 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

Cases that cite this headnote

[11] **Negligence**
⇦ Protection against acts of third persons
Negligence
⇦ Duty to warn

To impose a common law duty upon a defendant in a negligence action to control the conduct of another or to warn a third person or potential victim of danger under the special relationship exception, it is not necessary for the injuring party to have made a threat while under the defendant's control or custody; all that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person

Cases that cite this headnote

[12] **Negligence**
⇦ Duty to warn
Negligence
⇦ Care required in general

Wife of sex offender had no duty to warn neighboring children, as licensees, of her husband's admitted prior sexual abuse under a premises liability theory, absent showing that offender's wife, a lay person untrained in the recidivism of pedophilia, had reason to consider offender a potential danger, after State, no longer finding offender to be a danger, permitted him to return to the home, following an incident involving his daughter

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Cases that cite this headnote

[13] **Negligence**
⇦ Elements in general

To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty.

Cases that cite this headnote

[14] **Negligence**
⇦ Care dependent on status

The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury.

Cases that cite this headnote

[15] **Negligence**
⇦ Status of Entrant

In premises liability cases, courts recognize four general classifications of persons present on the property of another: adult trespassers, invitees, licensees, and children.

Cases that cite this headnote

[16] **Negligence**
⇦ Care required in general

A landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities.

Cases that cite this headnote

[17] **Negligence**
⇦ Care required in general

The duty owed to a licensee differs from the duty owed to an invitee in that the landowner has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee

Cases that cite this headnote

Attorneys and Law Firms

**647 Eric Marc Poulin, of Anastopoulo Law Firm, LLC, of North Charleston, for Appellants.

Eugene P. Corrigan, III, and J.W. Nelson Chandler, both of Corrigan & Chandler, LLC, of Charleston, for Respondent

Opinion

LOCKEMY, J.

*290 Jane Roe, as parent and natural guardian of Judy Roe, James Roe, and Joyce Roe, minor children under the age of eighteen (minor Appellants), (collectively with Roe, Appellants) argues the circuit court erred in granting Michelle Bibby's (Respondent) motion for summary judgment. Appellants argue Respondent had a duty to warn them under the special relationship exception and a premises liability theory We affirm.

*291 **FACTS/PROCEDURAL BACKGROUND**

This case involves allegations by the minor Appellants of sexual molestation by their neighbor, Daniel Bibby, Sr. The molestation allegedly occurred in a home owned by Mr Bibby and his wife, Respondent.

Respondent and Mr. Bibby were married in 1969 and had three children. In 1995, the Bibbys' sixteen-year-old daughter disclosed that her father had sexually molested her when she was younger Respondent confronted her husband about the allegations and Mr. Bibby admitted he had touched their daughter inappropriately The molestation was reported to the South Carolina Department of Social Services (SCDSS) and Mr. Bibby was removed from the home and placed in counseling Sometime thereafter, Mr. Bibby was permitted to return to the home.

In 2008, Roe, her husband, and the minor Appellants moved into a home across the street from the Bibbys. At the time, one of the Bibby's adult children was living with the Bibbys along with two of the Bibbys' grandchildren. The Bibby grandchildren and the minor Appellants became

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friends and often played together and visited each other's homes. Respondent was working outside the home at this time and was not always present when the minor Appellants were visiting Respondent never informed Appellants of Mr Bibby's prior acts of sexual abuse.

In April 2009, Mr. Bibby admitted to a counselor that he had been molesting his granddaughter. Upon learning of this admitted molestation, Roe questioned her children about any possible abuse Minor Appellant Joyce confirmed that Mr. Bibby had touched her chest and threatened to kill her if she told anyone Minor Appellant Judy also revealed similar accusations. Roe called the police and the minor Appellants were referred to the Dorchester Children's Center, where Judy was forensically interviewed. During her interview, Judy stated Mr. Bibby held her in a room with his granddaughter and took his clothes off and forced the children to take their clothes off as well. According to Judy, Mr. Bibby touched her breasts and vagina with his hands and made Judy touch the granddaughter as well. Judy also stated she was exposed to pornography in the Bibby household.

***292** According to Roe, she had no knowledge of Mr. Bibby's prior sexual abuse of his daughter and she had no reason to suspect it was unsafe for her children to play at the Bibbys' home. Roe further testified she never would have allowed her children to visit the Bibby household had she been warned of Mr Bibby's sexual propensities. Mr. Bibby denied touching the minor Appellants. He was convicted of molesting his granddaughter, but he ****648** was not prosecuted for any actions involving the minor Appellants.

On October 15, 2010, Appellants filed suit asserting causes of action against Mr Bibby for assault, battery, false imprisonment, and intentional infliction of emotional distress Appellants alleged Mr. Bibby sexually assaulted Judy and attempted to sexually assault Joyce Appellants also alleged Joyce and minor Appellant James witnessed the sexual assault of Judy Appellants asserted causes of action against Respondent for negligence and wrongful infliction of emotional distress on a bystander

Mr. Bibby failed to file a responsive pleading and Appellants obtained a default judgment against him. Respondent answered the complaint and denied Appellants' allegations. Thereafter, in April 2012, Respondent filed a motion for summary judgment alleging she did not owe a duty to Appellants. Respondent's summary judgment motion was heard on July 10, 2012, and the court took the matter under advisement. Subsequently, on October 12, 2012, the circuit court granted Respondent's motion for summary judgment and dismissed Appellants' claims with prejudice. This appeal followed.

STANDARD OF REVIEW

[1] [2] When reviewing an order granting summary judgment, an appellate court employs "the same standard applied by the trial court under Rule 56, SCRCP." *Wachovia Bank, N.A v. Coffey,* 404 S.C. 421, 425, 746 S.E.2d 35, 37 (2013) (internal quotation marks omitted) Rule 56 provides the trial court shall grant summary judgment if "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." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to ***293** the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland,* 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (internal quotation marks omitted)

LAW/ANALYSIS

Appellants argue the circuit court erred in granting Respondent's summary judgment motion because Respondent had a duty to warn Appellants under the special relationship exception and a premises liability theory.

[3] [4] [5] [6] In order to establish a claim for negligence, a plaintiff must show "(1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages " *Doe v. Marion,* 373 S.C. 390, 400, 645 S E.2d 245, 250 (2007). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). "Without a duty, there is no actionable negligence " *Id* "The existence of a duty owed is a question of law for the courts " *Washington v Lexington Cty. Jail,* 337 S.C. 400, 405, 523 S.E.2d 204, 206 (Ct.App.1999).

[7] [8] " '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.' " *Doe ex rel. Doe v. Wal-Mart Stores, Inc.,* 393 S.C. 240, 246, 711 S.E.2d 908, 911 (2011) (quoting *Faile v S.C. Dep't of Juvenile Justice,* 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)). Our courts recognize five

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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." *Id.* at 246–47, 711 S.E.2d at 911–12.

Although Appellants note the issue of whether a homeowner has a duty to warn visitors of his or her spouse's admitted prior sexual abuse is a novel issue in this state, they ask this *294 court to impose a duty to warn under the special relationship exception and a premises liability theory.

A. Special Relationship Exception

[9] Appellants assert Respondent had a special relationship with the minor Appellants **649 that required her to act based upon her knowledge of Mr. Bibby's prior misconduct.

[10] [11] "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' " *Doe v. Marion,* 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting *Bishop,* 331 S.C. at 86, 502 S.E.2d at 81) It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. *Bishop,* 331 S.C. at 88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. *Id.*

The circuit court found Respondent did not have a special relationship with Appellants because she did not have the ability to monitor, supervise, and control Mr. Bibby. Additionally, the court found Respondent had no knowledge of a specific threat to the minor Appellants.

Appellants argue that although the facts of this case present a novel issue, the issue was considered by this court in *Doe v. Batson,* 338 S.C. 291, 525 S.E.2d 909 (Ct.App.2000) (*Batson I*), *affirmed in part, vacated in part,* 345 S.C. 316, 548 S.E.2d 854 (2001). In *Batson I,* a number of minors were sexually assaulted by a 27–year–old man who lived with his mother (Batson). The minors brought suit against Batson, alleging (1) the molestations occurred in her home, (2) she knew her son had young boys in his bedroom, and (3) she was negligent for failing to warn or act. *Batson I,* 338 S.C. at 295, 525 S.E 2d at 911. This court reversed the trial court's grant of summary judgment to Batson, finding discovery was not complete. *Id.* at 304, 525 S.E.2d at 916. In reviewing the trial court's grant of summary judgment, this court considered the special relationship test and noted, "case law from other *295 jurisdictions lends credence to [the minor's] assertion that Batson had a duty to warn in this case." *Id.* at 301, 525 S.E.2d at 914.

The supreme court affirmed this court's finding in *Batson I* that summary judgment was improper because discovery had not yet been completed; however, the court explicitly vacated the portions of this court's opinion discussing liability. *Doe ex rel. Doe v. Batson,* 345 S.C. 316, 323, 548 S.E.2d 854, 858 (2001) (*Batson II*). In vacating those portions of the opinion, the supreme court noted, "[t]he paucity of the record makes it impossible for us to determine the merits of Doe's argument. Whether Batson had a cognizable duty will be determined after the record has been more fully developed." *Id.*

Appellants argue that "although *Batson I* is not strictly precedential, the opinion of the [c]ourt of [a]ppeals nonetheless sheds valuable and well-reasoned light on the issue." Appellants assert this case contains evidence of a specific threat (previous instances of molestation and more recent instances of viewing child pornography [1]) and a readily identifiable victim (a minor child roughly the same age as Mr. Bibby's prior victim who was invited into the home by Respondent)

We find the record contains no evidence Respondent had a special relationship akin to those special relationships recognized by our courts. *See, e.g., Marion,* 373 S.C. 390, 645 S.E.2d 245 (assuming special relationship between psychiatrist and patient/injurer); *Faile,* 350 S.C. 315, 566 S.E.2d 536 (finding special relationship between Department of Juvenile Justice and dangerous juvenile/injurer over whom it had custody per court order), *Bishop,* 331 S.C. at 86, 502 S.E.2d at 81 (finding special relationship between Department of Mental Health and involuntarily-committed patient/injurer in its custody); *Rogers v. S.C. Dep't of Parole & Cmty. Corr., et al.,* 320 S.C 253, 464 S.E.2d 330 (1995) (assuming special relationship between state agencies charged with prisoner parole and *296 prisoner/injurer who was being released from **650 custody (but finding no specific threat)), *Ballou v. Sigma Nu Gen. Fraternity,* 291 S.C 140, 352 S E.2d 488 (1986) (finding a fraternal organization had a duty to an initiate who had become helplessly drunken from alcohol furnished to him by the fraternity). We note this case does not involve

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a commercial child care situation or other commercial arrangement. Furthermore, Appellants presented no evidence Respondent had the ability to monitor, supervise, or control the conduct of Mr. Bibby. Respondent worked full-time outside the home and was not always present when the minor Appellants were visiting

Finally, we find the record contains no evidence Respondent had knowledge of a specific threat of harm to a specific individual. *See Marion,* 373 S C. at 401, 645 S.E.2d at 251 (" '[I]t 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.' " (quoting *Gilmer v. Martin,* 323 S.C. 154, 157, 473 S.E.2d 812, 814 (Ct.App.1996))). There is no evidence Mr. Bibby made a distinct, specific, and overt threat of harm towards the minor Appellants. Accordingly, the circuit court did not err in finding Respondent did not have a special relationship with Appellants.

B. Premises Liability

[12] Appellants argue that even assuming Respondent did not owe Appellants a duty to warn by way of their special relationship, she is still liable under a premises liability theory.

[13] [14] [15] "To establish negligence in a premises liability action, a plaintiff must prove the following three elements: (1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty." *Singleton v. Sherer,* 377 S.C. 185, 200, 659 S E.2d 196, 204 (Ct.App 2008). "The nature and scope of duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury." *Id.* South Carolina recognizes four general classifications *297 of persons present on the property of another: adult trespassers, invitees, licensees, and children *Id.*

[16] [17] Appellants contend they were licensees on Respondent's property. "Under South Carolina jurisprudence, 'a landowner owes a licensee a duty to use reasonable care to discover the licensee, to conduct activities on the land so as not to harm the licensee, and to warn the licensee of any concealed dangerous conditions or activities.' " *Id.* at 201, 659 S.E.2d at 204 (quoting *Landry v Hilton Head Plantation Prop. Owners Ass'n,* 317 S.C. 200, 203, 452 S.E.2d 619, 621 (Ct.App.1994)). "The duty owed to a licensee differs from the duty owed to an invitee 'in that the [landowner] has no duty to search out and discover dangers or defects in the land or to otherwise make the premises safe for a licensee.' " *Id.* (quoting 18 S C. Jur. *Negligence* § 44 (2007)).

Appellants note the issue of whether a homeowner has a duty to warn a licensee with regard to an alleged criminal act committed by a third-party is a novel issue. However, they assert Respondent had a duty to warn Appellants because she knew from Mr Bibby's past actions there was a likelihood of conduct dangerous to the safety of the minor Appellants.

Initially, Appellants cite *Burns v. South Carolina Commission for the Blind,* 323 S.C. 77, 448 S.E.2d 589 (Ct.App.1994), for the proposition that our courts "have already held that a victim of a sexual assault may bring suit under a premises liability theory." While this statement is correct, *Burns* is distinguishable from the present case. First, *Burns* involved an alleged duty to protect a resident of a treatment facility instead of an alleged duty to warn a third-party of an alleged threat in a residence. *Id* at 79–80, 448 S.E.2d at 591. Second, this court classified the plaintiff in *Burns* as an invitee and not a licensee, thus implicating a higher duty of care *Id.* at 80, 448 S.E.2d at 591. Third, the *Burns* court determined a special relationship existed between the plaintiff-victim and the defendant-residential treatment facility. *Id.*

**651 We find Respondent did not owe Appellants a duty to warn under a premises liability theory. We note no South Carolina cases recognize a duty to warn a licensee with regard to prior criminal acts committed by a third-party residing on the premises. Additionally, Mr. Bibby was not found to be a *298 continuing danger by State, and there is no evidence Respondent knew Mr. Bibby was a dangerous condition in their home or that he was abusing the minor Appellants. Respondent testified she believed the minor Appellants were untruthful regarding the alleged molestation and she did not believe Mr. Bibby molested any of the minor Appellants. Furthermore, Respondent, a lay person untrained in the recidivism of pedophilia, testified she believed Mr. Bibby was "cured" following his 1995 confession and release from treatment. Finally, a finding that Respondent had a duty to warn under a premises liability theory in this case could potentially subject homeowners to liability for failure to warn licensees of prior bad conduct, including conduct of a criminal nature, of any persons on the premises.

CONCLUSION

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Based on the foregoing, we find the circuit court did not err in granting Respondent's motion for summary judgment.

AFFIRMED.

KONDUROS, J., concurs.

WILLIAMS, J., dissents in a separate opinion.

WILLIAMS, J.

I respectfully dissent. I believe a homeowner has a duty to warn minor children of potential sexual abuse that could occur on the homeowner's premises under the special relationship exception and a premises liability theory. Whether Respondent breached a duty to warn Appellants of Mr. Bibby's sexual propensities in this context is an issue best decided by the jury. *See Miller v. City of Camden,* 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct.App.1994) (stating negligence is a mixed question of law and fact with the existence and scope of a duty being questions of law and a breach of duty being a question for the jury) As a result, I would reverse the circuit court's grant of summary judgment and remand for further proceedings.

As noted by the majority, under the special relationship exception, "[t]he defendant may have a common law duty to warn potential victims ... when the defendant 'has the ability to monitor, supervise and control an individual's conduct' and *299 when 'the individual has made a specific threat of harm directed at a specific individual.' " *Doe v Marion,* 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007) (quoting *Bishop v S.C. Dep't of Mental Health,* 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)) It is not necessary for the injuring party to have made a threat while under the defendant's control or custody. *Bishop,* 331 S.C. at 87–88, 502 S.E.2d at 82. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person. *Id.* at 88, 502 S.E.2d at 82.

I believe this court's rationale from *Doe v. Batson,* 338 S.C. 291, 525 S.E.2d 909 (Ct.App.2000), is persuasive on the issue of whether Respondent had a special relationship with Appellants. Although the supreme court ultimately vacated the portion of *Batson* wherein this court found the mother could potentially be liable for her son's sexual abuse of minor boys in her home under a special relationship exception and a premises liability theory, the supreme court did not expressly disavow this court's reliance on either of those theories. *Doe ex rel. Doe v. Batson,* 345 S.C 316, 323, 548 S.E.2d 854, 858 (2001) Rather, at issue in *Batson* was whether it was too early to dismiss the case based on the lack of discovery. *Id.* at 321, 548 S.E.2d at 857. Because relevant and crucial depositions had yet to occur, the supreme court ruled it was improper for this court to suggest sources of liability as "the paucity of the record ma[de] it impossible . . to determine the merits of [the victims'] argument." *Id.* at 323, 548 S.E.2d at 858.

Unlike *Batson,* several significant witnesses, including Respondent, minor Appellants, and Roe, have already been deposed. Testimony elicited during those depositions created at least a mere scintilla of evidence as it relates to whether Respondent either **652 knew or should have known that Mr. Bibby posed a specific threat of harm to the children that Respondent invited into her home. *See Bass v. Gopal, Inc.,* 395 S.C 129, 134, 716 S.E.2d 910, 912 (2011) (citing *Hancock v Mid-South Mgmt. Co., Inc.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)) ("In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment."); *300 *Bishop,* 331 S.C. at 88, 502 S.E.2d at 82 (holding all that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person).

Although the circuit court placed emphasis on the time lapse since Mr. Bibby had molested their daughter, the passage of time alone should not negate the possibility that Respondent knew or should have known of Mr. Bibby's sexually deviant proclivities. Respondent knew minor Appellants were coming over to their house to play and minor Appellants' presence in their home was a result of her own invitation. Further, Respondent admitted she was aware of Mr. Bibby's prior propensities for pedophilia, as she acknowledged Mr. Bibby sexually abused their daughter in the past. Even after Mr. Bibby was removed from their home and placed in counseling, Respondent clearly appreciated the possibility of Mr. Bibby abusing their daughter again. Specifically, she testified she placed a lock on their daughter's door after Mr. Bibby returned and hid the key from him.

The majority cites to cases in which our courts have found a special relationship existed but concludes this case is distinguishable because the abuse occurred inside Respondent's home as opposed to a commercial setting I believe the location is not dispositive for purposes of creating a special relationship. Rather, I would find Wife's act of

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voluntarily inviting minor Appellants into her home while knowing of Husband's prior sexual abuse and continuing sexually deviant propensities is sufficient to impose a duty in this instance *See, e g , Pamela L. v. Farmer,* 112 Cal.App.3d 206, 169 Cal.Rptr. 282 (Cal.Ct.App.1980) (holding that a wife who invited and encouraged children to visit her premises, even though she knew that husband had molested women and children in the past and might do so again, could be held liable in negligence), *J.S. v. R.T.H.,* 155 N.J. 330, 714 A.2d 924 (1998) (holding that a wife could be held liable for the negligent failure to prevent or warn the victims about her husband's sexually abusive behavior when the wife had actual knowledge or special reason to know that the husband was likely to abuse a particular person or persons); *Doe v. Franklin,* 930 S.W.2d 921 (Tex.Ct App.1996) (holding that a grandmother could be held liable for failure to protect her granddaughter from a known risk of sexual abuse by the grandfather).

***301** I would find the testimony of Respondent's son, Daniel Bibby, Jr., is further evidence to support the conclusion that Respondent knew of Mr Bibby's sexually deviant behavior toward children and that she knew he posed a risk to them In a written statement to police, Daniel recounted that he had caught his father looking at child pornography on the Internet for at least two years leading up to the alleged molestations. Daniel also told police that Mr. Bibby discarded his computer for fear that either Daniel or Daniel's children would disclose that Mr Bibby was using his computer for pornographic purposes. I would find the foregoing evidence regarding Mr. Bibby's apparent addiction to child pornography is particularly relevant to whether Mr. Bibby posed a specific threat of harm to minor Appellants

I believe a jury could find Respondent liable under a premises liability theory In coming to this conclusion, I do not intend to suggest that a homeowner could be subject to liability for failure to warn licensees of the criminal history of any person who happens upon the homeowner's premises. Nor do I urge the adoption of a rule that would impose a general duty to warn others in the surrounding vicinity of the dangerous propensities of one residing therein. Rather, I would find a homeowner owes a duty to take reasonable measures to protect children invited into his or her home from potential sexual ****653** assault when the homeowner knows or should know of the assailant's propensities

Both parties agree minor Appellants were licensees in Respondent's home. As it relates to a licensee, a landowner has a duty

> [t]o use reasonable care to warn [the licensee] of any *concealed dangerous conditions* or activities which are known to the possessor, or of any changes in the condition of the premises which may be dangerous to him, and which he may reasonably be expected to discover.

Neil v. Byrum, 288 S.C. 472, 473, 343 S.E.2d 615, 616 (1986) (internal citation omitted). Although negligence actions under a premises liability theory typically pertain to dangerous conditions or activities on one's land, our courts have permitted a sexual assault victim to bring suit for injuries inflicted by a third party under a premises liability theory *See Burns v.* ***302** *S.C. Comm'n for the Blind,* 323 S.C. 77, 448 S.E.2d 589 (Ct.App 1994), *see also* 62 Am.Jur.2d *Premises Liability* § 409 (2014) ("Generally, owners or occupiers of land have no duty to protect visitors to their property from the deliberate criminal conduct of third parties[.] ... However, an exception exists if the . landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor."). The majority finds *Burns* distinguishable because the plaintiff in Burns was an invitee in a treatment facility as opposed to a licensee in one's home, but, as children of tender years, I would hold that Respondent owed a heightened duty of care to minor Appellants similar to that imposed in Burns *See Lynch v. Motel Enter., Inc.,* 248 S.C. 490, 494, 151 S.E 2d 435, 436 (1966) (finding owner or occupier of land may be liable for injuries to children of tender years, whether licensees or trespassers, if children are likely to come into contact with an obvious danger that could be reasonably anticipated and prevented by owner or occupier); F Patrick Hubbard and Robert L Felix, *The South Carolina Law of Torts,* 132–33 (4th ed 2011) ("Special rules apply to children because they often lack the capacity to know and appreciate the danger and to understand the culpable wrongful entry on another's premises Where the premises contain a condition unreasonably dangerous to children, the owner/occupier owes a child a duty of care even if the child is a trespasser or a licensee ").

Under the particular facts of this case, I would find Appellants presented at least a mere scintilla of evidence from which a jury could find Respondent breached a duty of care to minor

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Appellants. Accordingly, I would reverse the circuit court's decision to grant summary judgment and remand this case for further proceedings.

Parallel Citations

763 S.E 2d 645

Footnotes

1 Judy stated in her interview she was exposed to pornography in the Bibby home Additionally, the Bibby's adult son, Daniel Bibby, Jr , told police he witnessed his father watching child pornography in the two years leading up to the alleged molestation of the minor Appellants. According to Jane Roe, Daniel Bibby, Jr told her he had informed Respondent on several occasions that Mr. Bibby was watching pornography.

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E.

373 S.C. 390
Supreme Court of South Carolina.

John DOE, individually and as Guardian and next friend for his minor child, James Doe, Petitioners,
v.
Robert Francis MARION, Jr., M.D., Individually, Parkwood Pediatrics Group, Carolina Family Care, Inc., Walton L. Ector, M.D., Individually, William Gamble, M.D., Individually, Malcolm Rhodes, M.D., Individually, William Fred O'Dell, M.D., Individually, Carol Graf, M.D., Individually, Carol Graf, M.D. & Associates, P.A., and Pit Marion, Individually, of Whom Carol Graf, M.D., and Carol Graf, M.D. & Associates, P.A., are, Respondents.

No. 26323. | Heard March 20, 2007. | Decided May 7, 2007.

Synopsis

Background: Father brought action against multiple defendants seeking to recover damages arising from a physician's sexual abuse of son and psychiatrist's failure to notify of sexual abuse The Circuit Court, Charleston County, Thomas L. Hughston, Jr., J., granted psychiatrist's motion to dismiss. Father appealed. The Court of Appeals, 361 S.C. 463, 605 S.E.2d 556, affirmed.

Holdings: After granting father's request for a writ of certiorari, the Supreme Court, Burnett, J., held that:

[1] child abuse reporting statute did not create private cause of action for negligence per se based on failure to report suspected or known child abuse, and

[2] psychiatrist who treated physician beginning several years before physician allegedly sexually molested a child did not have a common law duty during his treatment of the physician to warn future foreseeable victims of physician's predilection for child molestation of his patients.

Affirmed.

West Headnotes (12)

[1] **Appeal and Error**
⇨ Extent of Review Dependent on Nature of Decision Appealed from

In 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).

15 Cases that cite this headnote

[2] **Pretrial Procedure**
⇨ Matters considered in general

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Rules Civ.Proc., Rule 12(b)(6).

16 Cases that cite this headnote

[3] **Pretrial Procedure**
⇨ Availability of relief under any state of facts provable

Pretrial Procedure
⇨ Construction of pleadings

If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then 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).

9 Cases that cite this headnote

[4] **Pretrial Procedure**
⇨ Insufficiency in general

Pretrial Procedure
⇨ Construction of pleadings

For the purpose of a motion to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, the question

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is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Rules Civ.Proc., Rule 12(b)(6).

6 Cases that cite this headnote

[5] **Pretrial Procedure**
⇦ Insufficiency in general

The 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)

6 Cases that cite this headnote

[6] **Action**
⇦ Statutory rights of action

Infants
⇦ Right of action, parties, and standing

Child abuse reporting statute did not create private cause of action for negligence per se based on failure to report suspected or known child abuse; statute did not include language creating civil liability for failure to report suspected or known child abuse, and the purpose of the statute was to protect the public and was not to protect an individual's private right Code 1976, § 20-7-510.

3 Cases that cite this headnote

[7] **Action**
⇦ Statutory rights of action

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute

3 Cases that cite this headnote

[8] **Action**
⇦ Statutory rights of action

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 a civil liability.

3 Cases that cite this headnote

[9] **Action**
⇦ Statutory rights of action

When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.

6 Cases that cite this headnote

[10] **Health**
⇦ Released or non-committed patients

Psychiatrist who treated physician beginning several years before physician allegedly sexually molested a child, one of physician's patients, did not have a common law duty during his treatment of the physician to warn future foreseeable victims of physician's predilection for child molestation of his patients; physician did not specifically threaten any readily identifiable third party, such as the child who was allegedly molested.

Cases that cite this headnote

[11] **Negligence**
⇦ Elements in general

In order to prove negligence, a plaintiff must show. (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages

9 Cases that cite this headnote

[12] **Negligence**
⇦ Duty to warn

The defendant may have a common law duty to warn potential victims under the "special relationship" exception to the general rule that there is no general duty to control the conduct

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of another or to warn a third person or potential victim of danger 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.

4 Cases that cite this headnote

Attorneys and Law Firms

**246 J. Graham Sturgis, Jr., of Charleston; Gary B. Blasingame and Henry G. Garrard, III, of Blasingame, Burch, Garrard & Ashley, P C., and Michael O. Crain, of Oliver and Crain, all of Athens, GA, for Petitioners.

Carol B. Ervin and Stephen L. Brown, of Young, Clement, & Rivers, LLP, of Charleston, for Respondents

Opinion

Justice BURNETT.

*393 John Doe (Petitioner) brought an action on behalf of his minor son, James Doe, to recover damages arising from the sexual abuse of James Doe by Robert Francis Marion, Jr , M.D Petitioner also alleged Carol Graf, M D **247 and Carol Graf, M D. & Associates (Respondents) were negligent in failing to report to authorities or warn future victims of Dr. Marion's predilection for child molestation. The trial court disagreed and dismissed the case. The Court of Appeals affirmed. *Doe v Marion,* 361 S.C. 463, 605 S.E.2d 556 (Ct.App.2004). We granted Petitioner's request for a writ of certiorari to review the decision of the Court of Appeals, and we affirm

*394 *FACTUAL/PROCEDURAL BACKGROUND*

James Doe was a patient of Parkwood Pediatrics Group (Parkwood) from 1990 to 1998. Dr. Marion was a member of Parkwood until 1985 when he was asked to leave due to complaints of sexual abuse and molestation against him Dr Marion established a solo practice and began treating James Doe in 1999 after James Doe's mother transferred him from Parkwood to Dr. Marion. James Doe was allegedly sexually abused by Dr Marion for a period of several years beginning in 1999

Dr. Marion received psychiatric treatment from Dr. Graf beginning in 1984 for his predilection for child molestation. Dr. Graf also treated a victim of Dr. Marion who informed Dr. Graf of the molestation. Petitioner alleges Dr. Graf was negligent *per se* in her failure to notify the appropriate authorities of Dr. Marion's child molestation and abuse and in breaching her duty to report suspected sexual abuse of a child pursuant to S.C.Code Ann. § 20–7–510 (Supp.2002). Petitioner also alleges Dr. Graf was negligent under common law principles for her failure to warn "reasonably foreseeable" future minor patients of Dr. Marion. Finally, Petitioner alleges Carol Graf, M D. & Associates, P.A., is vicariously liable for Dr. Graf's negligence

Respondents were dismissed from the initial suit after the trial court granted their motions to dismiss under Rule 12(b)(6), SCRCP. The trial court found: (1) no common law duty to warn existed because there was not a specific threat to a specific individual; and (2) § 20–7–510 did not create a private right of action for failing to report, and if it did, it would only apply to threats to a specific child, not any possible future victims

The Court of Appeals affirmed the dismissal in *Doe v. Marion,* 361 S.C. 463, 605 S E.2d 556 (Ct.App.2004). The Court of Appeals found Petitioner failed to allege a specific threat necessary to compel a duty to warn and, therefore, the trial court correctly determined no legal duty existed under the common law The Court of Appeals also found § 20–7–510 does not create a private cause of action and, consequently, the trial court correctly determined Dr. Graf was not negligent *per se.*

*395 *ISSUES*

I Did the Court of Appeals err in finding S.C.Code Ann. § 20–7–510 (Supp.2002) does not give rise to a private cause of action for negligence *per se?*

II. Did the Court of Appeals err in finding a physician/psychiatrist is not liable under common law negligence principles for failing to report to authorities or warn future victims about the predilection for child molestation of her patient?

STANDARD OF REVIEW

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[1] [2] [3] [4] [5] In 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 *Williams v. Condon,* 347 S.C. 227, 553 S E 2d 496 (Ct.App.2001) In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence,* 368 S.C. 106, 116, 628 S.E 2d 869, 874 (2006) If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County,* 333 S C. 519, 511 S.E.2d 69 (1999), *Stiles v. Onorato,* 318 S C. 297, 457 S E.2d 601 (1995) "The question is whether, in the light most favorable to the plaintiff, **248 and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce,* 337 S.C. 1, 5, 522 S.E 2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham,* 292 S.C. 415, 357 S E.2d 8 (1987).

LAW/ANALYSIS

I. Negligence *Per Se*

[6] Petitioner argues the Court of Appeals erred in affirming the trial court's dismissal of Petitioner's claims for negligence against Dr. Graf. Specifically, Petitioner contends *396 S.C.Code Ann. § 20–7–510 creates a private cause of action for negligence *per se* We disagree

Section 20–7–510 provides, in pertinent part:

> (A) A physician .. shall 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's physical and mental health or welfare has been or may be adversely affected by abuse or neglect.
>
> ...
>
> (D) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found. [1]

Petitioner argues the statute imposes a duty on Dr. Graf to report Dr. Marion's predilection for sexual abuse and/or molestation of children to the appropriate authorities. Petitioner argues the purpose of the Children's Code[2], and specifically of the reporting statute, is to protect children from the type of harm James Doe suffered

[7] [8] [9] In determining whether a statute creates a private cause of action, the main factor is legislative intent:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, 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 a civil liability

*397 *Dorman v. Aiken Communications, Inc.,* 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (quoting *Whitworth v. Fast Fare Markets of South Carolina, Inc.,* 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. *Citizens of Lee County v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992)

While § 20–7–510 is silent as to civil liability, §§ 20–7–567 & –570 (Supp.2005)[3] do impose **249 liability for making a false report Sections 20–7–567 & –570 indicate the legislature intended to impose civil liability and establish private causes of action in certain instances. The fact that such language is missing from § 20–7–510 indicates the legislative intent was for the reporting statute not to create civil liability. *See Byrd v. Irmo High Sch.,* 321 S.C. 426, 433–34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist), *State v.* *398 *Hood,* 181 S.C. 488, 188 S.E. 134 (1936) ("It is presumed that the Legislature was familiar with prior legislation, and that if it intended to repeal existing laws it would have expressly done so.") Further, in *Rayfield v. South*

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Carolina Department of Corrections, 297 S.C. 95, 374 S.E.2d 910 (1988), this Court stated:

> [W]e are able to derive a test for determining when a duty created by statute will support an action for negligence. In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect.

In determining Dr. Graf had no duty to report, we look to the purpose of the Children's Code and determine the statute in question is concerned with the protection of the public and not with the protection of an individual's private right[4]. Section 20–7–480[5] states the purpose of the Children's Code and *399 focuses entirely, although not explicitly, on the duties of the Department of Social Services (DSS). *See, e.g., S.C. Dep't of Social Servs. v. Pritcher*, 329 S.C. 242, 246, 495 S.E.2d 242, 244 (Ct.App.1997) ("SCDSS has been designated as the state agency primarily responsible for implementing the child welfare scheme for the protection of children in South Carolina")

Petitioner cites *Jensen v. Anderson County Department of Social Services*, 304 S.C. 195, 403 S.E.2d 615 (1991), to support his contention § 20–7–510 creates a private cause of action. In *Jenson*, this Court upheld a private cause of action when a DSS worker failed to properly investigate claims of abuse of a young man After the young man's brother was beaten to death by his mother's boyfriend, the administratix of the brother's estate brought an action against **250 DSS and the social worker. While public officials are generally not liable for their negligence in public duties, this Court noted an exception exists when a duty is owed to an individual rather than the public, *i.e.*, a "special duty."[6]

This case is distinguishable from *Jensen* because there existed no special duty between Dr. Graf and James Doe. Dr. Graf was not a public official. She never had contact with James Doe. In fact, James Doe was not even born when Dr. Graf began treating Dr. Marion in 1984 Therefore, the Court of Appeals did not err in affirming the dismissal of the action and finding § 20–7–510 does not create a private cause of action for negligence *per se*

***400 II. Common Law Negligence**

[10] Petitioner argues the Court of Appeals erred in affirming the trial court's dismissal of Petitioner's claim for common law negligence. Specifically, Petitioner argues Dr. Graf had a duty to warn all future foreseeable victims which arose out of the "special relationship" created in the psychiatrist-patient relationship. We disagree.

[11] In order to prove negligence, a plaintiff must show: (1) defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. *Steinke v. S.C. Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999) ("The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict."). In *Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002), this Court recognized five exceptions to the general rule that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger:

> (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.

350 S.C. 315, 334, 566 S E 2d 536, 546 (2002).

[12] 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 *401 mentally afflicted patient for failure to warn or protect third persons threatened by a patient" and stated:

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> 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

****251** *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

CONCLUSION

We affirm the decision of the Court Appeals and find· (1) § 20–7–510 does not create a private right of action for negligence *per se;* and (2) a physician/psychiatrist is not liable under common law negligence principles for failing to report or warn about the predilection for child molestation of her ***402** patient in the absence of a specific threat to an identifiable party.

AFFIRMED.

TOAL, C.J., MOORE, WALLER and PLEICONES, JJ., concur.

Parallel Citations

645 S.E.2d 245

Footnotes

1 Section 20–7–510(A) was amended in 2003 and now reads: "A physician .. 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 " The amendments do not affect the analysis of Petitioner's argument

2 South Carolina Code Ann. §§ 20–7–10 to –9740 (1976 & Supp 2006).

3 South Carolina Code Ann § 20–7–567 states:

(A) It is unlawful to knowingly make a false report of abuse or neglect

(B) A person who violates subsection (A) is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than ninety days, or both.

South Carolina Code Ann. § 20–7–570 provides:

(A) If the family court determines pursuant to Section 20–7–695 that a person has made a report of suspected child abuse or neglect maliciously or in bad faith or if a person has been found guilty of making a false report pursuant to Section 20–7–567, the department may bring a civil action to recover the costs of the department's investigation and proceedings associated with the investigation, including attorney's fees. The department also is entitled to recover costs and attorney's fees incurred in the civil action authorized by this section. The decision of whether to bring a civil action pursuant to this section is in the sole discretion of the department.

(B) If the family court determines pursuant to Section 20–7–695 that a person has made a false report of suspected child abuse or neglect maliciously or in bad faith or if a person has been found guilty of making a false report pursuant

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to Section 20–7–567, a person who was subject of the false report has a civil cause of action against the person who made the false report and is entitled to recover from the person who made the false report such relief as may be appropriate, including:

(1) actual damages,

(2) punitive damages; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

4 Other jurisdictions have interpreted similar statutes and reached the same conclusion. For example, the Alabama Supreme Court held:

> The Child Abuse Reporting Act creates a duty owed to the general public, not to specific individuals, and, consequently, it does not create a private cause of action in favor of individuals Therefore, to the extent that the plaintiffs rely on that statute, they fail to state a cause of action, and the trial court properly dismissed the claims insofar as they were based on the statute.

C.B. v Bobo, 659 So.2d 98 (Ala 1995); *see also Arbaugh v. Board of Educ., County of Pendleton,* 214 W.Va. 677, 591 S.E 2d 235 (2003); *Cechman v. Travis,* 202 Ga.App. 255, 414 S.E.2d 282 (1991); *Fischer v. Metcalf,* 543 So 2d 785 (Fla.Dist.Ct.App.1989); *Borne v. Northwest Allen County Sch. Corp* , 532 N.E 2d 1196 (Ind.Ct.App.1989); *but see Ham v. Hospital of Morristown,* 917 F.Supp. 531 (E.D.Tenn.1995), *Landeros v. Flood,* 17 Cal.3d 399, 131 Cal Rptr. 69, 551 P.2d 389 (1976)

5 Section 20–7–480 declares:

(B) It is the purpose of this article to.

(1) acknowledge the different intervention needs of families,

(2) establish an effective system of services throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate;

(3) ensure permanency on a timely basis for children when removal from their homes is necessary;

(4) establish fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members; and

(5) establish an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them

6 A "special duty" exists when the following six elements are present

(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 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 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 *Jensen,* 304 S.C. at 200, 403 S.E.2d at 617.

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F.

370 S.C. 511
Supreme Court of South Carolina.

Allene HARDEE and Kathleen Hardee, Appellants,
v.
BIO-MEDICAL APPLICATIONS OF SOUTH CAROLINA, INC., d/b/
a Conway Dialysis Center, Respondent.

No. 26217. | Heard March 21, 2006. | Decided Oct. 23, 2006.
| Rehearing Denied Nov. 14, 2006.

Synopsis

Background: Motorists, who were injured when patient lost control of his vehicle as he was driving home from his dialysis treatment at dialysis center and struck motorists' vehicle, filed suit against dialysis center for negligence related to the treatment of patient in the administration of dialysis treatment. The Circuit Court, Horry County, John L. Breeden, J., entered summary judgment for dialysis center, and motorists appealed

[Holding:] The Supreme Court, Toal, C J., held that, as matter of apparent first impression, if dialysis center knew that patient could experience ill effects following dialysis treatment, dialysis center owed motorists a duty to warn patient of the risks of driving.

Reversed.

West Headnotes (5)

[1] **Appeal and Error**
⇦ Extent of Review Dependent on Nature of Decision Appealed from

When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court.

Cases that cite this headnote

[2] **Health**
⇦ Right of Action; Standing

Generally, an action against a doctor can only be maintained by the patient.

Cases that cite this headnote

[3] **Health**
⇦ Informed Consent in General; Duty to Disclose

Generally, a medical provider has a duty to warn of the dangers associated with medical treatment.

3 Cases that cite this headnote

[4] **Health**
⇦ Duties and Liabilities to Non-Patients

Health
⇦ Informed Consent in General; Duty to Disclose

A medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment; the duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment.

6 Cases that cite this headnote

[5] **Health**
⇦ Acts of Patients in General

If dialysis center knew that patient could experience ill effects following dialysis treatment, dialysis center owed motorists, who were injured when patient lost control of his vehicle as he was driving home from his dialysis treatment and struck motorists' car, a duty to warn patient of the risks of driving.

6 Cases that cite this headnote

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Attorneys and Law Firms

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Gray T. Culbreath and Christian Stegmaier, both of Collins & Lacy, of Columbia; and Wendy Raina Johnson Keefer, of Bancroft Associates, of Washington, DC, for Amicus Curiae South Carolina Defense Trial Attorneys' Association.

Opinion

Chief Justice TOAL:

*513 This appeal arises out of the trial court's decision to grant summary judgment in favor of Conway Dialysis Center (Respondent). The trial court held that Respondent was not liable for injuries Respondent's patient, Danny Tompkins (Patient), caused to be inflicted on Allene and Kathleen Hardee (Appellants) because South Carolina law does not recognize a duty running from a medical provider to a third party non-patient. We reverse.

FACTUAL/PROCEDURAL BACKGROUND

Appellants were badly injured in an accident which occurred in January of 1998. Appellants were traveling through the intersection of Highways 701 and 319 in Conway when Patient's automobile struck Appellants' automobile The accident occurred minutes after Respondent administered dialysis treatment to Patient

Patient is a Type 1 Insulin dependent diabetic whose diabetic condition is deemed "brittle." Patient took hemodialysis treatment three times a week and each treatment lasted almost four hours. The dialysis treatment required that Patient's blood be taken out of his system, run into a dialysis machine to be cleaned, and then returned to Patient's body

After the completion of the dialysis treatment, Patient was released to go home During the drive home, Patient lost control of his vehicle, and ultimately collided with Appellants. The accident resulted in Patient's death and devastating injuries to Appellants.

Following the accident, Appellants filed this suit against Respondent for negligence related to the treatment of Patient in the administration of dialysis treatment. Specifically, Appellants alleged that Respondent did not warn Patient of the ill effects that could result from his dialysis treatment, that Patient was experiencing insulin shock or suffering from low blood sugar at the time he left Respondent's facilities, and that Respondent did not perform the normal post-treatment tests or monitoring prior to releasing Patient. Respondent filed a motion for summary judgment, which the trial court initially denied Respondent requested that the trial court alter or amend its decision, however, and after further consideration, *514 the trial court granted Respondent's motion for summary judgment.

At this point, Respondent forwarded a proposed order to Appellants' counsel for comment. Appellants' counsel advised Respondent of a number of problems with the proposed order, however, prior to Appellants' counsel having the opportunity to present these comments to the trial court, the court signed the order. Appellants made a motion to alter or amend the order to correctly reflect the facts in the case. The trial court denied Appellants' motion, and this appeal followed

This case was certified to this Court pursuant to Rule 204(b), SCACR, and the following issues are before the Court for review.

I Did the trial court err in determining that a medical provider does not owe a duty to a third party (non-patient), even if the medical provider negligently fails to warn a patient of the risks related to driving immediately following a medical procedure and the failure to warn the patient results in harm to the third party?

II Should the trial court's order be vacated because opposing counsel did not have the opportunity to review the **631 proposed order pursuant to Rule 5, SCRCP?

STANDARD OF REVIEW

[1] When reviewing the trial court's decision to grant summary judgment, an appellate court applies the same standard applied by the trial court *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). A grant of summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

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of law." Rule 56(c), SCRCP; *Tupper v. Dorchester County,* 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Because the trial court's order granting summary judgment focused only upon whether Respondent owed Appellants any duty of care, we limit our analysis accordingly. [1]

*515 LAW/ANALYSIS

I. Duty to third parties

Appellant argues that the trial court erred in determining that, as a matter of law, a medical provider never owes a duty to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment. We agree

[2] Although this Court has never addressed this issue directly, we have decided similar cases. Generally, an action against a doctor can only be maintained by the patient *Bishop v. South Carolina Dep't of Mental Health,* 331 S.C. 79, 91, 502 S.E.2d 78, 84 (1998). However, this Court recognized in *Bishop* that a physician-patient relationship is not a requirement in every legal action against a medical provider. Id. at 92, 502 S.E.2d at 84. In that case, the Court stated that a physician's malpractice in treating a patient may form the basis of a negligence action against the physician by a third party in limited circumstances. Id. This Court has never defined what constitutes the limited circumstances in which a third party can maintain suit against a medical provider as outlined in *Bishop.*

At the outset, it is important to characterize the precise nature of the cause of action to which this statement in *Bishop* alluded. As we noted in *Bishop,* a medical malpractice action is instituted by a patient and is predicated upon a physician's deviation from accepted standards of professional care in treating that patient. Not every cause of action asserted against a medical provider, however, is an action for medical malpractice. Thus, our statement in *Bishop* affirms the validity of the general rule prescribing the class of permissible plaintiffs in medical malpractice actions, but also recognizes that causes of action may accrue in other contexts by virtue of a medical provider's actions or omissions.

In this case, Appellants argue Respondent knew that the medical procedure it performed on Patient could have substantial detrimental effects on Patient's ability to operate a motor *516 vehicle. Thus, Appellants argue that if Respondent did not warn Patient of the risks of operating a motor vehicle, Respondent breached a duty a medical provider owes to those persons in the general field of danger (that is, the motoring public) which should reasonably have been foreseen by Respondent when it administered the treatment

[3] [4] [5] We believe South Carolina tort law ought to recognize such a duty. [2] Generally, a medical provider has a duty to warn of the dangers associated with medical treatment Thus, a medical provider who provides treatment which it knows may have detrimental effects on a patient's capacities and abilities **632 owes a duty to prevent harm to patients and to reasonably foreseeable third parties by warning the patient of the attendant risks and effects before administering the treatment. Therefore, if Respondent knew that Patient could experience ill effects following dialysis treatment, Respondent owed Appellants a duty to warn Patient of the risks of driving. [3]

We note that this is a very narrow holding that carves out an exception to the general rule that medical providers do not owe a duty to third party non-patients. Importantly, this duty owed to third parties is identical to the duty owed to the patient, i.e., a medical provider must warn a patient of the attendant risks and effects of any treatment. Thus, our holding does not hamper the doctor-patient relationship

Accordingly, we reverse the trial court's decision granting summary judgment and remand the case for proceedings consistent with this opinion.

*517 II. Motion to alter or amend

Appellants argue the trial court erred in denying their motion to alter or amend the judgment because the proposed order submitted by Respondent did not contain facts and legal issues that were raised before the trial court. As a result, Appellants argue the trial court's order should be vacated.

Although we decline to address this argument pursuant to *Futch v. McAllister Towing of Georgetown,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing that an appellate court need not address additional issues if the resolution of another issue is dispositive), we note that Appellants properly made a motion to alter the trial court's decision granting summary judgment, which the trial court denied, and that

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Appellants appropriately appealed. As a result, all relevant facts were before this Court for review.

CONCLUSION

Based on the above cited authority, we reverse the trial court's decision granting summary judgment and hold that the trial court erred in determining that a medical provider never owes a duty to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment.

MOORE, WALLER, BURNETT and PLEICONES, JJ., concur.

Parallel Citations

636 S.E 2d 629

Footnotes

1 Specifically, the order granting summary judgment in this case focuses solely on the question of whether a medical provider owes a duty of care to a third party non-patient as a result of actions or omissions the provider takes in regard to a patient's treatment Thus, our review of this particular decision does not call upon us to perform a duty typically associated with a review of a summary judgment decision-determining the existence of any triable issues of fact.

2 " '[D]uty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection " WILLIAM L PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, 325-326 (4th ed. 1971).

3 We note, however, that we do not make the determination that Respondent owed Appellants this duty of care. The trial court granted summary judgment holding that under no factual circumstances could a duty exist. We hold that, under some circumstances, a duty can exist Determining the existence of a duty in a particular case, however, is another question. Our current responsibility is limited to construing the evidence and inferences in the light most favorable to Appellants and reviewing the trial court's decision made as a matter of law. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998)

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G.

331 S.C. 79
Supreme Court of South Carolina.

Brenda D. BISHOP, as Guardian ad Litem for Bobbi Hatley Robertson, Petitioner,
v.
SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH, Respondent.

No. 24799. | Heard Dec. 4, 1997. | Decided June 8, 1998. | Rehearing Denied July 17, 1998.

Grandmother as guardian for child sued Department of Mental Health, claiming that child was physically abused by mother upon mother's release from involuntary commitment, and alleging negligence in releasing mother, in failing to warn of release, and in failing to properly diagnose and treat mother. The Circuit Court, Greenville County, Larry R. Patterson, J., granted summary judgment for Department and the Court of Appeals, Hearn, J., 323 S.C. 158, 473 S E.2d 814, affirmed. On grant of certiorari, the Supreme Court, Burnett, J., held that (1) Department's breach of duty to warn regarding threats to harm child was not proximate cause of harm, due to intervening negligence of grandmother, and (2) Department did not have duty to child to properly diagnose and treat mother.

Affirmed as modified.

Toal, J , filed a dissenting opinion in which Waller, J., joined

West Headnotes (23)

[1] **Judgment**
⇨ Absence of Issue of Fact

Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.

1 Cases that cite this headnote

[2] **Judgment**
⇨ Presumptions and Burden of Proof

In determining on motion for summary judgment whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party.

2 Cases that cite this headnote

[3] **Negligence**
⇨ Necessity and Existence of Duty

Essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff; without a duty, there is no actionable negligence.

27 Cases that cite this headnote

[4] **Negligence**
⇨ Duty to Warn

South Carolina law does not recognize a general duty to warn of the dangerous propensities of others

Cases that cite this headnote

[5] **Negligence**
⇨ Duty to Warn

When a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct; duty to warn arises when the individual has made a specific threat of harm directed at a specific individual

6 Cases that cite this headnote

[6] **Health**
⇨ Hospitals, Clinics, and Other Institutions

Department of Mental Health had a special relationship with involuntarily committed patient because the Department had custody and control of patient, and thus, if the Department knew or should have known a specific threat was made by patient, the Department had a duty

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to warn the threatened third party of patient's release

1 Cases that cite this headnote

[7] **Health**
⇦ Duty to Warn in General

Duty to warn readily identifiable third party of threats made by patient do 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 the defendant be aware or should have been aware of the specific threat made by the patient to harm a specific person.

6 Cases that cite this headnote

[8] **Health**
⇦ Hospitals, Clinics, and Other Institutions

Department of Mental Health had sufficient knowledge of patient's threats to harm her child to trigger duty to warn child, although discharge summary stated patient related to examiners she had no intention of hurting herself or her family and patient did not make specific threat of harm to her child while in Department's custody, as Department was aware patient had made specific threats to harm child in the past, and these threats were noted on documents admitting mother into custody of Department.

1 Cases that cite this headnote

[9] **Health**
⇦ Hospitals, Clinics, and Other Institutions

Even though Department of Mental Health failed to warn of mother's release from involuntary commitment, thus breaching its duty to warn regarding her threats to harm child, its breach of this duty was not proximate cause of harm suffered by child, due to intervening negligence of grandmother as legal guardian; grandmother allowed mother to enter home and to have unsupervised custody of child, and grandmother was aware of mother's commitment and of fact that mother had made threats against child.

1 Cases that cite this headnote

[10] **Negligence**
⇦ Elements in General

To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff, (2) breach of that duty by a negligent act or omission, and (3) damage proximately resulting from the breach of duty.

31 Cases that cite this headnote

[11] **Negligence**
⇦ Necessity of Legal or Proximate Causation

Negligence is not actionable unless it is a proximate cause of the injury.

5 Cases that cite this headnote

[12] **Negligence**
⇦ Necessity of and Relation Between Factual and Legal Causation

Proximate cause requires proof of both causation in fact and legal cause.

1 Cases that cite this headnote

[13] **Negligence**
⇦ "But-For" Causation; Act Without Which Event Would Not Have Occurred

Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence.

2 Cases that cite this headnote

[14] **Negligence**
⇦ Foreseeability

Legal cause is proved by establishing foreseeability.

1 Cases that cite this headnote

[15] **Negligence**
⇦ Natural and Probable Consequences

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Foreseeability is determined by looking to the natural and probable consequences of the complained of act.

2 Cases that cite this headnote

[16] **Negligence**
⇦ Possibility of Multiple Causes

Defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury, instead, the plaintiff must prove that defendant's negligence was at least one of the proximate causes of the injury.

9 Cases that cite this headnote

[17] **Negligence**
⇦ In General; Foreseeability of Other Cause

Intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care; in such case, the original negligence still remains active, and a contributing cause of the injury.

6 Cases that cite this headnote

[18] **Negligence**
⇦ In General; Foreseeability of Other Cause

Test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in light of the attendant circumstances

5 Cases that cite this headnote

[19] **Negligence**
⇦ Proximate Cause

It is generally for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries, only when the evidence is susceptible of only one inference does proximate cause become a matter of law for the court.

3 Cases that cite this headnote

[20] **Appeal and Error**
⇦ Grounds for Sustaining Decision Not Considered

Because facts were sufficiently developed in record with regard to intervening negligence, appellate court affirmed summary judgment for defendant on that ground even though trial court made no specific ruling on that issue in its order.

1 Cases that cite this headnote

[21] **Health**
⇦ Hospitals, Clinics, and Other Institutions

Although Department of Mental Health owed its duty to warn of mother's threats to three-year-old child, grandmother's knowledge of threats was relevant issue in determining whether Department's breach of duty was proximate cause of harm suffered by child, as grandmother was legal guardian of child and as such she was responsible for making decisions to ensure child's safety, and child was too young to make these decisions for herself.

Cases that cite this headnote

[22] **Health**
⇦ Released or Non-Committed Patients

Department of Mental Health did not owe duty to patient's child to properly diagnose and treat patient, even if patient abused child upon release from commitment.

1 Cases that cite this headnote

[23] **Health**
⇦ Duties and Liabilities to Non-Patients

Malpractice claim can only be maintained by the patient, and if a physician deviated from accepted standards of professional care in treating a patient, he breached a duty of care to the patient and not a third party.

2 Cases that cite this headnote

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Attorneys and Law Firms

**80 *83 H.W. Pat Paschal, Jr., of Miller & Paschal, Greenville, for petitioner.

Ashby W. Davis, Steven A. Snyder, and Gregory A. Morton, all of Donnan, Morton, Davis & Snyder, P.A., Greenville, for respondent.

Opinion

BURNETT, Justice:

This Court granted certiorari to review the Court of Appeals' opinion in *Bishop v. South Carolina Department of Mental Health*, 323 S.C. 158, 473 S.E.2d 814 (Ct.App.1996). We affirm as modified

FACTS

On March 1, 1990, Petitioner Brenda Bishop (grandmother) signed an affidavit which led to the involuntary commitment of her daughter, Tammi Lee Hatley (mother), to Respondent South Carolina Department of Mental Health (Department) *84 for mental illness. Specifically, grandmother alleged mother had made threats against Bobbi Hatley Robertson (victim), mother's three-year-old daughter. At the time, grandmother had legal custody of victim.

Mother was lawfully committed to the Patrick B. Harris Psychiatric Hospital where she was examined by a physician, observed by nurses, and interviewed by a social worker. Two designated examiners examined mother and determined she was not mentally ill. Consequently, on March 2, 1990, mother was released pursuant to an order of the probate court.

On March 3, 1990, mother appeared at the home of grandmother Grandmother allowed mother to enter the home and grandmother, mother and victim spent several hours visiting together. Grandmother then acquiesced to mother's request to allow her to have custody of victim for a specific period of time. Thereafter, victim left with mother

After mother returned victim to grandmother a few hours later, grandmother noticed victim had green felt tip magic markings on her arms and body, including her abdominal and vaginal areas. Victim was examined by a physician at Greenville Memorial Hospital; no evidence of penetration or other trauma was found.

Grandmother brought this action on behalf of victim against the Department for the physical abuse of victim allegedly received at the hands of mother. Specifically, grandmother alleged the Department was negligent in releasing mother, in failing to warn of her release, and in failing to properly diagnose and treat mother for those illnesses which caused her to have dangerous propensities towards victim.

The circuit court granted summary judgment in favor of the Department. The court held the Department was not civilly liable pursuant to the provisions of S.C.Code Ann. §§ 15-78-60 (Supp.1997) and 44-17-900 (1976) for releasing mother.[1] The court concluded the Department had no duty to warn grandmother of mother's release. The court found grandmother was well aware of mother's alleged threats at the time she permitted mother to take victim for visitation. Finally, the circuit court held any duty of the Department regarding *85 the diagnosis and treatment **81 of mother was owed to mother and not to third parties.

On appeal, grandmother argued the circuit court erred in granting summary judgment on victim's negligence claims against the Department based on its findings that the Department did not owe a duty to warn victim of mother's release and that the Department did not owe any duty of care to victim regarding mother's treatment. The Court of Appeals disagreed and affirmed the circuit court's grant of summary judgment. *Bishop, supra.*

The Court of Appeals found the evidence established mother did not make a specific threat of harm to victim while in the Department's custody and, therefore, the Department had no duty to warn of her release The Court of Appeals noted grandmother, victim's guardian, was obviously aware of mother's release when she appeared at her home and grandmother was aware of mother's threats to harm victim, yet grandmother allowed mother to take victim from her home for an unsupervised visit With regard to the Department's duty to properly diagnose and treat mother, the Court of Appeals held the Department owed this duty to mother and not victim. *Id.*

ISSUES

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I. Did the Court of Appeals err in affirming the circuit court's grant of summary judgment on the basis that the Department owed no duty to warn victim of mother's release?
II. Did the Court of Appeals err in holding the Department did not owe a duty of care to victim to properly diagnose and treat mother; instead, this duty of care was only owed to mother?

DISCUSSION

Standard of Review

[1] [2] Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Hamiter v. Retirement Division of South Carolina Budget and Control Board,* 326 S.C. 93, 484 S.E.2d 586 (1997). In determining *86 whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Id.*

I.

Grandmother argues the Court of Appeals erred in affirming the grant of summary judgment to the Department because the Department had a common law duty to warn victim of mother's release since victim was a known potential victim of mother. Specifically, grandmother contends the Court of Appeals erred in finding because no express specific threat of harm was made by mother against victim while in the custody of the Department, the Department had no duty to warn victim According to grandmother, the Department knew mother had made specific threats against victim; therefore, it had a duty to warn victim upon mother's release.

[3] An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence. *Rogers v. S C. Dep't of Parole & Community Corrections,* 320 S.C. 253, 464 S.E.2d 330 (1995).

[4] [5] South Carolina law does not recognize a general duty to warn of the dangerous propensities of others *Rogers, supra; Sharpe v. S.C. Dep't of Mental Health,* 292 S.C. 11, 354 S.E.2d 778 (Ct.App.1987), *cert dismissed,* 294 S.C. 469, 366 S.E.2d 12 (1988) However, when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct. *Rogers, supra* (citing Restatement (Second) of Torts §§ 315 & 319). This duty to warn arises when the individual has made a specific threat of harm directed at a specific individual. *Id.*

The seminal case on the liability of one treating a mentally afflicted patient for failure to warn or protect third persons threatened by a patient is *Tarasoff v. Regents of* **82 *University of California,* 17 Cal 3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976). In *Tarasoff,* the court permitted the plaintiffs to *87 amend their complaints to state a cause of action against the therapists by asserting that the therapists in fact determined that their patient presented a serious danger of violence to the decedent, or pursuant to the standards of their profession should have so determined, but nevertheless failed to exercise reasonable care to protect decedent from that danger. The patient, a voluntary out-patient, informed his therapist that he was going to kill a girl, unnamed yet readily identifiable as the decedent, when she returned from Brazil No one warned the decedent of her peril. Shortly after decedent returned from Brazil, the patient killed her. According to the court,

> 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.

Id. at 20, 551 P.2d at 340. The court, citing Restatement (Second) of Torts §§ 315-320 to support its position, stated when the defendant stands in some special relationship to the person whose conduct needs to be controlled, a duty of care may be imposed upon the defendant to protect threatened

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third parties from harm. The court then found a special relationship between the patient and therapists which would give rise to this duty to protect a threatened third person from harm. *Id.*

[6] Here, the Department had a special relationship with mother because the Department had custody and control of mother. Thus, 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.

[7] In our opinion the Court of Appeals' interpretation of *Rogers* requiring the threat to be made while in the custody of defendant is too narrow. While cases following *Tarasoff* have made clear that this duty is only owed when a patient specifically *88 threatens a readily identifiable third party, none of these cases limit liability by requiring the threat to be made while under the control of or in the custody of the defendant. *Rogers, supra; Thompson v. County of Alameda,* 27 Cal.3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980); *Cairl v. State,* 323 N.W.2d 20 (Minn.1982). Instead, all that is required is the defendant be aware or should have been aware of the specific threat made by the patient to harm a specific person. *See Jablonski v. United States,* 712 F.2d 391 (9th Cir.1983) (patient's previous history indicated he would direct his violence against victim).

[8] 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

[9] However, we affirm the grant of summary judgment in favor of the Department. Even though the Department failed to warn of mother's release thus breaching its duty to warn, its breach of this duty was not a proximate cause of the harm suffered by victim.

[10] [11] [12] [13] [14] [15] [16] To establish a cause of action in negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. **83 *Rickborn v. Liberty Life Ins. Co*, 321 S.C. 291, 468 S.E.2d 292 (1996). Negligence is not actionable unless it is a proximate cause of the injury. *Hanselmann v. McCardle,* 275 S.C. 46, 267 S.E 2d 531 (1980) Proximate cause requires proof of both causation in fact and legal cause. *Oliver v. S.C. Dep't of Highways and Public Transportation,* 309 S.C. 313, 422 S E.2d 128 (1992). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. *Id.* Legal cause is *89 proved by establishing foreseeability. *Oliver, supra; Koester v. Carolina Rental Ctr., Inc.,* 313 S.C. 490, 443 S E.2d 392 (1994). Foreseeability is determined by looking to the natural and probable consequences of the complained of act. *Koester, supra.* The defendant's negligence does not have to be the sole proximate cause of the plaintiffs injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury *Hughes v. Children's Clinic, P.A.,* 269 S.C. 389, 237 S.E.2d 753 (1977).

[17] [18] The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care In such case, the original negligence still remains active, and a contributing cause of the injury. *Locklear v. Southeastern Stages,* 193 S.C. 309, 8 S.E.2d 321 (1940). The test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in light of the attendant circumstances. *Oliver, supra; Locklear, supra.*

[19] It is generally for the jury to determine whether the defendant's negligence was a concurring proximate cause of the plaintiff's injuries. *Id.* Only when the evidence is susceptible of only one inference does proximate cause become a matter of law for the court *Oliver, supra.*

[20] The evidence in the record includes a report written by the emergency trauma center social worker stating the "[c]hild visited with mother earlier today." Further, the trial judge made extensive findings in his order based on the evidence introduced at the summary judgment hearing that grandmother allowed mother to enter the home, grandmother, mother and victim visited for several hours in the home; and grandmother agreed to allow mother to have unsupervised custody of victim for a specific period of time. [2]

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[21] *90 Grandmother was well aware that mother had made threats against victim.[3] When mother appeared at grandmother's house three days after her commitment, grandmother became aware mother had been released from the Department. Grandmother allowed mother to enter her home, and after spending several hours visiting with mother, grandmother allowed mother to take victim from the home for an unsupervised visit. Grandmother had ample knowledge, without the Department's warning, to make an informed decision about whether to allow victim to visit with mother unsupervised. Grandmother made no allegation that she was alarmed or felt threatened when mother entered the house or when mother asked to visit with the child alone Further, grandmother did not allege that she attempted to contact any authorities concerning mother's release when mother appeared at her residence. Thus, grandmother was negligent in allowing victim to leave with mother.

We find, as a matter of law, the Department could not reasonably foresee **84 grandmother would allow mother to visit with victim unsupervised since only three days earlier grandmother had mother involuntarily committed because mother was threatening to harm victim. The evidence is susceptible of only this inference[4] Consequently, grandmother's intervening negligence supersedes the Department's negligence for failing to warn of mother's release and the Department will *91 not be held liable for its negligence because its negligence was not a proximate cause of victim's harm

II.

[22] Grandmother contends the Court of Appeals erred in affirming the grant of summary judgment to the Department on the issue of alleged negligence in the diagnosis and treatment of mother because the minor child was a foreseeable plaintiff within the scope of danger and the Department owed a duty of care to victim. We disagree.

[23] In South Carolina, a malpractice claim can only be maintained by the patient If a physician deviated from accepted standards of professional care in treating a patient, he breached a duty of care to the patient and not a third party. *Sharpe v. S.C. Dep't of Mental Health,* 292 S C. 11, 354 S.E.2d 778 (Ct.App.1987) (concurring opinion of Bell, J.), *cert. dismissed,* 294 S.C. 469, 366 S.E.2d 12 (1988) (duty of care owed to patient and not third parties). Other jurisdictions agree with this requirement and do not allow injured third parties to recover. *See Moye v. United States,* 735 F.Supp. 179 (E.D.N.C.1990) (there must be a physician-patient relationship between victim and doctor before the court will find a doctor owes a victim harmed by his patient a duty of care to properly evaluate and treat patient); *Russell v. Adams,* 125 N.C.App 637, 482 S.E.2d 30 (1997) (psychologists, like other health care providers, may be held liable in medical malpractice only to their patients).

However, some jurisdictions allow third parties to recover for a physician's malpractice under certain circumstances. *See Molien v. Kaiser Foundation Hospitals,* 27 Cal 3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980) (because a negligent misdiagnosis of a communicable disease may foreseeably cause injury to close members of patient's family, the physician's duty of care extends to them); *Hofmann v. Blackmon,* 241 So.2d 752 (Fla.App.1970) (a doctor is liable to persons infected by his patient if he negligently fails to diagnose a contagious disease); *Wojcik v. Aluminum Co. of America,* 18 Misc.2d 740, 183 N.Y.S.2d 351 (N.Y.Sup.1959) (doctor is liable for failing to warn patient's family of patient's contagious disease)

*92 The physician-patient relationship is not a requisite in every legal action against a medical provider. A reasonably foreseeable third party, who is harmed by a physician's malpractice in treating a patient, may initiate an action against a physician for malpractice under limited circumstances. *See Molien v. Kaiser Foundation Hospitals, supra; Hofmann v. Blackmon, supra; Wojcik v. Aluminum Co. of America, supra.* However, in the matter *sub judice,* the Department did not owe victim a duty to properly diagnose and treat mother This duty was owed only to mother

AFFIRMED AS MODIFIED.

FINNEY, C.J., and MOORE, J., concur.

TOAL and WALLER, JJ., dissenting in separate opinion.

TOAL, Justice:
I respectfully dissent, believing that this case ought to be reversed.

Essentially, the majority finds that the trial court and the Court of Appeals committed error granting summary judgment on a finding that the Department of Mental Health had no

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duty to warn grandmother that it was releasing mother. The majority rightly concludes that the Department had **85 specific knowledge that mother was a threat to grandmother. Further, the majority finds that the Court of Appeals erred in interpreting *Rogers v. South Carolina Department of Parole & Community Corrections,* 320 S.C. 253, 464 S.E.2d 330 (1995) to require a specific threat made while mother was in custody. Nevertheless, the majority upholds, on the ground of intervening negligence of grandmother, the Court of Appeals' affirmance of the trial court's grant of summary judgment

It is improper for the majority to base its holding on intervening negligence inasmuch as this issue is procedurally barred. In fact, a double preservation sin is being committed here First, the issue of intervening negligence was not raised to, or addressed by, the trial court. *See Medlin v. South Carolina Farm Bureau Mut. Ins Co.,* 325 S.C. 195, 480 S.E.2d 739 (1997) (Issue not ruled upon by the trial court is procedurally barred). Second, the issue was never raised to, *93 or briefed for, this Court *See State v Sullivan,* 277 S.C. 35, 282 S.E.2d 838 (1981) (An issue not argued in the appellant's brief is deemed abandoned). Certainly, under Rule 220(c), SCACR, the appellate court may affirm any ruling, order, or judgment upon any ground appearing in the record on appeal. However, here we do not have any ground in the record to justify affirmance. The issue has not been raised legally, nor has it really been developed factually. If there has not been factual development about grandmother's negligence, on what basis can this Court affirm? To make a factual determination, there must be facts before us To suggest that we may affirm on the basis of the mere allegations of the parties is to impermissibly expand the scope of Rule 220(c). With its decision, the majority has, in effect, changed Rule 220(c) from affirmance on the basis of "any" ground in the record, to affirmance on the basis of "no" ground in the record

However, even if we assume that this Court may properly reach the issue of intervening negligence, it is improper for us to rule upon the issue as a matter of law because it is quintessentially a question of fact. *See Dixon v. Besco Engineering, Inc.,* 320 S.C. 174, 463 S.E.2d 636 (Ct.App.1995) (Whether an intervening act breaks the causal connection is a question for the fact-finder.), *Small v. Pioneer Machinery, Inc.,* 316 S.C. 479, 450 S.E.2d 609 (Ct.App.1994) (The defenses of contributory negligence and assumption of risk ordinarily present questions of fact for the jury, and only rarely become questions of law for the court to determine The same thing may be said of the defense of intervening third-party negligence.).

The majority declares that the evidence is susceptible of only one inference. To the contrary, there are at least two other reasonable inferences. Although there is little to no evidence of grandmother's negligence, there is evidence that grandmother may have acted reasonably. The one fact that may clearly be derived from the record is that grandmother had been threatened The mental examination report, prepared by a licensed physician, states· "[Mother] is a danger to her mom [i.e. grandmother] and her daughter. Threatened mom last pm." Another medical report states: "Possibly into satanism. Threatened mother and daughter " Further, "Threatened daughter & mother last night. 'Put me in the *94 hospital and I'll kill you ' " Because grandmother had been threatened (even with death), we may well infer that she could have still felt intimidated of mother, even after her release, and that she gave up the child to mother for fear of harm.

Alternatively, we may infer that when grandmother learned that the Department had released mother, she could assume that the Department had correctly diagnosed and treated mother. It is alleged that mother, after her release, visited with grandmother for several hours Perhaps mother was acting normally during these hours, leading grandmother to conclude that mother had been treated by the Department On this basis, grandmother may have allowed mother to take the child

Accordingly, whether grandmother allowed the child to be taken by mother because she was intimidated, or whether she felt mother had been treated, is a factual question that must be determined on remand by a jury on the basis of evidence to be presented, and not by this Court on the basis of a factually undeveloped record.

**86 I would reverse the Court of Appeals' affirmance of the trial court's grant of summary judgment and remand this matter for trial.

WALLER, J., concurs.

Parallel Citations

502 S.E.2d 78

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Footnotes

1 This issue is not before this Court

2 Because we find the facts are sufficiently developed in the record with regard to grandmother's intervening negligence, we affirm on this ground even though the trial judge made no specific ruling on this issue in his order *See* Rule 220(c), SCACR

3 Grandmother claims because the duty to warn was owed to victim, the grandmother's knowledge of mother's threats was insufficient The focus should be on what victim knew. We disagree. Grandmother was the legal guardian of victim and as such she was responsible for making decisions to ensure victim's safety. Victim was too young to make these decisions for herself; therefore, it is the grandmother's knowledge that is important. *See Tarasoff, supra* (duty to warn victim *or person who would apprise victim of danger*).

4 We disagree with the dissent's finding that the evidence is susceptible to at least two other reasonable inferences. The dissent is speculating as to possible motivations to explain grandmother's actions However, the motivation for grandmother's actions are irrelevant Instead, application of intervening negligence arises from grandmother's conduct and grandmother's assumed motivations do not displace her conduct.

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320 S.C. 253
Supreme Court of South Carolina.

Bobby L. ROGERS, Executor of the Estate of Doris Rogers, Respondent,
v.
SOUTH CAROLINA DEPARTMENT OF PAROLE AND COMMUNITY CORRECTIONS, South Carolina State Board of Parole and Community Corrections, South Carolina Department of Corrections, and South Carolina State Board of Corrections, Appellants.

No. 24350. | Heard March 8, 1995. | Decided Nov. 27, 1995.
| Rehearing Denied July 30, 1996.

Executor of murder victim's estate brought wrongful death suit alleging that parole officials negligently failed to warn victim of perpetrator's release from prison. Jury returned verdict in favor of executor and the Circuit Court, Dillon County, John H. Waller, Jr., J , denied motion for directed verdict. Appeal was taken. The Supreme Court, Moore, J., held that parole officials had no duty to warn victim of release absent specific threats of harm against victim by perpetrator.

Reversed.

Toal, J , dissented and filed opinion.

Alexander S. Macaulay, Acting Associate Justice, dissented and filed opinion.

West Headnotes (5)

[1] **Negligence**
⇦ Necessity and Existence of Duty

Existence of legal duty of care is essential element in cause of action for negligence, without such a duty, there can be no actionable negligence.

7 Cases that cite this headnote

[2] **Negligence**
⇦ Protection Against Acts of Third Persons

Negligence
⇦ Duty to Warn

One generally has no duty to control dangerous conduct of another or to warn potential victim of such conduct. Restatement (Second) of Torts §§ 314, 315.

3 Cases that cite this headnote

[3] **Negligence**
⇦ Duty to Warn

Common law duty to warn potential victim of individual's dangerous conduct may exist when one has ability to monitor, supervise, and control individual's conduct; special relationship gives rise to duty Restatement (Second) of Torts §§ 314, 315

8 Cases that cite this headnote

[4] **Prisons**
⇦ Injuries and Harm; Duty to Protect

Duty to warn potential victim of another's dangerous conduct arises when person being released from custody has made specific threat of harm directed at specific individual Restatement (Second) of Torts §§ 314, 315.

9 Cases that cite this headnote

[5] **Pardon and Parole**
⇦ Liabilities

State parole officials owed no duty to warn murder victim when perpetrator was released under supervised furlough program absent specific threat by perpetrator to harm victim and, thus, victim's survivors could not prevail on wrongful death claim for negligent failure to warn of release. Restatement (Second) of Torts §§ 314, 315.

4 Cases that cite this headnote

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**331 *254 William H. Davidson, II, David L. Morrison, and Andrew F. Lindemann, all of Ellis, Lawhorne, Davidson, and Sims, P.A., Columbia, for appellants.

J. Michael Baxley, Martin S. Driggers, and W. Carole Holloway, all of Driggers & Baxley, Hartsville, for respondent.

Opinion

MOORE, Justice:

This is a wrongful death action in which respondent obtained a jury verdict in the amount of $600,000 We reverse.

FACTS

In 1985, Doris Rogers (Doris) was robbed, kidnapped, and murdered. Her assailants were Daniel Jones and Robert Vandroff (Vandroff). Seventeen days prior to Doris's murder, appellants released Vandroff pursuant to a supervised furlough program provided for in S.C.Code Ann. §§ 24-13-710 and -720.[1] Vandroff had been serving time for breaking into the *255 home occupied by Doris and her son (respondent).

In 1989, respondent brought this action for wrongful death claiming appellants were negligent in failing to warn Doris of Vandroff's release on furlough.[2] At trial, the jury returned a verdict for respondent in the amount of $600,000.[3]

**332 *ISSUE*

Did the trial judge err in denying appellants' motion for a directed verdict?

DISCUSSION

At trial, appellants moved for a directed verdict on the ground that a common law duty to warn of the release of an individual from custody does not exist in this state and that even if such a duty does exist, they did not have a duty to warn Doris in this case. On appeal, appellants argue the trial judge erred in denying their directed verdict motion. We agree.

[1] An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without such a duty, there can be no actionable negligence. *South Carolina Elec. & Gas Co. v. Utilities Constr. Co.*, 244 S.C. 79, 135 S.E.2d 613 (1964); *Kershaw Motor Co. v. Southern Ry. Co.*, 136 S.C. 377, 134 S.E. 377 (1926).

[2] [3] Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct. *See Degenhart v. Knights of Columbus*, 309 S C. 114, 420 S.E.2d 495 (1992); *Rayfield v South Carolina* *256 *Dep't of Corrections*, 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 and 315 (1965). However, when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct. *See Rayfield v. South Carolina Dep't of Corrections, supra*, Restatement (Second) of Torts §§ 315 and 319 (1965).

[4] We hold such a duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual. *See Sheerin v. State*, 434 N.W.2d 633 (Iowa 1989) (the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim), *Cairl v. State*, 323 N.W.2d 20 (Minn.1982) (a duty to warn exists only when specific threats are made against specific victims); *Thompson v. County of Alameda*, 27 Cal 3d 741, 167 Cal Rptr. 70, 614 P.2d 728 (1980) (defendants had no affirmative duty to warn of the release of an inmate who had made nonspecific threats of harm directed at nonspecific victims).

[5] In this case, however, there was no evidence presented that Vandroff ever made a specific threat to harm Doris. Therefore, appellants had no common law duty to warn Doris of Vandroff's release. Consequently, the trial judge erred in denying appellants' motion for a directed verdict. *Carolina Home Builders, Inc. v. Armstrong Furnace Co*, 259 S.C. 346, 191 S.E.2d 774 (1972) (when evidence presented at trial raises no issue for the jury as to defendant's liability, a motion for a directed verdict based on the sufficiency of the evidence should be granted); *South Carolina Elec. & Gas Co. v. Utilities Constr. Co., supra; Kershaw Motor Co v. Southern Ry. Co., supra.* We need not address the remaining issues.

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REVERSED.

FINNEY, C.J , and GEORGE T GREGORY, Jr., Acting Associate Justice, concur.

TOAL, A.J., dissents in separate opinion *257 ALEXANDER S. MACAULAY, Acting Associate Justice, concurs with dissent in separate opinion.

TOAL, Justice, dissenting:
I respectfully dissent I agree with the majority's holding that when a defendant has the ability to monitor, supervise and control an individual's conduct, a special relationship exists between the defendant and the individual such that the defendant under certain circumstances has a common law duty to warn potential victims of the individual's dangerous conduct. I further agree that this duty to warn arises only when defendant has knowledge that a specific individual poses a threat to a specific victim. Where I part company with the majority is with its overly **333 restrictive holding regarding how the defendant custodian acquires knowledge of the individual's threat to a specific victim. The majority holds that a defendant custodian of a dangerous individual only has a duty when the dangerous individual has made a specific threat against a potential victim. Under the majority's holding, if the dangerous individual's conduct indicates his intent to harm a potential victim, but the individual in custody has not specifically verbalized or written the threat, the custodian has no duty to warn the potential victim This restrictive holding defies logic as well as common sense. Quite often, an individual's threat to another is made known by violent acts or attempted violent acts, not by words. Many dangerous individuals in custody are incapable of verbalizing a threat but very capable of carrying out the threat. I would hold that a common law duty exists when the individual has made a specific threat of harm directed at the potential victim or when the *individual's conduct* indicates an intent to harm the potential victim. I would hold therefore, that whether or not Vandroff's prior course of conduct indicated an intent to harm the victim was a question of fact for the jury to decide

The following evidence was presented at trial. In 1980, Vandroff was sentenced to seven years for house breaking and larceny of the victim's home Vandroff admitted to breaking into the victim's home three times before he was apprehended. All persons the parole board contacted when considering Vandroff's parole, including the judge, solicitor, parole officer, and victim's son, stated they did not think parole was *258 appropriate In spite of this testimony, he was paroled in 1982. Within two months, Vandroff stole a car and was back in jail Prison records reveal he has a fourth grade education, is mentally retarded and mentally ill The parole officer recommended against Vandroff's release a second time. The only persons who recommended parole were Vandroff's father and Mr Cox, Vandroff's father's employer. All other persons who testified to the parole board, including the sheriff, recommended against parole Prison officials knew that when Vandroff was on parole he lived with his father, about 500 yards from the victim Because the defendant parole board's own rating indicated that Vandroff's furlough was high risk, he was placed on high security furlough The victim was not notified of his release.

In my opinion, viewing the evidence in the light most favorable to the respondent, there was evidence that Vandroff's prior course of conduct indicated to defendants an intent on his part to physically harm Doris after his release from prison. Accordingly, the trial judge properly sent this issue to the jury. *See Hollins v. Richland County School District,* 310 S C. 486, 427 S.E.2d 654 (1993) (when the evidence of gross negligence is susceptible to more than one inference, whether defendant exercised slight care was question for the jury); *Moore v. Levitre,* 294 S.C. 453, 365 S.E.2d 730 (1988) (if the evidence supports more than one reasonable inference with respect to a claim or defense, the judge must submit the case to the jury), *Lundy v. Southern Bell Telephone and Telegraph,* 90 S.C. 25, 72 S.E. 558 (1911) (what constitutes negligence is a question of law for the court, but whether negligence in fact exists in a particular case is a question of fact for the jury). In my view, the trial judge in this case properly submitted the issue of defendants liability to the jury I would AFFIRM.

ALEXANDER S. MACAULAY, Acting Associate Justice, concurring and dissenting·
I concur with Justice TOAL, and respectfully dissent Inasmuch as there is "a duty to warn ... when a person being released from custody has made a specific threat of harm directed at a specific individual," as held by the majority, I agree that there was sufficient evidence to submit the case to the jury

*259 This was not a case where the victim was not known to the perpetrator, *Sharpe v. S C. Dept. of Mental Health,* 292 S.C. 11, 354 S.E 2d 778 (Ct App 1987). In this case there was evidence that Vandroff had made specific threats of harm

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against Doris, housebreaking and larceny of her home, which was why he had been incarcerated. *See* **334 *Rayfield v. S.C. Dept. of Corrections,* 297 S.C. 95, 374 S E.2d 910 (Ct.App.1988), *cert denied,* 298 S.C. 204, 379 S.E.2d 133 (1989). It makes no difference whether the home was owned by Doris or the Respondent individually, housebreaking is a crime against possession rather than property. *State v. Miller,* 225 S.C. 21, 80 S.E.2d 354 (1954).

There having been a specific threat, a manifested propensity to violate the sanctity of one's home, *State v. Brooks,* 277 S.C. 111, 283 S.E.2d 830 (1981), directed at a specific individual, Doris and her family, *Rogers v. S.C. Dept. of Mental Health,* 297 S.C. 363, 377 S.E.2d 125 (Ct.App.1989), the existence of the legal duty of care was established in this case; and it then became questions of fact for the trier of fact to determine "whether the defendant failed to observe the standard of care required by law" and "whether [the] conduct proximately caused damage to the plaintiff." *Sharpe v. S.C. Dept. of Mental Health, supra,* 354 S.E.2d at 781 (Bell, J., concurring).

I would AFFIRM.

Parallel Citations

464 S.E.2d 330

Footnotes

1 These statutes have since been amended several times. Currently, § 24-13-710 requires the Department of Corrections to notify victims pursuant to the provisions of the Victim's and Witness's Bill of Rights, S.C.Code Ann. §§ 16-3-1510 to -1560 (1985 & Supp.1994), before releasing an inmate through any supervised furlough program. S C.Code Ann. § 24-13-710 (Supp 1994) The statute in effect when Vandroff was released did not contain such a notification provision. *See* Act No. 96, § 1, 1983 S.Ct Acts 199.

2 Respondent also claimed appellants were negligent in making the decision to release Vandroff on furlough and in supervising Vandroff after his release Appellants' motion for summary judgment was granted as to these claims and no appeal was taken

3 This action arose before the adoption of the South Carolina Tort Claims Act, S.C.Code Ann. §§ 15-78-10 to -190 (Supp 1994), but after this Court's decision in *McCall v. Batson,* 285 S C. 243, 329 S.E 2d 741 (1985), abrogating sovereign immunity for governmental entities to the extent of any existing tort liability insurance coverage.

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323 S.C. 154
Court of Appeals of South Carolina.

James GILMER, both personally and as Personal Representative of the Estate of Mallie S. Gilmer, Appellant,
v.
John W. MARTIN, M.D., Respondent.

No. 2514. | Heard April 3, 1996. | Decided May 28, 1996. | Rehearing Denied Aug. 22, 1996. | Certiorari Granted Jan. 23, 1997.

Survivor and estate of nursing home patient who died as result of fire set by nursing home employee sued employee's psychiatrist, alleging that defendant failed to warn nursing home that employee was dangerous and posed threat of harm to patients at nursing home. The Circuit Court, Anderson County, Rodney A. Peeples, J., granted defendant's motion for summary judgment. Plaintiff appealed. The Court of Appeals, Hearn, J., held that defendant owed no duty to warn.

Affirmed.

Attorneys and Law Firms

**813 *155 J. Stephen Welch, of Welch & Crain, Greenwood, for appellant

John L. Choate and Allan Levin, both of Cozen & O'Connor, Columbia, for respondent

Opinion

HEARN, Judge:

James Gilmer, personally and as personal representative of the estate of Mallie S. Gilmer, sued John W. Martin, M.D., for damages caused when one of Martin's psychiatric patients killed the decedent. Gilmer based his claim on Martin's failure *156 to warn the patient's employer, the nursing home where the decedent resided, that the patient was dangerous and posed a threat of harm to patients at the nursing home The circuit court judge granted summary judgment for Martin, finding no duty to warn existed, and Gilmer appeals. We affirm

[1] [2] Summary judgment is appropriate where it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the non-moving party. *Cafe Associates, Ltd. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991).

[3] Viewed most favorably for Gilmer the facts of this case are tragic. Debra Ann Pickens was an employee of the Latham Nursing Home in Anderson, South Carolina. Martin, a psychiatrist, treated Pickens since 1985 for anxiety and depression. Martin was aware Pickens was a nurse's aide at the nursing home and occasionally was left alone with elderly, defenseless patients. Martin also knew of at least two and possibly three suicide attempts by Pickens while under his care. However, Pickens never overtly threatened any single individual or any identifiable group of people.

In November 1990, Martin hospitalized Pickens for almost one week for her mental problems. Martin treated Pickens for a "conversion reaction" in late November 1990. He wrote her an excuse to allow her to remain out of work from November 26, 1990 through December 28, 1990, because of her mental status. Martin then placed Pickens in a "survivor's group" under the care of Dr Harry Diamant, a non-physician counselor employed by Martin. The group offered counseling for victims of rape. It is not clear whether Pickens actually had been raped or was simply delusional as to whether a rape had taken place. Martin did not personally examine Pickens prior to allowing her to go back to her job at the nursing home. He continued to treat Pickens but asked her no questions to determine if she was having audio or visual hallucinations. Martin was also aware Pickens attempted suicide at the nursing home while on duty in January 1991.

Martin did not notify the nursing home of the true status of Pickens's mental state, nor did he take steps to personally examine *157 Pickens after she returned to work following her month of "medical leave" for mental problems. On February 18, 1991, Pickens set a series of fires by igniting the rayon drawstring hanging from neon light fixtures over the heads of several patients. The decedent was fatally burned and several other patients were injured. As a result, James Gilmer filed wrongful death and survival actions against Martin, claiming negligence in failing to warn of the danger Pickens posed to patients at the nursing home.

[4] South Carolina does not recognize a general duty to warn of the dangerous propensities of others. *Sharpe v. South*

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Carolina Dep't of Mental Health, 292 S C. 11, 354 S.E.2d 778 (Ct.App.1987), *cert. dismissed* 294 S.C. 469, 366 S.E.2d 12 (1988); *Rogers v. South Carolina Dep't of Mental Health,* 297 S.C. 363, 377 S.E 2d 125 (Ct.App.1989). **814 "However, when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct." *Rogers v. South Carolina Department of Parole and Community Corrections,* 320 S.C. 253, 464 S.E.2d 330 (1995) (Toal, A.J and Macaulay, A.A J. dissenting) Such a duty to warn arises when a person being released from custody has made a specific threat of harm directed at a specific individual. *Id.*

In *Rogers v South Carolina Department of Parole and Community Corrections,* Rogers obtained a verdict in a wrongful death case against the Department after his mother, Doris, was robbed, kidnapped, and murdered by a furloughed inmate. The inmate was serving time for previous break-ins at Doris's home. Rogers' theory was negligence for failing to warn of the inmate's release on furlough. The Supreme Court reversed based upon a lack of evidence the inmate made a specific threat to harm Doris Hence, 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.

Gilmer concedes Martin "did not know of a specific threat against Mallie S. Gilmer individually," but claims there should be a duty to warn all "foreseeable" victims, such as in this *158 case, where an identifiable threat exists to a specific, small group of individuals Gilmer in essence requests this Court to adopt a rule of liability for the same generalized threat of harm already rejected by our Supreme Court This we cannot do. We are bound by the decisions of the Supreme Court. S.C. Const. art. V, § 9 (the decisions of the Supreme Court shall bind the Court of Appeals); *cf Balloon Plantation, Inc. v. Head Balloons, Inc.,* 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990) (the Court of Appeals will not dismiss on the same ground upon which the Supreme Court denied a motion to dismiss).

Moreover, the facts of *Rogers* are even more compelling than those presented here since in *Rogers* the perpetrator had a prior history of criminal conduct toward the victim. In this case it is undisputed that Pickens never made a specific threat of harm to any individual other than herself Consistent with the principles of *Rogers,* the trial judge correctly granted summary judgment.

For the reasons stated, the judgment is

AFFIRMED.

CURETON and CONNOR, JJ., concur.

Parallel Citations

473 S.E.2d 812

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J.

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297 S.C. 363
Court of Appeals of South Carolina.

Vicki H. ROGERS, Executrix of the Estate of Helone C. Harrison, Deceased, Appellant,
v.
SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH; William S. Hall, M.D.; Karl V. Doskocil, M.D.; Alphonso Pasicatan, M.D.; and N.A. Desrosiers, M.D., Respondents.

No. 1282. | Heard Dec. 14, 1988. | Decided Jan. 23, 1989.

Personal representative of mental patient's sister brought action against Department of Mental Health, Commissioner of Mental Health, Superintendent of State Hospital, and treating psychiatrist for wrongful death of sister by patient. The Court of Common Pleas, Richland County, George B. Timmerman, Jr., Special Judge, directed verdict in favor of defendants. Representative appealed. The Court of Appeals, Bell, J., held that psychiatrist owed no duty to warn state hospital patient's sister of risk posed by patient.

Affirmed

West Headnotes (1)

[1] **Health**
⚖ Duty to Warn in General

Psychiatrist owed no duty to warn state hospital patient's sister of risk posed by patient, where patient's family knew of her mental illness and its manifestations and knew about patient's violence towards them when she was suffering delusions of persecution, and where patient made no specific threats against sister or any other family member.

4 Cases that cite this headnote

Attorneys and Law Firms

**125 *363 Hardwick Stuart, Jr., and Theodore Von Keller of Adams, Quackenbush, Herring & Stuart, Columbia, for appellant

Ernest J. Nauful, Jr., and William H Davidson, II of Nauful & Ellis, Columbia, for respondents.

Opinion

*364 BELL, Judge:

This is an action for wrongful death. The decedent, Helone C. Harrison, was shot and killed by her sister, Sybil Ann Corley, a former patient of the South Carolina Department of Mental Health Harrison's personal representative, Vicki Rogers, sued the Department, the Commissioner of Mental Health, the Superintendent of the State Hospital, and two doctors who treated Corley, alleging the doctors negligently failed to warn Harrison that Corley might harm her. Prior to trial, the circuit court dismissed the action as to the Commissioner and the Superintendent. At trial, Rogers sought to introduce the testimony of a clinical psychologist to prove the two doctors breached a duty to warn Harrison she was a potential victim of her sister. The judge refused to admit the psychologist's opinion as to the standard of care required of the doctors in this case Rogers offered no other expert testimony to establish a breach of the professional standard of care At the close of the evidence, the court granted the defendants' motion for a directed verdict Rogers appeals. We affirm.

Rogers excepts to the trial judge's rulings on the admission of certain evidence and the manner of examining certain witnesses We find it unnecessary to reach these issues, because the directed verdict is sustainable, as a matter of law, on a different ground *See Watkins Motor Lines, Inc. v. Span-America Medical Systems, Inc.*, 296 S.C. 175, 371 S.E.2d 2 (Ct App.1988) (court may affirm a judgment on any ground appearing in the record).

The material facts are essentially undisputed. Corley has a history of mental illness dating to 1958. She has been admitted to mental hospitals nine times, including the admission to South Carolina State Hospital at issue here Her medical records reflect a longstanding delusion of persecution by her family, especially her sisters Over the years, she made repeated claims that the family were trying to kill her, poison her, homosexually abuse her, and the like. She was easily provoked to become combative and destructive. In the

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**126 *365 past, she engaged in violent outbursts against family members, although she did not attempt to kill anyone. The family members, including Harrison, were intimately aware of Corley's illness and its manifestations.

As the result of a hostile verbal exchange with one of her sisters, Corley was admitted to the State Hospital on July 3, 1980. Dr. Pasicatan, one of the defendant doctors, treated her while she was there. In January, 1981, she was released to the outpatient care of Dr Desrosiers, the other defendant doctor Her diagnosis upon release was paranoid schizophrenia with a guarded prognosis. Rogers alleges Dr. Pasicatan had a duty to warn Harrison of her sister's condition upon release from the hospital

Corley did well in outpatient care until August, 1982. On August 4th, her paranoid delusional system reappeared and she claimed that her sister Bernice was trying to poison her Rogers alleges Dr. Desrosiers had a duty to warn Harrison when this relapse occurred.

Corley's condition improved with medication and the doctor noted she was "Better, lots better" on August 9th. On August 19th, while at a sister's house, Corley shot three of her sisters with a handgun, killing Harrison and wounding the other two. She was arrested and committed for psychiatric evaluation. She was found incompetent to stand trial.

Significantly, there is no evidence that Corley directly threatened to harm her sisters, or anyone else, while she was under medical care. Rogers bases her case on the theory that Corley's delusions of persecution by her family were projections of her own murderous feelings towards them, which should have alerted her doctors to a high risk of "lethal action" on her part. In the face of this risk, Rogers argues, the doctors should have warned Harrison that she was endangered.

Rogers' expert witness offered testimony to support this theory as a clinical explanation for Corley's behavior. He also testified that the codes of ethics of the American Psychiatric Association and the American Psychological Association recognize a duty to warn if there is a reasonable probability of risk to a named victim or an identifiable victim or class of victims and a warning can be given without violating the patient's civil rights.

Given these facts, the dispositive question is whether the *366 law placed the doctors under a duty to warn Harrison. Unless a duty was owed in law, none of the defendants is liable for Harrison's death and the particular evidentiary questions raised by the appeal are moot.

In *Sharpe v. South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct.App.1987), *cert. dismissed*, 294 S.C. 469, 366 S.E.2d 12 (1988), we stated that South Carolina law does not recognize a general duty to warn of the dangerous propensities of others. We noted that some jurisdictions recognize a limited duty of a therapist to warn third persons when there is an apparent danger to a specific person from the therapist's patient However, we declined to recognize such a rule in *Sharpe* because there was no prior identifiable threat to the victim in that case.

In this case, there is no evidence that Corley made specific threats against Harrison or any other family member while she was being treated by the two doctors. Moreover, the family knew about her mental illness and its manifestations. They knew she could be violent towards them when she was suffering delusions of persecution. Thus, even if we were to recognize a duty to warn when a specific individual is threatened with a known danger, the rule would not apply to these facts. We therefore hold, as a matter of law, that Corley's doctors owed no duty to Harrison in this case. Whether a duty to warn exists when there is an apparent danger to a specific individual who would otherwise be unaware of the potential harm we do not decide, since that case is not before us.

Our disposition of the appeal makes it unnecessary to reach the appellant's specific exceptions, since they are all based on the assumption that the doctors were under a duty to warn Harrison. In particular, we note that the controversy over the admission **127 of the psychologist's testimony is beside the point, because the existence of a duty to warn is a question of law for the court, not a matter of opinion testimony from witnesses

AFFIRMED.

SHAW and CURETON, JJ., concur.

Parallel Citations

377 S.E.2d 125

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292 S.C. 11
Court of Appeals of South Carolina.

James L. SHARPE, as Administrator of the Estate of Bobby Charles Sharpe, Deceased, Appellant,
v.
SOUTH CAROLINA DEPARTMENT OF MENTAL HEALTH; Oliver Norman Evans, M.D.; and Patrick H. McDonaugh, M.D., Respondents.

No. 0904. | Heard Jan. 21, 1987. | Decided March 16, 1987.

Administrator of decedent's estate brought wrongful death action against Department of Mental Health and doctors after patient with history of mental illness, who had been discharged, shot and killed decedent The Court of Common Pleas, Lexington County, Julius H. Baggett, J , entered judgment for defendants. Plaintiff appealed. The Court of Appeals, Shaw, J., held that: (1) opinion by expert witness without firsthand knowledge of facts must be based as proper hypothetical question; (2) common knowledge exception to requirement of expert testimony in proving negligence did not apply to wrongful death action brought against Department of Mental Health and doctors after patient with history of mental illness, who had been discharged, shot and killed decedent; and (3) state Department of Mental Health and doctors had no duty to warn anyone involved

Affirmed.

Bell, J., concurred and filed opinion.

West Headnotes (6)

[1] **Evidence**
⇨ Hypothetical Questions and Answers

Opinion by expert witness without firsthand knowledge of facts must be based as proper hypothetical question.

2 Cases that cite this headnote

[2] **Evidence**
⇨ Due Care and Proper Conduct in General

Proper treatment of mental patient and standard of care required in deciding to discharge him under plan of outpatient care is not matter of common knowledge to average layman, for purpose of determining whether expert scientific knowledge is necessary to determine negligence with regard to plan.

2 Cases that cite this headnote

[3] **Negligence**
⇨ Necessity of Expert Testimony

Application of common knowledge exception to requirement of expert testimony in proving negligence depends on particular facts of case.

5 Cases that cite this headnote

[4] **Health**
⇨ Particular Procedures

Common knowledge exception to requirement of expert testimony in proving negligence did not apply to wrongful death action brought against Department of Mental Health and doctors after patient with history of mental illness, who had been discharged, shot and killed decedent.

7 Cases that cite this headnote

[5] **Health**
⇨ Released or Non-Committed Patients

States
⇨ State Institutions, Injuries in Operation Of

State Department of Mental Health and doctors had no duty to warn anyone involved in wrongful death action brought patient with history of mental illness shot and killed decedent; decedent did not move into trailer park where patient lived until after patient's discharge and patient and decedent did not know each other prior to patient's discharge.

1 Cases that cite this headnote

[6] **Health**
⇨ Duty to Warn in General

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Physician has no general duty to warn of potential danger to public at large by mental patient.

5 Cases that cite this headnote

Attorneys and Law Firms

**779 *12 Isadore S Bernstein, Columbia, and Walter G. Metcalfe, Cayce, for appellant.

Charles E Carpenter, Jr., and George C. Beighley, both of Richardson, Plowden, Grier & Howser, Atty. Gen. T. Travis Medlock, and Sr. Asst. Atty. Gen Edwin E. Evans, Columbia, for respondents.

Opinion

SHAW, Judge.

In this action for damages based on the alleged wrongful death of his brother, appellant, James L. Sharpe, as Administrator of the Estate of Bobby Charles Sharpe, Deceased, appeals the trial court's judgment for respondents, South Carolina Department of Mental Health; Oliver Norman Evans, M.D.; and Patrick H. McDonaugh, M.D. (hereinafter "defendants"). We affirm.

On April 30, 1979, the deceased, Bobby Sharpe, and a friend, Frank Smith, were working on a car beside the trailer in which William G. Sevits lived. Sevits, after asking the two men to keep the noise down because he had a headache, fired a shotgun from his window killing Sharpe and wounding Smith.

The record reveals Sevits has a history of mental illness and received treatment dating back to 1973. On February 2, 1979, Sevits voluntarily admitted himself to the G. Werber Bryan Psychiatric Hospital which is operated by the South Carolina Department of Mental Health. He was treated and then released on February 23, 1979, after twice requesting discharge. Sevits was advised of his need for outpatient treatment and an appointment was set up for him at the Columbia Area Mental Health Center. He was also given *13 medication to take through his first scheduled appointment.

Sharpe's complaint alleges the defendants were negligent in the treatment and discharge of Sevits as well as in failing to issue proper warnings to "the community." All parties waived a jury trial. The trial judge found for the defendants and dismissed the action

Sharpe argues the trial judge erred in (1) excluding the deposition of Sharpe's only expert witness, (2) failing to apply the "common knowledge" exception to the requirement of expert testimony in proving negligence and proximate cause, and (3) holding the defendants had no "affirmative duty to warn of the release of a violent patient in the absence of specific threats of harm to a particular individual...."

I.

The admission of evidence is discretionary with the trial judge, and this court will not disturb the judge's decision absent a clear showing of an abuse of that discretion, with resulting prejudice to an appellant. *Cudd v. John Hancock Mutual Life Insurance Company,* 279 S.C. 623, 310 S.E.2d 830 (Ct.App.1983).

[1] Sharpe sought to introduce at trial the deposition of Dr. John W Davis, a psychiatrist. Dr Davis never treated Sevits and had no personal knowledge of the facts of this case. The defendants objected because Dr Davis' opinions are not based on any "probable hypothetical question." Sharpe argued a hypothetical question is unnecessary. The trial judge disagreed, ruling an opinion by an expert witness without firsthand knowledge of the facts, must be based on a proper hypothetical question. We agree. This rule was recently reaffirmed by this court in *Logan v. Gatti,* 289 S.C. 546, 347 S.E.2d 506 (Ct.App.1986). We hold the trial judge did not err in excluding the deposition on this ground [1]

*14 II.

Sharpe argues expert scientific knowledge is not necessary to conclude the defendants **780 were negligent and, thus, the trial judge erred in finding such evidence is necessary.

First, we note this position is inconsistent with Sharpe's attorney's arguments at trial:

> ... the only way we can show negligence on the part of ... [the defendants] in the treatment is for an expert to say where did they go

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> wrong in failing to prescribe a certain medication and so forth.

The attorney later, in arguing for a new trial, stated:

> It was essential for proof of our case that we have evidence by a competent psychiatrist, establishing that there were deviations on the part of the defendants here from the standard of proper medical care with respect to patient's evidence.

[2] [3] [4] Second, we hold the proper treatment of a mental patient like Sevits and the standard of care required in deciding to discharge him under a plan of outpatient care is not a matter of common knowledge to the average layman. The application of the common knowledge exception to the requirement of expert testimony in proving negligence depends on the particular facts of a case. We hold it is not proper on these facts

III.

The trial judge, in his order, held that South Carolina has not "recognized a general duty to warn of the dangerous propensities of others." We are aware some states have imposed a duty on therapists, based on a therapist-patient relationship, to warn third persons when there is a danger to a specific person from the therapist's patient [2]

[5] However, this issue is not before us There was no identifiable threat to Bobby Sharpe on these facts In fact, the decedent, Bobby Sharpe, did not move into the trailer park where Sevits lived until after the defendants *15 discharged Sevits. Nothing in the record indicates Sevits and Sharpe knew each other prior to Sevits's discharge

[6] Sharpe argues the case of *Crowley v. Spivey,* 285 S.C. 397, 329 S.E.2d 774 (Ct.App.1985), imposes a general duty to warn on a physician of a potential danger to the public at large by a patient We disagree.

In *Crowley,* a couple divorced and the father later obtained custody of the couple's two children from the mother. When the father learned the mother, who had received treatment for paranoid schizophrenia for eight years, had obtained a gun, he informed the mother's parents, the Spiveys, he would no longer permit any visitation outside his home. The Spiveys assured the father they would supervise the care and safety of the children during the mother's visitation with the children in the Spivey's home. During such a visit the mother shot and killed the two children. This court affirmed jury verdicts for damages in suits brought by the father for the wrongful death of each child. However, this court did not declare a general duty to warn of a danger to unknown third persons based on any special relationship. The court found a duty of care existed in that case " . grounded in the legal proposition that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care " We hold it is patent from a reading of the case that *Crowley* does not support Sharpe's argument in this case. The trial judge did not err in finding the defendants had no duty to warn anyone in this case.

AFFIRMED.

GARDNER, J., concurs

BELL, J., concurs in a separate opinion.

BELL, Judge, concurring:
I agree the judgment must be affirmed, but for reasons other than those given by the Court.

**781 Sharpe prosecuted his suit on a theory of negligence. A cause of action for negligence arises from the concurrence of three essential elements. (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission, i e. failure to exercise the care of a *16 reasonable man in the circumstances; and (3) damage proximately resulting from the breach. *South Carolina Insurance Co. v. James C. Greene & Co.,* 290 S.C. 171, 348 S.E.2d 617 (Ct.App.1986). Whether the defendant is under a legal duty to the plaintiff is a question of law for the court; whether the defendant failed to observe the standard of care required by law in a particular case and whether his conduct proximately caused damage to the plaintiff are questions of fact for the trier of fact *Rogers v. Atlantic Coast Line Railroad Co.,* 222 S.C. 66, 71 S.E.2d 585 (1952), *Kulik v. Public Service Co. of Colorado,* 43 Colo.App. 139, 605 P.2d 475 (1979), *aff'd sub nom. Metropolitan Gas Repair Service, Inc. v. Kulik,* 621 P 2d 313 (Colo.1980); *Walters v. Kellam & Foley,* 172 Ind.App. 207, 360 N.E.2d 199 (1977). In this sense, negligence is a mixed question of law and fact *Rogers v. Atlantic Coast Line Railroad Co., supra.*

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The existence of a duty owed is not incidental to a cause of action for negligence; it is an indispensable element of the plaintiff's case. The question of liability for negligence cannot arise at all until it is established that the one who has been negligent owed some duty to the person who seeks to make him liable for his negligence. *Le Lievre v. Gould,* [1893] 1 Q B.D 491 (per Lord Esher, M.R.). "Proof of negligence in the air, so to speak, will not do." *Palsgraf v. Long Island Railroad Co*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (quoting Sir Frederick Pollock).

Our own Supreme Court has repeatedly affirmed this rule. In *Kershaw Motor Co. v. Southern Railway Co.,* 136 S.C. 377, 382, 134 S.E. 377, 378 (1926), the Court stated:

> An essential ingredient in any conception of negligence is that it involves the violation of a legal duty, which one person owes to another- the duty to take care for the safety of the person or property of the other; and the converse of the proposition is that, where there is no legal duty to exercise, there can be no actionable negligence. Therefore it is reasoned that a plaintiff, who grounds his action upon the negligence of the defendant, must show, not only that the conduct of the defendant was negligent, but also that it was a violation of some duty which the defendant owed him.

*17 Likewise, in *South Carolina Electric & Gas Co. v. Utilities Construction Co*, 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964), the Court held:

> The breach of a legal duty is essential to negligence and such legal duty is that which the law requires to be done or forborne with respect to a particular individual or the public at large. Without a violation of such a legal duty, there is no negligence

See also Brown v. South Carolina Insurance Co., 284 S.C. 47, 324 S.E.2d 641 (Ct.App.1984), *cert. dismissed,* 290 S.C. 154, 348 S.E.2d 530 (1986) (negligent conduct becomes actionable only when it violates some specific legal duty owed to the plaintiff); *Chrisley v. United States,* 620 F.Supp. 285 (D.S.C.1985), *affirmed without published opinion,* 791 F.2d 165 (4th Cir.1986) (where there is no duty owed to the plaintiff, there can be no negligence by the defendant); *Degg v. Midland Railway Co*, (1857) 1 H. & N. 773 (there is no intrinsic negligence; there can be no action except in respect of a duty infringed).

In this case, Sharpe argues the Department of Mental Health was negligent in two particulars: (1) it failed to give Sevits proper medical treatment or aftercare and (2) it failed to warn the public Sevits was in an unstable condition when it released him [1] To impose liability on either of these **782 theories, Sharpe was required to establish the Department owed him a duty respecting the matters alleged.

Sharpe claims the Department deviated from accepted standards of professional care in treating Sevits for mental illness. But the duty to observe appropriate standards of medical care was a duty owed to Sevits, not a duty owed to Sharpe. Sharpe was a stranger to the treatment process Sharpe had no relationship with the Department from which a duty to him could arise. His position was no different from that of any member of the general public as far as *18 the Department was concerned. He also had no relationship with Sevits. He moved next door to Sevits *after* Sevits had been treated and discharged He and Sevits did not know each other at the time Sevits was hospitalized. In these circumstances, even if the Department failed to observe due care in treating Sevits, there was no liability to Sharpe. "To prove negligence it is not enough to shew that the defendant has been negligent to others, the plaintiff must shew that there has been a breach of duty towards himself." *Thomas v. Quartermaine,* (1887) 18 Q.B.D. 685, 698 (per Bowen, L J). The plaintiff must sue in his own right for a breach of duty personal to him, and not as the vicarious beneficiary of a breach of duty to another. *Palsgraf v. Long Island Railroad Co., supra*

Accordingly, I would hold that Sharpe failed to prove liabililty arising from the Department's alleged negligent treatment of Sevits. Sharpe's theory would overthrow settled doctrine in favor of a rule that one rendering medical services owes a duty of care not only to the patient he treats, but to the whole world. It would make doctors and hospitals liable to the Frank Smiths who happen casually on the scene as well as the Bobby Sharpes who live next door. It would create no end of liability for negligence. Such a rule would be as unwise as it is unprecedented.

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Sharpe next argues the Department negligently failed to warn him or the general public that Sevits was unstable at the time of his release

Ordinarily, the common law imposes no duty on a person to act *Brown v. South Carolina Insurance Co., supra, Carolina Chemicals, Inc. v. South Carolina Department of Health & Environmental Control,* 290 S.C. 498, 351 S.E.2d 575 (Ct.App.1986). As a rule, an affirmative duty exists in law only if imposed by statute, contract, relationship, status, property interest, or some other special circumstance. *Id.* Therefore, the defendant generally incurs no liability for failure to take positive steps to benefit others or to protect them from harm not created by his own wrongful act. *Carrier v. Riddell, Inc*, 721 F.2d 867 (1st Cir.1983); *Williams v State,* 34 Cal.3d 18, 192 Cal.Rptr. 233, 664 P.2d 137 (1983); Restatement (Second) of Torts § 314 (1965)

Unlike South Carolina, some states have imposed a duty *19 on therapists to warn third parties when there is a danger to a specific person from the therapist's patient.[2] Even if we were to adopt such a rule, it would not avail Sharpe in this case. There was no threat to Bobby Sharpe as a specific individual at the time Sevits was treated and released. As previously noted, Sharpe moved next door to Sevits after the Department treated and discharged him Sevits and Sharpe did not know each other prior to Sevits's treatment and discharge. Sevits made no specific threats about Sharpe during the course of his treatment Thus, there was no basis for the Department to warn Sharpe individually, even if a duty to warn was imposed by law. Counsel has cited no case in which a court has found a duty to warn in the absence of a known danger to a specific individual [3]

**783 Sharpe, however, also asks us to recognize a legal duty to warn the public at large when a mental patient is released. I agree with the Court that no such duty exists in South Carolina law.[4] Furthermore, I see no principle of the common law which compels us to recognize such a duty.

As a practical matter, there is no effective way to give the public a meaningful warning that a released patient is potentially unstable. A treating facility could, perhaps, place a warning in the "legal notices" section of the newspaper No doubt, if we recognized a general duty to warn, hospitals and therapists, in order to protect themselves from liability, would adopt a policy of routinely issuing warnings upon the release of every patient. However, this would entail substantial human and economic costs. It would increase the financial *20 and administrative burdens on those rendering treatment; it would create new grounds for legal liability based on the content of the warnings; it would intrude on the patient's privacy; it would often be therapeutically counterproductive; it would publicly stigmatize mental patients and most probably deter them from seeking treatment; it would undermine the policy favoring voluntary rather than involuntary treatment for mental disorders; it would undermine the policy favoring release and reintegration of mental patients into the community, and rather than making the law more simple and more certain, it would create a maze of complex legal questions where none presently exists.

Balanced against these substantial costs are the negligible benefits of the rule The creation of a duty to warn is unlikely either to alert the public or to prevent tragedies such as Bobby Sharpe's death Since warnings would be issued routinely to avoid legal liability, the cry "Wolf!" would have no meaningful effect on public awareness or safety.

Sharpe argues that warning the public would allow the police or the family of a mental patient to take preventive measures when he is released. This "Big Brother" approach to the problem is not appealing. The police have neither the competence, the duty, nor the legal authority to supervise aftercare for mental patients. They cannot, as Sharpe suggests, simply enter a patient's home, search it, and confiscate anything that might be potentially dangerous to the patient or third parties. They have no authority to force a person to take his medication or otherwise comply with his treatment regime Warning the patient's family is no better. In this case, Sevits was thirty-five years old and lived by himself. Members of his family were aware of his mental problems. It is pure conjecture to suppose if they had been warned Sevits was unstable they could have or would have taken any action that would have prevented Bobby Sharpe's death.

Sharpe's death was a terrible misfortune In law, however, his action lies against the one who inflicted the harm, not against another who failed to prevent it.

In summary, I would hold the Department owed Sharpe no duty with respect to Sevits's treatment and no duty to *21 warn upon his release Since a duty owed was essential to Sharpe's cause of action for negligence, the judgment for the defendants should be affirmed. It is unnecessary to address the evidentiary questions raised by the appeal, since Sharpe's case fails as a matter of law.

Parallel Citations

354 S.E 2d 778

Footnotes

1 Even the use of proper hypothetical questions would not necessarily have made Dr. Davis' testimony admissible. It is not at all clear, as Sharpe contends, that under Rule 87(D)(3), Rules of Practice for the Circuit Courts of South Carolina, a. deposition is admissible simply on the basis of the attorney's statement the deponent is absent from the state *See Stone v. Guaranty Bank & Trust Co.*, 270 S.C. 331, 242 S.E.2d 404 (1978).

2 For example, see *Tarasoff v. Regents of University of California* 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976).

1 Originally, Sharpe also alleged negligence by reason of improper discharge from a treatment facility of the Department. The Supreme Court held this claim was barred by Section 44-17-900, Code of Laws of South Carolina, 1976, which grants immunity to those legally participating in the release or discharge of a patient from a mental health facility. *See Sharpe v. South Carolina Department of Mental Health*, 281 S.C. 242, 315 S.E.2d 112 (1984)

2 *See, e g., Tarasoff v. Regents of University of California*, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976).

3 For cases holding no such duty exists, see *Thompson v. County of Alameda*, 27 Cal 3d 741, 167 Cal.Rptr. 70, 614 P.2d 728 (1980); *Furr v. Spring Grove State Hospital*, 53 Md.App. 474, 454 A.2d 414 (1983), *Cairl v. State*, 323 N.W.2d 20 (Minn 1982).

4 Contrary to Sharpe's argument, I do not read the Supreme Court's prior opinion in this case as recognizing a duty to warn. The main issue in that appeal was whether the immunity statute, Section 44-17-900, had been impliedly repealed In discussing Sharpe's other allegations of negligence, the Court simply observed: "[T]he complaint contains allegations which *may* state other grounds for recovery not protected by the provisions of Section 44-17-900." *Sharpe v. South Carolina Department of Mental Health*, 281 S.C 242, 246, 315 S E.2d 112, 114 (1984) (emphasis added). It seems highly unlikely that the Court, with this tentative remark, intended to announce an important new doctrine of the tort law in South Carolina

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393 S.C. 240
Supreme Court of South Carolina.

J. DOE, by and through his Guardian ad Litem, F. DOE, Appellant,
v.
WAL–MART STORES, INC. and Dorchester County Department of Social Services, Defendants, of which Wal–Mart Stores, Inc. is the Respondent.

No. 26993. | Heard Feb. 15, 2011. | Decided June 27, 2011.

Synopsis

Background: Child's great uncle filed a negligence complaint against retail store after store failed to report suspected abuse depicted in photographs great aunt attempted to have developed at store. The Circuit Court, Charleston County, Roger M. Young, J., granted store summary judgment. Great uncle appealed.

[Holding:] The Supreme Court, Pleicones, J , held that retail store was not civilly liable due to store employees' failure to report suspected child abuse, as required by the South Carolina Reporter's Statute.

Affirmed.

West Headnotes (8)

[1] **Action**
⇨ Statutory rights of action

Infants
⇨ Particular Reporters

Retail store was not civilly liable due to store employees' failure to report suspected child abuse, as required by the South Carolina Reporter's Statute, depicted in photographs of child great aunt tried to develop at store, in great uncle's negligence action against retail store; the reporting statute did not create private cause of action for negligence based on failure to report suspected or known child abuse. Code 1976, § 63–7–310(A).

Cases that cite this headnote

[2] **Negligence**
⇨ Elements in general

In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages.

1 Cases that cite this headnote

[3] **Negligence**
⇨ Negligence as question of fact or law generally

Whether a defendant has acted negligently is a mixed question of law and fact.

1 Cases that cite this headnote

[4] **Negligence**
⇨ Protection against acts of third persons

Negligence
⇨ Duty to warn

There is no general duty to control the conduct of another or to warn a third person or potential victim of danger.

2 Cases that cite this headnote

[5] **Negligence**
⇨ Protection against acts of third persons

There are five exceptions to the general rule that there is no general duty to control the conduct of another or to warn a third person or potential victim of danger: (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

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(5) where a statute imposes a duty on the defendant.

2 Cases that cite this headnote

[6] **Negligence**
⇨ Duty to warn

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.

1 Cases that cite this headnote

[7] **Negligence**
⇨ Standard of Care

The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case.

Cases that cite this headnote

[8] **Infants**
⇨ Particular Reporters

Retail store did not owe a common law duty to child victim to report suspected child abuse, which was allegedly depicted in photographs great aunt tried to develop at store; store did not have a special relationship with child victim, it had no general duty to control the conduct of child victim's father, child's alleged abuser, and store did not negligently or intentionally create the risk of father's sexual abuse

Cases that cite this headnote

Attorneys and Law Firms

**909 Russell S. Stemke, of Isle of Palms, for Appellant.

Regina H. Lewis, of Gaffney, Lewis & Edwards, of Columbia, for Respondent.

Opinion

Justice PLEICONES

*242 Appellant brought an action against respondent Wal-Mart Stores, Inc. ("Wal-Mart") alleging various theories of negligence. The circuit court granted summary judgment in favor of Wal-Mart We affirm.

FACTS

This case arises from the physical and sexual abuse of then three-year-old J. Doe ("the victim"). The facts, in the light most favorable to appellant, are as follows Appellant, F. Doe, is the victim's guardian ad litem and great uncle F. Doe and his wife ("the aunt") often kept the victim for months at a time. According to the aunt, both of the victim's parents physically abused him beginning when he was three months old. She claimed she had seen bruising on the victim's legs and buttocks, and had observed the father "thump" the victim in the mouth and hit the child with a fly swatter. She did not, however, report the abuse to DSS or the police or seek medical attention for the victim. The aunt did not report the abuse because she feared DSS would remove the victim from his parents' home and she would not be allowed to see him.

In August 1997, upon picking up the victim from his parents' house, the aunt was informed by the victim's mother that the victim had bruises on his buttocks because he had fallen down the steps After arriving at her house, the aunt examined the victim and found two "wide strips" of bruising on his buttocks. Again, she did not contact the police or DSS or seek medical treatment Instead, she took two photographs of the victim's buttocks.

After the victim had been in the aunt's custody for several hours, the victim's father called her and told her to bring the victim home because DSS was there. The aunt took the victim home as requested, but did not attempt to speak with the DSS worker who was investigating the abuse allegations. *243 This investigation did not result in the victim's removal from the home.

Several days later, the aunt took the roll of film, which included other unrelated photographs, to Wal-Mart to be developed. When the aunt retrieved the photos, a photo technician informed her she had destroyed some of the photos because of a store policy requiring the destruction of

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photos depicting nudity. The aunt explained to the employee she needed the photos to give to DSS and pleaded with her to provide the photos. The aunt claimed the employee refused and told her **910 she was required to "destroy them," which the aunt believed meant the employee had destroyed the photos and the negatives. The employee did not, however, destroy the negatives. The aunt left the store with the remainder of the photos and all of the negatives, but erroneously believed the negatives depicting the victim's buttocks had been destroyed.

According to the aunt, the victim's father began sexually abusing him in September 1997, approximately one month after the incident that had caused the aunt to take the photos and DSS to investigate. In December 1997, while giving the victim a bath, the aunt noticed signs of sexual abuse. The aunt took the victim to a doctor who examined the victim and determined he had been sexually abused. The aunt and the doctor contacted DSS, and the victim was placed in the aunt's custody.

Father pled guilty to first degree criminal sexual conduct and was sentenced to twenty-five years' imprisonment.

In 2003, appellant instituted this action, arguing the victim's injuries from the sexual abuse were a result of (1) Wal–Mart's failure to report the suspected physical abuse depicted in the photos as required by the Reporter's Statute; [1] and/or (2) Wal–Mart's negligent hiring and supervision of its employees and its violations of approximately twenty internal company policies. The circuit court granted Wal–Mart's motion for summary judgment

*244 *ISSUE*

Did the circuit court err in granting summary judgment in favor of Wal–Mart?

STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of material fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party *Fleming,* 350 S.C. at 493–94, 567 S.E.2d at 860.

LAW/ANALYSIS

The circuit court granted summary judgment in favor of respondent, finding Wal–Mart incurred no civil liability for failing to report the suspected child abuse as required by the Reporter's Statute. The circuit court also found Wal–Mart had no common law duty to warn or protect the victim, and that Wal–Mart's internal policies did not create such a duty.

I. *Civil Liability Under the Reporter's Statute*

[1] Appellant first argues the circuit court erred in finding Wal–Mart did not have any civil liability for failing to report the suspected child abuse as required by the South Carolina Reporter's Statute. We disagree.

The Reporter's Statute provides, in pertinent part:

> ... [P]ersons responsible for processing films .. 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 63–7–20. [2]

*245 S.C.Code Ann. § 63–7–310(A) (Supp 2010).

In *Doe v. Marion,* 373 S.C. 390, 645 S E.2d 245 (2007), the Court found there could be no private right of action for failing to report suspected or known child abuse in accordance with § 63–7–310. In deciding whether § 63–7–310 gives rise to a private cause of action for negligence *per se,* the Court noted **911 the main factor in determining whether a statute creates a private cause of action is legislative intent:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the

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> statute .. In this respect, 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.

Id. at 396, 645 S.E.2d at 248 (quoting *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990))

The Court first observed § 63–7–310 is silent as to civil liability for failure to report Noting other provisions in the Reporter's Statute do impose civil liability,[3] the Court found the legislature's silence as to civil liability in § 63–7–310 indicated its intent not to create civil liability for failing to report as required. *Id.* at 397, 645 S E.2d at 249 (citing *Byrd v. Irmo High Sch*, 321 S.C. 426, 433–34, 468 S.E.2d 861, 865 (1996) (finding when one provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist)).

Further, the Court looked to the purpose of the Children's Code and determined § 63–7–310 is concerned with the protection of the public and not with the protection of an individual's private right. *Id.* at 398, 645 S.E.2d at 249. The Court also noted other jurisdictions have interpreted similar statutes and reached the same conclusion *Id.* at 198 n. 4, 645 S.E.2d at 249 n. 4.

*246 Because, consonant with *Doe v. Marion*, there can be no private cause of action under § 63–7–310, we find the circuit court properly granted summary judgment in favor of respondent as to this claim.

II. *Other Causes of Action*

Appellant also asserts the circuit court erred in granting summary judgment in favor of Wal–Mart on various other theories of common law negligence. We disagree.

Respondent has an internal policy against developing photos depicting nudity. The policy requires employees to bring to the attention of the store manager pornographic pictures of children where child abuse is suspected It also prohibits the printing of pictures depicting nudity and requires they be shredded if printed in error There is an exception for cases of suspected child abuse, where the developed photos must be kept as evidence. However, the policy requires processed negatives be returned to the customer

[2] [3] In order to establish a claim for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) defendant breached the duty by a negligent act or omission; (3) defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) plaintiff suffered an injury or damages. *Doe v. Marion*, 373 S.C. at 400, 645 S E.2d at 250. Whether a defendant has acted negligently is a mixed question of law and fact *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct.App.2007) First, the court must determine, as a matter of law, whether the law recognizes a particular duty If there is no duty, the defendant is entitled to a judgment as a matter of law *Id* (internal citations omitted).

[4] [5] "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." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) 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 *247 negligently or intentionally creates **912 the risk; and 5) where a statute imposes a duty on the defendant *Id*

[6] 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 " *Doe v. Marion, supra* (quoting *Bishop v South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E 2d 78, 81 (1998)).

[7] Once a duty has been established, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform 57A Am.Jur.2d *Negligence* § 132. "The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case " *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 140, 638 S.E 2d 650, 659 (2006) "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a

defendant's own policies and guidelines." *Id.* (citing *Peterson v. Natl. R.R. Passenger Corp.*, 365 S.C. 391, 397, 618 S.E.2d 903, 906 (2005). It follows that, if no duty has been established, evidence as to the standard of care is irrelevant. Only when there is a duty would a standard of care need to be established.

[8] The circuit court found Wal–Mart neither owed any common law duty to the victim, nor did it create or undertake any duty when its employees failed to follow Wal–Mart's internal policies.

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 *248 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.

We also hold Wal–Mart did not voluntarily undertake a duty. It is undisputed that Wal–Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence However, this internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law. *See Madison, supra.*

CONCLUSION

We find the circuit court's grant of summary judgment in favor of Wal–Mart was proper because there can be no civil liability under the Reporter's Statute and Wal–Mart owed no duty to the victim Accordingly, the order of the circuit court is

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur

Parallel Citations

711 S.E 2d 908

Footnotes

1 S.C.Code Ann. § 63–7–310 (Supp.2010).

2 Section 63–7–20 defines "child abuse or neglect" as a number of actions carried out expressly by "the parent, guardian, or other person responsible for the child's welfare "

3 Namely, §§ 20–7–567 and –570 (now §§ 63–7–440 and –430) impose civil liability for making a false report.

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401 S.C. 500
Court of Appeals of South Carolina.

Patricia Rhodes JOHNSON, Appellant,
v.
ROBERT E. LEE ACADEMY, INC., Jennifer Hostetler, Marc Quigley, Moore, Beauston & Woodham, LLP, Moore, Kirkland & Beauston, LLP and City of Bishopville, Defendants,
Of Whom Moore, Beauston & Woodham, LLP is the, Respondent.
Appellate Case No. 2011–198446.

No. 5067. | Heard Nov. 13, 2012. | Decided Dec. 28, 2012.

Synopsis

Background: Former bookkeeper/office manager of school brought negligence action against accounting firm hired by school to investigate missing money. The Circuit Court, Lee County, W. Jeffrey Young, J., granted summary judgment in favor of accounting firm. Bookkeeper/office manager appealed.

[Holding:] The Court of Appeals, Konduros, J., held that accounting firm hired by school to assist authorities owed no duty of care to bookkeeper/office manager.

Affirmed.

West Headnotes (5)

[1] **Accountants**
⇨ Duties and liabilities to third persons

Former bookkeeper/office manager fired by school after funds went missing was not client of accounting firm hired by school to assist law enforcement in investigating missing funds, and therefore, firm owed bookkeeper/office manager no duty of care, as required to support negligence action, where firm did not render a service to bookkeeper/office manager.

Cases that cite this headnote

[2] **Negligence**
⇨ Duty as question of fact or law generally

Whether the law recognizes a particular duty is an issue of law to be determined by the court.

Cases that cite this headnote

[3] **Negligence**
⇨ Necessity and Existence of Duty

An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance.

Cases that cite this headnote

[4] **Negligence**
⇨ Necessity and Existence of Duty

Ordinarily, the common law imposes no duty on a person to act.

Cases that cite this headnote

[5] **Negligence**
⇨ Voluntarily Assumed Duty

Negligence
⇨ Voluntarily assumed duties

Where an act is voluntarily undertaken, the actor assumes the duty to use due care.

Cases that cite this headnote

Attorneys and Law Firms

**512 James B. Moore, III and J. Edward Bell, III, both of Law Office of J. Edward Bell, LLC, of Georgetown, for Appellant

Mason A. Summers, Anthony E. Rebollo, and Francis Marion Mack, all of Richardson Plowden & Robinson, PA, of Columbia, for Respondent

Opinion

KONDUROS, J.

*501 Patricia Johnson appeals the circuit court's grant of summary judgment to the accounting firm Moore, Beauston, & Woodham, LLP (MBW) with respect to her negligence claim. We affirm.

FACTS/PROCEDURAL HISTORY

Johnson was employed as the bookkeeper and office manager at Robert E. Lee Academy in Lee County, South Carolina. Her responsibilities in that role included collecting and depositing *502 tuition and other incoming funds Around the middle of May 2006, Johnson had collected funds including $9,100 in cash plus additional cash and checks. On May 17, Johnson accounted for the $9,100 in her record keeping and planned to deposit the funds in the bank. Not having time to reconcile the additional cash and checks, she placed those funds in a container in the school's vault. According to bank records, the $9,100 deposit was made the morning of May 18. Johnson was delayed in depositing the other monies for various personal reasons, and when she arrived at work on May 23, the container was missing. She reported this to the school principal, Mrs Virginia Stokes.

**513 The school began an investigation into the missing funds and the Bishopville Police Department was brought in to assist. As part of the investigation, Johnson made a list of deposits from the weeks immediately preceding the disappearance of the funds and that list showed Johnson had made the $9,100 deposit. The school's monthly statement from the bank also showed the deposit

Johnson was fired from her position at the school, and the school board hired MBW to investigate the missing funds. [1] Marc Quigley was the accountant from MBW assigned to this task. Quigley met with the Bishopville Police investigating officer, Calvin Collins, and Agent Glen McClellan from the South Carolina Law Enforcement Division on August 8. Agent McClellan testified in his deposition Quigley indicated funds appeared to be missing. A schedule of deposits compiled by MBW and the list created by Johnson were inconsistent because the MBW list did not show the $9,100 deposit. Agent McClellan also indicated he provided Quigley with his email address should further information come to light about which the authorities should know According to Quigley, he emphasized to Officer Collins and Agent McClellan during this meeting his review was still in the preliminary stages and had not been finalized. Later that same day, Quigley compared the financial records and lists and realized the $9,100 deposit had been made. He emailed Agent McClellan with that *503 information the same day and also informed Katherine Woodham, a Robert E Lee Academy school board member involved in the investigation. No one informed the Bishopville Police Department of this discovery An arrest warrant accusing Johnson of misappropriating $9,100 was issued on August 15 and Johnson turned herself in to authorities on August 16. [2] The charges against Johnson were subsequently dropped

Johnson sued Robert E. Lee Academy, Jennifer Hostetler and Marc Quigley (both of MBW), MBW, and the City of Bishopville for defamation, abuse of process, malicious prosecution, negligence, and false imprisonment The claims against MBW were all dropped with the exception of the defamation and negligence claims. The circuit court granted summary judgment in MBW's favor on both remaining causes of action. With respect to the negligence claim, the circuit court determined that because Johnson was not a client, MBW owed no duty of care thereby eliminating that claim as a matter of law. This appeal followed.

STANDARD OF REVIEW

A trial court may grant a party's motion for summary judgment "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." Rule 56(c), SCRCP. "An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Epstein v. Coastal Timber Co*, 393 S.C. 276, 281, 711 S.E 2d 912, 915 (2011). "This Court has established that '[t]he plain language of Rule 56(c) mandates the entry of summary judgment . against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof.' " *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 357–58, 650 S.E 2d 68, 71 (2007) (internal citations omitted).

*504 LAW/ANALYSIS

[1] Johnson maintains the circuit court erred in finding MBW owed her no duty. She contends Quigley's actions

constituted a voluntary undertaking that gave rise to a duty of care toward her. We disagree.

[2] [3] [4] [5] "Whether the law recognizes a particular duty is an issue of law to be determined by the court." *Ellis v. Niles,* 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). "An affirmative legal duty exists only if created by statute, contract, relationship, status, ****514** property interest, or some other special circumstance." *Hendricks v. Clemson Univ.,* 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) "Ordinarily, the common law imposes no duty on a person to act. Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care." *Id.* at 456–57, 578 S.E.2d at 714 (citing *Russell v. City of Columbia,* 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991)).

The recognition of a voluntarily assumed duty in South Carolina jurisprudence[3] 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, ***505** 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.

The relationship between Johnson and MBW does not fit within the parameters set forth in section 323(a). Section 323(a) contemplates a party relying on the rendering of services to another for the other's protection. Even assuming Quigley acted voluntarily, he assisted the Bishopville Police Department in its investigation.[4] He did not render a service to Johnson; he assisted authorities. Additionally, his conduct was not undertaken for Johnson's protection and any negligence in his performance did not result in her physical harm.[5]

Furthermore, contorting the Restatement to create a precedent that may have a chilling effect on cooperation with the authorities or other conduct that inures to the public good is ill-advised and poor public policy. *See Underwood v. Coponen,* 367 S.C. 214, 219 n. 3, 625 S.E.2d 236, 239 n. 3 (Ct.App.2006) ("If we extended the duty to require private landowners to ensure that their trees do not hinder traffic control devises, we would be discouraging private landowners from voluntarily maintaining vegetation on their property which adjoins a ***506** public roadway or highway in an effort to shield themselves from unwarranted liability"), *Staples,* 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct.App.1997) (declining to impose duty on defendant to inspectproperty ****515** under circumstances as doing so "would create the highly undesirable precedent of encouraging rural landowners to shield their eyes and never inspect their land"). Other causes of action exist to address when citizens have been maliciously accused of or prosecuted for a crime.

Additionally, in *Hendricks,* 353 S.C. at 456–58, 578 S.E.2d at 714–15, the South Carolina Supreme Court signaled a reluctance to expand the voluntary assumption of duty doctrine beyond the circumstances set forth in the Restatement 323 and recognized in our jurisprudence.

> We believe recognizing a duty flowing from advisors to students is not required by any precedent and would be unwise, considering the great potential for embroiling schools in litigation that such recognition would create. Further, the Court of Appeals citation to *Miller* [329 S.C. at 318, 494 S.E.2d at 817] indicating a duty may have been created by Clemson's voluntary undertaking to advise Hendricks to ensure NCAA eligibility, is inapposite. The line of cases *Miller* discusses have thus far been limited to situations in which a party has voluntarily undertaken to prevent physical harm, not economic injury.

Id. at 458, 578 S.E.2d at 715.

The circumstances of this case do not fit within the existing voluntary assumption of duty framework, and we decline to expand that doctrine under the facts presented.[6]

Additionally, Johnson submitted with her Rule 59(e), SCRCP, motion the affidavit of John Hamilton, a certified public accountant, who opined MBW owed Johnson a duty

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of care under the circumstances. However, the existence of a *507 legal duty is a question of law for the court, and Hamilton's affidavit does not call into question any facts in the case *See Hendricks,* 353 S.C. at 456, 578 S.E.2d at 714 ("Whether the law recognizes a particular duty is an issue of law to be decided by the Court."). The affidavit simply proposes extending the potential third-party liability of an accountant beyond the limitations placed thereon by the Restatement Consequently, his affidavit did not create a genuine issue of material fact warranting the reconsideration of the circuit court's decision as to summary judgment.

Because MBW did not render a service to Johnson or for her protection from physical harm, we conclude MBW owed no duty of care to Johnson as a matter of law arising out of Quigley's conduct in communicating with police officials regarding the investigation into REL's missing funds. The circuit court's grant of summary judgment is

AFFIRMED.

SHORT and LOCKEMY, JJ , concur.

Parallel Citations

737 S.E.2d 512, 289 Ed. Law Rep. 388, 34 IER Cases 1395

Footnotes

1 Whether MBW was hired to perform an actual audit or just to investigate the missing funds is disputed; however, that does not affect our analysis of the issues on appeal.

2 The record is unclear as to exactly the amount of funds that were unaccounted.

3 *See Madison ex rel. Bryant v. Babcock Ctr., Inc.,* 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006) (recognizing a duty may arise under section 323); *Russell v. City of Columbia,* 305 S C. 86, 89–90, 406 S.E.2d 338, 340 (1991) (relying in part on section 323 to find duty may exist between volunteer defendant and plaintiff); *Sherer v. James,* 290 S.C. 404, 407–08, 351 S.E.2d 148, 150 (1986) (internal citation omitted) (" 'Section 323(a) simply establishes a duty on one who undertakes to render services for the protection of another *to use due care* to avoid increasing the risk of harm.' We agree with this rationale "); *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.,* 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (finding common law duty of care arose under section 323 when lender undertook to repair defects in condominiums); *Shropshire v. Jones,* 277 S.C. 468, 471, 289 S.E.2d 410, 411 (1982) (stating cause of action for negligent performance of gratuitous promise is summarized in Restatement section 323); *Staples v. Duell,* 329 S.C. 503, 510, 494 S E 2d 639, 643 (Ct.App.1997) (noting the South Carolina Supreme Court recognized section 323(a) "as relating to the element of duty."); *Goode v. St Stephens United Methodist Church,* 329 S C 433, 444–45, 494 S.E.2d 827, 832–33 (Ct App.1997) (finding no duty under section 323 when visitor to apartment building did not rely on any security measures undertaken by the building, and any measures taken were for protection of the tenants).

4 While we do not need to reach the factual issue of whether Quigley's conduct arose to the level of volunteer, we generally agree with Chief Justice Toal's statement that "[i]t simply does not square with common sense experience to characterize a . response to a governmental inquiry as voluntary " *See Miller v. City of Camden,* 329 S.C 310, 318, 494 S.E.2d 813, 817 (1997) (Toal, C J., dissenting in part, concurring in part)

5 We are cognizant of Restatement (Second) of Torts section 324A, although that section has not been adopted by our courts and is not specifically argued by Johnson on appeal. *See Miller,* 329 S C. at 315 n 2, 494 S E.2d at 816 n. 2 (declining to adopt section 324A) Section 324A contemplates a duty arising on the part of one who undertakes to render a service to another for the protection of a third party from physical harm. However, even applying section 324A to these circumstances, Johnson's cause of action fails because Quigley's cooperation with police was not intended to protect any party from physical harm.

6 South Carolina has recognized an accountant may have a duty to a third party under a negligent misrepresentation cause of action. *See ML–Lee v. Deloitte,* 327 S C. 238, 241 n 3, 489 S.E.2d 470, 471 n. 3 (1997) ("We adopt the [Restatement (Second) of Torts] § 552 standard of liability. Under § 552, an accountant has a duty to exercise reasonable care or competence in obtaining or communicating information."). However, to successfully pursue such a claim, the plaintiff must have relied on the accountant's misrepresentation, and Johnson conceded at oral arguments she did not rely on Quigley's statements

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N.



367 S.C. 214
Court of Appeals of South Carolina.

David R. UNDERWOOD, Appellant,
v.
Laurine H. COPONEN, Carolyn T. Webb, as Personal Representative of the Estate of Ansel B. Taylor, and County of Greenville, Defendants,
Of Whom Carolyn T. Webb, as Personal Representative of the Estate of Ansel B. Taylor is the Respondent.

No. 4067. | Submitted Nov. 1, 2005. | Decided Jan. 9, 2006.

Synopsis

Background: Motorist brought action against property owner's estate alleging negligent failure to trim tree on property, thereby contributing to motorist's accident in intersection. Estate moved for summary judgment. The Circuit Court, Greenville County, John C. Few, J., granted summary judgment. Motorist appealed.

[Holding:] The Court of Appeals, Short, J., held that property owner did not assume a duty to keep tree from blocking stop sign.

Affirmed

West Headnotes (5)

[1] Negligence
⇦ Elements in general

To prevail on a theory of negligence, the plaintiff must establish three elements: (1) that defendant owed a plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that, as a proximate result of the breach, the plaintiff suffered damage.

Cases that cite this headnote

[2] Negligence
⇦ Necessity and Existence of Duty

Negligence
⇦ Duty as question of fact or law generally

In deciding whether a defendant acted negligently, the court must determine, as a matter of law, whether the law recognizes a particular duty; if there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.

1 Cases that cite this headnote

[3] Negligence
⇦ Duty to inspect or discover

Urban landowners have a duty of reasonable care to inspect trees on their property and to make certain they are safe.

2 Cases that cite this headnote

[4] Automobiles
⇦ Property adjacent to highway

Municipal Corporations
⇦ Liabilities of Abutting Owners

Landowners have a duty of reasonable care to make certain their trees are safe for travelers of streets adjoining their land.

1 Cases that cite this headnote

[5] Automobiles
⇦ Property adjacent to highway

Property owner did not assume a duty to keep a tree on his property from blocking a stop sign, and therefore, property owner was not negligent in failing to trim the tree, even though property owner occasionally trimmed the tree for the purpose of clearing the stop sign and his failure to trim the tree might have increased the risk that the sign would be obstructed, neither the driver that ran the stop sign nor the motorist that was injured by collision with driver that ran the stop sign was aware that property owner occasionally trimmed the tree and did not rely on his doing so

1 Cases that cite this headnote

Attorneys and Law Firms

**237 William H. Ehlies, II, of Greenville, for Appellant

John P. Riordan and Zandra L. Johnson, both of Greenville, for Respondent.

Opinion

SHORT, J.:

*215 Laurine Coponen ran through a stop sign at an intersection and collided with David Underwood's car Underwood brought an action against Carolyn Webb, the personal representative of Ansel Taylor's estate, alleging Taylor was negligent *216 in failing to trim a tree located on his property, thereby contributing to the accident. The trial court granted Webb's motion for summary judgment, which Underwood now appeals. We affirm. [1]

FACTS

On May 4, 2002, Underwood was driving on Ansel School Road in Greenville County when Coponen ran through a stop sign at the intersection of Ansel School Road and Sharon Drive and collided with Underwood's car. Coponen testified that she did not see the stop sign because the limbs of a tree located on Taylor's property were partially blocking the sign. The respondent, Webb, is the personal representative of Taylor's estate. Taylor's wife testified that Taylor was aware the tree's limbs could obscure the stop sign and occasionally trimmed the tree to prevent it from doing so. Coponen testified that she had driven on Sharon Drive before; however, she also testified that she was not looking for a stop sign because she mistakenly thought she was on another road that did not have stop signs

Underwood initially brought this action solely against Coponen, alleging that she was liable for his injuries from the collision because she was negligent in running the stop sign. However, on October 23, 2003, Underwood amended his complaint to include both Webb and Greenville County as additional defendants, alleging that either or both were negligent in failing to trim the tree located on Taylor's property, thereby contributing to the accident. Webb filed a motion for summary judgment. After a hearing on November 2, 2004, the trial judge granted Webb's motion. A settlement was reached between Underwood and the other defendants. Underwood now appeals.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, we apply the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure: *217 summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v.* **238 *Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.* at 494–495, 567 S.E.2d at 860. "If triable issues exist, those issues must go to the jury." *Nelson v. Charleston County Parks Recreation Comm'n,* 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004).

LAW/ANALYSIS

Underwood argues the trial court erred by granting Webb's motion for summary judgment because Taylor owed a duty of care to Underwood as a matter of law. We disagree.

[1] [2] "To prevail on a theory of negligence, the plaintiff must establish three elements: (1) that defendant owed a plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage." *Staples v. Duell,* 329 S.C. 503, 506, 494 S.E.2d 639, 641 (Ct.App.1997). "The court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law." *Simmons v. Tuomey Reg'l Med. Ctr.,* 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000).

[3] [4] In South Carolina, urban landowners have a duty of reasonable care to inspect trees on their property and to make certain they are safe. *Staples,* 329 S.C. at 508, 494 S.E.2d at 641–42 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts,* § 57 at 391 (5th ed.1984)); *Israel v. Carolina Bar–B–Que, Inc.*, 292 S.C. 282, 288, 356 S.E.2d 123, 127 (Ct.App.1987). Also, landowners have a duty of reasonable care to make certain their trees are safe for travelers of streets adjoining their land. *Staples,* 329 S.C. at 508, 494 S.E.2d at 642. In *Israel v. Carolina Bar–B–Que,* 292

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S.C. 282, 288–90, 356 S.E 2d 123, 127–28 (Ct.App.1987), we held that a landowner has a duty to protect others from "defective or unsound trees on his premises" and found the landowner was liable for the damage caused by the fallen tree limb ***218** because there was evidence that the owner either saw or could have seen upon reasonable inspection that the tree that caused the damage was partially decayed.

In this case, Taylor's tree was not unsafe or defective. The tree limb did not fall and injure Coponen. The only effect the tree limb had was that it partially obscured the stop sign, which Coponen testified that she was not looking for because she thought that she was driving on another street, which does not have stop signs. Therefore, the rule set forth in *Israel* does not apply to the facts in this case. [2]

[5] Underwood also claims that because Taylor periodically trimmed the tree on his property, he undertook the duty to keep his tree from blocking the stop sign. However, the Restatement (Second) of Torts provides:

> 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.

Staples, 329 S C at 510, 494 S.E.2d at 643 (quoting ****239** Restatement (Second) of Torts § 323(a) (1965)). While Taylor did trim the tree occasionally for the purpose of clearing the stop sign and his failure to trim the tree might have increased the ***219** risk that the sign would be obstructed, neither Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so Therefore, Taylor's occasional trimming of his tree did not create a duty for which he can be held liable. [3] Additionally, even if Taylor had assumed a duty to trim the trees, he could have abandoned the duty at any time so long as his actions did not increase any risk that might have existed. *See Id.* at 506, 494 S.E.2d at 641 (affirming the trial court's ruling that the defendant's policy of searching for dead trees did not create a duty because he could have abandoned the policy at any time as long as doing so would not increase the risk of harm).

AFFIRMED.

GOOLSBY, and ANDERSON, JJ., concur.

Parallel Citations

625 S E 2d 236

Footnotes

1 We decide this case without oral argument pursuant to Rule 215, SCACR.

2 In making their decision, the *Israel* court adopted Illinois' ruling in *Mahurin v. Lockhart,* 71 Ill App.3d 691, 28 Ill.Dec. 356, 390 N E.2d 523 (1979) Therefore, it is worth noting that subsequent to publishing the *Mahurin* decision, Illinois issued several opinions on visual obstructions In *Nichols v Sitko,* 157 Ill App 3d 950, 109 Ill.Dec. 903, 510 N.E 2d 971, 974 (1987), the court refused to extend the *Mahurin* rule, which involved an injury caused by a fallen dead branch, to an alleged visual obstruction from overgrown weeds The court reasoned that the alleged obstruction was "no different from obstructions which are caused by houses and buildings encountered routinely in daily life " *Id.* Also, in *Adame v. Munoz,* 287 Ill.App.3d 181, 222 Ill Dec. 619, 678 N.E 2d 26, 29 (1997), the court held that there is no duty "on the part of landowners to maintain their property in such a way that it does not obstruct the view of travelers on an adjacent highway, and this refusal to find such a duty applies even where the obstruction is an artificial condition."

3 We further note that not imposing a duty on Taylor promotes good public policy If we extended the duty to require private landowners to ensure that their trees do not hinder traffic control devises, we would be discouraging private landowners from voluntarily maintaining vegetation on their property which adjoins a public roadway or highway in an effort to shield themselves from unwarranted liability.

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329 S.C. 503
Court of Appeals of South Carolina.

Julie STAPLES, Appellant,
v.
Charles DUELL, d/b/
a Middleton Place, Respondent.

No. 2756. | Heard Sept. 10, 1997. | Decided Nov. 24, 1997.

Motorist who was injured when she struck tree which had fallen onto highway from adjacent rural property sued property owner. The Circuit Court, Charleston County, John C. Hayes, III, J., granted owner's motion for directed verdict, and motorist appealed. The Court of Appeals, Howell, C.J., held that (1) owner of rural land does not owe duty to inspect or improve property, and (2) actions of owner in adopting policy of searching for dead trees did not result in assumption of duty owed to motorist.

Affirmed

West Headnotes (10)

[1] **Trial**
⇨ Hearing and Determination

In deciding motion for directed verdict, evidence and all reasonable inferences must be viewed in light most favorable to nonmoving party.

Cases that cite this headnote

[2] **Trial**
⇨ Inferences from Evidence

If more than one inference can be drawn from evidence, case must be submitted to jury, but if evidence yields only one inference, directed verdict in favor of moving party is proper.

Cases that cite this headnote

[3] **Negligence**
⇨ Elements in General

To prevail on theory of negligence, plaintiff must establish three elements: (1) that defendant owed plaintiff duty of care, (2) that by some act or omission, defendant breached that duty, and (3) that as proximate result of breach, plaintiff suffered damage.

2 Cases that cite this headnote

[4] **Negligence**
⇨ Duty as Question of Fact or Law Generally

Negligence
⇨ Standard of Proof; Evidentiary Showing Required

Issue of negligence is mixed question of law and fact; court must first determine whether duty arises in one party to exercise reasonable care for benefit of another under facts of given case, existence and scope of which duty are questions of law, and thereafter, jury determines whether breach of duty has occurred and resulting damages

3 Cases that cite this headnote

[5] **Automobiles**
⇨ Falling Objects

Automobiles
⇨ Property Adjacent to Highway

Owner of rural property adjacent to highway did not owe duty of care to motorists on highway to inspect and improve land, and thus was not liable for injuries sustained by motorist who struck dead tree which had fallen from property onto highway

1 Cases that cite this headnote

[6] **Negligence**
⇨ Duty to Inspect or Discover

Rural and urban landowners have different duties and responsibilities, so that, unlike urban landowner, rural landowner does not have duty to inspect and improve his land.

2 Cases that cite this headnote

[7] **Notice**
⇨ Constructive Notice

"Constructive notice" is notice that reasonable person should know and carries duty of reasonable care.

Cases that cite this headnote

[8] **Automobiles**
⇨ Nature and Grounds of Liability

State highway department has duty to protect commuters along highways.

Cases that cite this headnote

[9] **Negligence**
⇨ Voluntarily Assumed Duties

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for 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 (1) his failure to exercise such care increases risk of such harm, or (2) harm is suffered because of other's reliance upon undertaking. Restatement (Second) of Torts § 323(a).

1 Cases that cite this headnote

[10] **Automobiles**
⇨ Falling Objects

Rural landowner's policy of searching for dead trees on property did not result in assumption by landowner of duty owed to motorists on highway adjacent to property, for breach of which landowner could be held liable in action by motorist who was injured when she struck tree which had fallen from property onto highway, policy did not increase risk of harm to motorist, and motorist did not have prior knowledge of policy and thus did not detrimentally rely on it. Restatement (Second) of Torts § 323(a).

2 Cases that cite this headnote

Attorneys and Law Firms

**640 *505 Daniel A. Beck, Charleston, for appellant.

Benjamin A. Moore, Jr., and James D. Myrick, of Buist, Moore, Smythe & McGee, Charleston, for respondent.

Opinion

HOWELL, Chief Judge:

Julie Staples brought this suit against Charles Duell for damages arising out of an automobile accident that occurred near Duell's property on Highway 61. Both parties moved for a directed verdict. The trial judge denied Staples's motion, but granted Duell's motion, finding that Duell owed no duty of care to Staples. We affirm.

I.

During the early morning hours of May 24, 1997, Staples was driving from Charleston toward Summerville on Highway 61. As she drove, Staples encountered a dead pine tree in the road. Staples swerved but collided with the tree, causing her to suffer multiple injuries.

The tree with which Staples collided was a dead pine measuring about 100 feet in length The tree fell approximately sixty feet from the roadway and was located on land owned by Duell. For about two miles between Charleston and Summerville, Duell owns land on both sides of Highway 61. Along Duell's two mile stretch of Highway 61, there are no residences except one cabin. According to department of transportation records, approximately 13,500 vehicles a day pass by Duell's two-mile stretch of land on Highway 61

Located on the property owned by Duell is Middleton Place National Historic Landmark Part of Middleton Place is a tourist attraction which receives an estimated 100,000 admission-paying visitors a year. The only public entrance or exit to Middleton Place is on Highway 61. Duell maintains a two hundred and fifty foot buffer zone of trees on both sides of *506 Highway 61, to protect the scenic beauty of the road The highway department owns a fifty foot right-of-way along Highway 61.

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Duell employed James Woddle to "take care of the woodlands and security" for Middleton Place. Woddle's job duties included **641 twice a day driving around the perimeter of Middleton Place to inspect the premises During his inspections, Woddle looked for trespassers, abandoned vehicles, and dead trees.

In granting Duell's motion for a directed verdict, the trial court held that because the land from which the tree fell was rural, Duell had no common law duty to prevent the dangerous condition caused by the dead pine tree. The trial court further concluded that even if Duell adopted a policy of searching for dead trees along the roadway, Duell's policy did not create a duty because Duell could have abandoned it at any time and it did not increase the risk. Staples appeals the trial court's decision to grant Duell's motion for a directed verdict.

II.

[1] [2] "In deciding a motion for directed verdict, the evidence and all reasonable inferences must be viewed in the light most favorable to the nonmoving party If more than one inference can be drawn from the evidence, the case must be submitted to the jury.... [I]f the evidence yields only one inference, a directed verdict in favor of the moving party is proper." *Tumblin v. Ball-Incon Glass Packaging Corp*, 324 S.C. 359, 365, 478 S.E.2d 81, 84 (Ct App.1996).

[3] [4] To prevail on a theory of negligence, the plaintiff must establish three elements· (1) that defendant owed plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage. *Estate of Cantrell v. Green*, 302 S C. 557, 397 S.E.2d 777 (Ct.App.1990).

> The issue of negligence is a mixed question of law and fact. The court must first determine whether a duty arises in one party to exercise reasonable care for the benefit of another under the facts of a given case. The existence and *507 scope of the duty are questions of law. Thereafter, the jury determines whether a breach of the duty has occurred, and the resulting damages.

Miller v City of Camden, 317 S.C. 28, 31, 451 S.E.2d 401,. 403 (Ct App.1994), *cert granted*, (June 16, 1995) (citations omitted).

III.

[5] Staples argues that the trial court erred in finding that Duell did not have a duty to inspect and improve his land. [1] We disagree.

[6] In South Carolina rural landowners and urban landowners have different duties and responsibilities. In *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct.App.1987), this court quoted W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 57, at 391 (5th ed 1984), in holding:

The rule of non-liability for natural conditions was obviously a practical necessity in the early days, when land was very largely in a primitive state It remains to a considerable extent a necessity in rural communities, where the burden of inspecting and improving the land is likely to be entirely disproportionate not only to any threatened harm but even to the value of the land itself. But it is scarcely suited to cities, to say that a landowner may escape all liability for serious damage to his neighbors, merely by allowing nature to take its course. A different rule accordingly has been developed as to urban centers.

This is well illustrated by the cases of dangerous trees It is still the prevailing rule that the owner of rural land is not required to inspect it to make sure that every tree is safe, and will not fall over into the public highway and kill a person, although there is already some little dissent even as to this, and, at least if the defendant knows that the tree is *508 dangerous, he may be required to take affirmative steps. But when the tree is in an urban area, and may fall into a city street, the **642 landowner now has a duty of reasonable care, including inspection to make sure that the tree is safe Recent decisions have extended the right to reasonable protection from travelers on the street to adjoining landowners as well.

Israel, 292 S.C. at 288, 356 S.E.2d at 127. *See generally* Thomas R. Trenkner, Annotation, *Liability of Private Owner or Occupant of Land Abutting Highway for Injuries or Damage Resulting from Tree or Limb Falling onto Highway*, 94 A.L.R.3d 1160 § 3 (1979). Even though other jurisdictions

may be rethinkmg their approach to landowner liability, South Carolina follows the traditional rural and urban distinction. *Cf. Ford v. South Carolina Dep't of Transp.*, 328 S.C. 481, 492 S.E.2d 811 (Ct.App.1997). The policy reasons which were present at the inception of the rural landowner rule still exist in rural South Carolina today. *See Prosser and Keeton, supra,* § 57. To restrict or reverse the rural landowner rule would "impose a new and unusual burden upon the owners of forest lands." *Chambers v. Whelen,* 44 F.2d 340, 341 (4th Cir.1930) (holding a landowner not liable for an accident on a country road caused by a tree which fell from the landowner's property).

[7] [8] Staples also argues that constructive notice of the dead tree created a duty for Duell to safely remove the tree. [2] Constructive notice is notice that a reasonable person should know and carries a duty of reasonable care. *See Hightower v. Greenville County,* 255 S.C. 192, 195, 177 S.E.2d 785, 786 (1970) ("Where a defect or dangerous condition, not created by its act or that of its agents, has existed for such length of time that in the exercise of reasonable care the defect should have been discovered and remedied, the county is chargeable with knowledge of such defect, and consequently with negligence in not having remedied it "). Accordingly, we believe that it is illogical to say that rural landowners have no duty to inspect and improve their property, but then to charge a rural landowner with a duty arising out of constructive notice. Thus, in ***509** this case, once the trial judge ruled that Duell's land was rural, all of Staples's evidence and testimony concerning what Duell or Woddle should have known or noticed became irrelevant because Duell was not liable for constructive notice [3]

IV.

Staples invites us to carve out a commercial exception to the rule imposing no duty on rural landowners to inspect their land We decline.

Staples argues without citation to legal authority that because Highway 61 is the only means available for the public to reach Middleton Place, Duell had a duty to insure safe passage for everyone traveling along Highway 61. Adopting Staples's exception would effectively place on every farmer, rancher, and country store owner the puzzling and onerous task of determining whether their property is subject to a higher standard of care than that of other rural landowners. In addition, Staples's novel contention undermines the rural landowner rule's policy of protecting rural landowners from the burden of inspecting and improving land where the likely benefit is most often minimal. *See Prosser and Keeton, supra,* § 57. We believe that in actual practice, Staples's exception could produce bizarre and inconsistent results and we therefore do not adopt it

V.

Staples also argues that Duell assumed a duty by implementing a policy to search for dead trees We disagree.

[9] Even though there was conflicting evidence about whether Duell instituted an official ****643** policy for Woddle to inspect the premises for dead trees, we assume for the purposes of review that such a policy existed. The *Restatement (Second) of Torts* § 323(a) (1965), states.

> ***510** 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.

In *Sherer v. James,* 290 S.C. 404, 351 S.E.2d 148 (1986), the South Carolina Supreme Court recognized section 323(a) "as relating to the element of duty." *Id.* at 407, 351 S.E.2d at 150.

[10] Because the rural landowner rule relieved Duell of any duty to inspect or improve his land, in order to prevail, section 323(a) mandates that Staples prove either that Duell's policy of searching for dead trees increased her risk of harm or that she detrimentally relied on Duell's policy. First, Staples presents no evidence that Woddle's act of simply patrolling the area looking for dead trees increased her risk of harm. Duell's policy of inspecting for dead trees did not hasten the decay of trees or affect when and where dead trees might fall. Second, Staples made no allegation that she knew of the policy of searching for dead trees before the accident. Without previous knowledge of the policy, Staples could not have

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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.

Not imposing a duty on Duell in this case promotes good public policy. To impose a duty on Duell would create the highly undesirable precedent of encouraging rural landowners to shield their eyes and never inspect their land The better policy for this court to endorse is that rural landowners who inspect their lands for potential dangers are not creating a duty for themselves unless their inspection either increases the risk of harm to others or others detrimentally rely on their inspection.

VI.

We hold that the trial judge correctly applied the rural landowner test to find that Duell, as a rural landowner, did not have a duty to inspect and improve his land along Highway 61. ***511** In addition, we hold that Duell did not create a legal duty by instituting a policy of searching for dead trees along the highway.

For all of the foregoing reasons, the judgment of the lower court is hereby

AFFIRMED

HEARN and STILWELL, JJ., concur

Parallel Citations

494 S.E.2d 639

Footnotes

1 In her final brief, Staples did not argue the classification of Duell's property as urban or rural land constituted a jury question. We, therefore, do not address whether the trial court erred in declining to submit the rural or urban issue to the jury *See State v. McLaughlin,* 307 S C. 19, 413 S E 2d 819 (1992) (citing *State v. Sullivan,* 277 S.C. 35, 282 S.E.2d 838 (1981), for the proposition that exceptions not argued in brief are deemed abandoned).

2 Actual notice is not an issue in this case because Duell testified that neither he nor Woddle was aware of the dead tree, and Staples offered nothing to refute Duell's assertion

3 Our holding is easily reconcilable with *Inabinett v. State Highway Department,* 196 S.C. 117, 12 S.E.2d 848 (1941) *Inabinett* dealt with the state highway department's liability for injuries resulting from a fallen tree, where the highway department had actual or constructive notice of the tree's condition *Id* at 123, 12 S.E.2d at 851. Unlike a rural landowner, however, the highway department has a duty to protect commuters along the highways.

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2014 WL 3352174 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 30, 2014

*1 The Honorable Mike Fair
211 Gressette Senate Office
Columbia, SC 29202

Dear Senator Fair:
Attorney General Alan Wilson has referred your letter dated March 11, 2014 to the Opinions section for a response The following is this Office's understanding of your question and our opinion based on that understanding.

Issues (as quoted from your letter):

1) Does S.C. Code Ann. § 63-7-310 impose a duty on a mandatory reporter to report when an adult discloses that he or she was abused as a child?

2) If yes, under what circumstances would such a report be required (e g if the alleged abuser is a parent or teacher, other children [may] possibly still [[be] at risk, [what is] the length of time passed since [the] abuse occurred, etc.?)

3) [If yes,] are there any circumstances under which such reporting would not be required (e.g death of the perpetrator, length of time passed)?

Short Answer. Based on the statutory intent of South Carolina Code § 63-7-310 of the Children's Code to protect children, this Office believes a court will find that a mandatory reporter would not have to report pursuant to South Carolina Code § 63-7-310 when an adult discloses being abused in the past as a child, as long as the adult is not mentally incompetent, as long as there is no information that another child (who is, at the time of the disclosure, under the age of eighteen as defined in 63-3-20(3)) has been or may be abused or neglected as defined in S.C. Code Section 63-7-20(4), and as long as there is no other law that would require the abuse to be reported. Nevertheless, an adult who was abused in the past as a child may voluntarily report abuse that occurred in South Carolina to law enforcement at any time, as there is no statute of limitations on criminal actions for child abuse or criminal sexual conduct in South Carolina. [1]

Law/Analysis:

South Carolina Code § 63-7-310 states:
(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, school attendance officer, social or public assistance worker, substance abuse treatment staff, or childcare worker in a childcare center or foster care facility, foster parent, police or law enforcement officer, juvenile justice worker, undertaker, funeral home director or employee of a funeral home, persons responsible for processing films, computer technician, judge, or a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA **must report in accordance with this section when in the person's professional capacity the person has**

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received information which gives the person reason to believe that a child has been or may be abused or neglected as defined in Section 63-7-20.

*2 (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.

(C) Except as provided in subsection (A), a person, including, but not limited to, a volunteer non-attorney guardian ad litem serving on behalf of the South Carolina Guardian Ad Litem Program or on behalf of Richland County CASA, who has reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse and neglect may report, and is encouraged to report, in accordance with this section.

(D) Reports of child abuse or neglect may be made orally by telephone or otherwise to the county department of social services or to a law enforcement agency in the county where the child resides or is found.

S.C. Code § 63-7-310 (1976 Code, as amended) (emphasis added).

As a background regarding statutory interpretation, the cardinal rule of statutory construction is to ascertain the intent of the Legislature and to accomplish that intent. Hawkins v. Bruno Yacht Sales, Inc. 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003). The true aim and intention of the Legislature controls the literal meaning of a statute. Greenville Baseball v. Bearden. 200 S.C. 363, 20 S.E.2d 813 (1942). The historical background and circumstances at the time a statute was passed can be used to assist in interpreting a statute. Id. An entire statute's interpretation must be "practical, reasonable, and fair" and consistent with the purpose, plan and reasoning behind its making Id. at 816. Statutes are to be interpreted with a ""sensible construction," and a "literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose." U.S. v. Rippetoe. 178 F.2d 735, 737 (4th Cir. 1950). Like a court, this Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam.. 370 S.C. 452, 636 S.E.2d 598 (2006). The dominant factor concerning statutory construction is the intent of the Legislature, not the language used. Spartanburg Sanitary Sewer Dist. v. City of Spartanburg, 283 S.C. 67, 321 S.E.2d 258 (1984) (citing Abell v. Bell. 229 S.C. 1,91 S.E.2d 548 (1956))

The first place to look in regards to interpreting the statute is to the legislative intent. Title 63 is the titled as the "Children's Code" and states:

> *3 This title shall be liberally construed to the end that families whose unity or well-being is threatened shall be assisted and protected, and restored if possible as secure units of law-abiding members; and that each child coming within the jurisdiction of the court shall receive, preferably in his own home, the care, guidance and control that will conduce to his welfare and the best interests of the State, and that when he is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which they should have given him

S.C. Code § 63-1-30 (1976 Code, as amended). Additionally, the purpose of protecting children is clearly laid out in plain language by the Legislature in S C. Code § 63-7-10 It states:

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(A) Any intervention by the State into family life on behalf of children must be guided by law, by strong philosophical underpinnings, and by sound professional standards for practice. Child welfare services must be based on these principles.

...

(B) It is the purpose of this chapter to:
(1) acknowledge the different intervention needs of families,

(2) establish an effective system of services throughout the State to safeguard the well-being and development of endangered children and to preserve and stabilize family life, whenever appropriate;

(3) ensure permanency on a timely basis for children when removal from their homes is necessary;

(4) establish fair and equitable procedures, compatible with due process of law to intervene in family life with due regard to the safety and welfare of all family members, and

(5) establish an effective system of protection of children from injury and harm while living in public and private residential agencies and institutions meant to serve them.

S.C. Code § 63-7-10 (1976 Code, as amended). A child is defined in Title 63 as "a person under the age of eighteen." S.C. Code §§ 63-1-40(1); 63-7-20(3) (1976 Code, as amended). It seems clear the legislative intent of S.C. Code § 63-7-310 is to protect children More specifically, the intent is to protect those children who are or who have been abused by reporting that information to law enforcement. An implication is that children either would not know to report abuse to law enforcement or else they would not be able to do so themselves. It goes without saying that if an adult is not mentally competent, if there is a child (someone under the age of eighteen at the time the information is being disclosed) who currently is or has been abused, or if there is another law that requires disclosure, then the mandatory reporter would need to report the abuse of an adult in the past as a child pursuant to South Carolina Code § 63-7-310 However, your question concerns adults who were abused in their past A mentally-competent adult would have both the ability to report prior abuse and knowledge of the crime but may not choose to report past abuse for a number of reasons

*4 An adult who was abused as a child may voluntarily report past criminal abuse to law enforcement regardless of how long ago the conduct occurred.[2] As stated above, it should be noted that South Carolina does not have a statute of limitations for criminal charges for sexual abuse of a child or criminal sexual conduct Jodi Leibowitz, Criminal Statutes of Limitations: An Obstacle to the Prosecution and Punishment of Child Sexual Abuse, 25 Cardozo L.Rev. 907 (Dec. 2003). A civil statute of limitations on actions is generally three years from when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action," though there have been numerous cases discussing the circumstances in which tolling begins in civil sexual abuse cases. S.C. Code § 15-3-535, see, e g , Doe v. Bishop of Charleston. 407 S.C. 128, 754 S.E.2d 494 (2014); Doe v. Crooks. 364 S.C. 349, 613 S.E.2d 536 (2005); Moriarty v. Garden Sanctuary Church of God. 341 S.C. 320, 534 S.E 2d 672 (2000), Doe v R D 308 S.C. 139, 417 S E.2d 541 (1992).[3] However, South Carolina Code Section 15-3-555 states regarding civil actions based on sexual abuse or incest:
(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.

(B) Parental immunity is not a defense against claims based on sexual abuse or incest that occurred before, on, or after this section's effective date.

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S.C. Code § 15-3-555 (1976 Code, as amended).[4]

Conclusion: As stated above, this Office believes a court will conclude the statutory intent of South Carolina Code § 63-7-310 of the Children's Code is to protect children As such, this Office believes a court will conclude that a mandatory reporter would not have to report pursuant to South Carolina Code § 63-7-310 when an adult discloses being abused in the past as a child, as long as the adult is not mentally incompetent, as long as there is no information that another child (who is, at the time of the disclosure, under the age of eighteen as defined in 63-3-20(3)) has been or may be abused or neglected as defined in S.C. Code § 63-7-20(4), and as long as there is no other law that would require the abuse to be reported. However, this Office is only issuing a legal opinion based on the current law at this time. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,

*5 Anita S Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D Cook
Solicitor General

Footnotes

1 Adults and mandatory reporters still must comply with any other laws that may otherwise require disclosure or action.

2 However, as with all cases, there may be legal or other issues that may apply which could preclude prosecution of a case, and such cases must be evaluated on a case-by-case basis South Carolina law enforcement has jurisdiction over crimes that occurred in South Carolina which violate state law. For conduct that occurred outside of South Carolina, law enforcement at the location where the conduct occurred would normally have jurisdiction.

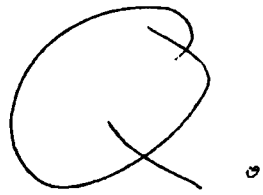
3 While there is not a significant amount of case law on S.C. Code § 63-7-310, our State Supreme Court has held there is no private cause of action for negligence based on failure to report abuse pursuant to S.C. Code § 63-7-310 Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 711 S.E.2d 908 (2011). See, also, Doe v Marion, 373 S.C. 390, 645 S E.2d 245 (2004) (finding a psychiatrist had no duty to warn all foreseeable future victims). However, for further questions or specific factual scenarios we would recommend seeking a declaratory judgment from the court, as only a court of law can interpret statutes and make such determinations. S.C. Code § 15-53-20, et al

4 Please note 2013 S C. H B 3940 proposed removing any limitation on commencement of civil actions in S.C. Code § 15-3-555 when the Victim is under eighteen. While there may be other relevant statutes, case law and proposed legislation regarding your question, this opinion is merely noting a few.

2014 WL 3352174 (S.C.A.G.)

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Q

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

* * * * * * * * * * * * * * * * *

A P P E A R A N C E S

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ALSO PRESENT: DOUG WHITE, LEGAL VIDEOGRAPHER
MARY GRONDINES, PARALEGAL

And I recall he thought that was -- he had experience with that position in the military, and he thought that The Citadel ought to have an individual that had those responsibilities. And I believe that was in -- I believe he started talking about that shortly after he took office in the beginning of 2006 and we hired Janet Shealy in the fall of 2006, as I recall.

Q. Would you agree with me that beginning in 2006, with General Rosa, it was important enough to him and The Citadel -- that coordinating a response to a claim of sexual assault was so important that he wanted somebody in charge of that 40 hours a week at The Citadel?

A. He wanted a full-time person to address those kind of issues.

Q. When you received the call from Father Doe in April of 2000- -- received a phone message about that, you called him back?

A. Uh-huh (indicating an affirmative response).

Q. What -- would you consider what you did from April of 2007 through September of 2007 an investigation?

A. That's the term we have used.

Q. What were your goals for the investigation?

A. To find out what had happened.

Q. Would you agree with me that preventing harm to other young boys or victims was a goal of the investigation?

A. Sure.

Q. Would you agree with me that by undertaking the investigation, that The Citadel was aiming to prevent harm to potential victims?

A. I assume so.

Q. In April of 2007, would you agree with me that the names of sexual assault victims are kept confidential by police agencies in South Carolina?

A. I assume so. I'm not a police officer. I don't -- I don't know what exactly their policies are.

Q. Do you know what the law was in 2007, whether they were required to keep the names of --

A. I don't.

Q. -- sexual assault victims --

A. I don't.

Q. -- confidential? Do you know what it is now, the law?

R.

392 S.C. 560
Court of Appeals of South Carolina.

L. Paul TRASK, Jr., Personally, and as Next of Kin and as the Duly Appointed Personal Representative of the Estate of L. Paul Trask, III, deceased; and Meredith C. Trask, Appellants,

v.

BEAUFORT COUNTY; Curtis M. Copeland in His Official Capacity as Coroner of Beaufort County; Judy R. Copeland, as Personal Representative of the Estate of Curtis M. Copeland; and Copeland Company of Beaufort, LLC, Respondents.

No. 4799. | Heard Oct. 6, 2010. | Decided March 2, 2011. | Rehearing Denied June 3, 2011.

Synopsis

Background: Parents of 20-year-old driver who was killed in accident after consuming alcohol filed negligence claims against county coroner, both in his official capacity and individually, as operator of crematory, in connection with cremation of body without an autopsy or toxicology tests. The Circuit Court, Beaufort County, Doyet A. Early, III, J., granted summary judgment to coroner. Parents appealed.

[Holding:] The Court of Appeals, Few, C.J., held that statutes relied upon by parents did not create a special duty of care owed to them by coroner.

Affirmed.

Attorneys and Law Firms

**537 Stephen P. Groves, Thomas S. Tisdale, Jr., and Jeffrey S. Tibbals, all of Charleston, for Appellants.

Andrew F. Lindemann, of Columbia; and Marshall H. Waldron, Jr., of Beaufort; for Respondents.

Opinion

FEW, C.J.

*563 The primary issue in this appeal is whether various statutes governing coroners and crematory operators give rise to private rights of action for civil damages. We agree with the circuit court that they do not, and affirm. We also affirm the circuit court's ruling granting summary judgment for the defendants for spoliation of evidence and intentional infliction of emotional distress.

*564 I. Facts

On November 21, 2005, Paul Trask, III, a twenty-year-old, consumed beer at his parents' home in Beaufort.[1] Shortly before midnight Paul drove his father's car to a Hess gas station named Xpress Lane on Boundary Street. The gas station attendant sold Paul two twenty-four-ounce cans of beer without verifying his age. Paul Trask, Jr. described the store video as showing his son "going into the Xpress Lane store and immediately going in, going to the bathroom, pretty clear he had been drinking beer, coming out, he seems steady, but we know he's been drinking beer." Paul consumed the beer he **538 purchased from Xpress Lane while driving approximately twenty-two miles to Fripp Island, but was turned away at the security gate. After driving almost four miles away from Fripp Island, Paul lost control of the car, ran off the road, and collided with large pine trees. The car caught on fire and Paul died from the injuries he sustained in the accident, either the impact, fire, or a combination.

On May 22, 2006, Mr. Trask and his wife filed a wrongful death and survival action against Hess Corporation and Xpress Lane, Inc., which we refer to as the Xpress Lane suit. The Trasks alleged Paul's death "was the proximate result of the alleged negligence of [Hess and Xpress Lane], in several particulars, including: the negligent sale of alcohol to a minor."[2] They claimed the beers Xpress Lane sold to Paul "were the beers that caused his intoxication." Hess and Xpress Lane agreed to pay the Trasks $750,000 to settle the case before trial. As required by law, the Trasks requested the circuit court approve the settlement, which it did on January 9, 2008. However, Mr. Trask later testified "that it was worth more than $750,000" and explained, "we were only able to negotiate a very partial settlement in the Xpress Lane case because we had no definitive toxicology results to prove *565 . . that Paul was intoxicated.... And so I would say that caused great damage to the Xpress Lane suit."

In this action the Trasks have sued Beaufort County and Curtis Copeland,[3] both in his official capacity as the coroner of Beaufort County and in his individual capacity as a crematory operator. They seek damages for the reduced settlement value of the Xpress Lane suit along with damages

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for emotional harm. The Trasks contend various statutes create duties owed to them which Copeland breached individually and officially This case is troubling because Copeland did violate at least some of the statutes, and conducted himself in a manner we believe was inappropriate. We hold, however, that the law does not provide a remedy for this conduct in the form of civil damages.

Shortly after the accident occurred, Copeland went to the scene. At around 1:00 a m on November 22, after he learned who owned the car, Copeland drove to the Trasks' home to inform them of the accident and death When Copeland arrived at their home, he did not know who was killed in the accident; he knew only that the car belonged to Mr. Trask. Once the Trasks determined Paul was the only family member not at home, they realized he had been the driver. Later that day family and friends of the Trasks gathered at Mr Trask's mother's home Copeland went there around noon to discuss the funeral arrangements In addition to being the county coroner, Copeland also owned Copeland Company of Beaufort, LLC, which owns and operates Copeland Funeral Home and Coastal Cremation Services. At the gathering, the Trasks told Copeland they wanted Paul's body cremated and signed the cremation authorization form. Although they signed the form sometime between noon and one o'clock, Copeland instructed them to write the time as 9:15 a m The following day Coastal Cremation Services cremated Paul's body.

The Trasks contend two statements made by Copeland caused them emotional distress First, when Copeland was leaving the Trasks' home after telling them about the accident, Mrs Trask asked him if he planned to perform an autopsy on *566 Paul's body. Copeland responded there was no need to perform an autopsy because "the cause of death is obvious." Second, a few months later the Trasks asked Copeland how badly Paul's body was burned in the accident, to which he responded, "you couldn't tell if the body was black, white, or Mexican."

The Trasks allege Copeland, as coroner, was required, but failed, to positively identify the body in the car as their son, to conduct an autopsy, and to prepare a toxicology report on the body They claim that because Copeland individually cremated the body **539 without conducting a toxicology test officially as coroner, the resulting lack of knowledge of Paul's blood alcohol level "made it difficult, if not impossible, for the Trasks to establish and prove otherwise valid claims against the Xpress Lane and Hess Corporation" and forced them to settle for less money.

The Trasks filed this action on April 11, 2007, with claims for negligence and negligent supervision and training against Beaufort County and Copeland officially; for negligent spoliation of evidence against Beaufort County; for negligence and intentional or negligent spoliation of evidence against Copeland individually and Copeland Company; and for intentional infliction of emotional distress against Copeland individually.[4] The Trasks moved for partial summary judgment based on liability. All Respondents filed motions for summary judgment. The trial court filed its order on January 2, 2009, granting summary judgment for Respondents. The Trasks appeal the entire order

II. Determining the Existence of a Private Right of Action

[1] [2] In a negligence cause of action, it is the plaintiff's burden to establish that a duty of care is owed to him by the defendant. *See McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 390–91, 684 S.E.2d 566, 571 (Ct.App.2009) ("An essential element in a negligence cause of action is the existence of a legal *567 duty of care owed by the defendant to the plaintiff. Without such a duty, a plaintiff cannot establish negligence.") (internal quotation marks and citation omitted), *Chastain v. Hiltabidle*, 381 S.C. 508, 519, 673 S.E 2d 826, 832 (Ct App.2009) ("If no duty exists, the defendant is entitled to judgment as a matter of law."). Though the common law generally does not impose a duty to act, a statute may create an affirmative duty owed to a plaintiff *Vaughan v. Town of Lyman*, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006).

[3] In *Rayfield v South Carolina Department of Corrections*, 297 S.C. 95, 103, 374 S E.2d 910, 914 (Ct.App.1988), *cert denied*, 298 S.C. 204, 379 S.E.2d 133 (1989), this court set forth the analysis to apply when determining whether a statute creates a duty whose breach allows for a private right of action.

> In order to show that the defendant owes him a duty of care arising from a statute, the plaintiff must show two things: (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class

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> of persons the statute is intended to protect.

If the plaintiff demonstrates these two elements, he has established the first element of a negligence claim—a duty owed to him by the defendant. 297 S.C. at 103, 374 S.E.2d at 915.

[4] [5] However, when the statute at issue creates or defines the duties of a public official, the public duty rule applies. 297 S.C. at 105, 374 S.E.2d at 915. " '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.

*568 [6] 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 **540 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.

Id.; see also Vaughan, 370 S.C. at 441, 635 S.E.2d at 634 (referring to the six-part *Rayfield* test as "the well established 'special duty' exception"); *Jensen v. Anderson Cnty. Dep't of Soc. Servs.,* 304 S.C. 195, 203, 403 S.E.2d 615, 619 (1991) (adopting the six-part *Rayfield* test and calling it an "exception to the public duty rule"). If a special duty is found to exist after analyzing a statute under this test, courts can be sure the Legislature intended that a plaintiff within the protected class injured by a public official's breach of the duty have a private right of action against the official. 304 S.C. at 201, 403 S.E.2d at 618; *see Vaughan,* 370 S.C. at 442, 635 S.E 2d at 634 ("The public duty rule is a rule of statutory construction which aids the court in determining whether the legislature intended to create a private right of action... [T]he dispositive issue is ... whether the statute was intended to provide .. a private right of action .. ").

We must analyze the one statute alleged to have been violated by Copeland individually under the general two-part test and those alleged to have been violated by Copeland officially under the special duty exception to the public duty rule.

A. Section 16–17–600 Does Not Create a Duty Owed by Copeland Individually and Copeland Company to the Trasks

[7] The only allegation of negligence against Copeland individually and Copeland Company is that they breached a *569 statutory duty contained in section 16–17–600 of the South Carolina Code (Supp.2010). The section provides:

> (A) It is unlawful for a person willfully and knowingly, and without proper legal authority to: (1) destroy or damage the remains of a deceased human being;....
>
> A person violating the provisions of subsection (A) is guilty of a felony....
>
> A crematory operator is neither civilly nor criminally liable for cremating a body which (1) has been incorrectly identified by the funeral director, coroner, medical examiner, or person authorized by law to bring the deceased to the crematory, or (2) the funeral director has obtained invalid authorization to cremate

§ 16–17–600(A).[5] The Trasks contend this statute creates an actionable duty under the two-part *Rayfield* test Specifically, they argue the statute's essential purpose "is to ensure dead bodies are not destroyed without proper authority." Even if that is the essential purpose, however, it is not the harm the Trasks claim they suffered. At oral argument, the Trasks' counsel stated the harm they suffered was a loss of settlement value of the Xpress Lane suit because Paul's body was no longer available. Additionally, Mr. Trask stated in his

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deposition· "Mr. Copeland performed an illegal cremation on my son's body, which had the effect of destroying any opportunity to, number one, know for certain whether or not it was our son, Paul, [6] number two, the actual cause of his death, whether it was the crash itself or whether he burned to death. We have been denied the toxicology results as a result of the illegal cremation .. " Therefore, the harm they claim to have suffered is that Paul's body was no longer available for an autopsy and a toxicology test.

*570 The essential purpose of section 16–17–600 is not to preserve a body as evidence for a civil action. Accordingly, the Trasks fail to meet the first element of the two-part *Rayfield* **541 test. The Trasks argue, however, that the statute's specific reference to a crematory operator's immunity for civil liability demonstrates the Legislature intended for its violation to serve as the basis for civil liability. We disagree Section 16–17–600 is a criminal statute which provides only for criminal sanctions *See Dorman v Aiken Commcns , Inc ,* 303 S.C. 63, 67, 398 S.E.2d 687, 688–89 (1990) (refusing to find a private right of action for "a criminal statute which provides only for criminal sanctions" because "[t]he primary consideration in deciding whether a private cause of action should be implied under a criminal statute is legislative intent") We find section 16–17–600 does not create a duty of due care owed by Copeland or Copeland Company to the Trasks, and therefore they do not have a private right of action for its breach. [7]

B. No Duties Exist as to the Negligence Claims Against Copeland Officially

The Trasks allege the following statutory duties were breached by Copeland officially: (1) to perform an autopsy to ascertain the cause of death pursuant to section 17–7–10 of the South Carolina Code (2003); (2) to perform a toxicology test of the victim of a motor vehicle accident pursuant to section 17–7–80 of the South Carolina Code (2003), and (3) to take certain steps pursuant to sections 17–5–570(B) and –590 of the South Carolina Code (2003 & Supp.2010), which are required when a body cannot be identified. Copeland pled the public duty rule as a defense to these claims We agree with the trial court that none of these statutes satisfy the elements of the six-part *Rayfield* test, and thus no special duty exists under any of them and the Trasks have no private rights of action.

[8] First, the Trasks allege section 17–7–10 creates a special duty. It states: "The coroner of the county in which a *571 body is found dead ... shall order an autopsy or post-mortem examination to be conducted to ascertain the cause of death." § 17–7–10. The essential purpose of the statute is "to ascertain the cause of death," The "particular kind of harm" the Trasks claim to have suffered is that an autopsy would have provided evidence for the Xpress Lane suit, and they were not satisfied with the level of detail in the coroner's explanation of the cause of death. Mr Trask testified an autopsy "would have confirmed the results of a toxicology examination, would have determined the actual cause of death, whether it be the crash itself or by the fire " The essential purpose of the statute is neither to provide evidence for a civil lawsuit nor to ensure that the family of a deceased person is given its desired level of detail regarding the cause of death. [8] Accordingly, the Trasks' negligence claim against Copeland officially under section 17–7–10 is barred by the public duty rule.

[9] Second, the Trasks allege section 17–7–80 creates a special duty. Title 17 is labeled "Criminal Procedures," and section 17–7–80 states

> Every coroner .. shall examine the body within eight hours of death of any driver and any pedestrian, sixteen years old or older, who dies within four hours of a motor vehicle accident .. , and take or cause to have taken by a qualified person such blood or other fluids of the victim as are necessary to a determination of the presence and percentages of alcohol or drugs. Such blood or other fluids shall be forwarded to the South Carolina Law Enforcement Division within five days after the accident in accordance with procedures established by the Law Enforcement Division

The Trasks argue the essential purpose of the section "is to protect those who may perish in a motor vehicle accident, as well as their survivors, their estates, and their heirs, **542 and equally importantly, to accurately ascertain the cause of the decedent's death " They contend if Copeland had taken a toxicology sample, they "would have known what effect alcohol *572 had on Paul's ability to drive, whether it likely impaired his driving, and whether it significantly contributed to his death." We do not believe the essential purpose of the statute is to protect against this "particular kind of harm " Rather, because the statute requires the toxicology sample be sent to the South Carolina Law Enforcement

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Division, we find the purpose of the statute is one of law enforcement Therefore, any benefit or injury to the Trasks from its performance or nonperformance in determining whether alcohol played a role in their son's death is incidental to its essential purpose. The Trasks' negligence claim against Copeland officially under section 17–7–80 is also barred by the public duty rule.

Third, and finally, the Trasks allege sections 17–5–570(B) and 17–5–590 create a special duty when a body is not identifiable. Because the Trasks concede that Paul died in the accident, we need not address this further. Even under their own theory, they are not within the protected class: families of unidentifiable deceased persons. Accordingly, the Trasks' claims based on these statutory duties are barred by the public duty rule.

III. Third Party Spoliation of Evidence

[10] The Trasks also allege a third party spoliation of evidence cause of action. In *Austin v. Beaufort County Sheriff's Office,* 377 S.C. 31, 36, 659 S.E.2d 122, 124 (2008), the supreme court refused to adopt the tort of third party evidence spoliation. However, it stated, "we decline to address whether we would, under other factual circumstances, adopt the tort." *Id.* The supreme court then listed the elements of negligent and intentional third party spoliation as stated in *Hannah v. Heeter,* 213 W.Va. 704, 584 S.E.2d 560, 569–70, 573 (2003). *Austin,* 377 S.C. at 34–35, 659 S.E.2d at 123–24. As the supreme court did in *Austin,* we find the Trasks fail to meet those elements. The Trasks have not presented any evidence that Copeland or Beaufort County had knowledge two days after Paul's death of a potential civil action against Hess Corporation and Xpress Lane, or that Paul's body would be considered evidence in such a lawsuit. More importantly, the Trasks authorized the cremation of Paul's body. They also failed to show it was possible to obtain a toxicology test, and did not show how the results of that test would be vital to *573 their ability to prevail in a civil action The circuit court correctly granted summary judgment as to this claim.

IV. Intentional Infliction of Emotional Distress

The second category of damages the Trasks claim from Copeland's conduct is emotional harm. They allege Copeland is liable for intentional infliction of emotional distress for the two statements he made to the Trasks. The statements were made in response to questions from the Trasks about the performance of an autopsy and the details of the accident. These are questions properly addressed to a coroner, not a funeral home owner. Under the Tort Claims Act, a coroner is immune from suit for "the intentional infliction of emotional harm." S.C.Code Ann. § 15–78–50 (2005) ("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 hereinafter provided.") (emphasis added); § 15–78–30 (2005) (" 'Loss' ... does not include the intentional infliction of emotional harm."). We agree with the trial court that the Trasks cannot "circumvent the bar of sovereign immunity by raising alleged acts by Copeland acting as the Coroner and then seeking to recover for those acts against Copeland individually."

V. Beaufort County is Not Liable for the Acts or Omissions of Copeland Officially

[11] [12] The negligence claim against Beaufort County for Copeland's failure to perform a toxicology test in his official capacity and the claim of negligent supervision and training were properly dismissed because Copeland owed no duty to the Trasks arising from his official actions or inactions in this **543 case. Beaufort County cannot be vicariously liable for Copeland's conduct because Copeland is not liable. "If no duty exists, the defendant is entitled to judgment as a matter of law." *Chastain,* 381 S.C. at 519, 673 S.E.2d at 832. Therefore, we need not reach the issue of whether Beaufort County has control over the coroner. *See Futch v. McAllister Towing of Georgetown, Inc.,* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (recognizing that an appellate court need not address remaining issues when resolution of one issue is dispositive)

*574 VI. Conclusion

In this case, much of the coroner's conduct is troubling, but none of it is actionable. Because we find the statutes at issue do not give rise to private rights of action, because South Carolina has not recognized the tort of third party spoliation of evidence, and because the Trasks fail to state a claim for intentional infliction of emotional distress, we find the circuit court was correct in granting summary judgment.

AFFIRMED.

HUFF and GEATHERS, JJ., concur.

Parallel Citations

709 S.E.2d 536

Footnotes

1 We recite the facts, derived primarily from the complaint and Mr Trask's deposition, in the light most favorable to the Trasks. *See Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct.App.2010) (noting in a summary judgment case "the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party").

2 This quotation is from the "Petition for Approval of Settlement" in the Xpress Lane suit.

3 Mr. Copeland passed away after oral argument Judy R Copeland, the personal representative of his estate, has been substituted for him in his individual capacity.

4 In their complaint, the Trasks sought damages for wrongful death and survival actions Because the Trasks conceded they were not alleging a wrongful death or survival action against Respondents, we do not address that claim

5 Subsections (B) and (C) prohibit actions of theft, destruction, vandalism, or desecration on burial grounds or in a graveyard. S.C.Code Ann. § 16–17–600(B)–(C) (Supp.2010)

6 In several causes of action, the Trasks claimed damages for uncertainty as to whether Paul is dead because his body was never "positively identified " However, the Trasks later conceded the body from the accident was their son. Mr. Trask stated. "I acknowledge that my son is dead "

7 Because we find section 16–17–600 created no duty owed by Copeland to the Trasks, we do not reach the issue of whether the coroner could be immune from liability under the Safe Cremation Act. S C.Code Ann. §§ 32–8–300 to –385 (2007 & Supp 2010)

8 "Cause of death" is a defined term and "refers to the agent that has directly or indirectly resulted in a death." S.C.Code Ann. § 17–5–5(2) (2003) In this case, the Coroner's Report states the "Manner of Death" is "Accident" and the "Cause of Death" is "Multiple Injuries Extreme."

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360 S.C. 7
Court of Appeals of South Carolina.

Woodrow Wilson BROWN, Appellant,
v.
Joseph Wilson BROWN and
Town of Harleyville, Respondents.

No. 3827. | Submitted April 6, 2004. | Decided June 21, 2004.

Synopsis

Background: Motorist brought negligence action against town after police officer allowed him to drive away from scene of traffic stop as replacement driver for driver who had been drinking alcohol, and he ran off road. The Circuit Court, Dorchester County, James C. Williams, Jr., J., granted summary judgment in favor of town. Motorist appealed.

Holdings: The Court of Appeals, Stilwell, J., held that

[1] public duty rule barred motorist's statutory negligence claims;

[2] officer properly exercised his discretion in selecting motorist as replacement driver, and

[3] town was immune from claim that it failed to properly train and supervise its police officers.

Affirmed.

West Headnotes (5)

[1] Municipal Corporations
⇐ Nature and Grounds of Liability

"Public duty rule" is only implicated when a plaintiff relies upon a statute as creating a duty

Cases that cite this headnote

[2] Municipal Corporations
⇐ Nature and Grounds of Liability

Under the public duty rule, a statute prescribing the duties of a public officer does not, without more, impose on him a duty of care toward individual members of the public in the performance of his duties

Cases that cite this headnote

[3] Municipal Corporations
⇐ Police and Fire

Public duty rule barred statutory negligence claims in motorist's action against town after police officer allowed him to drive away from scene of traffic stop as replacement driver for driver who had been drinking alcohol, and he ran off road; statutes corresponding to motorist's claims merely recited in broad terms when circumstances made it unlawful to operate motor vehicle, procedures surrounding incidents of possible driving under the influence (DUI), and general licensing requirement for motorists, but no statutes implicated by motorist's claims identified any particular class of victims or any particular harm that would create special duty exception to general rule. Code 1976, § 15-78-60.

Cases that cite this headnote

[4] Municipal Corporations
⇐ Police and Fire

Police officer properly exercised his discretion in selecting motorist, who was passenger in vehicle driven by driver who had been drinking alcohol, as replacement driver, and thus, town was immune to motorist's negligence claim under tort claims act; officer had choice of issuing citation to original driver and having car towed, or selecting another driver, and so officer chose motorist to drive after he volunteered and satisfactorily completed sobriety tests, motorist admitted that he was in better condition to drive than original driver, and other passenger expressly refused to drive, and police trainer stated that officer operated pursuant to accepted law enforcement practices. Code 1976, § 15-78-60(5).

Cases that cite this headnote

[5] **Municipal Corporations**
⇦ Police and Fire

Town was immune from motorist's claim under tort claims act that town failed to properly train and supervise its police officers after officer allowed motorist to drive away from scene of traffic stop as replacement driver for driver who had been drinking alcohol, where officer's decision in selecting motorist to be replacement driver met requirements to establish discretionary immunity under tort claims act. Code 1976, § 15-78-60(5).

Cases that cite this headnote

Attorneys and Law Firms

**729 *8 Helen Tyler McFadden, of Kingstree, for appellant.

Christy Stephens, of Walterboro, for respondents.

Opinion

STILWELL, J.:

Woodrow Brown brought this action against Joseph Wilson Brown and the Town of Harleyville alleging negligence by a *9 police officer resulting in injury to Woodrow The trial court granted summary judgment in favor of the town. We affirm. [1]

**730 FACTS

Officer McKee of the Harleyville Police Department stopped Earl Felder's car after he noticed Felder driving in an erratic manner. Woodrow, his brother Joseph, and another young man were all traveling as passengers in the car. While speaking with Felder, the officer smelled alcohol on his breath and required him to perform several field sobriety tests. Felder performed marginally well indicating that, although he had consumed alcohol, he did not lack control of his functions, nor was he fully impaired. The men insisted they lived at an address less than one mile from the stop site and promised to go straight home. Officer McKee did not issue a citation but determined one of the passengers should drive the car

When asked by the officer whether any of the passengers could drive, Joseph volunteered Joseph was allowed to drive only after he satisfactorily completed the same battery of field sobriety tests given to Felder. The men assured the officer they would go straight home.

As an added precaution, Officer McKee followed the car to observe Joseph's driving. The officer testified that Joseph was not driving erratically or unsafely. He finally turned around and resumed his patrol once the car reached the town limit of Harleyville.

Rather than driving home as promised, the men waited until the patrol car was out of sight and reversed course and began driving to a party. Sometime before reaching the party, Joseph ran off the road and into a tree. Woodrow, along with other passengers, suffered minor injuries When the highway patrol arrived they discovered Joseph was not a licensed driver. He was issued tickets for driving without a license, no insurance, driving too fast for conditions, and failing to wear a safety belt No citation was issued for DUI.

Two years after the accident, Woodrow brought this action asserting claims for common law negligence against Joseph *10 and negligence against the town for 1) failing to properly train and supervise its officers; 2) failing to properly require officers to provide for health and safety on the roadway; 3) failing to charge Felder with DUI; 4) choosing Joseph, an unlicensed driver, to operate the vehicle; and 5) violations of statutes and the common law of South Carolina. The trial court granted the town's motion for summary judgment, finding the public duty rule applied and as such Woodrow failed to establish a duty owed to him individually by Officer McKee. Additionally, the court concluded Woodrow produced no evidence of any special undertaking by the officer that would create an exception to the rule.

DISCUSSION

When we review the trial court's grant of a motion for summary judgment, we apply the same standard that governs the trial courts. Summary judgment is proper when there is no genuine issue of material fact and the moving party is

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entitled to judgment as a matter of law On appeal, we review the evidence and all inferences reasonably drawn from it in the light most favorable to the nonmoving party. Rule 56(c) SCRCP, *Osborne v. Adams,* 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001).

Woodrow claims the trial court incorrectly applied the public duty rule without first determining whether the officer properly exercised his discretion under S.C.Code Ann. § 15-78-60 (Supp 2003). We disagree.

[1] [2] [3] Woodrow's complaint alleges general acts of negligence without basing those allegations on any specific statutory authority Rather, he claims only generally that the town violated state statutes and common law The trial court granted summary judgment based upon the public duty rule. The public duty rule is only implicated when a plaintiff relies upon a statute as creating a duty *See Trousdell v. Cannon,* 351 S C 636, 641, 572 S.E 2d 264, 266-267 (2002); *Arthurs v. Aiken County,* 346 S C. 97, 103, 551 S E.2d 579, 582 (2001) (holding when and only when the plaintiff relies upon a statute as creating the duty does the public duty rule come into play). Under the public duty rule, a statute prescribing the duties of a public officer does not, without more, impose on him a duty *11 of care toward individual members of the public in the performance of his duties. *See* **731 *Rayfield v. South Carolina Dep't of Corr*, 297 S.C. 95, 105, 374 S.E.2d 910, 915-16 (Ct App.1988).

To the extent Woodrow relies on violations of a statute or statutes, we agree with the trial court his claims are barred by the public duty rule. We note the code sections corresponding to Woodrow's claims merely recite in broad terms when circumstances make it unlawful to operate a motor vehicle, procedures surrounding incidents of possible DUI or, as in the case of the latter section, the general licensing requirement for motorists. None of the statutes implicated by Woodrow's claims identify any particular class of victims or any particular harm that would create a special duty exception to the general rule *See Rayfield,* 297 S.C. at 106, 374 S.E.2d at 916. *See also Jensen v. Anderson County Dep't of Soc. Servs*, 304 S.C. 195, 200, 403 S.E.2d 615, 617 (1991) (wherein the supreme court adopted this court's six step special duty analysis as an exception to the public duty rule). We conclude the duty, if any, created by the statutes in question is owed to the public at large and not to Woodrow individually.

Woodrow's complaint also included negligence claims based on Officer McKee's decision to choose Joseph as the replacement driver and alleged failure by the town to properly train and supervise its police officers Neither of these claims is based on statutory duties. Therefore, they are not barred by the public duty rule. *See Arthurs,* 346 S.C. at 103, 551 S.E.2d at 582 (2001). However, the town raised the affirmative defense of immunity based upon the tort claims act and in particular S.C.Code Ann. §§ 15-78-60(4), (5), (20), (25) (Supp.2003) in its motion for summary judgment. We agree that Woodrow's remaining claims are barred by the act.[2]

[4] S.C.Code Ann. § 15-78-60 carves out exceptions to the limited waiver of governmental immunity established by the tort claims act, including discretionary immunity that arises when a government employee's decision is within the discretion or judgment allowed. *See* S.C Code Ann. § 15-78-60(5) *12 (Supp.2003). Officer McKee was faced with the choice of issuing a DUI citation, requiring the passengers to find another way home and have the car towed, or selecting another driver after determining whether that individual was fit to drive. He chose Joseph to drive after he volunteered and satisfactorily completed field sobriety tests Woodrow admitted in his affidavit that Joseph was in a better condition to drive than he. The other passenger expressly refused to drive.

Major Neil Baxley, a police-training instructor, stated in his affidavit that Officer McKee operated pursuant to accepted practices of law enforcement in South Carolina and was not required to arrest Felder Major Baxley opined Officer McKee was entitled to use his discretion to best remedy the situation. Viewing the evidence in the light most favorable to Woodrow, we find Officer McKee's selection of Joseph was a considered, discretionary judgment. As such, the town is immune to Woodrow's negligence claim under section 15-78-60(5) of the tort claims act. *See Clark v. South Carolina Dep't of Pub. Safety,* 353 S.C. 291, 304, 578 S.E.2d 16, 22 (Ct App.2002) (stating the requirements necessary to establish discretionary immunity under the tort claims act).

[5] Finally, Woodrow alleges the town failed to properly train and supervise its police officers There is no evidence in the record to support this claim beyond Woodrow's allegations in his affidavit that, in his opinion, Officer McKee was not following standard law enforcement procedures when he made the discretionary judgment to allow Joseph to drive instead of arresting Felder and impounding the car. As we have already determined that the officer's decision met the

requirements to establish discretionary immunity under the tort claims act, we conclude the town is likewise immune from this claim pursuant to section 15-78-60(5)

AFFIRMED.

HUFF, J., and CURETON, A.J., concur.

Parallel Citations

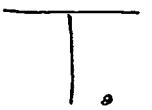
598 S.E.2d 728

Footnotes

1 We decide this case without oral argument pursuant to Rule 215, SCACR.

2 Though we recognize the trial court's order was silent on this issue, on appeal this court may affirm on any ground contained in the record. *See* Rule 220(c), SCACR

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309 S.C. 114
Supreme Court of South Carolina.

William J. DEGENHART, Vincent J. Degenhart, and Robert W. Degenhart, Appellants,
v.
KNIGHTS OF COLUMBUS, Respondent.

No. 23684. | Heard April 21, 1992. | Decided July 13, 1992.

Investors who engaged in business ventures with insurance agent brought suit against fraternal organization alleging failure to properly supervise and manage agent's activities. George W. Jefferson, Master-In-Equity, Lexington County, held that fraternal organization was not liable for acts of agent and investors appealed The Supreme Court, Harwell, C.J., held that: (1) fraternal organization did not negligently supervise agent, and (2) organization had no duty arising out of field agent contract to protect investors from activities arising out of agent's own business ventures.

Affirmed.

West Headnotes (6)

[1] **Negligence**
⇨ Necessity and Existence of Duty

Person ordinarily has no duty to act and, thus, person usually incurs no liability when he or she fails to take steps to protect others from harm not created by that person's own wrongful conduct.

3 Cases that cite this headnote

[2] **Labor and Employment**
⇨ Negligent training and supervision

Employer may be liable for "negligent supervision" if employee intentionally harms another while. upon premises in possession of employer or upon which employee is privileged to enter only as employee, or is using chattel of master; and employer knows or has reason to know that he has ability to control servant, and knows or should know of necessity and opportunity for exercising such control.

26 Cases that cite this headnote

[3] **Insurance**
⇨ Powers, duties, and liabilities

Fraternal organization did not negligently supervise insurance agent who allegedly induced clients to invest money in business venture for agent's own benefit in absence of evidence that agent harmed clients while utilizing premises or chattel of organization or that organization knew or should have known that it should exercise control over agent.

9 Cases that cite this headnote

[4] **Insurance**
⇨ Powers, duties, and liabilities

Fraternal organization owed no duty arising out of insurance agent contract to protect investors from risks resulting from their relationship with agent in various business ventures entered for agent's own benefits since any duty of care by organization extended only to supervising agent's actions undertaken in capacity as insurance agent.

2 Cases that cite this headnote

[5] **Appeal and Error**
⇨ Necessity of presentation in general

Appeal and Error
⇨ Sufficiency and Scope of Statement of Grounds

Issue on which master-in-equity never ruled and which was not raised in posttrial motion is not properly preserved for appeal.

8 Cases that cite this headnote

[6] **Appeal and Error**
⇨ As to Judgment, or Modification or Vacation of Judgment

Allegation that summary judgment was premature where nonmoving party had motion

to compel discovery outstanding was not preserved for appeal where party against whom summary judgment was entered did not move for continuance or ask for summary judgment decision to be held in abeyance pending outcome of motion to compel discovery.

8 Cases that cite this headnote

Attorneys and Law Firms

**495 *115 Paul V. Degenhart, Columbia, for appellants.

Val H. Stieglitz, of Nexsen, Pruet, Jacobs & Pollard, Columbia, for respondent.

Opinion

HARWELL, Chief Justice:

Appellants William J. Degenhart, Vincent J. Degenhart, and Robert W. Degenhart (the Degenharts) assert that the master-in-equity erred in holding that respondent Knights of Columbus was not liable for the acts of its agent, Michael A Aun, II. We affirm.

**496 I. FACTS

Knights of Columbus is a fraternal, non-profit organization that offers life insurance, health insurance, and annuities to its members Aun and Knights of Columbus entered into a Field Agent Contract wherein Aun was authorized to solicit and procure applications for life and health insurance on the lives of members of Knights of Columbus. Aun agreed that he would "not engage in any other occupation or business, except as authorized by [Knights of Columbus]."

Contrary to the Field Agent Contract, Aun established a real estate business. Aun initially contacted the Degenharts in his capacity as insurance agent for Knights of Columbus He subsequently induced the Degenharts to invest over $250,000 in various partnerships created by him for the purposes of owning and managing rental properties. When the investments failed, the Degenharts brought an action against Aun and Knights of Columbus, alleging, among other things, that they were injured by Knights of Columbus's failure to properly supervise and manage Aun's activities.

The master-in-equity found that the Degenharts were aware that Aun promoted his various business ventures for *116 his own benefit, and not for the benefit or profit of Knights of Columbus He also found that Knights of Columbus possessed no notice of Aun's outside activities. Accordingly, the master-in-equity found that Aun was acting outside the scope of his authority as agent for Knights of Columbus. The master-in-equity discerned no genuine issue of fact tending to demonstrate that Knights of Columbus had notice of Aun's outside real estate activities sufficient to create a duty on the part of Knights of Columbus to supervise the activities. The master-in-equity therefore granted summary judgment in favor of Knights of Columbus.

II. DISCUSSION

The Degenharts assert that because Knights of Columbus entrusted its members to Aun, it owed a duty to its members, including the Degenharts, to implement adequate safeguards to monitor and enforce Aun's contract. We disagree.

[1] Initially, we note that the question is not whether Knights of Columbus had notice of Aun's activities. Rather, the dispositive issue is whether Knights of Columbus owed the Degenharts a duty, and, if so, the extent of that duty If Knights of Columbus owed no duty to the Degenharts to protect them from the harm they suffered, notice is immaterial This is because the common law ordinarily imposes no duty on a person to act. *Rayfield v. South Carolina Department of Corrections*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct.App.1988) Thus, a person usually incurs no liability when he fails to take steps to protect others from harm not created by his own wrongful conduct. *Id.*

[2] Under certain circumstances, an employer is under a duty to exercise reasonable care to control an employee acting outside the scope of his employment. An employer may be liable for negligent supervision if the employee intentionally harms another when he:

(i) is upon the premises in possession of the [employer] or upon which the [employee] is privileged to enter only as his [employee], or

(ii) is using a chattel of [the employer], and ... [the employer]

(i) knows or has reason to know that he has the ability to *117 control his [employee], and

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(ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965).

An employer also may have a legal duty arising out of a contract which flows to a plaintiff with whom he is not in privity of contract This occurs when an employer, by entering into a contract with an employee, places himself in such a relation with the plaintiff that the law imposes upon the employer an obligation, sounding in tort and not in contract, to act in such a way that the plaintiff will not be injured. *See* W. Keeton, D. Dobbs, R Keeton & D. **497 Owen, *Prosser and Keeton on The Law of Torts* 667–68 (5th ed. 1984).

[3] Having identified duties that an employer may owe to third parties for the acts of its employee, we now turn to the case before us. As to negligent supervision, the Degenharts have presented no evidence demonstrating that Aun harmed them while utilizing the premises or chattel of Knights of Columbus Even assuming that Knights of Columbus had the ability to control Aun by enforcing the contract, as the Degenharts assert, there are no facts tending to show that Knights of Columbus knew or should have known that it should exercise control over Aun. Thus, we conclude that Knights of Columbus did not negligently supervise Aun.

[4] As to the contract between Knights of Columbus and Aun, we find that any duty Knights of Columbus might owe the Degenharts arising out of the contract between Knights of Columbus and Aun would be limited to an obligation on the part of Knights of Columbus to use due care in supervising Aun's actions undertaken in his capacity as agent for Knights of Columbus Here, Knights of Columbus's name appeared in no partnership agreement; no investment checks were made payable to Knights of Columbus; and Aun utilized his own name to publicize his business ventures. Clearly, Aun was acting in his individual capacity, and not as agent for Knights of Columbus, when he allegedly injured the Degenharts. Accordingly, we conclude that Knights of Columbus possessed no duty arising out of the contract to protect the Degenharts from unreasonable risks resulting from their relationship with Aun in his individual capacity.

*118 [5] [6] The Degenharts next allege that summary judgment was premature because they had a motion to compel discovery outstanding It appears from the record that the Degenharts took no steps to protect their interests in this regard. The Degenharts did not move for a continuance or ask the master-in-equity to hold his decision in abeyance pending the outcome of their motion to compel discovery. An issue on which the master-in-equity never ruled and which was not raised in post-trial motions is not properly before this Court. *SSI Medical Services, Inc. v. Cox,* 301 S.C. 493, 392 S.E 2d 789 (1990) The order of the master-in-equity granting summary judgment is

AFFIRMED.

CHANDLER, FINNEY, TOAL and MOORE, JJ., concur.

Parallel Citations

420 S.E.2d 495

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469 Mass. 710
Supreme Judicial Court of Massachusetts,
Suffolk.

Robert ROE NO. 1 & others [1]
v.
CHILDREN'S HOSPITAL
MEDICAL CENTER & others. [2]

SJC–11533. | Submitted April 8, 2014. | Decided Oct. 1, 2014.

Synopsis

Background: Alleged victims of sexual abuse by pediatric physician at North Carolina hospital filed negligence action against Massachusetts' hospital that had previously employed the physician. Hospital filed motion to dismiss for failure to state a claim. The Superior Court Department, Suffolk County, Merita A. Hopkins, J., granted motion Victims filed application for direct appellate review, which was granted

Holdings: The Supreme Judicial Court, Cordy, J., held that:

[1] no special relationship existed between hospital and pediatric physician, or with any of his prospective patients, such as would give rise to a duty of care for benefit of the victims, and

[2] community consensus in favor of protecting children from abuse could not have created a duty of care on part of hospital for benefit of victims

Affirmed

West Headnotes (13)

[1] **Appeal and Error**
⇦ Cases Triable in Appellate Court

The Supreme Judicial Court's review of a trial judge's decision to dismiss a claim for failure to state a claim is de novo. Rules Civ.Proc., Rule 12(b)(6), 46 M.G.L.A

Cases that cite this headnote

[2] **Pretrial Procedure**
⇦ Insufficiency in general

Pretrial Procedure
⇦ Presumptions and burden of proof

A plaintiff's obligation to provide the grounds of his entitlement to relief, based on motion to dismiss for failure to state a claim, requires more than labels and conclusions, and factual allegations must be enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the complaint are true, even if doubtful in fact. Rules Civ.Proc., Rule 12(b)(6), 46 M.G.L A.

Cases that cite this headnote

[3] **Negligence**
⇦ Necessity and Existence of Duty

To recover for negligence, a plaintiff must show the existence of an act or omission in violation of a duty owed to the plaintiffs by the defendant.

Cases that cite this headnote

[4] **Negligence**
⇦ Necessity and Existence of Duty

Negligence
⇦ Public policy concerns

Whether a defendant owes a plaintiff a duty of reasonable care is a question of law that is decided by reference to existing social values and customs and appropriate social policy, and if no such duty exists, a claim of negligence cannot be brought.

Cases that cite this headnote

[5] **Negligence**
⇦ Necessity and Existence of Duty

Negligence
⇦ Foreseeability

As a general rule, all persons have a duty to exercise reasonable care in their own conduct to

avoid harming others where the risk of harm is foreseeable to the actor.

Cases that cite this headnote

[6] **Negligence**

⇨ Protection against acts of third persons

Duty to exercise reasonable care to avoid harming others where the risk of harm is foreseeable does not typically extend to controlling the conduct of a third party unless a special relationship exists between the party posing a risk to others and the party who can prevent that harm from occurring by taking action.

Cases that cite this headnote

[7] **Labor and Employment**

⇨ Negligent Hiring

Labor and Employment

⇨ Negligent training and supervision

An employer whose employees have contact with members of the public in the course of conducting the employer's business has a duty to exercise reasonable care in selecting and supervising its employees.

Cases that cite this headnote

[8] **Health**

⇨ Abuse of patient

No special relationship existed between hospital and pediatric physician it had formerly employed, or with any of his prospective patients while working for subsequent medical employer such as would give rise to a duty of care on part of hospital to warn subsequent employer of past allegations of sexual abuse for benefit of prospective patients, given that only connection between the patients and hospital was that their alleged abuser worked for hospital twenty-four years before their abuse was reported.

Cases that cite this headnote

[9] **Negligence**

⇨ Voluntarily Assumed Duty

A community may impose a duty of care on itself.

Cases that cite this headnote

[10] **Health**

⇨ Abuse of patient

Mere existence of medical licensing boards and their ability to research histories of applicants, as evidence of community consensus in favor of protecting children from abuse, did not create a duty of care on hospital's part for benefit of pediatric physician's future patients to warn of alleged sexual abuse of former patients; medical facilities were not required to report alleged abuse to boards, and there was no penalty for a failure to do so.

Cases that cite this headnote

[11] **Health**

⇨ Abuse of patient

Policy statement of the American Academy of Pediatrics (AAP), which recommended that medical facilities search State registries and contact former employers to determine whether an employee had a history of child abuse, did not create a duty of care that would have required hospital to report to prospective employers the sexual abuse allegations made against pediatric physician it had formerly employed, in absence of an inquiry by a prospective employer; statement merely encouraged hospitals to inquire whether a potential hire presented a risk of child abuse.

Cases that cite this headnote

[12] **Health**

⇨ Abuse of patient

Existence of statute, which required physicians to notify Department of Children and Families when they had "reasonable cause to believe" that a child had been abused, did not support conclusion that public had come to consensus that hospital, that had formerly employed pediatric physician, owed a duty of care to

protect the physician's potential future patients in other States, or to require hospital affirmatively to alert prospective employer's that the physician had been accused of sexual abuse.

Cases that cite this headnote

[13] **Negligence**
⇨ Duty based upon statute or other regulation
Negligence
⇨ Violations of statutes and other regulations

Mere existence of a statute or regulation does not automatically give rise to a legal duty for the purpose of a negligence action, rather, it is only where a duty of care exists that the violation of a statute, ordinance, regulation, or policy is relevant because it constitutes some evidence of a defendant's negligence.

Cases that cite this headnote

Attorneys and Law Firms

**1045 Mark F. Itzkowitz, Boston, (Carmen L. Durso with him) for the plaintiffs

Gail M. Ryan (John P. Ryan with her), Boston, for Children's Hospital Medical Center

The following submitted briefs for amici curiae:

John J. Barter, Boston, for Professional Liability Foundation, Ltd

Darrell L. Heckman, of Ohio, & Ninamary Buba Maginnis, of Kentucky, for National Center for Victims of Crime.

J. Michael Conley, Braintree, Jeffrey S. Beeler, Natick, Thomas R. Murphy, Salem, & Kimberly A. Alley for Massachusetts Academy of Trial Attorneys.

**1046 Present: SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.

Opinion

CORDY, J.

*710 This case requires us to decide whether a Massachusetts hospital employer owes a legally cognizable duty of care to future patients of a doctor who has left the hospital's employ and *711 resumed practicing medicine in the employ of a different hospital in another State. We conclude that such a duty is not cognizable in the circumstances presented here, where the hospital does not have the type of special relationship either with its former employee, or with any of his prospective patients, that would create such a duty. Consequently, we affirm the judgment entered in the Superior Court dismissing the complaint for failing to state a claim on which relief may be granted.

1 *Background.* We recite the relevant facts as drawn from the plaintiffs' complaint, which we assume to be true for the purposes of our review. *Nader v. Citron,* 372 Mass. 96, 98, 360 N.E.2d 870 (1977).

The defendant, Children's Hospital Medical Center (Children's Hospital), is a fully licensed hospital located in Boston. In 1966 it hired Melvin Levine as a pediatric physician. Levine held that position until leaving Children's Hospital's employ in 1985.[3] On leaving Children's Hospital, Levine relocated to North Carolina, where he obtained a license to practice medicine and became employed as a pediatrician at the University of North Carolina School of Medicine (UNC). Twenty-four years later, in 2009, amid allegations that he had performed medically unnecessary genital examinations on a number of his patients at UNC, Levine signed a consent order surrendering his license to practice medicine in North Carolina and agreeing not to practice medicine in any other jurisdiction.

In 2011, the plaintiffs, eleven former patients of Levine at UNC, brought this suit against Children's Hospital in the Superior Court. Essentially, they allege that Children's Hospital failed to properly train, supervise, or discipline Levine during his employment at Children's Hospital; knew or should have known that Levine was conducting inappropriate genital examinations of minors during that employment; and failed to report Levine's conduct to various licensing authorities and UNC. Further, they allege that, as a consequence of this negligence on the part of Children's Hospital, Levine was able to continue his abuse of patients, including the plaintiffs, during his employment at UNC.[4]

*712 More specifically, the plaintiffs allege that, in 1967, the mother of a minor male patient informed Children's Hospital that Levine had sexually abused her son during

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an examination,[5] and that the plaintiffs are "informed and believe" that other patients may have made similar complaints **1047 to Children's Hospital during the term of Levine's employment. Further to this allegation, the complaint identifies litigation initiated in Massachusetts by former patients treated by Levine when he worked at Children's Hospital—litigation brought after Levine left Children's Hospital's employ. For example, in 1988, a patient identified as John Doe No. 6 filed suit against Levine in the United States District Court for the District of Massachusetts, alleging that Levine repeatedly performed medically unnecessary examinations of his genitals between 1978 and 1984; and, in 1993, a former patient identified as John Doe No. 7 complained of similar abuse to the Board of Registration in Medicine (board) [6] The complaint also references four additional suits that were filed in the Superior Court in 2005, 2006, 2008, and 2011, alleging substantially the same type of conduct by Levine during his employment at Children's Hospital.

In July, 2011, Children's Hospital moved to dismiss the plaintiffs' complaint pursuant to Mass. R. Civ. P. 12(b)(6), 365 Mass. 754 (1974), for failure to state a claim. Children's Hospital argued, among other things, that it did not owe any cognizable duty of care to the plaintiffs, as the alleged abuse happened after Levine left its employ and during his work for an unrelated hospital in another State. In response, the plaintiffs moved to amend their complaint in August, 2011, to add a paragraph alleging that Children's Hospital owed them a duty of care because it had a "special relationship" with Levine, and it knew or should have known that he posed a foreseeable risk of harm to *713 future patients. Children's Hospital opposed the motion, arguing that the proposed amended complaint would still not state a claim on which relief could be granted.

In July, 2012, a Superior Court judge, in a detailed memorandum of decision and order, allowed Children's Hospital's motion to dismiss and denied the plaintiffs' motion to amend. She concluded that Children's Hospital did not owe a recognized duty of care to the plaintiffs—victims of abuse at a hospital in North Carolina—given that the alleged abuse occurred after Levine left Children's Hospital's employ. The judge added that public policy did not dictate the creation of a duty to the plaintiffs that would expose an employer to liability for future potential abuse on unknown persons by a former employee anywhere in the country. As a result, she denied the motion for leave to amend, as the proposed amendment would not "cure the defect in the original complaint: the lack of a cognizable legal duty to these particular plaintiffs." The plaintiffs timely appealed the judge's decision, and we granted their application for direct appellate review.

[1] [2] 2 *Discussion* The only issue on appeal is whether Children's Hospital owed a duty of reasonable care to the plaintiffs requiring it to take affirmative action to protect them from Levine, including informing UNC or other appropriate authorities of allegations of sexual abuse made against him. Our review of the judge's decision to dismiss the claim pursuant to Mass. R. Civ. P. 12(b)(6) is de novo *Dartmouth v. Greater New Bedford Regional Vocational Tech. High Sch. Dist.*, 461 Mass. 366, 373, 961 N.E.2d 83 (2012) On review, "a plaintiff's obligation to provide the 'grounds' of his 'entitle [ment] to relief' requires more than labels and con **1048 clusions ... Factual allegations must be enough to raise a right to relief above the speculative level . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). " *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636, 888 N.E.2d 879 (2008), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–555, 127 S.Ct. 1955, 167 L Ed.2d 929 (2007).

[3] [4] "To recover for negligence, a plaintiff must show 'the existence of an act or omission in violation of a ... duty owed to the plaintiff[s] by the defendant.' " *Cottam v. CVS Pharmacy*, 436 Mass. 316, 320, 764 N.E.2d 814 (2002), quoting *Dinsky v. Framingham*, 386 Mass. 801, 804, 438 N E.2d 51 (1982) "Whether a defendant owes a plaintiff a duty of reasonable care is a question of law that is decided 'by reference to existing social values and customs and appropriate *714 social policy ' " *Coombes v. Florio*, 450 Mass. 182, 187, 877 N.E.2d 567 (2007), quoting *Cremins v Clancy*, 415 Mass. 289, 292, 612 N.E.2d 1183 (1993). "If no such duty exists, a claim of negligence cannot be brought." *Remy v MacDonald*, 440 Mass. 675, 677, 801 N.E.2d 260 (2004)

[5] [6] As a general rule, all persons have a duty to exercise reasonable care in their own conduct to avoid harming others where the risk of harm is foreseeable to the actor. *Id* That duty does not typically extend to controlling the conduct of a third party—here, Levine—unless a "special relationship" exists between the party posing a risk to others and the party who can prevent that harm from occurring by taking action. *Lev v. Beverly Enters.-Mass., Inc.*, 457 Mass. 234, 242, 929 N.E.2d 303 (2010).

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[7] We have recognized the relationship between an employer and employee as a type of special relationship "that potentially would give rise to a duty of care [to third parties] ... when 'the employment facilitates the employee's causing harm' " to them (citation omitted). *Lev*, 457 Mass. at 243–244, 929 N.E.2d 303. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 41 (2012) ("Duty to Third Parties Based on Special Relationship with Person Posing Risks").[7] In such circumstances, employers are responsible for exercising reasonable care to ensure that their employees do not cause foreseeable harm to a foreseeable class of plaintiffs. For example, an employer whose employees have contact with members of the public in the course of conducting the employer's business has a duty to exercise reasonable care in selecting and supervising its employees. See *Coughlin v. Titus & Bean Graphics, Inc.*, 54 Mass.App.Ct. 633, 639, 767 N.E.2d 106 (2002).

[8] While there is little doubt that Children's Hospital had a duty to supervise and monitor Levine's conduct while he was employed as a physician there, and **1049 owed a duty of reasonable care to his minor patients to prevent foreseeable harm to them, that is *715 not this case. 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 While the responsibilities of medical providers to vulnerable patients might extend beyond those of other service-providing employers, the geographic and temporal breadth of the duty the plaintiffs seek to impose reaches too far, and would potentially expose the employer to liability to an essentially limitless class of unknown parties for acts committed long after the employer had any ability to supervise, monitor, or discipline the former employee's conduct. We decline to create such uncertainties for medical providers in the Commonwealth by creating such a duty, and are not aware of any other jurisdiction that has done so.[8]

In similar circumstances, the Supreme Court of Wisconsin declined to find a special relationship giving rise to a duty of care in *Hornback v. Archdiocese of Milwaukee*, 313 Wis.2d 294, 752 N.W.2d 862 (2008). In that case, the plaintiffs, who grew up in Kentucky, alleged that their former teacher sexually abused children between 1964 and 1966 while employed by various schools in Wisconsin that were operated by the Diocese of Madison (diocese). *Id.* at 302, 752 N.W.2d 862. The teacher then accepted a position in another State, Kentucky, where he allegedly abused the plaintiff students. *Id* The plaintiffs brought suit against the diocese, claiming that it knew or should have known of the teacher's conduct and was negligent in failing to affirmatively warn other schools or authorities of the teacher's history of sexual abuse. *Id.* at 302–303, 752 N.W.2d 862. The court affirmed the dismissal of the complaint,[9] *id.* at 328, 752 N.W.2d 862, concluding that the diocese did not owe the plaintiffs a duty of care, *716 reasoning that "[t]here 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." *Id.* at 319, 752 N.W.2d 862. The court went on to state that the "plaintiffs appear to interpret Wisconsin's duty of ordinary care as creating automatic negligence and liability for any person even tangentially connected in a causal chain of injury, with little concern about the relationship among those sued, or how many years have passed between causal events ... There must be limits. We draw one here." *Id.* at 327–328, 752 N.W.2d 862.

**1050 The plaintiffs here have not alleged that Children's Hospital affirmatively misrepresented Levine's employment history in response to reference or professional qualification inquiries from UNC or any other authority, or that any such inquiries were even made.[10] Rather, the duty the plaintiffs seek to impose is one that would obligate Children's Hospital to seek out Levine's future employers in order to warn them of past allegations of abuse made against him It is unclear what level of knowledge on the part of an employer would trigger such an obligation. For example, if Children's Hospital received a complaint about Levine (or any other doctor), investigated that complaint, and determined it to be unsupported, would it still be obliged to seek out potential future employers and disclose the complaint to them in order to avoid liability? Such a duty would place an onerous burden on employers, obligating them to track former employees and warn their future employers or, perhaps, even the customers of such future employers. While the protection of children from sexual abuse is of great importance, an employer's duty to prevent such harm cannot extend to a duty to prevent the actions of a former employee later employed by an unrelated entity in another State in the decades following his departure from the employer's employ.

We have also recognized, on occasion, a "special relationship" between a defendant and prospective plaintiffs. See *McGuiggan v. New England Tel. & Tel. Co.*, 398 Mass 152, 162, 496 N.E.2d 141 (1986) (social *717 host has duty to potential class of victims to stop serving individual he reasonably should know is intoxicated); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 501, 233 N.E.2d 18 (1968)

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(tavern owner has same duty) See also *Mullins v. Pine Manor College,* 389 Mass. 47, 51, 449 N.E.2d 331 (1983) (college owed duty of care to students who were victims of rape where community of colleges had taken "steps to provide an adequate level of security on ... campus"). [11] We have generally recognized such relationships only where the defendant could reasonably anticipate that his or her failure to take prompt action in circumstances that he or she controlled could result in harm to a clearly defined class of plaintiffs; for example, a tavern owner can reasonably be aware that his or her failure to stop serving an intoxicated person can lead to a predictable injury to other drivers on the neighboring roads

We decline to recognize a special relationship between Children's Hospital and the plaintiffs The potential class of plaintiffs who could claim a special relationship with Children's Hospital includes every potential patient in any State where Levine ever worked after he left its employ—essentially, an unlimited and unknowable number of people. The plaintiffs had virtually no relationship with or connection to Children's Hospital. There are significant gaps both temporally and geographically between Levine's employment at Children's **1051 Hospital and the alleged abuse at UNC. See *Hornback,* 313 Wis.2d at 318–319, 752 N.W.2d 862. Indeed, the only connection between the plaintiffs and Children's Hospital is that their alleged abuser worked for Children's Hospital twenty-four years before their abuse was reported. This is simply insufficient to support the existence of a special relationship between the parties giving rise to a duty of care.

In support of their argument that Children's Hospital owed them a duty of care, the plaintiffs also argue that (1) the medical community has imposed a duty on itself to report alleged abuse in order to protect future patients from predatory physicians, (2) the general public has demonstrated, through the enactment of statutes *718 and regulations, that such a duty exists, establishing a "community consensus"; and (3) public policy is served by the recognition of such a duty. While we agree that there is a well-established community consensus in favor of protecting children from abuse, we disagree that such concerns create a duty under the circumstances presented in this case, but address the plaintiffs' points in turn.

[9] First, a community may impose a duty of care on itself. See *Mullins,* 389 Mass. at 51, 449 N.E.2d 331. The plaintiffs contend that the medical community has imposed on itself the duty to protect children from being abused. As evidence, they point to the creation of the Federation of State Medical Boards (FSMB) and the National Board of Medical Examiners (NBME), [12] which are organizations whose services are used by medical facilities to determine the fitness of applicants for licensure. They also point to the 1958 version of the American Medical Association's "Principles of Medical Ethics," which called on physicians to "safeguard the public" against immoral physicians and "expose, without hesitation, illegal or unethical conduct of fellow members of the profession " Finally, they draw our attention to a policy statement of the American Academy of Pediatrics (AAP), which recommends that medical facilities search State registries and contact former employers to determine whether an employee has a history of child abuse. American Academy of Pediatrics, Policy Statement —Protecting Children from Sexual Abuse by Health Care Providers, 128 Pediatrics 407, 411–412 (2011)

[10] While we agree that the medical community has taken steps to protect children from sexual abuse, we are not persuaded that medical care facilities have undertaken a duty to protect unknowable future plaintiffs from harm by former employees. The FSMB and NBME are licensing databases, and exist to allow medical institutions and licensing boards to research the histories of applicants. Medical facilities are not required to report alleged abuse to them, and there is no penalty for a failure to do so. The mere existence of the boards does not create a duty of care on Children's Hospital's part to the plaintiffs

[11] *719 Similarly, the AAP's statement merely encourages hospitals to inquire whether a potential hire presents a risk of child abuse. It does not create a legal duty of care. *Lev,* 457 Mass. at 244–245, 929 N.E.2d 303 (employer's internal safety policy does not create legal duty where none already existed at law) It also is not apparent that the statement even applies **1052 to these circumstances, as it does not include a duty to actively report alleged abuse. While the AAP's statement may be evidence of a consensus with respect to proper hiring and retention practices, and could potentially be used to prove UNC's negligence if it failed to exercise its due diligence in investigating Levine's fitness as a pediatrician, it does not support the plaintiffs' claim that the medical community has imposed on itself a duty that would require *Children's Hospital* to report the allegations made against Levine in the absence of an inquiry by a prospective employer

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[12] The same is true of the plaintiffs' contention that the duty of care proposed has been incorporated into Massachusetts statutory law, evincing a consensus in the general public in support of the duty. The plaintiffs refer us to G.L. c. 119, § 51A, which requires physicians—among other professionals—to notify the Department of Children and Families (department) when they have "reasonable cause to believe" that a child has been abused; [13] G.L. c. 111, § 53B, which requires hospitals to report disciplinary action taken against registered physicians to the board; and G.L. c. 112, § 5F, which requires health care providers to report to the board "any person who there is reasonable basis to believe" has engaged in the improper practice of medicine. [14]

[13] As an initial matter, and as the judge correctly noted, the mere existence of a statute or regulation does not automatically give rise to a legal duty for the purpose of a negligence action. See *Lev*, 457 Mass. at 245, 929 N.E.2d 303. Rather, "[i]t is only where a duty of care exists that the violation of a statute, ordinance, regulation, or policy is relevant because it constitutes some evidence of a *720 defendant's negligence." *Id.* Certainly, all of the referenced statutes are generally intended to protect children in Massachusetts from abuse, and any evidence that Children's Hospital violated those statutes regarding Levine's conduct might be relevant in a tort action by patients alleged to have been abused by Levine while in Children's Hospital's employ. That, however, is because Children's Hospital already has a legally cognizable duty to prevent harm to its own minor patients, not because the existence of the statutes created that duty.

In any event, the statutes referenced by the plaintiffs do not support a conclusion that the public has come to the consensus that Children's Hospital owes a duty of care to the plaintiffs. To be certain, they require that Children's Hospital report abuse to the department and the board in order to protect children in the care of Massachusetts hospitals and doctors. They do not, however, create a duty to protect potential future plaintiffs in other States, or require Children's Hospital affirmatively to alert prospective employers that Levine had been accused of sexual abuse. We thus conclude that the plaintiffs' complaint does not state a claim on which relief may be granted. [15]

**1053 3. *Conclusion.* We affirm the denial of the plaintiffs' motion to amend the complaint and the allowance of Children's Hospital's motion to dismiss the complaint.

So ordered.

Parallel Citations

16 N.E.3d 1044

Footnotes

1 Robert Roe Nos. 2–11

2 Michael Moe Nos 1–10.

3 The reasons for the departure of Melvin Levine from Children's Hospital and Medical Center (Children's Hospital) are not in the record, and the plaintiffs have not alleged that Levine's departure was the product of complaints against him or that it was anything other than voluntary

4 The plaintiffs' complaint alleges the following legal theories: count I alleges that Children's Hospital was negligent in failing to take any action to prevent Levine from abusing them, count II alleges a conspiracy between Children's Hospital and unknown individuals to conceal and prevent the disclosure of Levine's sexual abuse of his patients; and count III alleges that Children's Hospital intentionally and fraudulently concealed and prevented the disclosure of Levine's sexual abuse of his pediatric patients.

5 Children's Hospital denies that any such report was filed, but for the purposes of our review we take the factual allegations set forth in the complaint as true

6 Children's Hospital was not a party to the Federal lawsuit brought by John Doe No. 6, and after a jury trial, a directed verdict was entered in favor of Levine, resulting in the suit's dismissal. According to Children's Hospital, the complaint filed by John Doe No 7 with the Board of Registration in Medicine (board) was dismissed after an investigation had been completed by board investigators.

7 The Restatement identifies four types of special relationships giving rise to a duty of reasonable care with regard to risks posed by a third party that arise within the scope of the relationship: "(1) a parent with dependent children; (2) a custodian with those in custody; (3) an employer with employees when the employment facilitates the employee's causing harm

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to third parties, and (4) a mental-health professional with patients " Restatement (Third) of Torts Liability for Physical and Emotional Harm § 41(a) (2012).

"Employment facilitates harm to others when the employment provides the employee access to physical locations, such as the place of employment, or to instrumentalities, such as a concealed weapon that a police officer is required to carry while off duty, or other means by which to cause harm that would otherwise not be available to the employee." *Id* at § 41 comment e

8 Even when we impose new duties based on relationships, we are careful not to recognize duties that would expose the person having the relationship to endless liability and litigation from innumerable people for failing to act in ways that arguably might have prevented some future harm. Compare *Jupin v. Kask,* 447 Mass. 141, 152, 849 N.E.2d 829 (2006) (recognition of duty of property owner to secure gun from person known to have history of violence and mental instability would not expose property owners to endless litigation and liability), with *Remy v. MacDonald,* 440 Mass. 675, 677–678, 801 N E.2d 260 (2004) (imposing liability on pregnant woman not to harm fetus negligently would present unlimited number of circumstances where liability could attach)

9 There were two defendants in the case, the Archdiocese of Milwaukee (archdiocese) and the Diocese of Madison (diocese) The trial court dismissed the complaint against both defendants on statute of limitations grounds, a decision that the Appeals Court of Wisconsin affirmed See *Homback v. Archdiocese of Milwaukee,* 313 Wis 2d 294, 304, 752 N W.2d 862 (2008) The Supreme Court of Wisconsin also affirmed the dismissal against the diocese, but on duty of care grounds. *Id.* at 319, 752 N W.2d 862 An equally divided Supreme Court affirmed the dismissal of the case against the archdiocese on statute of limitations grounds *Id.* at 328, 752 N.W 2d 862.

10 We leave open the question what, if any, duty Children's Hospital might have with respect to inquiries made of it by prospective employers in the medical field with regard to abuse allegations arising out of the work of former employees.

11 As Children's Hospital points out, in *Coombes v. Florio,* 450 Mass 182, 190, 877 N E.2d 567 (2007), we recognized a special relationship between doctor and patient giving rise to liability. In that case, the patient injured the plaintiffs after his doctor neglected to exercise a duty to inform the patient about the side effects of prescribed medication. *Id.* at 184–185, 190, 877 N.E.2d 567. While both *Coombes* and this case involve medical personnel, *Coombes* is inapposite given that the proposed relationship here arose from conduct occurring between an employer and its employee, not a doctor and his or her patient

12 According to the trial judge's memorandum of decision, the Federation of State Medical Boards represents seventy medical boards in the United States and maintains a database of information regarding the licensing and discipline of physicians to be used by the public While it collects information from its member medical boards, it is unclear whether it solicits direct reports from medical institutions

13 General Laws c 119, § 51A (*a*), requires that "[a] mandated reporter who, in his professional capacity, has reasonable cause to believe that a child is suffering physical or emotional injury resulting from: (i) abuse inflicted upon him which causes harm or substantial risk of harm to the child's health or welfare, including sexual abuse ... shall immediately communicate with the department orally and, within 48 hours, shall file a written report with the department detailing the suspected abuse or neglect "

14 The plaintiffs argue not that Children's Hospital violated these statutes, but that the statutes are indicative of the community consensus in favor of imposing their proposed duty of care.

15 Because we conclude that the plaintiffs' complaint, even if amended as proposed, would not state a claim on which relief may be granted, we affirm the Superior Court's denial of the plaintiffs' motion to amend See *Vakil v. Vakil,* 450 Mass. 411, 417, 879 N E 2d 79 (2008) (motion to amend should be granted unless there appears to be good reason for denying motion such as futility of proposed amendment)

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V.



112 Ohio App.3d 724
Court of Appeals of Ohio,
Tenth District, Franklin County.

EVANS et al., Appellants,
v.
OHIO STATE UNIVERSITY, Appellee.*

No. 95APH08-965. | Decided July 23, 1996.

Minor's mother sued state university, alleging that university, through its county extension office, hired goat expert to be fair judge and clinic speaker despite knowledge of expert's prior convictions for gross sexual imposition and corruption of minor, and that expert thereafter molested plaintiff's minor daughter. The Court of Claims, Franklin County, entered judgment for university, and plaintiff appealed. The Court of Appeals, Deshler, J., held that: (1) it was not reasonably foreseeable to university that expert would come in contact with plaintiff's daughter, who was not herself 4-H member during expert's employment, thus precluding recovery on negligent hiring claim; (2) university was not liable under theory of agency by estoppel or apparent authority; and (3) county extension office employees did not engage in "wanton misconduct" by failing to warn others of expert's prior criminal record.

Affirmed.

Lazarus, J., issued opinion concurring in part and dissenting in part.

West Headnotes (25)

[1] **Parent and Child**
⇨ Persons in loco parentis in general

"In loco parentis" is relationship which person assumes toward child not his own, holding him out to world as member of his family toward whom he owes discharge of parental duties, person standing in loco parentis to child is one who put himself in position of lawful parent assuming obligations incident to parental relation, without going through formalities necessary to legal adoption.

14 Cases that cite this headnote

[2] **Parent and Child**
⇨ Persons in loco parentis in general

When person accepts custody of child, that person stands in loco parentis to child, accepting all rights and responsibilities that go with that status.

1 Cases that cite this headnote

[3] **Parent and Child**
⇨ Persons in loco parentis in general

Key factors of "in loco parentis" relationship are intentional assumption of obligations incidental to parental relationship, especially support and maintenance

11 Cases that cite this headnote

[4] **Parent and Child**
⇨ Persons in loco parentis in general

A 4-H organization did not stand in relation of "in loco parentis" with 4-H member who was molested by volunteer who became involved with 4-H organization after prior conviction for gross sexual imposition and corruption of minor, 4-H did not assume type of parental rights, duties or responsibilities over its members required to obtain in loco parentis status.

7 Cases that cite this headnote

[5] **Negligence**
⇨ Necessity and Existence of Duty

Negligence
⇨ Duty as question of fact or law generally

Existence of duty in negligence case is question of law for court to determine, and there is no formula for ascertaining whether such duty arises

3 Cases that cite this headnote

[6] **Labor and Employment**
⇨ Negligent Hiring

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Labor and Employment
⇦ Negligent retention

Elements of claim for negligent hiring or retention are existence of employment relationship, employee's incompetence, employer's actual or constructive knowledge of such incompetence, employee's act or omission causing plaintiff's injuries, and employer's negligence in hiring or retaining employee as proximate cause of plaintiff's injuries. Restatement (Second) of Agency § 213.

49 Cases that cite this headnote

[7] **Labor and Employment**
⇦ Negligent Hiring

Whether considering claim based on negligent hiring or one for failure to control conduct of third person, issue of whether duty is owed is based upon foreseeability of injury. Restatement (Second) of Agency § 213.

13 Cases that cite this headnote

[8] **Negligence**
⇦ Protection against acts of third persons

Ordinarily, there is no duty to control conduct of third person by preventing him or her from causing harm to another, except in cases where there exists special relationship between actor and third person which gives rise to duty to control, or between actor and another which gives the other right to protection; thus, liability in negligence will not lie in absence of special duty owed by particular defendant.

1 Cases that cite this headnote

[9] **Negligence**
⇦ Foreseeability

Existence of duty depends on foreseeability of injury, i.e., whether reasonably prudent person would have anticipated that injury was likely to result from performance or nonperformance of act.

2 Cases that cite this headnote

[10] **Negligence**
⇦ Protection against acts of third persons

There is no common-law duty to anticipate or foresee criminal activity; thus, law usually does not require prudent person to expect criminal activity of others.

Cases that cite this headnote

[11] **Negligence**
⇦ Protection against acts of third persons

Mere fact that defendant might reasonably anticipate criminal acts of third party is not of itself sufficient to hold defendant liable for such acts; only where such acts were to be anticipated, and taking risk of them was unreasonable, can liability be imposed for consequences to which such intervening acts contributed.

4 Cases that cite this headnote

[12] **Education**
⇦ Particular Injuries to Persons Other Than Students or Teachers

State university, through its county extension office, could not reasonably foresee likelihood that, as a result of its decision to hire convicted child molester as fair judge or clinic speaker, he would later become personally involved with local 4–H community, come in contact with plaintiff minor, and engage in wrongful misconduct, and thus university could not be held liable on negligent hiring theory, even though it knew of his prior record; decision to hire molester was based on view that he would have only limited contact with 4–H members in controlled setting under supervision of extension office, minor became member after molester last spoke at clinic, and molestation took place not at 4–H activity, but at molester's residence, over one year after employment relationship ended Restatement (Second) of Agency § 213.

3 Cases that cite this headnote

[13] **Negligence**
⇦ Protection against acts of third persons

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Foreseeability of criminal act by third party depends on defendant's knowledge, which must be determined by totality of circumstances, and it is only when totality of circumstances is somewhat overwhelming that defendant will be held liable.

9 Cases that cite this headnote

[14] **Labor and Employment**
⇨ Negligent Hiring

Scope of employer's duty in exercising reasonable care in making hiring decision is largely dependent on type of responsibility associated with particular job.

Cases that cite this headnote

[15] **Education**
⇨ Particular Injuries to Persons Other Than Students or Teachers

Decision by state university, through county extension office, to hire convicted child molester as fair judge and clinic speaker was not proximate cause of acts of molestation he subsequently committed upon minor, where that minor became 4–H member approximately six months after molester last spoke at clinic, and where molestation took place not at 4–H activity, but at molester's residence, over one year after employment relationship ended

Cases that cite this headnote

[16] **Principal and Agent**
⇨ Nature of the relation in general

"Agency relationship" is consensual fiduciary relationship between two persons where agent has power to bind principal by his actions, and principal has right to control agent's actions.

11 Cases that cite this headnote

[17] **Principal and Agent**
⇨ Implied and Apparent Authority
Principal and Agent
⇨ Estoppel to Deny Authority

In order to show "agency by estoppel" or "apparent authority," plaintiff must establish that principal held agent out to public as possessing sufficient authority to embrace particular act in question, or knowingly permitted him to act as having such authority, and that person dealing with agent knew of facts and acting in good faith had reason to believe and did believe that agent possessed necessary authority.

3 Cases that cite this headnote

[18] **Labor and Employment**
⇨ Nature, Creation, and Existence of Employment Relation

Unpaid volunteer may be "servant" of one accepting such services. Restatement (Second) of Agency § 225.

Cases that cite this headnote

[19] **Charities**
⇨ Officers and agents of charitable societies

Determination whether unpaid volunteer is "servant" generally depends on charitable organization's right to control volunteer's activities. Restatement (Second) of Agency § 225.

Cases that cite this headnote

[20] **Education**
⇨ Particular Injuries to Persons Other Than Students or Teachers

State university, through county extension office, did not have "apparent authority" over goat expert when he molested minor 4–H member at expert's residence, even though office had previously hired expert to judge two fair goat shows and to conduct four prefair clinics, and thus, university was not liable for that molestation under theory of agency by estoppel or apparent authority, there was no evidence that office had right to control, or that it manifested right to control or supervise, expert's actions after their employment relationship ended, molestation occurred over one year thereafter, and evidence indicated that extension office was

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unaware of any alleged activities by expert in connection with local 4–H clubs. Restatement (Second) of Agency § 225.

1 Cases that cite this headnote

[21] **Education**
⇦ Evidence

Evidence did not support claim that goat expert, whom defendant state university, through its county extension office, at one time hired as fair judge and clinic speaker despite his prior gross sexual imposition conviction, ever committed any criminal acts at any 4–H clinics, fair events or club meetings, for purposes of action arising from expert's molestation of minor 4–H member after his employment with defendant ended, while one witness testified that her daughter stated that she was raped by expert at fair, there was no evidence indicating that her daughter was at fair as 4–H member or that expert was at fair as 4–H representative.

Cases that cite this headnote

[22] **Education**
⇦ Trial

Even if decision by university, through its county extension office, not to disseminate information that goat expert it hired as fair judge and clinic speaker had prior convictions for gross sexual imposition and corruption of minor were not basic policy decision involving high degree of discretion, and even if it were thus error to conclude that university was entitled to statutory immunity for expert's subsequent molestation of minor 4–H member, such holding was harmless, university owed no duty to that minor, as she became 4–H member six months after expert's employment relationship ended, and molestation occurred not at 4–H activity, but at expert's residence, over one year after employment relationship ended. R.C. § 2743.02.

3 Cases that cite this headnote

[23] **Negligence**
⇦ Willful or wanton conduct

"Wanton misconduct" is failure to use any care and indifference to consequences, when probability of harm is great and probability of harm is known or should be known; it is more than mere negligence, and it must be such conduct with knowledge of dangerous situation liable to cause injury to others as manifests heedless disregard for or indifference to rights of others or for consequences, i e., such conduct as manifests disposition to perversity.

Cases that cite this headnote

[24] **Education**
⇦ Particular Injuries to Persons Other Than Students or Teachers

Even if 4–H officials whom defendant state university employed through its county extension office in first county were aware of goat expert's prior convictions for gross sexual imposition and corruption of minor, and even if those officials failed to warn extension office in second county of those convictions before that office hired expert as fair judge and clinic speaker, officials in question did not thereby engage in "wanton misconduct," for purposes of action against university by minor 4–H member from second county whom expert molested after his employment relationship with second county ended; officials from first county never served in second county, and information regarding expert's criminal record came to attention of second county's officials before minor in question joined 4–H.

Cases that cite this headnote

[25] **Education**
⇦ Particular Injuries to Persons Other Than Students or Teachers

County extension officer did not engage in "wanton misconduct" by failing to disclose to 4–H advisors and members that goat expert whom extension office hired as fair judge and clinic speaker had prior convictions for gross sexual imposition and corruption of minor, and thus, state university, which employed extension officer, was not liable for expert's molestation of

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minor 4–H member after expert's employment with extension office ended, officer brought issue up at committee meeting, and committee members approved expert's hiring, based on grounds that one member knew expert and felt that he was not guilty of prior charges, and based upon fact that expert's duties would be performed in public setting and under control of county extension office.

Cases that cite this headnote

Attorneys and Law Firms

**164 Zellmer & Gruber, James R. Douglass and Beth Z. LaRue, Cleveland, for appellants

Betty D. Montgomery, Attorney General, Peggy W. Corn and Catherine M. Cola, Assistant Attorneys General, for appellee.

Opinion

DESHLER, Judge

This is an appeal by plaintiffs, Carol Evans, individually, and as guardian and next friend of her daughter, Stephanie Foucher ("Stephanie"), from a judgment of the Ohio Court of Claims finding in favor of defendant, the Ohio State University, in a negligence action.

On April 25, 1994, plaintiffs filed a complaint against defendant, alleging that James Waites, a 4–H volunteer counsellor and judge, utilized his position as a 4–H advisor to lure Stephanie, a minor, to his residence, where he sexually assaulted her on May 30, 1992 It was averred that, notwithstanding the fact that defendant knew or should have known of Waites's known propensities to utilize his position as a 4–H advisor to assault minor children, defendant continued to retain Waites without adequate supervision and to hold him out as a reliable and competent member of the 4–H staff. The matter came for trial before the Court of Claims beginning on February 13, 1995.

Pursuant to R.C. 3335.36, defendant, through the College of Agriculture, conducts educational programs in conjunction with the Ohio Cooperative Extension Service ("extension service"). The extension service is an educational arm of various land grant universities in the United States, and it conducts educational activities related to agriculture, home economics, natural resources, family living and youth development. 4–H is the public name of the youth development effort within the extension service. There is an extension office in every Ohio county and defendant employs agents in these offices to coordinate and operate its programs, including 4–H. The central offices for the 4–H organization are at the Ohio State University in Columbus, Ohio.

At the county level, 4–H is organized, in part, through different committees. At the head of this committee structure is the 4–H committee, which is responsible *730 for the final policy review of other committees. In addition to the 4–H committee, there are various advisory committees, including a saddle horse committee, dairy committee, market animal committee, small animal committee and home economics committee. There are also numerous 4–H clubs formed at the local county level. Each club has an organizational advisor, also known as a head advisor, as well as other volunteer assistant advisors In order to become an advisor, an applicant must submit a written application with references The county extension agent keeps a list of official 4–H volunteers.

In 1981, James Waites became a volunteer advisor for a 4–H club in Lake County, Ohio Waites had two children in the 4–H program at the time. In 1984, he served on Lake County's 4–H market livestock committee.

In November 1984, Waites pled no contest and was convicted of gross sexual imposition and corruption of a minor. Waites served approximately two years in prison and was released in 1987; thereafter, he returned to his Lake County residence in Perry, Ohio.

**165 In 1988 or 1989, Waites again became involved in 4–H activities in Lake County. The testimony at trial indicated that individuals in Lake County at that time were familiar with Waites and knew of his prior convictions Among these individuals were Lake County 4–H advisors Mary Ann Zoldak and Linda Hofer, both of whom believed Waites was innocent.

Waites continued his involvement in Lake County 4–H until 1990 when, in August of that year during the Lake County Fair, a dispute arose between Waites and other members of the 4–H organization. Specifically, Waites made accusations that 4–H advisor Linda Hofer and her husband were raising sick goats, resulting in the contamination of other goats. Waites attempted to have the Hofers' goats removed from the fair.

Waites also made accusations regarding the manner in which the goat judging was conducted at the fair that year.

In 1989, Thomas Hopkins was hired by defendant as the Ashtabula County extension agent to oversee the 4–H program in that county. One of the 4–H clubs in Ashtabula County at that time was the "All–County Kids." Cynthia Maddox Cook and Chris Malnar were advisors to the All–County Kids in the early 1990s.

The Ashtabula County Fair Board, through a cooperative arrangement, delegates responsibility for organizing the junior fair show to the Ashtabula County 4–H. One of the components of the junior fair is the junior fair goat show. In the late 1980s and early 1990s, the 4–H small animal committee made recommendations regarding the selection of judges for the county fair. Catherine ("Kitty") Butler, a 4–H advisor, worked on the small animal committee during those years *731 and was the individual primarily responsible for selecting the goat judge at the fair during this time

Butler was familiar with Waites, who had a reputation as a goat expert. They first met in 1983, at about the time Butler began raising goats as a business venture. Butler and Waites became friends through activities at goat shows and by working together on various goat-related projects. Butler invited Waites to be a judge at the Ashtabula County Fair in 1988 and 1989 Waites also was asked to speak at Ashtabula County 4–H sponsored prefair clinics in April 1991, May 1990, May 1989, and June 1988.

Waites received $25 for judging the goat show at the 1988 Ashtabula County Fair and $35 for judging the show at the 1989 Ashtabula County Fair He received $15 for his work at the prefair clinic in 1989, and $20 for the clinic he conducted in 1990. Funding for judges at the fair is provided by the fair board.

In March 1990, Hopkins received a memo from Jodi Black, an employee of the Ohio State University ("OSU") extension office, indicating that Waites had served two years in prison for gross sexual imposition and corruption of a minor Black, a 4–H animal science extension associate, was prompted to write the letter by a phone call she had received in early 1990 from a woman who had been a judge at the Ross County goat show. The caller told Black that " 'James Waites is on your nonrecommended, nonapproved, noncertified judges list, and I believe he is a convicted child molester. I'm not for sure, but I've heard that ' " As a result of that conversation, Black contacted Dr. John Stitzlein, the head of personnel for the OSU extension service, as well as James Helt, the state 4–H leader. Stitzlein and Helt recommended that Black send out a letter to county agents to inform the county extension personnel responsible for selecting junior fair judges of the facts concerning Waites. Black sent the letter to all eighty-eight Ohio counties.

Shortly thereafter, at an April meeting of the Ashtabula County 4–H small animal committee, Hopkins raised the issue of the Black memo. During that meeting, Kitty Butler stood up and spoke on behalf of Waites, stating that she had known Waites for a long time, that she was aware of his prior criminal record, and that she did not believe that he was guilty. Hopkins testified that several people then spoke up and indicated that, since Kitty Butler was familiar with the situation, having known Waites for a period of time, and based upon the fact that this was a "one-time situation, * * * we were only asking **166 him to come and do a clinic, in a public setting, where he would be under our control, and then he would be back across the county lines, that it was a reasonable thing to * * * go ahead and ask him to come and allow him to do that clinic." Thus, following the meeting at which the memo was discussed, Waites spoke at a clinic in the spring of 1990 and he was a speaker at another clinic in the spring of 1991. Both of these clinics were open to the public None of the advisors of the All–County *732 Kids attended the April 1990 meeting, and the evidence indicated that neither of those advisors, nor any other advisors in Ashtabula County, were notified at the time of Waites's prior criminal record.

Stephanie Foucher joined 4–H in November 1991, and was a member until September 1992. Soon after joining 4–H, she became involved in a goat project. Stephanie asked Chris Malnar if she knew someone who could assist her with goats and Malnar suggested Waites. Stephanie and her stepfather subsequently went with Waites to Chesterland, Ohio to purchase a goat for Stephanie's project.

Stephanie recalled seeing Waites at the home of Chris Malnar during a meeting of the All–County Kids club in January 1992. Specifically, Stephanie testified as follows.

"Q. What was he [Waites] doing there at the meeting?

"A. Um, he was out back. All of us were in her house, and I think he was out back with her husband, and then he came

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in later and just stood around and watched us and butted in whatever he wanted to say.

"Q. When you say 'butted in,' was he talking—

"A. Well, he just put his two cents in

"Q. And the subject, I take it, was goats?

"A. Yes."

Stephanie also indicated that she saw Waites at a club meeting at the home of Cynthia Cook. Stephanie stated that Waites once drove her home from an activity at a farm where other members of the club were in attendance Stephanie did not recall seeing Waites at any club meetings held at the fairgrounds Waites and Cook once came over to Stephanie's house to help dehorn Stephanie's goat. Waites came over to Stephanie's house on two occasions by himself to assist with Stephanie's goat. Stephanie indicated that she did not ask him to come to her house; rather, she stated, "usually he invited himself over." Waites made phone calls to Stephanie at her home and Stephanie recalled phoning Waites two or three times regarding questions about her goat.

Stephanie's mother, Carol Evans, testified that in the spring of 1992, Waites would come over to the house "every so often" to talk with Stephanie about the goat. More specifically, Evans recalled that he came to the house on six occasions According to Evans, it was her impression that Waites was spoken about and treated as though he were a 4–H leader Evans stated that Waites "was allowed to be very involved with these children * * * and I assumed he was a leader" Evans sometimes drove her daughter to club meetings; on those occasions, she never saw Waites at any meetings

*733 Waites told Evans that he was an orthopedic doctor and that he worked at Mount Sinai Hospital; Evans thought that Waites sounded very credible. During the month of May 1992, Waites began making frequent telephone calls to the Evans's residence to talk with Stephanie. Waites told Evans that "he thought Steph had potential and that she could do real well and that he wanted to work with her, and I just believed him." Waites spoke about a possible 4–H scholarship for college.

Waites subsequently offered to give Stephanie a French Alpine goat. On Sunday morning, May 30, 1992, Waites picked up Stephanie at the home of Cynthia Cook, where Stephanie had spent the previous evening attending an all-night sleep-over with other girls. Stephanie had her mother's permission to go with Waites to pick up the goat that day. Stephanie was molested by Waites at his residence on that date, under the pretext that he was going to give her a physical examination. Stephanie did not tell her mother of the assault when it occurred

At the time of the molestation, Stephanie believed that Waites was a physician. Specifically, **167 Waites told her that he was a bone doctor and that he worked at Mt. Sinai in Cleveland, Ohio Waites often carried a black medical bag and he told Stephanie that entertainer Michael Jackson was one of his patients. Stephanie testified that Waites was not an advisor to the All–County Kids but she believed he was part of 4–H. Waites molested other children, including Kitty Butler's daughter, under the pretext, in most instances, that he was a physician.

Waites was subsequently indicted in Lake County on various counts of kidnapping, corruption of a minor, rape and felonious sexual assault involving four minors, including Stephanie. Following a jury trial, Waites was convicted on all counts. [1]

In the instant case, part of plaintiffs' theory of the case was that Waites, in addition to performing duties as a fair judge and clinic speaker, also served on behalf of 4–H as a volunteer project advisor, and that he was actively involved at the local club level. Defendant, on the other hand, claimed that Waites was never an advisor in Ashtabula County and that he merely acted out of his own interest, without the knowledge of the Ashtabula County extension office, to become personally involved in the Ashtabula County goat community and gain the trust of parents and children There was varying testimony regarding Waites's degree of involvement within the Ashtabula 4–H organization at the local club level

*734 Sandra Koch, a mother of one of the members of the All–County Kids, testified that she had first met Waites in 1989 and that she saw Waites at five or six club meetings over a three-year period She thought that he may have attended three or four meetings in 1990. Koch could not recall if he attended meetings in 1991 She stated that Waites participated in carpools. She also indicated that Waites would visit their house, either in the company of Chris Malnar, Cynthia Cook, or by himself, regarding goat matters.

Sandra Koch's daughter, Terra, who was a member of the All–County Kids and was one of Waites's victims, testified that Waites attended nine or ten club meetings in 1990. Terra stated that Waites drove her home from 4–H meetings. Terra stated that in 1991, Waites attended eight or nine meetings and that Waites's attendance at the club declined in 1992 when he only attended a couple of meetings early in the year Terra testified that, after Waites no longer was a judge at fairs, he continued to attend the fairs in 1991 and 1992. According to Terra, Waites "would basically hang around the goat barn * * * [a]nd he just helped everybody out." Terra stated that Waites was never an advisor to her club.

Cynthia Cook, a 4–H advisor in Ashtabula County during 1991 and 1992 for the All–County Kids, testified that she could not recall if Waites had ever been to a meeting of the club Cook stated that Waites did transport children to and from goat activities in his vehicle, and Cook had gone with Waites to the homes of children to help assist with the care of their goats. Waites would also go to the county fair and help children prepare animals for the show. Cook stated that Waites was never an advisor with the All–County Kids club.

Ashtabula County extension agent Thomas Hopkins testified that James Waites was never a 4–H advisor in Ashtabula County. Hopkins had no knowledge that Waites attended any club meetings or had any involvement with 4–H clubs in Ashtabula County in 1990 and 1991 apart from conducting two prefair clinics. Hopkins testified that, under the 4–H organizational structure, local club advisors have a great deal of discretion regarding club activities. He further stated that it would be up to a club advisor to inform the county extension office about somebody who wanted to be an advisor at a club level

Kitty Butler, a member of the 4–H small animal committee, testified that she was not aware that Waites had attended any meetings of the All–County Kids club nor did she have any knowledge that he was involved in carpools with the club Butler had no knowledge **168 that Waites was a 4–H advisor in Ashtabula County.

Defendant also introduced into evidence the deposition testimony of Chris Malnar Malnar, who served as an advisor with the All–County Kids, stated that Waites was never at a meeting

*735 On June 30, 1995, the Court of Claims rendered its decision, finding in favor of defendant. In its decision, the court held that:

"The child molesting activities of Waites in this case were the direct and proximate result of Waites securing the confidence and trust of Stephanie and her parents. The county extension agent had no reason to anticipate or believe that Waites would develop such personal relationships, and he was never aware of any such activities;

"Hopkins had neither the power nor the duty to control Waites' personal activities. * * *

" * * *

"The criminal acts that Waites committed against Stephanie did not occur at a 4–H event, function or activity and did not occur on property owned or under the control of 4–H Waites was only paid to judge goats and do pre-fair clinics in Ashtabula County He properly performed those responsibilities. 4–H is not responsible for the personal actions of Waites or of the actions of the thousands of young people who participate in volunteer 4–H activities when they are not attending a 4–H function. * * * In this case, plaintiffs have failed to prove by a preponderance of the evidence that the defendant was negligent and such negligence was a proximate cause of the assault on Stephanie. It was not reasonable or foreseeable that a person hired to be a judge from a foreign county would then become personally involved with children and their families who attended the fair and clinics. * * * "

On appeal, plaintiffs set forth the following eight assignments of error for review·

"Assignment of Error No 1

"The court erred in holding that the decision of Thomas Hopkins not to inform the club advisors and members of the 4–H small animal committee of James Waites' history of child molesting is entitled to statutory immunity.

"Assignment of Error No. 2

"The court erred in not holding that the state of Ohio was liable for the negligent hiring of James Waites.

"Assignment of Error No. 3

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"The court erred in holding that it was not reasonably foreseeable that an individual such as James Waites would sexually molest young girls involved in 4–H

"Assignment of Error No 4

*736 "The court erred in holding that the Ohio State University could not be held liable as the criminal conduct of James Waites was an intervening event.

"Assignment of Error No. 5

"The court erred in holding that the conduct of 4–H employees Owen, Maruschak and Hopkins, were not guilty [*sic*] of wanton misconduct relative to the retention of James Waites and the failure to warn others relative to their actual knowledge of Waites criminal history.

"Assignment of Error No 6

"The court erred and [*sic*] finding that there was no evidence that Waites ever committed any criminal acts at any 4–H clinic, fair or club meetings.

"Assignment of Error No. 7

"The court erred in holding that 4–H was not a person in loco parentis based upon *State v. Noggle*

"Assignment of Error No. 8

"The court erred when it did not find that the plaintiffs-appellants must prevail upon the theory of agency by estoppel or apparent agency."

While the issue of duty will be discussed more fully below, we will initially address plaintiffs' assertion, raised under the seventh assignment of error, that the Court of Claims erred in not finding that an *in loco parentis* relationship existed between Stephanie and the 4–H organization which imposed a duty on 4–H, arising from that relationship, to protect Stephanie from the sexual attack of Waites. Plaintiffs argue that the Court of **169 Claims improperly relied upon *State v. Noggle* (1993), 67 Ohio St.3d 31, 615 N E.2d 1040, in finding that an *in loco parentis* relationship did not exist.

[1] [2] [3] The term "*in loco parentis*" has been defined as "the relationship which a person assumes toward a child not his own, holding him out to the world as a member of his family toward whom he owes the discharge of parental duties", further, "a person standing in loco parentis to a child is one who had put himself in the situation of a lawful parent assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption." *In re Estate of George* (App.1959), 82 Ohio Law Abs. 452, 455. This court has previously held that "[w]hen a person accepts custody of a child, that person stands *in loco parentis* to the child, accepting all the rights and responsibilities that go with that status." *Slagle v. White Castle Systems, Inc.* (1992), 79 Ohio App 3d 210, 217, 607 N.E.2d 45, 49. The key factors of an *in loco parentis* relationship have been delineated as "the intentional assumption of obligations incidental to the parental relationship, especially support and maintenance." *Nova Univ., Inc v Wagner* (Fla 1986), 491 So.2d 1116, 1118, fn 2.

*737 In *Noggle, supra,* the Ohio Supreme Court had the occasion to discuss the phrase "*in loco parentis*" in the context of its relationship to R.C. 2907 03(A)(5), Ohio's sexual battery statute The defendant in *Noggle,* a high school teacher and coach, was charged under the statute with alleged sexual conduct involving a student. An amended bill of particulars filed by the prosecution alleged that an *in loco parentis* relationship existed between defendant and the student by virtue of defendant's position as a teacher and school coach. The trial court dismissed the indictment, holding that a teacher and coach is not, as a matter of law, a person *in loco parentis* for purposes of the criminal statute. On appeal, the court of appeals upheld the trial court's decision

On further appeal, the Ohio Supreme Court affirmed the decision of the court of appeals, relying in part upon the following definition of *in loco parentis:*

"The term 'in loco parentis' means 'charged, factitiously, with a parent's rights, duties, and responsibilities ' Black's Law Dictionary (6 Ed 1990) 787. A person in loco parentis has assumed the same duties as a guardian or custodian, only not through a legal proceeding." *Noggle,* 67 Ohio St 3d at 33, 615 N.E.2d at 1042

The court went on to hold that the criminal statute at issue "was not designed for teachers, coaches, scout leaders, or any other persons who might temporarily have some disciplinary control over a child Simply put, the statute applies to the people the child goes home to." *Id* The court further rejected

a contention by the state that there may be certain scenarios where a teacher might be considered as a person *in loco parentis*, holding that "[t]he only time a teacher could be found to be so would be if the student lived with the teacher and relied on the teacher for support." *Id.* at 34, 615 N.E.2d at 1042.

[4] Thus, under the case law, the relationship of *in loco parentis* is established when a person assumes the responsibilities incident to parental status, including custody and support of the child, stated otherwise, the rights, duties and responsibilities are the same as those of the lawful parent. Based upon case authority, and a review of the evidence regarding the nature of the 4–H organization, we are unable to accept plaintiffs' contention that 4–H assumes the type of parental rights, duties or responsibilities over its members, including matters of custody, support and maintenance, that the term *in loco parentis* contemplates, and we hold that the Court of Claims did not err in failing to find that defendant stood in the relation of *in loco parentis* with the injured plaintiff.

Plaintiffs' seventh assignment of error is overruled

Plaintiffs' second, third, fourth, sixth and eighth assignments of error are interrelated and will be jointly considered next.

Under the second and eighth assignments of error, plaintiffs contend that the Court of Claims erred in failing to address the theories of negligent hiring or *738 negligent retention and in failing to find that an apparent **170 agency relationship existed between 4–H, Waites and the children and parents of the Ashtabula County 4–H organization. Under the third and fourth assignments of error, plaintiffs argue that the court erred in holding that it was not reasonably foreseeable that Waites would engage in sexual activity with 4–H members he came in contact with. Plaintiffs assert under the sixth assignment of error that the Court of Claims made certain erroneous findings regarding whether Waites ever engaged in criminal acts at a 4–H activity.

It is fundamental that the elements necessary to establish actionable negligence consist of the existence of a duty, a breach of that duty and an injury proximately resulting therefrom. *Menifee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St 3d 75, 77, 15 OBR 179, 180–181, 472 N.E.2d 707, 710. In the instant case, it was not disputed that the Ashtabula County extension office had knowledge of Waites's prior criminal record by virtue of the memo prepared and circulated in March 1990 to all county extension offices by Jodi Black, an employee in the OSU extension office. While the decision of the Court of Claims discusses the import of defendant's knowledge of Waites's criminal record in the context of both duty and proximate cause in its determination that there was no liability on the part of defendant, the threshold (and in this particular case, determinative) inquiry goes to the question of duty.

One commentator has observed that

"Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question of whether the defendant should be legally responsible for the injury. Unlike the fact of causation, with which it is often hopelessly confused, this is primarily a problem of law. It is sometimes said to depend on whether the conduct has been so significant and important a cause that the defendant should be legally responsible. But both significance and importance turn upon conclusions in terms of legal policy, so that they depend essentially on whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred. Quite often this has been stated, and properly so, as an issue of whether the defendant is under any duty to the plaintiff, or whether the duty includes protection against such consequences. This is not a question of causation, or even a question of fact, but quite far removed from both; and the attempt to deal with it in such terms has led and can lead only to utter confusion." Prosser & Keeton, Law of Torts (5 Ed. 1984) 272–273, Section 42.

In considering the issue of intervening intentional or criminal acts in cases where "the defendant has created the situation acted upon by another force to bring about the result," the above commentator has noted that an attempt to deal with such cases in terms of proximate cause "is only to avoid the real issue;" *739 rather, the problem is best stated as "the scope of the legal obligation to protect the plaintiff against such an intervening cause." *Id.* at 313, Section 44.

[5] The existence of a duty in a negligence case is a question of law for a court to determine and there is no formula for ascertaining whether such a duty arises. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N.E.2d 265, 269–270. Rather, it has been stated that duty " 'is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to

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protection." ' " *Id.*, quoting Prosser, Law of Torts (4 Ed.1971) 325–326

We will first address plaintiffs' contention that the Court of Claims failed to address the theories of negligent hiring or negligent retention in its findings of fact even though, it is asserted, those theories were properly pled and proven at trial. The tort of negligent hiring is recognized in Ohio. See *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 565 N.E.2d 584. The tort is set forth in the Restatement of the Law 2d, Agency (1958), Section 213, which provides:

"A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

" * * *

**171 "(b) in the employment of improper persons or instrumentalities in work involving risk of harm to others * * *."

[6] The elements necessary for a plaintiff to prove an action for negligent hiring or retention are:

" ' * * * (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the plaintiff's injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.' " *Ruta v. Breckenridge–Remy Co* (Dec 12, 1980), Erie App. No E–80–39, unreported.

Initially, we note that, while plaintiffs contend that the Court of Claims failed to consider both negligent hiring and negligent retention as theories of recovery, plaintiffs' negligent retention claim appears to be based upon the assertion that, subsequent to the time the Ashtabula County extension office last hired Waites to participate in a clinic in the spring of 1991, the extension office negligently retained Waites's services as a "project advisor volunteer" and allowed him to serve as a chaperone and carpool driver for a local 4–H club in Ashtabula County There was no evidence presented at trial, however, indicating that any official in the Ashtabula County extension office had knowledge that Waites attended or participated in any local club meetings after he spoke at the last clinic for which *740 he was compensated in May 1991 Thus, under the facts developed at trial, plaintiffs' claim appears to be more properly based upon a theory of negligent hiring as opposed to negligent retention or supervision of an employee

[7] We further note that, in addition to plaintiffs' contention that a duty of care was breached by defendant under a negligent hiring theory, plaintiffs also assert that a duty was owed to protect against the criminal acts of a third person based upon the existence of a special relationship. Whether considering a claim based upon negligent hiring or one for failure to control the conduct of a third person (and even assuming, *arguendo,* the existence of a special relationship), the issue of whether a duty is owed is based upon the foreseeability of the injury.

[8] [9] [10] In *Fed. Steel & Wire Corp. v Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173–174, 543 N.E.2d 769, 772–773, the court held that

" * * * Ordinarily, there is no duty to control the conduct of a third person by preventing him or her from causing harm to another, except in cases where there exists a special relationship between the actor and the third person which gives rise to a duty to control, or between the actor and another which gives the other the right to protection * * * Thus, liability in negligence will not lie in the absence of a special duty owed by a particular defendant. * * *

"We have found that '[t]he existence of a duty depends on the foreseeability of the injury * * * ' * * * The court in *Menifee, supra,* set forth the following test to be used in order to determine foreseeability: '[W]hether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act.' * * * We recognize that there is no common-law duty to anticipate or foresee criminal activity * * * Thus, the law usually does not require the prudent person to expect the criminal activity of others. As a result, the duty to protect against injury caused by third parties, which may be imposed where a special relationship exists, is expressed as an exception to the general rule of no liability. * * * "

[11] Concerning criminal acts of a third party which the defendant might reasonably anticipate, "the mere fact that misconduct on the part of another might be foreseen is not of itself sufficient to place the responsibility upon the defendant " Prosser & Keeton, *supra,* at 305. Rather, "[i]t is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for

consequences to which such intervening acts contributed." *Id.* at 313.

[12] The issue before this court, therefore, is whether defendant, through its county **172 extension office, owed a duty of care extending to Stephanie in its decision to hire Waites as a fair judge or clinic speaker on the basis that such employment *741 might create a reasonably foreseeable risk of harm. More specifically, the issue is whether defendant, knowing of Waites's prior criminal record, should have reasonably foreseen the likelihood that, as a result of Waites's employment as a clinic speaker, he would later become personally involved within the Ashtabula County 4–H community, come in contact with Stephanie (not herself a member of 4–H during Waites's employment), and engage in wrongful misconduct.

Plaintiffs focus primarily upon the fact that defendant was made aware of Waites's prior criminal record, such knowledge presumably giving rise to a duty (either to warn others or to control a third person) extending to all 4–H members Waites came in contact with subsequent to his employment as a clinic speaker. Assuming that defendant's knowledge of Waites's prior criminal record, in and of itself, defined the scope of the duty, the requisite inquiry would end. The scope of the duty, however, is "limited to cover only those intervening causes which lie within the scope of the foreseeable risk, or have at least some reasonable connection with it * * *." Prosser & Keeton, *supra,* at 312

Under the facts of this case, we find that the attack on Stephanie was not a reasonably foreseeable consequence of defendant's decision to engage Waites as a goat judge or clinic speaker. The record indicates that Waites was hired by Ashtabula County 4–H to conduct four separate clinics and to judge two county fair shows The two fair events (in 1988 and 1989) as well as two of the clinics (in 1988 and 1989) took place before the Black memo was circulated. After learning of Waites's prior record, the county extension office, through the small animal committee, met and discussed the memo. Thereafter, a decision was made to allow Waites to speak at a clinic in 1990 and a subsequent clinic in 1991 based upon the view that the nature of his employment, including the fact that Waites would have limited contact with 4–H members, would not result in any harm. The duties Waites was hired to perform required him to speak at clinics in a controlled setting under the supervision of the county extension office. The clinics were open to the public and there was no evidence that any incidents occurred at the clinics (or fairs) in which he was asked to participate. 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.

The Court of Claims found that Waites had never applied to be an adult volunteer advisor in Ashtabula County and there was evidence supporting a *742 finding that he was not recognized as an advisor there.[2] County extension agent Thomas Hopkins testified that local club advisors are responsible for informing the county extension office of any individuals who wish to participate at the local level in an official capacity. Club advisors Malnar and Cook both stated that Waites never served as an advisor for their club. While there was evidence indicating that Waites may have shown up on his own volition at 4–H club meetings (as well as other goat-related activities) and that he made himself available to provide transportation, the evidence supports the Court of Claims' finding that the county extension office had no knowledge that Waites was involved in local 4–H club meetings. The evidence indicated that Waites gained the trust and friendship of parents and members of the 4–H community in Ashtabula County; he was adept at developing personal relationships and he convinced these individuals that he was a physician **173 and that he could be influential in obtaining "scholarships" for the children. The evidence further indicated that Waites would appear unannounced at the home of Stephanie and that he pursued a continuing relationship with the family through numerous telephone calls to Stephanie's home.

As found by the Court of Claims, the molestation of Stephanie by Waites was a self-serving act, unrelated to Waites's employment as a 4–H goat judge or clinic speaker. On the date of the incident, Waites made arrangements with Stephanie's mother to pick up Stephanie and drive her to his home. As noted above, the molestation occurred at Waites's home, over a year after he was last hired to conduct a clinic in Ashtabula County, and the events giving rise to the incident occurred without the sanction, knowledge or control of the county 4–H extension office.

[13] [14] The foreseeability of a criminal act depends on the knowledge of the defendant, which must be determined by the totality of the circumstances, and it is only when the totality of the circumstances are "somewhat overwhelming"

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that the defendant will be held liable. *Feichtner v. Cleveland* (1994), 95 Ohio App.3d 388, 396, 642 N.E.2d 657, 662. In considering the totality of the circumstances, we are unable to conclude that the probability of harm to the plaintiff should have been reasonably anticipated by defendant at the time Waites was engaged to be a clinic speaker. As previously noted, the duties for which Waites was hired involved limited contact with those in attendance and took place in a controlled *743 setting under the supervision of the county extension office. The scope of an employer's duty in exercising reasonable care in making a hiring decision "is largely dependent on the type of responsibilities associated with the particular job." *Yunker v. Honeywell, Inc.* (Minn.App.1993), 496 N.W.2d 419, 422 See, also, *Connes v. Molalla Transport System, Inc.* (Colo.1992), 831 P.2d 1316, 1321 (scope of duty "will depend largely on the anticipated degree of contact which the employee will have with other persons in performing his or her employment duties") In addition to the limited nature of the duties for which Waites was hired as well as the limited degree of contact he had with other individuals in performing those duties, the circumstances of this case indicate that no incidents occurred at any clinic in which Waites participated, Waites was never a 4–H advisor in Ashtabula County, defendant had no knowledge of Waites's personal activities in that county, the assault at issue did not occur at a 4–H event, the injured plaintiff was not a member of 4–H at the time Waites was employed by defendant, and there was no employment relationship between defendant and Waites at the time of the molestation, Waites's last clinic event taking place over one year prior to the incident While a duty of care was owed by defendant to children attending the fair and clinic events for which Waites was hired, and may have encompassed members whom the county extension office had knowledge that Waites was involved with through 4–H club meetings or activities (a factual scenario not at issue in this case), we are unable to conclude that a duty of care extended to every member of 4–H who Waites may have come in contact with following his fair and clinic employment; more particularly, under the circumstances of this case, defendant's duty of care did not extend to the risk of foreseeing the misconduct that occurred.

Accordingly, the Court of Claims did not err in failing to find defendant liable under a negligent hiring theory, nor did the court err in finding that the harm was not a reasonably foreseeable consequence of defendant's conduct.

[15] We note that, under the fourth assignment of error, plaintiffs discuss the issue of foreseeability as an element of proximate cause, relying in part upon Sections 448 and 449 of the Restatement of Law 2d, Torts (1965). Having found, however, that the injured party was not a foreseeable plaintiff under a duty analysis, we need not reach the issue of proximate cause. See, *e g , Giant Food, Inc. v. Mitchell* (1994), 334 Md 633, 641–642, 640 A.2d 1134, 1138 (Section 448 of the Restatement concerns itself with whether the criminal act of a third person is a superseding cause of the actor's negligence; for purposes of Section 448, the actor's negligence is a given); *Casey v. Geiger* (1985), 346 Pa.Super. 279, 293, 499 A 2d 606, 614 (Section **174 448 of the Restatement "is only relevant to the question of causation in a negligence action and does not determine whether appellees owed a duty of care to the appellant * * * ").

*744 We note, however, to the extent that plaintiffs contend that the hiring of Waites placed 4–H's imprimatur or approval on his activities (*i.e.*, gave stature or credibility to Waites, thus allowing him to become actively involved in Ashtabula County), we find no error in the trial court's determination that plaintiffs failed to establish a causal connection between defendant's hiring decision and Waites's subsequent criminal actions. While plaintiffs argue that defendant "selected Waites as a Judge and clinic instructor thereby creating an aura of respectability" with the parents and children of Ashtabula County, plaintiffs make no distinction between Waites's activities prior to the disclosure to defendant of his convictions and his activities subsequent thereto, rather, plaintiffs discuss Waites's involvement with 4–H in the aggregate and assert a causal connection based upon such activity in general. The evidence, however, fails to link Waites's attendance at two clinics (following the disclosure of his convictions) with his ability to ingratiate himself within the Ashtabula 4–H community and assault the victim in this case; thus, the trial court did not err in finding that plaintiffs failed to prove by a preponderance of the evidence that defendant's actions proximately caused the plaintiff's injuries.

[16] [17] We further find no merit to plaintiffs' contention that the trial court erred in failing to find defendant liable under a theory of agency by estoppel or apparent authority. An "agency relationship" is defined as "a consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent." *Funk v. Hancock* (1985), 26 Ohio App.3d 107, 110, 26 OBR 317, 320, 498 N E.2d 490, 494, citing *Haluka v. Baker* (1941), 66 Ohio App. 308, 312, 20 O.O. 136, 138, 34 N.E.2d 68, 70. The doctrines of agency by estoppel and apparent authority are

equivalent and are based upon the same elements *Whitlow v. Good Samaritan Hosp.* (1987), 42 Ohio App.3d 74, 76, 536 N.E.2d 659, 661–662. In order to show such an agency, a plaintiff must establish:

"(1) That the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority." *Logsdon v. ABCO Constr. Co.* (1956), 103 Ohio App. 233, 241–242, 3 O.O.2d 289, 293, 141 N.E.2d 216, 223.

[18] [19] In the context of an unpaid volunteer, courts have noted that the volunteer "may be a servant of one accepting such services." *Doe v. Roman Catholic Church* (La.App.1992), 602 So.2d 129, citing the Restatement 2d of Agency, Section 225. The determination of whether an unpaid volunteer is a servant "generally depends on the charitable organization's right to control the activities of the volunteer." *Id.*

*745 [20] Plaintiffs' claim of apparent agency is based upon the contention that the Ashtabula County 4–H knowingly permitted Waites to attend 4–H meetings, to teach at these meetings, to go on field trips with advisors and children, and to act with authority on behalf of the Ashtabula County 4–H. As previously noted, however, there was evidence presented, including the testimony of the Ashtabula County extension agent which, if believed, indicated that the county extension office was unaware of any alleged activity by Waites in connection with local 4–H clubs in Ashtabula County.

Plaintiffs assert that the evidence shows that the county extension agent "had full control over the volunteers" in 4–H at the local level. However, the testimony of Lake County extension agent William Owen and Ashtabula County extension agent Thomas Hopkins indicated that, under the 4–H organizational structure, local clubs possess a great deal of autonomy and advisors are vested with a high degree of discretion regarding club activities. William Owen, who stated that there are between two hundred and two hundred fifty local clubs in Lake **175 County, provided the following testimony during direct examination regarding the amount of control exerted by the county extension office in club matters:

"Q. And who determines when and where these clubs will meet?

"A. That's up to the adviser and the club members.

"Q. And who determines what they are going to discuss at those meetings?

"A. That's also up to the adviser and the officers of the club.

"Q. Do these clubs report to you, as the county extension agent, in any form or fashion, about their activities?

"A. I'm not sure 'report' is the word I would use. Some keep us pretty well informed of what they are doing, and others are basically on their own, doing their own activities.

"We don't have a reporting system where they have to fill out a form, 'This is what the club did this month or this year.' From time to time we ask them for things like, 'What community service projects did you do?' But there's no official reporting mechanism, no.

"Q. And there's no requirement that they do that, then?

"A. Absolutely not."

Thomas Hopkins testified that clubs in Ashtabula County were operated in a similar manner. Hopkins stated that "I tell new advisers that one of our strengths is the freedom that they have in their club, to organize their club, to create their own meeting schedules, so we don't dictate many of those things." Hopkins added that "there is a lot of * * * independence that the advisers assume. They assume a lot of responsibility." Hopkins further stated that it *746 was up to the local advisors "to let us know * * * if they have somebody that they want to have help them in their club, in an official way."

The issue of apparent authority and its relationship to the degree of control an organization exercises over its local leaders was raised in *Wilson v. United States* (C.A.8, 1993), 989 F.2d 953. In that case, the plaintiffs, parents of boy scouts involved in an accident while visiting Fort Leonard Wood, Missouri, brought an action against the Boy Scouts of America ("BSA") for alleged negligence on the part of the adult leaders of a scout troop, raising claims that a principal-agency relationship existed between BSA and its local council under a theory of implied agency or apparent authority. On

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the particular activity giving rise to the negligence action, members of a local troop had gone on a boy scout trip at an army base, when, on the second night of their weekend stay, one of the youths was fatally electrocuted while playing with an aluminum pipe which came into contact with a high voltage power line.

The facts in *Wilson* indicated that, under the organizational structure of BSA, local volunteers formed a patrol leaders' council to plan troop activities, local troops did not need permission from BSA before participating in activities, and BSA had no advance notice of the troop's trip to Fort Leonard Wood. The court in *Wilson,* in rejecting plaintiffs' claim of apparent authority, held that

"Appellants fail * * * to produce any evidence that BSA manifested that it had direct control over the specific activities of individual troops or that it had a duty to control, supervise or train volunteer leaders for the Fort Leonard Wood activity. On the contrary, the Boy Scout Handbook clearly provides, '[w]hat the troop does is planned by the patrol leaders' council.' The organizational structure of the BSA leaves the control of the specific activities at the level closest to the individual troop. Appellants have produced no direct or circumstantial evidence to suggest that in this case BSA manifested control." *Wilson, supra,* 989 F.2d at 959.

The court in *Wilson* noted that other jurisdictions had rejected liability on the part of BSA or local councils under similar circumstances, noting the lack of control these entities exercise over individual troops. See, *e.g., Mauch v. Kissling* (1989), 56 Wash.App. 312, 783 P.2d 601 (scoutmaster not acting as ostensible agent of scouting organization while flying private plane with scout as passenger where organization had no duty or right to control scoutmaster's actions as private pilot, nor did they have a duty to prevent scout from accompanying him where **176 there was no evidence scoutmaster would be carrying a scout passenger), *Anderson v. Boy Scouts of Am., Inc.* (1992), 226 Ill.App.3d 440, 168 Ill.Dec. 492, 589 N.E.2d 892 (local scout leader not agent of BSA at time he negligently ran over infant while backing out of driveway after delivering craft materials to be used for scouting project; there were no provisions in BSA *747 charter, bylaws, rules or regulations which grant BSA or its district councils' direct supervisory powers over the method or manner in which adult volunteer scout leaders accomplish their tasks, and there was no evidence BSA exercised any control over scout leader on the date in question); *Wilson v. St. Louis Area Council* (Mo.App.1992), 845 S.W.2d 568 (mere assertion by plaintiff that BSA and Council constituted one organization, with scout leaders as its representatives, not sufficient to create apparent authority in absence of evidence of representations by Council which would give rise to such reliance; further, plaintiff presented no evidence that scouting organizations consented to or had control over scoutmaster's activities).

In the instant case, apart from the occasions in which the county extension office hired Waites to judge two fair goat shows and to conduct four prefair clinics, the evidence does not indicate that the extension office had the right to control, nor that it manifested a right to control or supervise, Waites's actions. Waites was not a 4–H advisor and, while he may have attempted to clothe himself with authority from the 4–H organization, his self-serving pursuits were not in service to Ashtabula County 4–H. In an action alleging apparent authority, "a principal is responsible for the acts of an agent within his apparent authority only where the principal himself by his acts or conduct clothes the agent with the appearance of the authority, and not where the agent's own conduct creates the apparent authority." *Logsdon,* 103 Ohio App. 233, 3 O.O.2d 289, 141 N.E.2d 216, at paragraph one of the syllabus.

The facts surrounding the injury to the plaintiff in the instant case are even more attenuated than those in *Wilson,* 989 F.2d 953, whereas the fatality in *Wilson* occurred on a troop outing under the supervision of scout leaders, the assault in the instant case was not connected with a 4–H sponsored activity and did not involve 4–H personnel. As previously noted, the evidence regarding the events leading to the molestation of Stephanie indicates that Waites made arrangements with Stephanie's mother to pick Stephanie up and drive her to his house, the alleged purpose of the trip being Waites's offer to provide Stephanie with an Alpine goat. The Ashtabula County extension office did not direct, nor did they have knowledge of, this activity, and the Court of Claims did not err in failing to find defendant liable under a theory of apparent authority.

[21] Finally, we address plaintiffs' argument under the sixth assignment of error, that the Court of Claims erred in finding that there was no evidence that James Waites ever committed any criminal acts at any 4–H clinics, fair events or club meetings. Plaintiffs maintain that there is evidence that Waites, on at least three occasions, committed gross sexual imposition with a minor "at 4–H sponsored events." Upon review, we find that the record does not support plaintiffs' contentions.

*748 Plaintiffs first assert that the testimony of Kitty Butler indicates that Waites raped her sixteen-year-old daughter "at the 4–H Geauga County Fair in 1991." However, the record indicates that, while Kitty Butler testified that her daughter informed her that she was raped by Waites in September 1991, at the Burton Fair, there was no evidence indicating that her daughter was at the fair as a 4–H member or that Waites was at the fair as a representative of 4–H. Specifically, Butler testified that her daughter "was not involved with the goats" at the Burton Fair and she further indicated that Waites was not a judge, rather, Butler stated, "[h]e was a contestant, just like everybody else was."

Plaintiffs further argue that there was evidence that Waites assaulted Butler's daughter that summer "when he took her to a medical examination required for the youngster to obtain a 4–H college scholarship " Butler testified that her daughter told her that Waites was "supposed to have taken her for a doctor's appointment at a clinic—I don't **177 even know for sure where it was—that he took her to his house and examined her and, I believe, raped her there " While plaintiffs maintain that this event was done under the ruse that the examination was for a "4–H college scholarship," Butler testified that "it had nothing to do with 4–H." Rather, Butler testified that Waites had told Butler and her daughter that "there was a program through his work where she could go to college while she was still in high school and take college courses," and that "in order to be enrolled in the program, she had to have a medical exam, so he arranged for the medical exam and took her."

The final incident pointed to by plaintiffs concerns evidence that Waites molested Terra Koch "while going to" a 4–H meeting. The evidence regarding this event indicates that the incident occurred at Waites's home and did not, by plaintiffs' own admission, occur at a 4–H activity. Further, there was no evidence that the county extension office had knowledge of this activity and the evidence simply does not support a finding that Waites was acting as an agent on behalf of defendant in offering transportation to Terra Koch. Upon review, the Court of Claims did not err in finding that no criminal acts were committed at a 4–H event.

Based upon the foregoing, plaintiffs' second, third, fourth, sixth and eighth assignments of error are overruled.

We will address plaintiffs' first and fifth assignments of error together Under the first assignment of error, plaintiffs contend that the Court of Claims erred in holding that defendant's decision not to disseminate information regarding Waites's prior criminal record was entitled to statutory immunity under *749 R.C. 2743.02.[3] Under the fifth assignment of error, plaintiffs contend that the Court of Claims erred in failing to find that certain 4–H employees engaged in wanton misconduct. More specifically, plaintiffs argue that William Owen, Donna Maruschak and Thomas Hopkins all engaged in wanton misconduct in failing to warn others of Waites's prior criminal record.

[22] Even assuming that the Court of Claims erred in finding that OSU was entitled to statutory immunity on the grounds that the decision not to disseminate information about Waites's criminal record constituted a basic policy decision involving a high degree of discretion, in light of our disposition of the previous assignments of error, finding that a duty did not extend to the injured plaintiff under the theories advanced, any alleged error is non-prejudicial and this assignment of error is overruled as moot.

[23] Nor does the evidence support a finding that individual 4–H employees Owen, Maruschak and Hopkins engaged in wanton misconduct. "Wanton" misconduct is defined as "a failure to use any care and an indifference to the consequences, when the probability of harm is great and the probability of harm is known or should be known." *Downing v. Columbus Bd. of Edn.* (Feb. 13, 1992), Franklin App. No. 91AP–981, unreported, 1992 WL 30802. In order to constitute wanton misconduct, the conduct of a tortfeasor "must be more than negligent. it must be such conduct with knowledge of a dangerous situation liable to cause injury to others, as manifests a heedless disregard for or indifference to the rights of others or for the consequences, *i.e.*, such conduct as manifests a disposition to perversity." *Roszman v. Sammett* (1971), 26 Ohio St.2d 94, 55 O.O.2d 165, 269 N.E.2d 420, paragraph two of the syllabus.

[24] Defendant argues that the knowledge and conduct of Owen and Maruschak, both employees in Lake County, were irrelevant to the issue of liability in this case inasmuch as they never served in Ashtabula County and, in any event, the information regarding Waites's criminal record came to **178 the attention of Ashtabula County officials in 1990, prior to the time Stephanie joined 4–H. We agree.

[25] Regarding the actions of Ashtabula County extension officer Thomas Hopkins, the evidence fails to support plaintiffs' contention that he acted in a *750 wanton manner

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when, once he became aware of Waites's criminal record, he failed to disclose that information to 4–H advisors or members. As previously noted, after the Black memo was sent out, Hopkins brought up the issue at the small animal committee meeting and sought the advice of those members. At the meeting, Kitty Butler gave her opinion that Waites had not been guilty of the charges and other members of the committee were asked for their input on the matter Hopkins testified that his decisionmaking process in this matter was based upon the views expressed at the meeting and the fact that Waites's duties in speaking at a clinic would be limited and under the control of the county extension office. Upon review, the record indicates that the Court of Claims did not err in failing to find that Hopkins's actions in dealing with the issue of the Black memo constituted wanton misconduct.

Plaintiffs' first and fifth assignments of error are without merit and are overruled.

Based upon the foregoing, plaintiffs' first, second, third, fourth, fifth, sixth, seventh and eighth assignments of error are overruled and the judgment of the Court of Claims is hereby affirmed.

Judgment affirmed.

PEGGY BRYANT, J , concurs

LAZARUS, J., concurs in part and dissents in part.

LAZARUS, Judge, concurring in part and dissenting in part Although I concur with the majority's judgment regarding the fifth assignment of error, I dissent with regard to the majority's judgment that Ohio State University ("OSU") was not negligent Because OSU was negligent, because that negligence was a proximate cause of Stephanie Foucher's injury, and because OSU was not immune, I would hold OSU liable

OSU is liable based on two breaches of duty, which in combination, if not individually, proximately caused James Waites's abuse of Stephanie. First, Ashtabula County extension agent Thomas Hopkins and Ashtabula County small animal committee member Kitty Butler conferred apparent legitimacy on Waites by hiring him as a fair judge and clinic instructor despite actual knowledge that he was a convicted child molester. Second, Hopkins failed to warn the Ashtabula County 4–H club advisors or parents of Waites's conviction. This negligent failure to warn resulted in the All–County Kids club advisors, Chris Malnar and Cindy Maddox Cook, and the parents of club members unwittingly allowing Waites unfettered access to the children.

*751 Ohio courts describe the tort of negligence as consisting of three elements: duty, breach of duty, and injury proximately caused by the breach of duty. See *Littleton v. Good Samaritan Hosp. & Health Ctr.* (1988), 39 Ohio St.3d 86, 92, 529 N.E.2d 449, 454–455; *Strother v. Hutchinson* (1981), 67 Ohio St 2d 282, 285, 21 O.O.3d 177, 179, 423 N.E.2d 467, 469–470; *Malone v. Miami Univ.* (1993), 89 Ohio App.3d 527, 529, 625 N E.2d 640, 641–642; *Abram & Tracy, Inc. v. Smith* (1993), 88 Ohio App.3d 253, 261, 623 N.E 2d 704, 709–710. Whether there exists a duty for purposes of a negligence action is a question of law for the court. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318, 544 N E 2d 265, 269–270.

The general rule is that a person owes no duty to act for the protection of others.

"The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." Restatement of the Law 2d, Torts (1965) 116, Section 314

Thus, under the general rule, OSU would not have any duty to protect its 4–H members Two exceptions to this general rule impose a duty of reasonable care upon OSU· the negligent hiring exception and the "special relationship" exception.

**179 One exception to the general rule of nonliability for the acts of third parties is that a principal may be liable for the negligent hiring of an agent See *Albain v. Flower Hosp* (1990), 50 Ohio St.3d 251, 257, 553 N.E.2d 1038, 1044–1045; Restatement of the Law 2d, Agency (1958) 458–460, Section 213 and Comment *d* For example, in *Akins v. Estes* (Tex.App.1994), 888 S.W 2d 35, the court held that the Boy Scouts of America and the regional Boy Scout council could be liable for negligently hiring a volunteer scoutmaster despite the fact that neither entity exercised direct control over the daily activities of local scout troops or their adult leaders. The court stated that, because they work with children, youth organizations must be held to an even higher standard of care when hiring youth leaders.

"As stated by the Supreme Court of New Jersey, '[o]ne dealing with the public is bound to use reasonable care to

select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee.' *Di Cosala v. Kay,* 91 N.J. 159, [172] 450 A 2d 508, 515 (1982). * * * [O]rganizations such as the Boy Scouts, whose primary function is the care and education of children, owe a higher duty to their patrons to exercise care in the selection of their workers than would other organizations. *Doe v. Boys Clubs of Greater Dallas, Inc.,* 868 S.W.2d [942] at 951 [1994]. A higher standard of care is owed to children than to similarly situated adults." *Id.,* 888 S.W.2d at 42–43. See, also, *Wilson v. Tobiassen* (1989), 97 Or.App. 527, 530–532, 777 P.2d 1379, 1382 (affirming verdict against Boy Scouts of America and regional council for *752 sexual molestation by scoutmaster on theory of negligent supervision of scoutmaster).

The court in *Akins* concluded that Boy Scouts of America and its regional council had a duty to fire the scoutmaster if they knew or had reason to know he was unfit. *Id.,* 888 S.W.2d at 43. "An employer who negligently hires or retains in his employ an individual who is incompetent or unfit for the job may be liable to a third party whose injury was proximately caused by the employer's negligence " *Id* at 42.

I would hold that a convicted child molester is presumptively incompetent and unfit to work directly with children and that a youth organization is negligent if it knowingly allows a convicted child molester to work with its members without issuing reasonable warnings [4] In this case, Hopkins and Butler, despite having actual knowledge that Waites is a convicted child molester, hired Waites as a fair judge and clinic instructor to work with the children, yet failed to warn those who were in a position to protect them.

I disagree with the majority's conclusion that OSU owed no duty to Stephanie on the ground that it was not foreseeable that its conduct would facilitate Waites's molestation of 4–H members Hiring Waites as a fair judge and clinic instructor could serve only to foster Waites's prominence, respectability, power, and influence in the 4–H community. 4–H promoted its goat clinics with advertising featuring Waites's name and describing the value of the clinic in terms of Waites's role as a fair judge [5] A videotape of the August 8, 1989 Ashtabula County Junior Fair Goat Show reveals Waites speaking and working closely with the children and their **180 goats. While OSU and the majority conclude that hiring Waites to work the fairs and clinics was safe and reasonable because *753 Waites would presumably always be in public view, the fact is that repeatedly giving Waites a public forum in which to display the authority conferred upon him by 4–H served to legitimize a convicted child molester. Waites seduced Stephanie by telling her that he was a fair judge and former 4–H advisor, and he enticed parents by telling them he could help the children get 4–H scholarships It was indefensible for Hopkins to conclude that he or anyone else could promote the involvement of a convicted child molester in the lives of 4–H members without subjecting the children to an unreasonable risk of sexual assault.

The other exception to the general rule of nonliability for the acts of third parties is that an actor owes a duty to exercise reasonable care to protect those with whom the actor has a special relationship from the conduct of third persons. See *Fed. Steel & Wire Corp. v. Ruhlin Constr. Co.* (1989), 45 Ohio St.3d 171, 173–174, 543 N.E.2d 769, 772 (citing cases). Restatement of the Law 2d, Torts (1965) 122, Section 315, states the rule:

"There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

"(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or

"(b) *a special relation exists between the actor and the other which gives to the other a right to protection.*" (Emphasis added.)

Section 314A of the Restatement lists four specific "special relationships" and the following caveat: "The Institute expresses no opinion as to whether there may not be other relations which impose a similar duty." The comments to Sections 314 and 314A express the same idea, that courts may recognize additional special relationships to expand the exception to the general rule:

"The result of the [general] rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule." Section 314 of the Restatement, Comment *c,* paragraph 3.

" * * * The relations listed are not intended to be exclusive, and are not necessarily the only ones in which a duty of affirmative action for the aid or protection of another may be found. * * * The question is therefore left open by the Caveat * * * The law appears, however, to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence." Restatement, Section 314A, Comment *b.*

*754 The trend has indeed been for courts to increase the number of instances in which a duty is imposed on the basis of special relationships. *Tarasoff v. Regents of Univ. of California* (1976), 131 Cal.Rptr. 14, 23, 551 P.2d 334, 343, fn. 5 (holding that when a psychological therapist determines that a patient presents a serious danger of violence to another, the therapist owes a duty of reasonable care to protect the intended victim). When imposed, the duty is only "to exercise reasonable care under the circumstances." Section 314A of the Restatement, Comment *e.*

Courts must consider all relevant circumstances when imposing duties.

" * * * There is no formula for ascertaining whether a duty exists. Duty ' * * * is the court's "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection." (Prosser, Law of Torts (4th ed. 1971) pp. 325–326.) Any number of considerations may justify the imposition of duty in particular circumstances, including the guidance of history, our continually refined concepts of morals and justice, the convenience of the rule, and social judgment as to where the loss should fall ' " (Citations **181 omitted) *Mussivand,* 45 Ohio St.3d at 318, 544 N.E.2d at 270

Because children are among the most vulnerable members of our society, the law, in ways too numerous to count, makes special provision for their well-being. [6] Youth organizations that undertake to provide learning experiences for children are particularly susceptible to attracting child molesters, who use organizations like 4–H [7] as a pool from which to select their victims Pedophiles pose a *755 particular danger because of children's naiveté in sexual matters and because "there is little evidence that race, religion, intelligence, education, occupation, or social class can differentiate a child molester or pedophile from the general population." Fuller, Child Molestation and Pedophilia. An Overview for the Physician, Journal of the Am. Med Assn (Jan. 27, 1989) 602, 603. It is common knowledge that pedophiles use lies and threats to lure and silence children, and Waites used both, telling people he was innocent of the 1984 molestation charges, telling 4–H advisors, members, and parents that he was a healthcare worker, and stating that he did not want to be left alone with the children because he did not want anybody "accusing him of anything." After molesting Patty Bailey and Sabrina Bailey, Waites told them they would get in trouble if they told anyone. *State v. Waites* (Aug. 22, 1994), Lake App. No. 93–L–009, unreported, at 3–4, 1994 WL 590289. After molesting Terra Koch, he told her that, if she told anyone, they would get in a lot of trouble, she would be sent to a foster home or private school, and her parents would hate her Waites told Stephanie that if she did not remove her clothes so he could put some medicine on her, she would require surgery on her reproductive system.

The mission of youth organizations to educate children, the naiveté of children, and the insidious tactics employed by child molesters dictate that the law recognize a special relationship between youth organizations and their members such that the youth organizations are required to exercise reasonable care to protect their members from the foreseeable conduct of third persons. Such a holding is supported by the opinions of foreign courts that have addressed the question of how the Restatement's "special relationship" concept should be applied to situations in which the defendants took inadequate action to prevent a known pedophile from sexually abusing the plaintiffs

Courts have said that neighbors, relatives, and youth organizations can be in a special relationship with children so as to create a duty. In *Pamela L. v. Farmer* (1980), 112 Cal App.3d 206, 169 Cal Rptr 282, the court reversed judgment on the pleadings and held that the wife of a known pedophile had a special relationship with the plaintiff children because she invited the children to her home to play in the swimming pool under the exclusive supervision of her husband. The court wrote.

**182 " * * * [T]he necessary special relationship between respondent and plaintiffs in this case can be inferred The trend has been to expand the list of special relationships which justify imposing liability * * * In this case plaintiffs were dependent upon respondent because plaintiffs are children. Being of tender years they were particularly vulnerable to this sort of misconduct and not fully able to protect themselves against it * * * In inviting the children to her home, respondent assumed that special relationship Respondent recognized that special *756 duty and relationship when

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she assured plaintiffs' parents it would be safe for them to play at her house." *Id.* at 211, 169 Cal Rptr. at 285. See *Chaney v. Superior Court* (1995), 39 Cal App.4th 152, 157, 46 Cal.Rptr.2d 73, 76 ("Without knowledge of her husband's deviant propensities, a wife will not be able to foresee that he poses a danger [to the family friend and frequent visitor]").

In *N.W. v. Anderson* (Minn.App.1991), 478 N.W.2d 542, the court held that the plaintiffs' landlords did not owe a duty to warn them of the fact that a co-tenant was a convicted child molester. The court grudgingly affirmed summary judgment in favor of the landlords based on state Supreme Court precedent holding that a duty to warn exists only when the actor knows of specific threats against specific victims. *Id* at 544. Left to decide the issue of duty in the absence of this precedent, the court stated that it would have held that the landlords did owe a duty to warn:

"In this case, the following facts exist which may have made the sexual assault foreseeable. the Andersons [the landlords] knew Bearbower was a convicted sex offender for an offense against a young female child; the Andersons knew that when appellants moved onto the farm, Bearbower was still on probation for the sex offense; the Andersons knew appellants' family included young children; the Andersons knew Bearbower raised rabbits near the trailer which attracted the children, and the Andersons never advised appellants that Bearbower had a history of sexual misconduct against children." *Id.*, 478 N.W.2d at 544.

The court expressed its distaste for having to follow the restrictive precedent:

"We note that this is an extremely tortious [*sic*, tortuous] case and we are troubled by the decision we are required to make The harm to N W may have been prevented by the Andersons had they simply warned appellants about Bearbower. We believe the risk to N W. was not so speculative that, as matter of law, the Andersons were under no duty to warn appellants of Bearbower's dangerous propensities. Yet under the rule set forth in *Cairl* [*v. State*, 323 N.W.2d 20 (1982)]—that there must be a specific threat against a specific victim—we are compelled to hold the Andersons had no duty to warn appellants." *Id*

The court was unequivocal that it believed the law should impose on the landlords a duty to warn.

"We believe the standard set forth in *Cairl* does not comport with reality or the facts of this case. It would be a rare case where a child molester would make a specific threat against a specific victim. Nevertheless, the indication of impending danger or harm may be so great, that a duty to warn should be imposed on those who could reasonably prevent the harm from occurring

*757 "Except for the restrictive language in *Cairl*, we feel the danger to N.W. was so compelling or foreseeable, that the Andersons may have had a duty to warn appellants of Bearbower's dangerous proclivities." *Id.*, 478 N.W.2d at 544–545. See *Smith v. Orkin Exterminating Co.* (La.App.1989), 540 So.2d 363, 368 (holding that because exterminating business sends employees into homes, it owes a higher standard of duty to protect against intentional torts than does a regular business); *Williams v. Butler* (La.App.1991), 577 So.2d 1113, 1116 (applying *Smith* to case involving supervisor of public recreation center, who "was placed in a position of authority over young children," thereby creating duty on the part of the employer).

Similarly, relatives of children can be in a special relationship with them. In *A.R H. v. W.H.S.* (Mo.App.1994), 876 S.W.2d 687, the court, reversing judgment on the pleadings, **183 held that a grandmother who knew that her husband had sexually assaulted her granddaughter could be liable for negligence for the subsequent sexual assaults. In *T.A. v. Allen* (1995), 447 Pa.Super. 302, 669 A 2d 360, three grandchildren accused their stepgrandmother of negligence for not warning or protecting them from their natural grandfather, the defendant's husband, whom the defendant knew to be a pedophile. The trial court found for the plaintiffs, but a five-judge majority of the superior court reversed, relying solely on the law of premises liability. However, in a partial dissent relying on Comment *c* to Section 314 of the Restatement, two members of the court wrote that they would hold that the stepgrandmother did owe a general duty to warn the grandchildren that her husband was a pedophile.

" * * * The facts of this case strongly implicate 'our ideas of morals and justice' and 'the mores of the community.' Appellees, while mere licensees, were children. They were particularly ill-equipped to recognize and deal with the danger posed by their grandfather. The bizarre details of Eugene Allen's pedophilic practices which came out at trial demonstrate the exceptional magnitude of this danger. Also, Elizabeth Allen had first-hand knowledge of her husband's pedophilic practices These weighty factors must coalesce

into some kind of duty." *Id.* at 317, 669 A.2d at 367 (Olszewski, J., concurring in part and dissenting in part)

Youth organizations also can be in a special relationship with their members. In *L.P. v. Oubre* (La.App.1989), 547 So.2d 1320, the court, reversing partial judgment on the pleadings, held that the Boy Scouts of America and the regional Boy Scout council could be liable for failing to warn scouts and their parents that the scoutmaster was a pedophile.

"We further recognize the legal principle that an actor has no duty to control the conduct of a third person so as to prevent him from causing physical harm to another unless a special relationship exists between the actor and the other so as *758 to afford the other a right to protection. We decline to adopt the arguments of Istrouma [the regional council] and BSA, that the existence of a special relationship is limited to those found in current reported decisions or that it arises through payment of a fee. The law is not a static concept, both civilian and common theory provide for its application and extension as the case arises. * * * Plaintiffs have pleaded the existence of a special relationship between themselves, Oubre [the scoutmaster], Istrouma and BSA. Where such relationship exists, the law currently characterizes the duty as one to warn of risks of which the actor knew or should have known. * * * " *Id.* at 1324.

The duty of youth organizations to exercise reasonable care to protect against the foreseeable conduct of third persons is limited to the organization's members and other children significantly connected with the organization. There is no duty to protect the community at large. See Section 314A of the Restatement, Comment *c* (duty contemplates only risk of harm arising in the course of the relationship).

As counsel for OSU conceded at oral argument, OSU owed a general duty to exercise reasonable care to protect its 4–H members against the foreseeable conduct of third persons The next question is whether OSU breached that duty, or in other words, whether under the circumstances OSU's general duty to exercise reasonable care required OSU to take action specifically regarding Waites, the least burdensome action being warning Ashtabula County 4–H club advisors or parents that Waites was a convicted child molester. OSU argues that it cannot be charged with this specific duty because the Ashtabula County 4–H agent, Hopkins, did not even know that Waites was involved with 4–H in Ashtabula County, other than with the events for which Hopkins hired him, judging fairs and running 4–H clinics

Although Hopkins did not know of Waites's other involvement with Ashtabula County 4–H, once he received Jodi Black's memo, he owed a specific duty either to find out whether Waites was involved with a 4–H club or to warn the Ashtabula County 4–H club advisors that Waites was a convicted child molester so that they could protect the children Hopkins breached this duty. Hopkins failed to warn the people who most **184 needed the information regarding Waites, the club advisors and parents. When Hopkins failed to warn the club advisors or parents of Waites's conviction, they had no reason to let Hopkins know that Waites was involved with the club

4–H's salaried line-management personnel in Ashtabula County consists of just two people, county extension agent Hopkins and a part-time home economics agent The mission of 4–H is carried out mostly through the work of volunteers, who run the clubs with little organizational oversight Under the 4–H structure, a county extension agent like Hopkins would probably not know when uninformed *759 club advisors are allowing someone the agent knows to be a pedophile to work with 4–H members. Black did not know whether Waites was involved with 4–H in Ashtabula County or elsewhere, that is why she sent the warning memo to all eighty-eight county extension agents. Similarly, because Hopkins was not in a position within the organization to know whether Waites was involved with 4–H in Ashtabula County, he had a duty either to investigate himself or to warn the people that would know, the club advisors. The fact that Hopkins would not know of Waites's involvement with the All–County Kids club made it imperative that he inform the club advisors that Waites was a convicted child molester

Upon learning of Waites's conviction and involvement with 4–H, OSU, through Black's memo, began the process of fulfilling its duty to protect its members by disseminating the information of Waites's conviction to those who were in a position to protect the children. This process broke down in Ashtabula County. Hopkins breached the duty by failing to pass the information on to all of the Ashtabula County 4–H club advisors. Malnar and Maddox Cook subsequently encouraged their club members to work one-on-one with Waites, making Waites's abuse of them highly probable, if not inevitable This failure by Hopkins constituted a breach of the duty to take reasonable care to protect 4–H members from the foreseeable risk Waites presented.

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After receiving Black's memo, Hopkins raised the issue of Waites at the April 9, 1990 meeting of the Ashtabula County 4–H small animal committee. Although the memo was addressed to "County Extension Personnel Responsible for Hiring Junior Fair Judges," and although Black's intent was that the memo be passed on to the county committees hiring junior fair judges, Hopkins did not distribute or display Black's memo. At the meeting, Butler defended her friend Waites, stating that based on what she heard from friends, Waites was innocent despite his no contest plea. As county extension agent, Hopkins was the ultimate authority in Ashtabula County on 4–H matters. Relying on Butler, Hopkins took no other action on Black's memo and, instead, agreed to hire Waites again. Hopkins's reasoning for siding with Waites is inconsistent. Hopkins testified that he relied both on Kitty Butler's recommendation that Waites was innocent of the 1984 charge and on the belief that Waites should be given a "second chance."

Although all club advisors, including Malnar and Maddox Cook, were members of the small animal committee and received copies of the minutes of committee meetings, the minutes of the April 9, 1990 meeting do not mention the committee's discussion of Waites.[8] Because the minutes were silent, and because neither *760 Malnar nor Maddox Cook attended that meeting, Maddox Cook did not learn of Waites's 1984 conviction until after the 1992 molestations were publicized.

With club advisors Malnar and Maddox Cook lacking the information they should have had, that Waites was a convicted child molester, and Hopkins lacking the information that he should have had, that Waites was involved with the club, Malnar and Maddox Cook encouraged contact between Waites and club members. Malnar and Maddox Cook introduced Stephanie to Waites in the fall of 1991 and lauded him as a goat expert, "the man to talk to about your goats." **185 Shortly after Waites took Stephanie and her father to buy her first goat, Waites and Maddox Cook went to Stephanie's home to dehorn the goat. Waites visited Stephanie's home five times after that and telephoned her five or six times. Terra Koch, another of Waites's victims, was introduced to Waites by a 4–H advisor at the 1989 Ashtabula County 4–H goat clinic. Malnar also met Waites for the first time at a 4–H clinic. Malnar told Terra and her mother to call Waites if they needed help with her goat. Malnar and Maddox Cook told members at a club meeting that Waites was the expert to call. Stephanie's mother and Terra's mother testified that Waites was promoted as an integral part of their daughters' 4–H experience. Stephanie considered Waites "like an advisor" and called him when she had questions about her goat. Maddox Cook knew that Waites had previously been a 4–H volunteer in Lake County, and when asked by Terra's mother whether Waites was all right, Malnar responded, "Oh, yes, he just loves kids and goats, and he has been in 4–H for years."

According to Terra, Waites attended nine or ten meetings of the All–County Kids club in 1990, eight or nine meetings in 1991, and one or two meetings in 1992. Terra's mother also testified that Waites attended and spoke at no fewer than five or six club meetings. One meeting was held at Waites's home. Stephanie also testified regarding Waites's attendance at a club meeting. Waites did not merely attend club meetings as a parent. He assisted the advisors, served as the expert instructor at meetings of the All–County Kids club, and went with the advisors to the members' homes. Waites also drove club members to meetings and to fairs in Ohio and Pennsylvania.[9]

Still, OSU would escape liability if Waites's molestation of club members were not a foreseeable consequence of the access and status 4–H accorded him. The majority does plaintiffs a disservice by limiting its analysis of their negligence *761 theory to the hiring of Waites as a fair judge and clinic instructor. Although I disagree with its conclusion, the majority thoroughly discusses the negligent hiring component of appellants' case. The majority fails, however, to discuss the greater part of the negligence attributable to OSU: the duty to warn arising from the special relationship between 4–H and the children and the failure of Hopkins to warn his club advisors or members' parents of Waites's conviction. This breach resulted in Malnar, Maddox Cook, and the parents continuing to allow Waites supervised and unsupervised access to the children. Stephanie's injury was the foreseeable result of the dual breaches of duty: failure to warn and negligent hiring.

Section 302B, Restatement of the Law 2d, Torts (1965) 88, addresses the specific issue of foreseeability of intentional or criminal conduct.

"An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."

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I expect the framers of Section 302B had cases like this one in mind when they drafted the accompanying Comments *d* and *e*:

"*d* * * * In the ordinary case [the actor] may reasonably proceed upon the assumption that others will not interfere in a manner intended to cause harm to anyone. * * *

"*e* There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct, or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations

**186 "* * *

"D Where the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct."

The issue, therefore, is whether it is foreseeable that a convicted child molester will commit another pedophilic crime if placed in a position of leadership, authority, or responsibility in a youth organization without issuing reasonable warnings Or, to paraphrase the Restatement's comments, whether the youth organization realizes or should realize that the child molester's sanctioned involvement *762 with the youth organization involves an unreasonable risk of harm to the children, whether the youth organization should be required to anticipate and guard against the child molester's pedophilic proclivities, whether the youth organization is under a special responsibility toward its members to protect them against such intentional misconduct, whether the youth organization's own affirmative act has created or exposed its members to a recognizable high degree of risk of harm through such misconduct, which a reasonable person would take into account, or whether the youth organization has brought its members into contact or association with the child molester, whom the organization knows or should know to be peculiarly likely to commit a pedophilic crime under circumstances which afford a singular opportunity or temptation for such misconduct

The scientific literature, legislative pronouncements, and judicial opinions support the conclusion that the magnitude of the risk—the foreseeability—that a known child molester will commit a pedophilic offense when placed in a position of leadership, authority, or responsibility in a youth organization without reasonable warnings requires that the youth organization be held liable.

Child molesters usually do not limit themselves to one victim. Fuller, Child Molestation and Pedophilia, *supra,* at 603. In the largest study of pedophiles ever undertaken, an analysis of five hundred seventy-one cases showed that those who admitted to probation officers to one to four incidents of molesting young girls admitted to an average of twenty-three incidents when guaranteed anonymity. Meyer, Abnormal Behavior and the Criminal Justice System (1992) 94. Of course, most convicted child molesters are not allowed to work with youth organizations

Legislatures have responded to the particular risk posed by pedophiles with registration and public notification laws. Statutorily mandated child abuse registries proliferated in the 1970s. Note, The Constitutionality of Employer–Accessible Child Abuse Registries: Due Process Implications of Governmental Occupational Blacklisting (1993), 92 Mich.L.Rev. 139 In response to the particular risk of recidivism of sex offenders, the Ohio General Assembly instituted required registration of habitual sex offenders in 1963. See R.C. 2950.01 to 2950.08 Increasingly since 1993, states have been implementing sex offender notification statutes. See Note, There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester is Released into the Community (1995), 28 Ind.L.Rev. 715, 716; see, also, Comment, Examining Sex Offender Community Notification Laws (1995), 83 Cal.L.Rev. 885, 904, "Megan's Law": Community Notification and the Constitution (1995), 29 Colum.J.L. & Soc.Probs. 117, 120. The Washington and Idaho legislatures included in their sex offender registration *763 legislation findings of a higher risk of recidivism.[10] In May 1996 the federal government enacted "Megan's Law," Pub.L. 104–145, 110 Stat 1345 (1996) (to be codified at **187 Section 14071[d], Title 42, U.S.Code), which requires state and local law enforcement agencies to "release relevant information that is necessary to protect the public concerning a specific person required to register" under the now federally mandated state registration programs.

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Court opinions also support the conclusion that it is foreseeable that a convicted child molester will commit a pedophilic offense when provided extraordinary access to unsuspecting children. In *Almonte v. New York Med. College* (D.Conn.1994), 851 F.Supp. 34, a ten-year-old hospital patient was sexually assaulted by a resident psychiatrist. The resident had undergone psychoanalysis with the defendant psychiatrist, during which the psychiatrist learned that the resident was a pedophile and that he planned on specializing in child psychiatry. The court denied the psychiatrist's motion for judgment on the pleadings and held that the psychiatrist had a duty to warn the resident's child patients of the resident's pedophilia:

"* * * [T]he plaintiffs allege that although Ingram knew that DeMasi was a pedophiliac and that he intended to pursue and practice child psychiatry, neither Ingram nor the College took any steps on the basis of this knowledge. Because the court finds that a self-confessed pedophiliac who intends to practice child psychiatry presents a foreseeable threat of harm to future minor patients, * * * the plaintiffs' complaint states a claim against Ingram and the College for failure to exercise reasonable care to protect Denny against such foreseeable harm." *Id.* at 41.

"Ordinary people do not commit outrages against others because they have relatively little inclination to do so, and because any inclination in that direction is suppressed by moral inhibitions and fear of the practical risks associated with the commission of crimes. A person with a history of rape or child molestation stands on a different footing. His past conduct provides evidence that he has the combination of aggressive and sexual impulses that motivates the commission of such crimes, that he lacks effective inhibitions against acting on these impulses, and that the risks involved do not deter him." Karp, *764 Evidence of Propensity and Probability in Sex Offense Cases and Other Cases (1994), 70 Chi.-Kent L.Rev. 15, 20.

The Eleventh Circuit Court of Appeals made a similar observation:

"[S]ex offenders are subject to a continually recurring physiological urge which is part of their nature and requires the imposition of effective restraints in order to curb the habitual repetition of episodes producing the harmful consequences to the public resulting from the propensities of their nature." *Hendking v. Smith* (C.A.11, 1986), 781 F.2d 850, 852 (holding that a prison rule that excludes from certain privileges inmates with a history of violent sex offenses is reasonable and appropriate and not violative of the Equal Protection Clause); see *Lustgarden v. Gunter* (C.A.10, 1992), 966 F.2d 552, 555 (same); *Neal v. Shimoda* (D.Haw.1995), 905 F.Supp. 813, 819 (following *Hendking* and noting high risk of recidivism of untreated sex offenders).

In *Haddock v. New York* (1988), 140 A.D.2d 91, 98, 532 N.Y.S.2d 379, 383, affirmed (1990), 75 N.Y.2d 478, 554 N.Y.S.2d 439, 553 N.E.2d 987, the city of New York employed a man with a long criminal record, including one conviction of attempted rape and parole revocation based on another rape charge, to work at a children's playground. The man abducted and raped a nine-year-old girl at the playground. The jury awarded $3.5 million, but the trial court granted the city's motion for judgment notwithstanding the verdict, in part on the ground that the attack was not foreseeable. *Id.* at 482–483, 554 N.Y.S.2d at 442, 553 N.E.2d at 990. The Appellate Division reversed, reinstating the jury's verdict subject to remittitur. The New York Court of Appeals affirmed. Employment of a person with such a criminal history, the Appellate Division stated, subjected children at the playground to a clearly foreseeable risk of harm. *Id.* at 94–96, 532 N.Y.S.2d at 381. The city considered the criminal's job at the playground as not involving public contact or working with children. *Id.* at 480–484, 554 N.Y.S.2d at 440–442, 553 N.E.2d at 989–990. Similarly, 4–H's Hopkins testified that he thought that Waites was not a threat because of his presumed limited access to 4–H members.

**188 The foreseeability at issue here—the foreseeability that defines the scope of the youth organization's liability—is not the foreseeability that a convicted child molester will commit another crime, or even that a convicted child molester will commit another sexual or pedophilic crime. Rather, the foreseeability at issue here—and to which I would limit the holding—is the foreseeability that a convicted child molester will commit another pedophilic crime if placed in a position of leadership, authority, or responsibility in a youth organization without warning members, parents, or staff that are in a position to protect the children. The effect of OSU's negligent hiring and negligent failure to warn was that Waites was made a judge, instructor, and mentor. This negligence provided him access to the children and the status to exploit that access. As should have been *765 anticipated, Waites used the postincarceration access and status given him by 4–H to molest more children. Waites's path to Stephanie was

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not merely foreseeable; it was the classic *modus operandi* of a child molester

OSU owed a duty of care to Stephanie, and it breached that duty OSU, through Hopkins, breached its duty to exercise reasonable care to protect its 4–H members by failing to warn Ashtabula County 4–H club advisors or parents [11] of Waites's conviction This breach resulted in the All–County Kids club advisors and parents unwittingly allowing Waites unconscionable access to the children. Compounding the injurious effect of this breach, OSU, through Hopkins and Butler, breached its duty to exercise reasonable care in hiring fair judges and clinic instructors by hiring Waites, thereby bestowing upon him the imprimatur of 4–H's approval, despite actual knowledge that he was a convicted child molester. Appellants' second assignment of error should be sustained.

The third element of a negligence action is injury proximately caused by the breach of duty. The proximate cause element requires some reasonable connection between the defendant's negligent act or omission and the plaintiff's injury. Prosser & Keeton, *supra,* at 263, Section 41. Like the duty element, proximate cause is often expressed as a function of foreseeability

"A person is not liable for proximately causing an injury if, under all of the circumstances, he did not foresee and, acting as a reasonably prudent person, could not have foreseen the consequences of his alleged negligent acts" *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 539 N.E.2d 614, paragraph one of the syllabus.

Ohio courts also say that an injury is proximately caused by a breach of duty when the injury is the natural and probable consequence of the breach. The injury must have been, under the surrounding circumstances of the particular case, foreseeable or anticipated by the wrongdoer as likely to follow from the breach of duty. *Id.* at 143, 539 N.E.2d at 617; *Strother, supra,* 67 Ohio St.2d at 287, 21 O.O.3d at 180–181, 423 N.E.2d at 470–471; *Ross v Nutt* (1964), 177 Ohio St. 113, 114, 29 O.O.2d 313, 314, 203 N.E.2d 118, 119–120; *Jeanne v. Hawkes Hosp. of Mt Carmel* (1991), 74 Ohio App 3d 246, 252, 598 N.E.2d 1174, 1177–1178; *Grange Mut. Cas. Co. v. Fleming* (1982), 8 Ohio App.3d 164, 166–167, 8 OBR 223, 225–226, 456 N.E.2d 816, 818–820. An injury may have multiple proximate causes. *Taylor v. Webster* (1967), 12 Ohio St.2d 53, 41 O.O.2d 274, 231 N.E.2d 870; *Reed v. Weber* (1992), 83 Ohio App.3d 437, 441, 615 N.E.2d 253, 255–256.

The determination of whether a breach of duty was the proximate cause of an injury is usually termed a question of fact. *766 *Strother, supra,* 67 Ohio St.2d 282, 21 O.O.3d 177, 423 N.E.2d 467. A trial court's findings of fact are presumed to be correct and will not be reversed as being contrary to the manifest weight of the evidence if there is competent and credible evidence supporting the finding. *Wisintainer v. Elcen Power Strut Co* (1993), 67 Ohio St.3d 352, 355, 617 N.E 2d 1136, 1138–1139; *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614, 614 N.E.2d 742, 745; **189 *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St 3d 77, 79–80, 10 OBR 408, 410–411, 461 N.E.2d 1273, 1275–1277. By their third assignment of error, plaintiffs argue that the trial court erred in finding that it was not reasonably foreseeable that Waites would sexually molest Stephanie.

For the same reasons that the foreseeability of harm meant that OSU's general duty to exercise reasonable care required it to warn of Waites's conviction, the foreseeability of harm satisfies the proximate cause element of appellants' negligence claim.

In arguing that 4–H's decision to hire Waites, even if negligent, was not a proximate cause of Stephanie's injury, OSU relies on the facts that 4–H last hired Waites to run a 4–H goat clinic in April 1991, and that Stephanie was not a 4–H member at that time and did not meet Waites until the fall of 1991. OSU argues that because Stephanie was not a 4–H member at the time Waites was last in the paid service of 4–H, it was unforeseeable that Stephanie would be victimized I do not dispute the proposition that it was unforeseeable which 4–H member Waites would victimize, but it was eminently foreseeable that Waites would victimize a 4–H member The duty and proximate cause elements of a negligence claim do not require that a particular individual be the object of foreseeable harm. It is sufficient that the breach of duty is likely to result in injury to someone. *Williams v. Williams* (1990), 68 Ohio App.3d 529, 532, 589 N.E.2d 89, 91–92; *Strother, supra,* 67 Ohio St 2d at 287–288, 21 O.O.3d at 180–181, 423 N.E.2d at 470–472; *Mudrich v Std. Oil Co.* (1950), 153 Ohio St. 31, 39, 41 O.O. 117, 121, 90 N.E.2d 859, 863–864; see *Semadeni v. Ohio Dept. of Transp* (1996), 75 Ohio St 3d 128, 131, 661 N.E.2d 1013, 1016 (holding the Ohio Department of Transportation liable for the death of a motorist killed by a concrete block thrown from a highway overpass, on the ground that the department had a duty to foreseeable travelers to timely implement policy of installing protective fencing on overpasses).

The anonymous caller from Ross County foresaw the risk. Jodi Black and the 4–H administrators in Columbus foresaw the risk. Hopkins himself foresaw the risk but, rather than protecting 4–H members by removing Waites from the list of fair judges, preventing Waites from participating in any 4–H event, and warning 4–H club advisors of Waites's conviction, Hopkins filed away the warning missive from Jodi Black and withheld the critical information from club advisors, parents, and Waites's next set of victims

*767 OSU also argues that any negligence was not the proximate cause of Stephanie's injury because Waites never abused Stephanie at a 4–H event. OSU relies on Hopkins's assertion that he allowed Waites to judge fair competitions and run goat clinics only because the circumstances of the competitions and clinics were such that it would be unlikely that Waites would be alone with 4–H members. Although Hopkins recognized the danger that Waites posed, he unreasonably concluded that hiring Waites for the limited purpose of serving as a fair judge and a clinic instructor was an adequate safeguard against the admitted risk.

The law does not support OSU's argument that its liability should be limited to sexual assaults committed at 4–H events. Child molestation is not usually committed in plain view Unless Waites was to be kept under constant surveillance during clinics and competitions, the likelihood existed that he could seduce a child into a clandestine location either during or after the 4–H events. The greater danger, however, was that Waites would use the institutional endorsement associated with being the 4–H judge and goat expert to lure children, their parents, and unsuspecting 4–H advisors into trusting a man they would not otherwise trust. That danger was realized. The All–County Kids club had eight or nine members during the 1991–1992 term, and Waites molested three members plus the sister of one of the members.

Waites's history of child molestation made it all but inevitable that he would molest a child again if placed in a position of leadership, authority, or responsibility in 4–H. The trial court's finding that Waites's abuse of Stephanie was not proximately caused by 4–H's negligence in failing to inform the Ashtabula County club advisors and 4–H's negligence in hiring Waites to serve as a fair judge and 4–H clinic instructor is contrary to the manifest weight of the evidence. To **190 some extent the law imposes on each citizen the risk of being victimized by recidivist criminals. However, the law should not fail to address the risk of individual children being victimized by a recidivist child molester when that risk is created by a youth organization that has knowingly placed the child molester in its midst and promoted him as a teacher, a judge, and a role model. Plaintiff's third assignment of error should be sustained.

By their fourth assignment of error, plaintiffs correctly assert that the trial court erred in finding that Waites's sexual assault on Stephanie was an intervening event precluding the liability of the state. A finding of liability in this case is not precluded by the doctrine of the superseding cause. Waites's tortious conduct cannot be a superseding event, because that conduct was the very risk that gave rise to OSU's duty. See *Fed. Steel & Wire Corp., supra,* 45 Ohio St 3d at 176–177, 543 N.E.2d at 774–776; *Knor v. Parking Co of Am* (1991), 73 Ohio App.3d 177, 190, 596 N.E.2d 1059, 1067 ("The defendant cannot now argue that the actions of the kidnappers were a superseding cause of the plaintiff's injuries, *768 when it breached its duty to protect against the very type of criminal act that occurred.") An alleged superseding cause does not cut off liability when it is itself foreseeable. *Cascone v. Herb Kay Co.* (1983), 6 Ohio St.3d 155, 6 OBR 209, 451 N E.2d 815, paragraph one of the syllabus; *Taylor v. Webster* (1967), 12 Ohio St.2d 53, 56, 41 O.O.2d 274, 275–276, 231 N.E.2d 870, 872–873; *Mouse v. Cent Sav. & Trust Co.* (1929), 120 Ohio St. 599, 606, 167 N.E. 868, 870; *Turner v. Children's Hosp., Inc.* (1991), 76 Ohio App.3d 541, 558, 602 N E.2d 423, 433–434. Appellants' fourth assignment of error should be sustained.

By their first assignment of error, plaintiffs argue that the trial court erred in finding that OSU is entitled to statutory immunity for Hopkins's failure to inform all of the club advisors and members of the small animal committee of Waites's conviction. I agree with plaintiffs [12]

In *Reynolds v. State* (1984), 14 Ohio St.3d 68, 14 OBR 506, 471 N E.2d 776, the Supreme Court of Ohio held that the state was immune from liability arising from "basic policy decisions" requiring exercise of discretion but could be liable for negligence in the performance of activities implementing those decisions In *Crawford v. Ohio Div. of Parole & Community Serv.* (1991), 57 Ohio St 3d 184, 187–188, 566 N.E.2d 1233, 1236–1237, the court held that the decision to send one particular inmate to an outside Alcoholics Anonymous meeting was not a "basic policy decision" within the meaning of *Reynolds.*

" * * * The determination to send *one particular individual* to outside A.A. meetings cannot be said to be a 'basic policy decision' within the meaning of *Reynolds, supra.* Likewise, as demonstrated above, the determination is not characterized by the exercise of a high degree of official judgment or discretion. Rather, it is a decision that is operational in nature, relating to the day-to-day business of the [Columbus Reintegration] Center. As such, it is analogous to a ministerial act for which the state may be held liable. * * * " (Emphasis *sic*) *Id.* at 187, 566 N.E 2d at 1237.

Similarly, because the decisions made by OSU agents regarding Waites's involvement with 4–H were decisions concerning only one person, Waites, and because these decisions were operational in nature, relating to the day-to-day business of county- and club-level 4–H administration, these decisions were not "basic policy decisions" protected by sovereign immunity Therefore, OSU may be vicariously liable for the negligent decisions of its agents at issue here Appellants' first assignment of error should be sustained.

Because I would reverse the decision of the trial court and enter judgment in favor of plaintiffs on the basis of the first four assignments of error, I would not ***769** reach the sixth, seventh, and eighth assignments of error. Because the evidence supports the trial court's finding that Owen, Maruschak, and Hopkins were not guilty of wanton misconduct, ****191** I concur in the majority's judgment regarding the fifth assignment of error

For these reasons, I would sustain the first, second, third and fourth assignments of error, overrule the fifth assignment of error, and reverse the judgment of the Court of Claims of Ohio and remand this cause to that court with instructions to enter judgment in favor of plaintiffs on the issue of liability and proceed to trial on the issue of damages.

Parallel Citations

680 N.E.2d 161, 118 Ed. Law Rep. 1104

Footnotes

* Reporter's Note A discretionary appeal to the Supreme Court of Ohio was not allowed in (1996), 77 Ohio St.3d 1494, 673 N.E.2d 149

1 On appeal, the Court of Appeals for Lake County affirmed in part and reversed in part the judgment of the trial court. See *State v. Waites* (Aug 19, 1994), Lake App No. 93–L–009, unreported, 1994 WL 590289.

2 Plaintiffs assert that Waites was a "volunteer project advisor," a title appearing in an "Ohio 4–H BLAST Program" manual However, Ashtabula County extension agent Thomas Hopkins testified that the "BLAST Program" curriculum was not in place prior to the fall of 1992 Hopkins further testified that, during the time of Waites's alleged involvement in local 4–H club activities, there was nobody who served solely in the capacity of what might be considered a volunteer project advisor in Ashtabula County.

3 In its decision, the Court of Claims relied upon *Reynolds v. State* (1984), 14 Ohio St 3d 68, 70, 14 OBR 506, 507–508, 471 N.E.2d 776, 778–779, in which the Ohio Supreme Court held that language in R.C. 2743 02 providing that the state shall have its liability determined in accordance with the same rules of law applicable to suits between private parties means that "the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion."

4 In this case, OSU both (1) allowed a convicted child molester to work directly with the children as a judge and instructor, and (2) failed to warn club advisors or parents of the conviction Therefore, I express no opinion on the questions of whether it is ever reasonable and nonnegligent for a youth organization (1) to utilize a convicted child molester in any capacity, or (2) to allow a convicted child molester to work with children after warning parents.

5 Ashtabula County 4–H promoted its May 27, 1989 goat clinic with a press release published locally announcing "The instructor at the clinic will be Mr James Waites who will also serve as the judge at this year's Junior Fair Goat Show." The May 5, 1990 and April 13, 1991 goat clinics were promoted with fliers featuring Waites's name that were distributed to the members of the All County Kids club The 1990 flier read.

"BRING YOUR GOAT TO THIS CLINIC.
"YOU WILL BE PRACTICING SHOWMANSHIP.
"OUR SPEAKER FOR THE CLINIC IS: MR. JAMES WAITES from PERRY, OHIO
"MR WAITES WILL ALSO BE OUR JUDGE FOR THE COUNTY FAIR SO THIS WILL BE A GOOD OPPORTUNITY TO FIND OUT JUST WHAT HE WILL BE EXPECTING AT JUDGING."

6 One example is R.C. 3319.20 and 3319.52, which require prosecutors to inform the employing board of education when school employees are convicted of certain offenses. Another example is *Bowman v. Parma Bd of Edn.* (1988), 44 Ohio App.3d 169, 542 N.E 2d 663. In *Bowman*, the court affirmed summary judgment in favor of the defendant school board and against the administrator of the estate of a teacher who had committed suicide after public revelation of his pedophilia. The teacher had agreed to resign pursuant to a settlement agreement in which the board agreed " 'No further references or other statements related to Ginebaugh's employment will be given unless required by Court order.' " *Id.* at 171, 542 N E.2d at 665. Less than a month later, however, a member of the Parma School Board informed a member of the school board that hired the decedent of the decedent's pedophilia The court held that, as to disclosures of pedophilia, the nondisclosure clause of the settlement agreement was unenforceable. The *Bowman* court's rationale aptly explains my rationale for holding that Hopkins owed a duty to warn of Waites's pedophilia

"The evidence implicating Phillip Ginebaugh as a man entirely unsuited for the teaching profession is clear. * * * Phillip Ginebaugh's decision to remain in the teaching profession undermines any validity the non-disclosure clause might otherwise have possessed. This court will not countenance an action for breach of such a clause upon such unchallenged facts as those in the instant case, for to do so would be to expose our most vulnerable citizens to a completely unacceptable risk of physical, mental and emotional harm." *Id.* at 172, 542 N.E.2d at 666

7 The mission of 4–H is to provide learning experiences for children between the ages of five and eighteen Ohio 4–H Program Agent's Handbook (3d rev. 1994), 1.1.

8 Hopkins speculated that the secretary at the meeting may have excluded the committee's discussion of Waites's conviction because the secretary may have considered it "insensitive to include names and talk about those kinds of discussions in the set of minutes, * * * knowing that these [minutes] are going to be distributed to homes by mail * * * "

9 Maddox Cook became a club advisor in 1991. She testified that she could not remember whether Waites ever attended a club meeting. At oral argument, counsel for OSU conceded that Waites attended and drove members to and from club meetings.

10 "The legislature finds that sex offenders pose a high risk of engaging in sex offenses even after being released from incarceration * * * " 1994 Wash Laws ch. 3, Section 117, reprinted in Historical and Statutory Notes to Wash Rev Code Ann 4 24.550 (West Supp.1996)

"The legislature finds that sex offenders present a high risk of reoffense and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sex offenses are impaired by the lack of information available about individuals who have pled guilty to or have been found guilty of sex offenses who live within their jurisdiction " Idaho Code 18–8302 (Supp.1995).

11 Hopkins owed a duty to inform at least the club advisors. Because Hopkins warned neither the advisors nor the parents, it is not necessary to decide whether he owed a duty to inform the parents.

12 The majority ruled the first assignment of error moot based on its holding that OSU owed no duty to Stephanie

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172 Cal.App.4th 1133
Court of Appeal, Fourth District, Division 1, California.

Trisha PHILLIPS, Plaintiff and Appellant,
v.
TLC PLUMBING, INC. et al.,
Defendants and Respondents.

No. D053072. | April 3, 2009.

Synopsis

Background: Customer's daughter brought action against plumbing service for negligent hiring and retention of a former employee who shot and killed customer approximately two years after his employment was terminated. The Superior Court, San Diego County, No GIC865882, Yuri Hofmann, J., granted summary judgment for plumbing service. Daughter appealed.

[Holding:] The Court of Appeal, McDonald, J., held that plumbing service did not owe customer a duty of care regarding negligent hiring and retention after employee's termination

Affirmed.

West Headnotes (14)

[1] **Appeal and Error**
⇦ Extent of Review Dependent on Nature of Decision Appealed from

In reviewing a grant of summary judgment, the appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later.

Cases that cite this headnote

[2] **Negligence**
⇦ Elements in general

The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate or legal cause between the breach and (4) the plaintiff's injury.

11 Cases that cite this headnote

[3] **Negligence**
⇦ Duty as question of fact or law generally

In considering a cause of action for negligence, the existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide.

12 Cases that cite this headnote

[4] **Negligence**
⇦ Negligence as question of fact or law generally

Negligence
⇦ Proximate Cause

In considering a cause of action for negligence, the elements of breach of duty and causation are ordinarily questions of fact for the jury's determination.

7 Cases that cite this headnote

[5] **Negligence**
⇦ Proximate Cause

In considering a cause of action for negligence, causation may be a question of law if on undisputed facts there can be no reasonable difference of opinion on causal nexus.

1 Cases that cite this headnote

[6] **Labor and Employment**
⇦ Negligent Hiring

Labor and Employment
⇦ Negligent retention

An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit

15 Cases that cite this headnote

[7] **Labor and Employment**
⇦ Negligent Hiring

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Negligence liability will be imposed on an employer if it knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes

17 Cases that cite this headnote

[8] **Labor and Employment**
⇨ Negligent Hiring
Principal and Agent
⇨ Rights and liabilities of principal

California follows the Restatement rule that a person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless in the employment of improper persons or instrumentalities in work involving risk of harm to others. Restatement (Second) of Agency § 213.

4 Cases that cite this headnote

[9] **Labor and Employment**
⇨ Negligent retention

Liability for negligent retention of an employee is one of direct liability for negligence, not vicarious liability.

11 Cases that cite this headnote

[10] **Appeal and Error**
⇨ Sufficiency of Presentation of Questions

The Court of Appeal would exercise its discretion to consider on appeal the question of law whether under the undisputed circumstances of the case an employer owed customer a duty of care at the time its former employee killed customer, even if employer untimely raised the absence of a duty of care by first raising that issue in its reply to plaintiff's opposition to employer's motion for summary judgment of an action for negligent hiring and retention.

7 Cases that cite this headnote

[11] **Appeal and Error**
⇨ Necessity of presentation in general

A party may raise a new issue on appeal if that issue is purely a question of law on undisputed facts.

12 Cases that cite this headnote

[12] **Labor and Employment**
⇨ Negligent Hiring
Labor and Employment
⇨ Negligent retention

Plumbing service did not owe customer a duty of care for purposes of a negligent hiring and retention action based on her death at the hands of a former employee, even though employee's social relationship with customer began when employer dispatched him on a service call to her home, where plumbing service terminated his employment two years before he murdered customer

See 6 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1190; Cal. Jur. 3d, Employer and Employee, § 162, Annot., Employer's liability for assault, theft, or similar intentional wrong committed by employee at home or business of customer (1993) 13 A.L.R.5th 217

1 Cases that cite this headnote

[13] **Labor and Employment**
⇨ Negligent Hiring
Labor and Employment
⇨ Negligent retention

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 if that former employee initially met the plaintiff while employed by the employer

3 Cases that cite this headnote

[14] **Labor and Employment**
⇨ Nature of liability in general

Plumbing service and its owner were not guarantors of the safety of all customers or other persons whom former employee incidentally met

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while performing plumbing service work for employers.

Cases that cite this headnote

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Opinion

McDONALD, J.

*1136 Plaintiff Trisha Phillips (Plaintiff) appeals a summary judgment entered in favor of defendants TLC Plumbing, Inc., (TLC) and Thad L. Condon (together Defendants). **866 [1] Plaintiff filed the instant action after James Joseph Cain, one of TLC's former employees, shot and killed Judith Phillips (Judith), Plaintiff's mother. Plaintiff's action alleged a cause of action for negligent hiring and retention of Cain. On appeal, she contends the trial court erred by granting Defendants' motion for summary judgment because there are triable issues of material fact on her cause of action for negligent hiring and retention.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999 TLC employed Cain as a plumbing service repairman At the time Cain was hired, Condon, as owner of TLC, learned Cain was on parole and apparently had been convicted of a domestic violence and/or arson offense involving his then wife.

On April 2, 2003, TLC dispatched Cain on a service call to Judith's residence. On April 24, TLC dispatched Cain on another service call to her residence. On or about May 21, TLC terminated Cain's employment for misuse of a company vehicle, drug and alcohol use, and apparently threatening a coworker.

*1137 Cain and Judith apparently began a social relationship in April 2003 after his first service call. Their relationship seemingly evolved over time into a romantic one. On May 19, 2005, after Judith had ended their relationship and applied for a restraining order against Cain, he shot her. She died the following day and Cain was convicted of her murder

In May 2006, Plaintiff filed the instant complaint alleging causes of action against Defendants, including a cause of action for negligent hiring and retention of Cain.[2] Defendants filed a motion for summary judgment, asserting there were no triable issues of material fact. They argued Cain was not their employee at the time he killed Judith and their alleged negligence was not a legal cause of her harm. Plaintiff opposed the motion, arguing Defendants owed her a duty of care and there were triable issues of material fact that precluded summary judgment In their reply to the opposition, Defendants argued they did not owe Plaintiff a duty of care.

On January 25, 2008, following arguments of counsel, the trial court granted Defendants' motion for summary judgment. The court stated:

> "Specifically, Defendants have shown, and [Plaintiff has] failed to introduce evidence refuting, that there was no employer-employee relationship between Cain and Defendants at the time Cain shot and killed Judith Phillips. [Citations.] Rather, the parties agree that, at the time Cain killed [her], he had not been employed by TLC for approximately two years and had been in a years-long personal relationship with [her]. Thus, Defendants cannot be held vicariously liable for [Plaintiff's] injuries. Additionally, Defendants have shown, and [Plaintiff has] failed to introduce evidence refuting, that, even assuming Defendants' hiring and retention of Cain was negligent, it was not reasonably foreseeable that Cain would enter into a personal relationship with [Judith] which would later lead to Cain's shooting and killing of [her] years after he provided plumbing service to her Although causation **867 is usually an issue which cannot be resolved on summary

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> judgment, in this case, there is no room for reasonable difference of opinion on causal nexus."

On March 19, the court entered judgment for Defendants Plaintiff timely filed a notice of appeal.

DISCUSSION

I

Summary Judgment Standard of Review

"On appeal after a motion for summary judgment has been granted, we review the record de novo, considering all the evidence set forth in the ***1138** moving and opposition papers except that to which objections have been made and sustained [Citations.]" (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334, 100 Cal Rptr.2d 352, 8 P.3d 1089; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767, 107 Cal.Rptr.2d 617, 23 P 3d 1143.) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493 (*Aguilar*).)

Aguilar clarified the standards that apply to summary judgment motions under Code of Civil Procedure section 437c.[3] (*Aguilar, supra,* 25 Cal.4th at pp. 843–857, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Generally, if all the papers submitted by the parties show there is no triable issue of material fact and the " 'moving party is entitled to a judgment as a matter of law' " (§ 437c, subd (c)), the court must grant the motion for summary judgment. (*Aguilar,* at p. 843, 107 Cal.Rptr.2d 841, 24 P.3d 493.) Section 437c, subdivision (p)(2), states:

> "A defendant ... has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant .. has met that burden, the burden shifts to the plaintiff .. to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff . may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto "

Aguilar stated:

> "To speak broadly, all of the foregoing discussion of summary judgment law in this state, like that of its federal counterpart, may be reduced to, and justified by, a single proposition: *If a party moving for summary judgment in any action . would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment.* In such a case, ... the 'court should grant' the motion 'and avoid a . trial' rendered 'useless' by nonsuit or directed verdict or similar device [Citations]" (*Aguilar, supra,* 25 Cal.4th at p. 855, 107 Cal Rptr.2d 841, 24 P.3d 493, italics added)

[1] "On appeal, we exercise 'an independent assessment of the correctness of the trial court's ruling, applying the same ****868** legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law ' [Citation] 'The appellate court must examine only papers before the trial court when it considered the motion, and not documents filed later. [Citation] Moreover, we construe the moving party's affidavits strictly, construe the opponent's ***1139** affidavits liberally, and resolve doubts about the propriety of granting the motion in favor of the party opposing it.' [Citations]" (*Seo v. All–Makes Overhead Doors* (2002) 97 Cal.App.4th 1193, 1201–1202, 119 Cal.Rptr.2d 160.)

II

Tort of Negligent Hiring and Retention Generally

[2] [3] [4] [5] "The elements of a cause of action for negligence are (1) a legal duty to use reasonable care, (2) breach of that duty, and (3) proximate [or legal] cause between the breach and (4) the plaintiff's injury. [Citation.]" (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App 4th 1333, 1339, 78 Cal.Rptr.2d 525.) "The existence of a legal duty to use reasonable care in a particular factual situation is a question of law for the court to decide. [Citation.] However, the elements of breach of that duty and causation

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are ordinarily questions of fact for the jury's determination. [Citation.]" (*Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846.) Nevertheless, causation may be a question of law if on undisputed facts there can be no reasonable difference of opinion on causal nexus. (*Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1687, 19 Cal.Rptr.2d 601.)

[6] [7] [8] [9] "An employer may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. [Citation.]" (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564–1565, 50 Cal.Rptr.2d 399.) "Liability for negligent hiring .. is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees " (*Mendoza v. City of Los Angeles, supra,* 66 Cal.App.4th at p. 1339, 78 Cal.Rptr.2d 525.) Negligence liability will be imposed on an employer if it "knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054, 58 Cal.Rptr.2d 122.) "California follows the rule set forth in the Restatement Second of Agency section 213, which provides in pertinent part: 'A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless· ... [¶] (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]' (*Ibid.*)" (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal App.4th 828, 836, 10 Cal.Rptr.2d 748.) "Liability for negligent ... retention of an employee is one of direct liability for negligence, not vicarious liability. [Citation.]" "1140 (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815, 52 Cal.Rptr.3d 376.) Comment d to section 213 of the Restatement Second of Agency explains at pages 459 to 460·

> "The principal may be negligent because he has reason to know that the . agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him. If the dangerous quality of the agent causes harm, the principal may be liable under the rule that one initiating **869 conduct having an undue tendency to cause harm is liable therefor. [Citation] [¶] ... An agent ... may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. .. [¶] One who employs another to act for him is not liable . merely because the one employed is incompetent, vicious, or careless. If liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business in hand. [¶] Liability results . . not because of the relation of the parties, but because the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment...."

In 2006, the Restatement Third of Agency was published, adopting section 7.05 as the counterpart to section 213 of the Restatement Second of Agency, and stating

> "(1) A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent...." (Rest.3d Agency, § 7.05, p. 177.)

"Liability under this rule is limited by basic principles of tort law, including requirements of causation and duty." (Rest.3d Agency, § 7 05, com c, p. 180.) Furthermore, "[l]iability under this rule also requires some nexus or causal connection between the principal's negligence in selecting or controlling an actor, the actor's employment or work, and the harm suffered by the third party." (Rest.3d Agency, § 7.05, com. c, illus 5, p 180)

III

Duty of Care Owed after Termination of Cain's Employment

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Defendants assert the trial court properly granted their motion for summary judgment because they did not owe any duty of care to Plaintiff at the time Cain shot and killed Judith, harm that occurred about two years *after* TLC terminated his employment. Because Plaintiff cannot prove that required *1141 element of her cause of action for negligent hiring and retention, Defendants argue they are entitled to summary judgment.[4]

A

[10] [11] Although Plaintiff argues Defendants untimely raised the absence of a duty of care by first raising that issue in their reply to Plaintiff's opposition to their motion for summary judgment and therefore cannot raise that issue on appeal, we exercise our discretion to consider on appeal the question of law whether in the undisputed circumstances of this case Defendants owed Plaintiff a duty of care at the time Cain shot and killed Judith A party may raise a new issue on appeal if that issue is purely a question of law on undisputed facts. (*Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, 1709, 71 Cal Rptr.3d 207; *Francies v. Kapla* (2005) 127 Cal.App.4th 1381, 1386, 26 Cal Rptr.3d 501; *Frink v. Prod* (1982) 31 Cal.3d 166, 170, 181 Cal.Rptr. 893, 643 P.2d 476.) As noted above, "[t]he existence of a legal duty to use reasonable care in a particular factual situation is a question **870 of law for the court to decide. [Citation.]" (*Vasquez v. Residential Investments, Inc , supra,* 118 Cal.App 4th at p. 278, 12 Cal.Rptr.3d 846.) Because it is undisputed Cain was not employed by TLC at the time he shot and killed Judith and Plaintiff has had an opportunity to address the issue of duty on appeal, we exercise our discretion to determine the question of law whether Defendants owed Plaintiff a duty of care at the time Judith was harmed by Cain.

B

[12] Although neither party cited, and we are not aware of, any California case addressing the instant question of law, cases from other jurisdictions support our conclusion that 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 employee, as in this case, initially met the plaintiff while employed by the employer. Accordingly, we agree with Defendants' assertion that because Cain's tortious act on Judith occurred *two years after* his employment with TLC was terminated, Defendants did not owe Plaintiff a duty of care at the time of Cain's tortious act and therefore cannot be held liable on a cause of action for negligent hiring and retention

In *Abrams v. Worthington* (2006) 169 Ohio App.3d 94, 861 N.E.2d 920 (*Abrams*), an Ohio court concluded a company did not owe a duty of care to a customer in connection with a former employee's *1142 posttermination tort committed against that customer and therefore was not liable on a negligent hiring cause of action. (*Id.* at pp 922–924.) In *Abrams,* the company hired Chad Sullivan as a furniture mover, but did not uncover his criminal record that included convictions for theft, burglary, and receiving stolen property. (*Id.* at p. 921.) Four months later in December 2001, a married couple hired the company to move their possessions to their new home. (*Ibid.*) Sullivan and two other movers participated in the move (*Ibid.*) In January 2002, the company terminated Sullivan's employment because of his bad attitude, poor work performance, and unreliability. (*Ibid.*) In March 2002, Sullivan and four or five other accomplices went to the couple's home and attacked the husband, bound him and his wife, beat him, and stole valuable property. (*Id.* at pp. 921–922.) Sullivan was convicted of aggravated burglary, aggravated robbery, kidnapping, and grand theft (*Id.* at p. 922) The couple filed an action against the company, alleging causes of action for negligent hiring and negligent retention of Sullivan. (*Ibid.*) The trial court granted the company's motion for summary judgment. (*Ibid.*)

On appeal, *Abrams* noted Ohio courts rely on section 213 of the Restatement Second of Agency (as quoted above) in defining the torts of negligent hiring and negligent retention. (*Abrams, supra,* 861 N.E.2d at pp. 922–923.) It also quoted section 7 05(1) of the Restatement Third of Agency, which it stated provided a "more succinct statement" of those torts. (*Abrams,* at p. 923.) Noting "the existence of a duty depends upon the foreseeability of injury to the plaintiff" (*ibid*), the *Abrams* court noted two of its prior cases involving analogous circumstances "found that the *defendants did not owe the plaintiffs a duty of care because a reasonable person could not foresee that the ex-employees would injure the plaintiffs months after their employment ended*" (*Id.* at p. 924, italics added.) *Abrams* stated "Essentially, our reasoning [in those two cases] conflated the two elements necessary for a duty to arise in negligent hiring and negligent retention cases—the existence **871 of an employment relationship *and* foreseeability of injury We now clarify that both elements must be considered separately and, *based upon the lack of an*

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employment relationship between [the defendant] and [the ex-employee] at the time of the [plaintiffs'] injuries, conclude that [the defendant] did not owe the [plaintiffs] a duty to prevent [the ex-employee] from causing their injuries." (*Id.* at p. 924, second italics added) Accordingly, *Abrams* affirmed the summary judgment for the company (*Id.* at p. 924.)

In *Staten v. Ohio Exterminating Co., Inc.* (1997) 123 Ohio App.3d 526, 704 N.E.2d 621 (*Staten*), one of the two prior cases cited in *Abrams,* the court concluded a company was not liable for posttermination tortious conduct committed by a former employer against a customer. (*Id.* at p. 624.) In that case, the company hired Rommel Knox as a service technician trainee. (*Id.* at p. 622.) In June 1994, Knox and his supervisor were ***1143** in the home of a customer, who later reported a diamond ring was stolen. (*Ibid.*) The company asked Knox to submit to a polygraph test, but he did not return to work and his employment was terminated shortly thereafter. (*Ibid.*) In August 1994, Knox was charged with felony theft of the ring (*Ibid.*) In January 1995, another person shot and killed the customer while Knox was present (*Ibid.*) Knox was convicted of aggravated murder of the customer. (*Ibid.*) The administrator of the customer's estate filed a wrongful death action against the company based on its alleged negligent hiring of Knox. (*Id.* at pp. 622–623.) The trial court granted summary judgment for the company on the wrongful death cause of action. (*Id.* at p. 622.)

On appeal, *Staten* quoted section 213 of the Restatement Second of Agency and noted that "[t]he existence of a duty depends upon the foreseeability of the injury." (*Staten, supra,* 704 N.E.2d at p. 623.) The appellant in *Staten* argued the company should have investigated Knox's background and refused to hire him to work inside customers' homes because of his criminal background.[5] (*Staten, supra,* 704 N.E.2d at p. 624.) *Staten* concluded: "Here, it was not foreseeable that Knox would have [the customer] killed *six months after his employment relationship with [the company] ended* " (*Ibid.,* italics added.) The court elaborated. "Even if Knox's convictions and criminal charges are considered, it was not foreseeable that, six months after he was fired from [the company's] employment, he would have [the customer] killed." (*Ibid.*) Accordingly, *Staten* affirmed the summary judgment for the company (*Id.* at p. 625.) Although *Staten* did so ostensibly for lack of foreseeability, in *Abrams,* as discussed above, the court clarified that its reasoning in *Staten* was conflated and its decision was actually based on the *lack of a duty owed* by a company to a customer for a posttermination tort committed by a former employee. (*Abrams,* 861 N.E.2d at p. 924.)

In *Evans v. Ohio State Univ.* (1996) 112 Ohio App.3d 724, 680 N.E.2d 161, the other case cited in *Abrams,* the court concluded: "We are unable to conclude that a duty of care extended to every member of 4–H [with whom] Waite may have come in contact . following his fair and clinic employment; more particularly, under the circumstances of this case, defendant's duty of care did not extend to the risk of foreseeing the misconduct that occurred." ****872** (*Evans,* at p. 173.) Accordingly, *Evans* concluded the 4–H organization run by the university that had employed Waite was not liable for its negligent hiring or retention of Waite to the child against whom Waite committed tortious acts (i.e., sexual molestations) that occurred at his home *over one year after his employment was terminated.* (*Id.* at pp 171–173.)

***1144** Although we need not discuss the specific facts of each case, there are other analogous cases discussing posttermination torts that provide additional support for our conclusion that an employer does not owe a duty of care to a customer or other third party for posttermination tortious acts committed by a former employee or agent after termination of his or her employment or agency. (See, e g., *Janssen v. American Hawaii Cruises, Inc.* (1987) 69 Haw. 31, 731 P.2d 163, 166–167; *Ledbetter v. United American Ins. Co* (Ala.1993) 624 So 2d 1371, 1373–1374 [summary judgment on negligent hiring action affirmed because alleged harm to plaintiff occurred after company had terminated the employment of agents/employees and therefore company owed plaintiff no duty of care at the time of the alleged harm], cf. *Coleman & Co. Securities, Inc. v. Giaquinto Family Trust* (S.D.N.Y.2002) 236 F.Supp.2d 288, 304 [company did not owe plaintiff any duty to supervise after employee's employment had been terminated].)

In contrast to the many cases cited above that concluded an employer does not owe a duty (or is otherwise not liable) to a plaintiff for posttermination tortious conduct committed by a former employee, we found only one contrary case that appeared to recognize a former employer may be held liable for posttermination torts committed by a former employee. In *Abbott v. Payne* (Fla.App.1984) 457 So.2d 1156, the court reversed an order dismissing a complaint that alleged employer liability for a tort committed by a former employee after the termination of his employment. (*Id.* at p. 1157.) In so doing, *Abbott* merely made the conclusory statement: "Liability can also attach for the conduct of an ex-employee."

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(*Ibid.*) In support of that statement, *Abbott* cites *Wayne v. Unigard Mutual Insurance Company* (Fla.App.1975) 316 So.2d 581. (*Abbott*, at p. 1157.) However, based on our review of *Wayne*, we conclude its language does not provide support for the proposition stated in *Abbott*. Accordingly, *Abbott* does not persuade us to vary from our conclusion that a former employer does not owe a duty of care to a plaintiff for posttermination tortious conduct committed by a former employee after his or her employment is terminated

[13] The great weight of case authority from other jurisdictions that have applied the Restatement Second of Agency to posttermination torts by former employees supports our conclusion. 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.[6] Accordingly, we agree with ***1145** Defendants' assertion that because Cain's tortious act on Judith occurred *two years after* his employment with TLC was terminated, Defendants did not owe Plaintiff a duty of care at the time of Cain's tortious act and therefore cannot be held liable on a cause ****873** of action for negligent hiring and retention. Because based on the undisputed circumstances in this case Plaintiff cannot establish a required element of her cause of action for negligent hiring and retention of Cain (i.e , a duty of care), the trial court properly granted Defendants' motion for summary judgment. (§ 437c, subds. (c), (p)(2).)

IV

Additional Support for Summary Judgment

Although the absence of a duty of care owed by Defendants to Plaintiff provides a sufficient basis on which to affirm the summary judgment in this case, we nevertheless briefly address other grounds that may provide additional support for the summary judgment in Defendants' favor.

A

Section 7.05 of the Restatement Third of Agency, published in 2006, is the counterpart to section 213 of the Restatement Second of Agency, which most courts have recognized as defining a cause of action for negligent hiring and retention of an employee. As quoted above, that new section (§ 7 05) provides:

> "(1) A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent . " (Rest.3d Agency, § 7.05, p. 177.)

"Liability under this rule is limited by basic principles of tort law, including requirements of causation and duty." (Rest.3d Agency, § 7 05, com. c, p. 180.) Furthermore, "[l]iability under this rule also requires some nexus or causal connection between the principal's negligence in selecting or controlling an actor, the actor's employment or work, and the harm suffered by the third party " (Rest 3d Agency, § 7.05, com c, illus. 5, p. 180) Most importantly, for purposes of this case, comment c to section 7.05 expressly states: "*When the actor's tort follows termination of the actor's employment, the tort and the employment may not be causally related* for purposes of this rule." (Rest.3d Agency, § 7.05, com. c, illus. 5, p. 180, italics added.) Accordingly, section 7.05 of the Restatement Third of Agency states, in effect, there may be a lack of proximate or legal cause between a former employer's negligent hiring and retention of an employee and the posttermination tort committed by that former employee. Furthermore, regarding a somewhat analogous circumstance, comment c to section 7.05 also states: "Likewise, when the actor's tort occurs in the course of an extramural activity ***1146** unrelated to the actor's employment, the tort may lack a sufficient causal relationship to the actor's employment." (Rest.3d Agency, § 7 05, com. c, illus. 5, p. 180.) Accordingly, in the undisputed circumstances of this case, we doubt Defendants' alleged negligent hiring and retention of Cain was a proximate or legal cause of Cain's tortious conduct committed on Judith *two years after* Defendants terminated his employment, especially when Cain and Judith's initial social relationship began outside of Cain's employment duties and their romantic relationship did not begin until after his employment was terminated.

B

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[14] Finally, there is language in one California case that also provides support for summary judgment for Defendants In *Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 69 Cal.Rptr.2d 370, the court addressed the potential negligent **874 hiring or other liability of a current employer for a current employee's tortious acts committed after work hours and off the employer's premises. (*Id.* at pp. 1213–1215, 69 Cal.Rptr.2d 370) After discussing section 213 of the Restatement Second of Agency and related cases, *Federico* stated:

> "We recognize that it was foreseeable Kaslar would come into contact with young male customers and visitors in the course of his work, and that he was actually introduced to plaintiff at the business place. However, even assuming defendant's prior awareness that those meetings were likely, or inevitable, such unavoidable encounters do not provide a basis upon which it can be found that defendant acted unreasonably at the time he hired Kaslar. *An employer is not charged with guaranteeing the safety of anyone his employee might incidentally meet while on the job against injuries inflicted independent of the performance of work-related functions.* Rather, as we have previously explained, liability for negligence can be imposed only when the employer knows, or should know, that the employee, because of past behavior or other factors, is *unfit for the specific tasks to be performed.*" (*Federico, supra,* 59 Cal.App.4th at p. 1215, 69 Cal.Rptr.2d 370, italics added)

In the circumstances of this case, *Federico* provides support for summary judgment for Defendants. First, Defendants are not guarantors of the safety of all customers or other persons whom Cain incidentally met while performing plumbing service work for Defendants. Second, *Federico* provides support for a conclusion that Defendants could be held liable for negligent hiring or retention only if they knew, or should have known, that Cain was unfit to perform the plumbing service work for which he was hired by Defendants Accordingly, *Federico* provides additional support for the trial court's order granting Defendants' motion for summary judgment.

*1147 V

Remaining Contentions

Because we resolve Plaintiff's appeal on the grounds discussed above, we need not address Plaintiff's assertions that there are triable issues of material fact regarding the element of causation and, in particular, whether Cain's conduct was a superseding cause of Plaintiff's harm.

DISPOSITION

The judgment is affirmed. Defendants are entitled to their costs on appeal

WE CONCUR: BENKE, Acting P.J , and IRION, J.

Parallel Citations

172 Cal App.4th 1133, 157 Lab.Cas. P 60,780, 09 Cal. Daily Op. Serv 4215, 2009 Daily Journal D.A.R. 5002

Footnotes

1 The former party designations of Judith Phillips as plaintiff and Trisha Phillips as successor in interest, and also as trustee of Judith Phillips's trust, are incorrect and we do not use them in this appeal

2 The complaint also named Cain as a defendant.

3 All statutory references are to the Code of Civil Procedure.

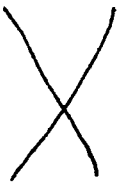
4 Plaintiff does not assert on appeal that the trial court erred in granting summary adjudication for Defendants on her other causes of action alleged against Defendants

5 Before the company hired Knox, he had been convicted of attempting to carry a concealed weapon and aggravated menacing, and had been charged with aggravated burglary, theft, assault, and domestic violence, which charges were either dismissed or not prosecuted. (*Staten, supra,* 704 N.E.2d at p 624)

6 In so concluding, we need not address the multiple factors to be considered in determining the existence and scope of a duty of care as set forth in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113, 70 Cal Rptr 97, 443 P.2d 561.

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2012 WL 1340103
Only the Westlaw citation is currently available.
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.

Attorneys and Law Firms

Todd Brown Ledford, Ledford Law Firm, Boiling Springs, SC, for Plaintiff.

Adam Crittenden Bach, Luanne Lambert Runge, W. Howard Boyd, Jr., Gallivan White and Boyd, Greenville, SC, Charles Lloyd Appleby, IV, Christopher Adams, Collins and Lacy, Columbia, SC, for Defendants.

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

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

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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 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.

*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

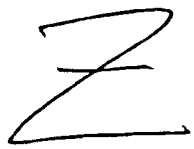
For the foregoing reasons, the court **GRANTS** Defendants' (Spartanburg County and Sheriff Chuck Wright)

Motion for Summary Judgment on the Third, Fourth, Fifth and Sixth causes of action [Doc. 24].

IT IS SO ORDERED.

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314 S.C. 531
Supreme Court of South Carolina.

Freda UPCHURCH, Jimmy Upchurch, Kevin Upchurch, Chase Upchurch, Dee Dee Upchurch Allen, and Michelle Upchurch Wood, Appellants,
v.
The NEW YORK TIMES COMPANY, d/b/a Spartanburg Herald, and Ralph Grier, Respondents.

No. 23845. | Heard March 9, 1993. | Decided May 3, 1993.

Survivors of person who died from undiagnosed heart condition brought action against newspaper and reporter for intentional infliction of emotional distress based on publication of newspaper article containing information that law enforcement officials suspected cocaine was involved in death. The Cherokee County Court, E. C. Burnette, III, J., directed verdict in favor of newspaper and reporter. Survivors appealed. The Supreme Court, Harwell, C.J., held that survivors had no viable cause of action against newspaper and reporter where there was no evidence that newspaper and reporter directed their allegedly tortious conduct at survivors.

Affirmed.

West Headnotes (8)

[1] **Damages**
⇨ Privilege or Immunity; Exercise of Legal Rights

Substantial truth was not a defense which newspaper and reporter could assert as against a claim for intentional infliction of emotional distress based on publication of an article.

Cases that cite this headnote

[2] **Torts**
⇨ Defenses and Mitigating Circumstances

Publisher of newspaper has no special immunity from application of general laws and no special privilege to invade rights and liberties of others.

Cases that cite this headnote

[3] **Damages**
⇨ Privilege or Immunity; Exercise of Legal Rights

Fact that speech of newspaper and reporter may have been constitutionally privileged under First Amendment did not automatically protect them from private action for intentional infliction of emotional distress based on publication of article. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[4] **Torts**
⇨ Miscellaneous Torts in General

Torts
⇨ Matters of Public Interest or Public Record; Newsworthiness

When newspaper lawfully obtains truthful information about a matter of public significance, liability may be imposed only if it serves a need to further a state interest of highest order and if this test is not met, torts committed by press are actionable more readily, particularly when a private party is involved.

2 Cases that cite this headnote

[5] **Damages**
⇨ Elements in General

Tort of intentional infliction of emotional distress arises when one by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.

6 Cases that cite this headnote

[6] **Damages**
⇨ Elements in General

To recover for intentional infliction of emotional distress, plaintiff must establish that defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; conduct was 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; actions of defendant caused plaintiff's emotional distress, and emotional distress suffered by plaintiff was so severe that no reasonable person could be expected to endure it.

6 Cases that cite this headnote

[7] **Damages**
⇦ Elements in General

Damages
⇦ Physical Illness, Impact, or Injury; Zone of Danger

Law limits claims of intentional infliction of emotional distress to egregious conduct toward plaintiff proximately caused by a defendant; it is not enough that conduct is intentional and outrageous but, rather, it must be conduct directed at plaintiff or occur in presence of plaintiff of whom defendant is aware.

9 Cases that cite this headnote

[8] **Damages**
⇦ Media and Publications

Survivors of person who died from undiagnosed heart condition had no viable cause of action against newspaper and reporter for intentional infliction of emotional distress based on publication of article containing information that law enforcement officials suspected cocaine was involved in death where there was no evidence that newspaper and reporter directed their allegedly tortious conduct at survivors.

2 Cases that cite this headnote

Attorneys and Law Firms

**559 *533 Wade S. Weatherford, III, of Gaffney, and J. Bruce Foster, Spartanburg, for appellants

Carl F. Muller and Wallace K. Lightsey, both of Wyche, Burgess, Freeman & Parham, Greenville, and Deborah R. Linfield, of The New York Times Co., New York, for respondents.

Opinion

HARWELL, Chief Justice:

This is an action for intentional infliction of emotional distress. Appellants Freda **560 Upchurch, Jimmy Upchurch, Kevin Upchurch, Chase Upchurch, Dee Dee Upchurch Allen, and Michelle Upchurch Woods appeal a directed verdict in favor of respondents The New York Times Company, d/b/a Spartanburg Herald, and Ralph Grier, a reporter for the Spartanburg Herald. We affirm.

I. FACTS [1]

On August 18, 1986, Bodie Upchurch, the son and brother of appellants, was lifting weights at the Gaffney YMCA. He began feeling unwell and decided to discontinue his workout. A short while later, while Bodie was driving home, he collapsed and died. He was twenty-three years old and in apparent good health.

The next morning, an autopsy to determine the cause of death commenced in the presence of two law enforcement officers from the Gaffney Police Department. A white, powdery substance was detected in Bodie's nostrils during the initial examination of his body. A swab of the substance was forwarded to State Law Enforcement Division (SLED) for analysis to determine whether the substance was cocaine. The law enforcement officers reported the discovery of the white, *534 powdery substance to their chief of police, who cautioned them to divulge nothing about the discovery to anyone until the results of the SLED analysis revealed the identity of the substance.

Despite official secrecy regarding the discovery of the white, powdery substance, rumors quickly began circulating in the community that cocaine was implicated in Bodie's death. Soon respondents were seeking official confirmation that law enforcement suspected the white, powdery substance to be cocaine. Law enforcement refused to comment regarding the cause of Bodie's death. The request for a drug screen prepared by the coroner and forwarded to SLED was not in the possession of respondents, and there is no evidence that respondents were aware of the existence of the request. An alternative explanation was inferable that the white, powdery substance in Bodie's nostrils was chalk or talc

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used by Bodie when he was lifting weights. Nevertheless, respondents published a front page article and Bodie's picture under a banner headline exclaiming "Cocaine Suspected In Death." The same day the article was published, SLED toxicology reports came back negative as to the presence of cocaine. In fact, Bodie died of an obstruction of blood to his heart resulting from previously undiagnosed coronary atherosclerosis.

Appellants brought this action for intentional infliction of emotional distress, alleging that the newspaper article contained false information that law enforcement suspected cocaine was involved in Bodie's death, that respondents knew or should have known that the statements contained in the article were false, and that their publishing the article constituted outrageous conduct entitling appellants to recover for the emotional harm they had suffered as a result of reading the article. At the conclusion of a jury trial, the trial judge directed a verdict in favor of respondents on the grounds that the statements contained in the article were substantially true at the time of publication. According to the trial judge, an article which truthfully reports a matter of public concern is protected under the free press guarantees of the First Amendment, and, as a result, cannot be considered to be such extreme and outrageous conduct so as to constitute intentional infliction of emotional distress.

*535 II. DISCUSSION

Appellants contend that the trial judge erred in directing a verdict for respondents. We disagree.

[1] [2] [3] [4] As an initial matter, we find respondents' reliance on substantial truth as a defense to the tort of intentional infliction of emotional distress to be misplaced. This defense is applicable in defamation actions *See, e g*, **561 *Capps v. Watts*, 271 S.C. 276, 246 S.E 2d 606 (1978); *see also Holtzscheiter v. Thomson Newspapers, Inc.*, 306 S.C. 297, 411 S.E.2d 664, 671 (1991) (Toal, J , dissenting) (in an invasion of privacy claim, whether a news statement was "substantially true" is of no consequence). Moreover, we disagree with the trial judge that respondents' allegedly tortious acts are shielded simply by virtue of the protections guaranteed the press by the First Amendment. The publisher of a newspaper has no special immunity from the application of general laws, and he has no special privilege to invade the rights and liberties of others *Nicholson v. McClatchy Newspapers*, 177 Cal.App.3d 509, 223 Cal.Rptr. 58 (1986) (quoting *The Associated Press v. Nat. Labor Rel. Bd*, 301 U.S. 103, 57 S.Ct. 650, 81 L.Ed. 953 (1937)). Thus, the fact that respondents' speech may be constitutionally privileged does not automatically protect them from private action *See The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (action for invasion of privacy). However, when a newspaper (1) lawfully obtains (2) truthful information about (3) a matter of public significance, liability may be imposed only if it serves a need to further a state interest of the highest order. *Id.* at 536-37, 109 S.Ct. at 2610-11, 105 L.Ed.2d at 457. If the test articulated in *Florida Star* is not met, torts committed by the press are actionable more readily, particularly when a private party is involved. *See, e g., Miller v. National Broadcasting Co.*, 187 Cal.App.3d 1463, 232 Cal.Rptr. 668 (1986) (television crew's alarming absence of sensitivity and civility in filming and broadcasting last moments of dying man's life without regard to the decedent's wife's subsequent protestations presented a question for the jury as to the wife's cause of action for intentional infliction of emotional distress), *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir.1971) (First Amendment does not give publication license to intrude into a home simply *536 because the person subjected to intrusion reasonably is suspected of committing a crime).

Accordingly, a correct analysis of respondents' liability to appellants would have addressed the threshold inquiry under *Florida Star*. We perceive that we need not review the facts under *Florida Star* in order to determine whether to uphold the directed verdict, however. We find that we must affirm the trial judge because appellants possess no basis upon which to assert a cause of action for intentional infliction of emotional distress.

[5] [6] The tort of intentional infliction of emotional distress arises when one by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another *Ford v Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981) (quoting Restatement (Second) of Torts § 46 (1965)). In order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (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 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 the plaintiff's emotional distress; and (4)

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the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it *Id.*

[7] [8] 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 **562 allegedly false information about Bodie. There are situations when plaintiffs may recover for intentional *537 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) We agree with our sister state's disposition of a claim for intentional infliction of emotional distress which originated under strikingly similar facts. In *Briggs v. Rosenthal,* 73 N.C.App. 672, 327 S E.2d 308, *cert denied,* 314 N.C. 114, 332 S.E.2d 479 (1985), the plaintiffs brought an action for intentional infliction of emotional distress against an author and publisher as the result of a magazine article describing their son who had died in an automobile accident. The court noted that the magazine article had been published in a periodical intended for the public. The parents were not the subject of the article, but, like appellants herein, brought their action as third party family members distressed because they felt that their son had been disparaged in the magazine article. The *Briggs* court affirmed the trial court's dismissal of the parents' complaint because, among other reasons, the author and publisher of the *538 magazine, like respondents herein, had not specifically directed their conduct toward the plaintiffs, and had not committed a violent act upon the son in the presence of the plaintiffs. *Accord Miller,* 187 Cal.App.3d at 489, 232 Cal.Rptr. at 682 (claims by daughter for intentional infliction of emotional distress excluded because thrust of her claims arose out of her relationship to her parents, the victims of the tortfeasor)

In sum, we hold that appellants possess no viable cause of action for intentional infliction of emotional distress against respondents because there is no evidence respondents directed their allegedly tortious conduct at appellants, and because we discern no facts that would warrant recovery by appellants under section 46(2). We also find appellants' remaining allegation to be without merit.

We may affirm the trial judge for any reason appearing in the record. Rule 220(c), SCACR; *Hossenlopp v. Cannon,* 285 S.C. 367, 329 S.E.2d 438 (1985). We conclude that the trial judge did not err in directing a verdict in favor of respondents.[2] Accordingly, the order of the trial judge is

AFFIRMED.

CHANDLER, FINNEY, TOAL and MOORE, JJ., concur.

Parallel Citations

431 S.E.2d 558, 21 Media L. Rep. 1568

Footnotes

1 We recite the facts in the light most favorable to appellants as the non-moving party in this appeal from the granting of a directed verdict. *Sub Station II of Tennessee v. Oliver,* 307 S.C. 166, 414 S.E.2d 141 (1992).

2 Had Bodie survived to bring this action against respondents for publishing an unsubstantiated article indicating cocaine had been suspected in his collapse, for example, a directed verdict in favor of respondents might not be appropriate. As discussed above, a newspaper generally is shielded from liability when it prints truthful information of public significance which it has lawfully obtained The facts are hotly disputed as to whether respondents made a deliberate decision to print mere rumors and suspicions. As stated earlier, and had this case been in the proper posture, respondents may have had to overcome a challenge that they did not meet the three-part test enunciated in *Florida Star* before they could have invoked the protections recognized by the United States Supreme Court in that case. *But see Hustler Magazine v. Falwell,* 485 U.S. 46, 108 S.Ct 876, 99 L.Ed.2d 41 (1988) (to recover for intentional infliction of emotional distress, public figures and public officials must show publication contains a false statement of fact which was made with actual malice)

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2014 WL 7005250
Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina,
Charleston Division.

Brandon ROBERTS, Plaintiff,
v.
Irene SIMMONS, Defendant.

Civil Action No. 2:14–2252–MGL–WWD. | Signed Dec. 11, 2014.

Attorneys and Law Firms

Brandon Roberts, Cumberland, MD, pro se

ORDER ADOPTING THE REPORT AND RECOMMENDATION AND DISMISSING PLAINTIFF'S ACTION WITHOUT PREJUDICE AND WITHOUT ISSUANCE AND SERVICE OF PROCESS

MARY G. LEWIS, District Judge.

*1 This case was filed as a 42 U.S.C. § 1983 action The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting that Plaintiff's action be dismissed without prejudice and without issuance and service of process. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina

The Magistrate Judge makes only a recommendation to this Court The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court *Mathews v. Weber,* 423 U.S. 261, 270, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b) (1)

The Magistrate Judge filed the Report on October 7, 2014, but Plaintiff failed to file any objections-even after asking for, and being granted, a generous extension of time to file them. "[I]n 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.' " *Diamond v. Colonial Life & Acc Ins. Co.,* 416 F.3d 310, 315 (4th Cir.2005) (quoting Fed R.Civ.P. 72 advisory committee's note). Moreover, a failure to object waives appellate review.*Wright v. Collins,* 766 F.2d 841, 845–46 (4th Cir.1985).

Plaintiff's father died intestate while incarcerated in the Lieber Correctional Institution Plaintiff alleges that Defendant falsely informed the probate court that she was the surviving spouse of Plaintiff's father in her successful attempt to become the executrix of Plaintiff's father's estate. He brings the following claims in his complaint: (a) "Access to Court/Due Process Petition Government for Redress Violation of the I & V Amend U.S. Const.;" (b) "Falsifying Government Documents Fraud/Deception Violation of State & Federal Laws;" and (c) "Intentional Infliction of Emotional Distress Pain & Mental Anguish."Amended Complaint 5–7 He seeks both monetary and declaratory relief. *Id. at 8.*

Although Plaintiff states that he is bringing his constitutional claims under 42 U.S.C. § 2000e, a statutory provision that contains the definitions of terms used in Title VII, the Magistrate Judge has liberally construed the suit as having been brought under 42 U.S.C. § 1983. Nevertheless, the Magistrate Judge suggests that Plaintiff's constitutional claims under § 1983 must fail.

Simply stated, Plaintiff alleges nothing more than private conduct. And, the "under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.' " *American Mfrs Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (quoting *Blum v Yaretsky,* 457U.S. 991, 1002 (1982)) Therefore, Plaintiff's § 1983 claims will be dismissed.

*2 The Magistrate Judge also recommends that Plaintiff's fraud claims be dismissed. One of the nine elements that must be alleged in a fraud cause of action is the "hearer's consequent and proximate injury " *Ardis v. Cox,* 314 S.C. 512, 431 S.E.2d 267, 269 (S.C.1993). But, Plaintiff has failed to allege that the hearer-in this case, various "[g]overnment officials" suffered any injury Consequently, the Court will dismiss Plaintiff's fraud claim, as well.

Finally, the Magistrate Judge asserts that Plaintiff's intentional infliction of emotional distress claim should be

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dismissed, too. To establish a claim of intentional infliction of emotional distress, or outage, the plaintiff must establish, among other things, that "the defendant's conduct was so extreme and outrageous that it exceeded all possible grounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community "*Dye v. Gainey,* 320 S.C. 65, 463 S.E.2d 97, 99 (S.C.Ct.App.1995). In the opinion of both the Magistrate Judge and this Court, Plaintiff is unable to satisfy this element ofthe claim on the facts of this case. *See Folkens v. Hunt,* 290 S.C. 194, 348 S.E.2d 839, 845 (S.C.Ct.App.1986) (holding that verbal abuse by defendant accountant and accusation that plaintiff owed hundreds of thousands of dollars in taxes and filed fraudulent tax returns was not "so extreme and outrageous as to exceed all possible bounds of decency and was atrocious, and utterly intolerable in a civilized community" (internal quotation marks and citations omitted)). Therefore, the Court will dismiss this claim, as well.

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court adopts the Report and incorporates it herein. Therefore, it is the judgment of this Court Plaintiff's action is **DISMISSED** without prejudice and without issuance and service ofprocess.

IT IS SO ORDERED.

REPORT AND RECOMMENDATION

WALLACE W. DIXON, United States Magistrate Judge.

Plaintiff, Brandon Roberts ("Plaintiff" or "Roberts"), proceeding *pro se* and in *forma pauperis,* filed the instant suit against Defendant Irene Simmons. (*See* Dkt. No. 1; *see also* Dkt No. 12) Pursuant to the provisions of 28 U.S.C. § 636(b)(1), and Local Rule 73.02(B)(2) (D S.C), the undersigned United States Magistrate Judge is authorized to review such complaints for relief and to submit findings and recommendations to the District Court. After careful review, the undersigned finds that the instant action should be summarily dismissed, without prejudice and without issuance and service of process.

PRO SE AND *IN FORMA PAUPERIS* REVIEW

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. § 1915. The review has been conducted in light of the following precedents: *Neitzke v. Williams,* 490 U.S. 319, 324–25, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Haines v. Kerner,* 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); and *Gordon v. Leeke,* 574 F.2d 1147 (4th Cir.1978) The Complaint herein has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action is "frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief."28 U.S.C. § 1915(e)(2)(B)(i), (ii), (iii) Hence, under 28 U.S.C. § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte Neitzke v. Williams,* 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989)

*3 This Court is required to liberally construe *pro se* documents, *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), holding them to a less stringent standard than those drafted by attorneys, *Hughes v. Rowe,* 449 U.S. 5, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (per curiam). Even under this less stringent standard, however, a *pro se* complaint is subject to summary dismissal

The mandated liberal construction afforded *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so, but a district court may not rewrite a petition to "conjure up questions never squarely presented" to the court.*Beaudett v. City of Hampton,* 775 F.2d 1274, 1278 (4th Cir.1985). The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't. of Soc. Servs* , 901 F.2d 387 (4th Cir.1990).

BACKGROUND

As noted above, Plaintiff filed the instant action against Defendant Irene Simmons. (*See* Dkt. No. 1; *see also* Dkt No 12) In Plaintiffs Amended Complaint, he alleges this court has jurisdiction "pursuant to the Civil Rights Statute 42 U.S C. § 2000e et seq., to redress the deprivation and

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rights secured by the U.S Constitution" and that the court has supplemental jurisdiction over his state law claims (*See* Am. Compl at 1 of 9) Plaintiff alleges that on or about March 8, 2011, Plaintiff's father, Clarence Roberts (the "decedent"), died intestate while incarcerated at Lieber Correctional Institution (*Id.* at 2 of 9 .) According to Plaintiff, the decedent was married and left behind an estate. (*Id*)

Plaintiff alleges that on or around June 8, 2011, he "learned that the defendant filed a formal application with the probate court requesting executrix status to the decedent's estate."(*Id* at 3 of 9.) Plaintiff alleges the Defendant "willingly, knowingly[,] and intentionally" falsified government documents, "fraudulently claiming that she was the decedent's spouse," such that she was "appointed as executrix to the estate" and was "fraudulently designat[ed] ... as the surviving spouse" on the decedent's death certificate. (*Id.*) According to Plaintiff, Defendant "did maliciously and intentionally fail [ ] to inform the plaintiff, so as to carry out these tasks and to prevent the plaintiff from applying for executor to the estate."(*Id*) Plaintiff asserts that on or about June 15, 2011, he "inform[ed the probate court] of the situation, [and] shortly thereafter, the defendant was terminated as executrix."(*Id.*)

Plaintiff alleges Defendant "was in a relationship with the decedent for several years and had full knowledge that the decedent was married and that the plaintiff was his son "(*Id.*) He asserts Defendant "did intentionally withhold a substantial amount of information and facts surrounding the estate proceedings" and "carried out a number of actions intending to obstruct and stymie the plaintiff's ability to make a claim as executor to his father's estate."(*Id*) Plaintiff complains that Defendant "us[ed] her daughter to oppose the plaintiff's bid for executor" and "used the plaintiff's imprisonment as another means to prevent him from qualifying for executor "(*Id.* at 4 of 9.) According to Plaintiff, the Defendant's daughter ("Jane I") "was subsequently appointed executrix inappropriately by a probate court judge, sympathizing with the defendant."(*Id.*) Plaintiff states (verbatim),

> *4 The defendant's[ ] actions did cause the plaintiff a great deal of dis-association, anger, division, distrust and malice amongs a number of family members. Such could have been avoided, but for the defendant's fraudulent deceptive actions to gain control of the decedent's estate thereby[ ] causing pain & mental anguish emotional distress.

(*id*)

Plaintiff seeks monetary damages and declaratory relief (*See* Dkt. No. 12 at 8 of 9) He lists the following causes of action in his Amended Complaint: (a) "Access to Court/Due Process Petition Government for Redress Violation of the I & V Amend. U S Const."; (b) "Falsifying Government Documents Fraud/Deception Violation of State & Federal Laws"; and (c) "Intentional Infliction of Emotional Distress Pain & Mental Anguish."(*See generally* Dkt. No. 12)

DISCUSSION

For the reasons set forth herein, the undersigned recommends dismissing the instant action without prejudice and without issuance and service of process.

Claim Pursuant to 42 U.S.C. § 1983

To the extent Plaintiff attempts to sue Defendant pursuant to 42 U.S.C. § 1983, that claim fails. [1] A civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief."*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999) To state a claim under § 1983, a plaintiff must allege two essential elements. (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L Ed.2d 40 (1988).

Plaintiffs purported § 1983 claim fails because there is no allegation that Defendant acted under color of state law. The "under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.' " *American Mfrs. Mut. Ins Co. v. Sullivan*, 526 U.S. 40, 50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). "The person charged must either be a state actor or have a sufficiently close relationship with state actors such that a court would conclude that the non-state actor is engaged in the state's actions." *DeBauche v. Trani*, 191 F.3d 499, 506 (4th Cir.1999). "[P]rivate activity will generally not be deemed 'state action' unless the state has so dominated such activity as to convert it into state

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action: 'Mere approval of or acquiescence in the initiatives of a private party' is insufficient" *Id* at 507 (quoting *Blum,* 457 U.S. at 1004). The instant case involves purely private conduct· Plaintiff alleges that Defendant, who was in a relationship with Plaintiff's father for many years, wrongfully prevented Plaintiff from being appointed executor of his father's estate. (*See generally* Am. Compl.) Plaintiff fails to state a claim pursuant to § 1983. *See Hall v. Creech,* 17 Fed. App'x 270 (6th Cir.2001); *see also Patterson v. Rodgers,* 708 F.Supp.2d 225, 238–39 (D.Conn.2010).

Fraud

*5 Plaintiff seeks to assert a claim for fraud, complaining that Defendant "falsified Government documents claiming she was the surviving spouse of the decedent."(Am Compl. at 6 of 9.) Plaintiff alleges that Defendant violated Plaintiffs rights "[w]hen she provided fraudulent information to [g]overnment officials "The elements of a cause of action for fraud are.

> (1) a representation; (2) its falsity, (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

Cheney Bros., Inc. v. Batesville Casket Co., 47 F.3d 111, 114 (4th Cir.1995) (citing *Ardis v. Cox.* 314 S.C. 512, 515, 431 S.E.2d 267, 269 (1993); *DeHart v. Dodge City of Spartanburg, Inc* , 311 S.C. 135, 138–39, 427 S.E.2d 720, 722 n. 1 (1993))."A complaint is fatally defective if it fails to allege all nine elements of fraud "*Ardis,* 314 S.C. at 515, 431 S.E 2d at 269 (citing *Inman v. Ken Hyatt Chrysler Plymouth, Inc.,* 294 S.C. 240, 363 S.E.2d 691 (1988)).

Of course, Plaintiff alleges that Defendant made the at-issue representations to various "[g]overnment officials," not to Plaintiff. As noted above, an element of fraud is the ***"hearer's*** consequent and proximate injury." *Ardis,* 314 S.C. at 515, 431 S.E.2d at 269 (emphasis added). In the instant case, the alleged "hearer" of the representation has not suffered any injury Accordingly, Plaintiff does not state a claim for fraud. *See DeHart,* 311 S.C. at 139–40, 427 S.E.2d at 722 (holding the trial judge erred in denying the defendant's motions for a directed verdict and judgment notwithstanding the verdict where, as a matter of law, the plaintiff hearer did not have the right to rely on statements made by the defendant's salesman); *see also Shaw v. Great Atl. & Pac. Tea Co.,* 115 F.2d 684, 684–85 (4th Cir.1940) ("It is well settled in South Carolina and elsewhere that a plaintiff may not recover on the charge of fraud and deceit unless it is shown that he was deceived by false representation, and relied upon them to his hurt.").

Intentional Infliction of Emotional Distress

Plaintiffs last cause of action is for intentional infliction of emotional distress.

> To establish the tort of intentional infliction of emotional distress, or outrage, the plaintiff must establish the following:
>
> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or knew that distress would probably result from his conduct;
>
> (2) the defendant's conduct was so extreme and outrageous that it exceeded all possible grounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community;
>
> (3) the actions of the defendant caused the plaintiff's emotional distress; and
>
> *6 (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Dye v. Gainey, 320 S.C. 65, 69, 463 S.E.2d 97, 99 (Ct.App.1995) (citing *Shupe v. Settle,* 315 S.C. 510, 445 S.E 2d 651 (Ct.App 1994)).

Plaintiff alleges that Defendant's actions "did cause pain and emotional distress" as well as "mental anguish" to the Plaintiff (Am Compl at 7 of 9.) Plaintifffurther asserts that he suffered pain and emotional distress "[w]hen several of his relatives dis-associated themselves with him thereby[ ] causing division, distrust and malice."(*Id.*)

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. *See Upchurch v. N.Y. Times Co.,* 314 S.C. 531, 536, 431 S.E 2d 558, 536 (1993) ("The law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately

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caused by a defendant 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."(citations omitted)). Regardless, Defendant's alleged conduct does not-in the opinion of the undersigned-constitute conduct "so extreme and outrageous that it exceeded all possible grounds of decency and was furthermore atrocious, and utterly intolerable in a civilized community."*Compare Dye,* 320 S.C. at 69, 463 S.E.2d at 99 ("Allegations of broken promises made during the course of an adulterous relationship, without more, are not sufficient to state a claim for outrage."), *Folkens v. Hunt,* 290 S C. 194, 204, 348 S.E.2d 839, 845 (Ct.App.1986) (verbal abuse by defendant accountant and accusation that plaintiff owed hundreds of thousands of dollars in taxes and filed fraudulent tax returns was not "so extreme and outrageous as to exceed all possible bounds of decency and was atrocious, and utterly intolerable in a civilized community" (internal quotation marks and citations omitted)); *with Ford v. Hutson,* 276 S.C. 157, 276 S.E.2d 776 (1981) (finding the evidence legally sufficient to support a verdict for the plaintiff's intentional infliction of emotional distress claim where there was evidence that the defendant home buyer subjected the plaintiff realtor to repeated public browbeatings, obscenities, and threats over a two-year period, and even entered plaintiffs home without permission and verbally attacked her in front of a guest).*Cf. Hansson v. Scalise Builders of S C.,* 374 S.C. 352, 359–60, 650 S.E.2d 68, 72 (2007) ("Assuming, without deciding, that Petitioners' conduct was sufficiently 'outrageous' to come within the ambit of intentional infliction of emotional distress, Hansson's passing references to fairly ordinary symptoms are nonetheless insufficient to create a jury question on the damages element of his claim for intentional infliction of emotional distress "). Plaintiff has not stated a claim for intentional infliction of emotional distress.

RECOMMENDATION

*7 For the foregoing reasons, the instant action should be summarily dismissed, without prejudice and without issuance and service of process

Filed Oct. 7, 2014.

Footnotes

1 The undersigned notes that Plaintiff cites 42 U.S.C. § 2000e as the statutory basis for his claim "to redress the deprivation and rights secured by the U.S. Constitution."(*See* Dkt No. 12 at 1 of 9) Presumably this reference is a scrivener's error, as that statutory provision contains the definitions for terms used in Title VII of the Civil Rights Act *See Mitchell v. RJK of Gloucester, Inc.,* 899 F.Supp. 246, 247 (E D.Va.1995) ("By its terms, Title VII only applies to 'employers.' "); *see also*42 U.S.C § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person ").

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2007 WL 8327520
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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

John and Jane DOE, as Parents, Natural Guardians and Next Friends of Anonymous Child, Appellants,

v.

Cassius ROJAS and Richland County School District # 2, Respondents.

No. 2007–UP–195. | Submitted March 1, 2007. | Decided April 26, 2007.

Appeal From Richland County, James R. Barber, III, Circuit Court Judge.

Attorneys and Law Firms

John E. Schmidt, III and Melissa J. Copeland, both of Columbia, for Appellants.

James Shadd, III, Kathryn Long Mahoney, Thomas K. Barlow and Kenneth L. Childs, all of Columbia, for Respondents

Opinion

PER CURIAM.

*1 In this tort action, John and Jane Doe [1] (the Does) appeal the trial court's grant of summary judgment to Richland County School District Two (the School District) on their claim for intentional infliction of emotional distress. We affirm. [2]

FACTS

During the 2001–2002 school year, the School District employed Cassius Rojas as a teacher. Rojas taught math and coached the girls' basketball team at Ridge View High School (Ridge View). The Does' minor daughter, KK, was a junior at Ridge View and manager of the girls' basketball team. She was also Rojas' student aide At some point during the school year, Rojas and KK began to have a sexual relationship. The two had sex on numerous occasions and often had sex while at Ridge View.

On July 29, 2002, while at a coaches' convention, Rojas confided to Coach Lynch, who was also employed at Ridge View, that he was having sex with a junior at the school. Lynch, believing Rojas' confession to be "the ramblings of a drunken man," did not inform school officials until August 20, after the School District had discovered Rojas' misconduct.

On August 16, 2002, around lunchtime, a student who was home changing clothes saw Rojas leaving KK's house. KK lived near the school and was on "homebound" status at the time. When the student returned to school, he reported the information to the school's assistant principal Principal Sharon Buddin confronted Rojas, who initially denied being at KK's house. Rojas averred he left his keys at the front desk of the school and went jogging in order to find a jogging route for the girls' basketball team. Although the jogging route took him by KK's residence, he denied going to the house. According to KK,, Rojas called later that day to tell her Principal Buddin would be calling to discuss the allegations against him. Rojas explained KK should lie and tell Principal Buddin he was not at her house On August 19, after repeatedly denying Rojas' presence at her house, KK eventually broke down in tears and confessed to a school guidance counselor.

On August 20, 2002, the School District placed Rojas on administrative leave pending the outcome of an investigation. Soon after, officers arrested Rojas and he formally resigned from his teaching and coaching positions at Ridge View.

In 2000, prior to the Rojas incident, another coach at Ridge View was accused of having a sexually inappropriate relationship with a female student During the same year, an administrator at the school was reprimanded for touching a student's legs when demonstrating proper short lengths and for grabbing student IDs off students' chests instead of asking the students to hand over their IDs.

On August 5, 2004, the Does and KK filed suit against the School District [3] The parties agreed to settle all of KK's claims, leaving only the Does' claims against the School District. On June 20, 2005, the School District moved for summary judgment on the Does' claims for intentional infliction of emotional distress and negligent supervision.

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*2 After a hearing on January 10, 2006, the trial court found the Does failed to identify any conduct by the School District so extreme and outrageous, that it exceeded all possible bounds of decency Accordingly, the trial court granted summary judgment to the School District on the intentional infliction of emotional distress claim. However, the trial court denied the School District's motion with respect to the Does' negligent supervision claim. This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder."*George v. Fabri,* 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Both the trial court and appellate courts apply the same standard when reviewing a summary judgment motion pursuant to Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). The evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Id.* at 494, 567 S.E.2d at 860.

The party moving for summary judgment has the initial burden of showing an absence of evidentiary support for the opponent's case, and the non-moving party must show more than the allegations or denials contained in the pleadings. *Peterson v. W. Am. Ins. Co.,* 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App.1999). The non-moving party must come forward with specific facts showing a genuine issue for trial. *Regions Bank v. Schmauch,* 354 S.C. 648, 660, 582 S.E.2d 432, 438 (Ct.App.2003).

LAW/ANALYSIS

The Does allege the trial court's grant of summary judgment on their claim for intentional infliction of emotional distress was an error of law. The Does maintain the trial court erred in finding the School District's behavior was not extreme and outrageous We disagree.

South Carolina has long recognized "that 'one's wilful, malicious conduct proximately causing another's emotional distress may be actionable' as intentional infliction of emotional distress or the tort of outrage "*Williams v. Lancaster Sch Dist.,* 369 S.C. 293, 305, 631 S.E.2d 286, 293 (Ct.App 2006) (quoting *Ford v Hutson,* 276 S.C. 157, 161, 267 S.E.2d 776, 778 (1981)). To establish a claim for intentional infliction of distress, or outrage, a party must show:

> (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" 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 the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" so that "no reasonable man could be expected to endure it."

*3 *Folkens v. Hunt,* 290 S.C. 194, 203, 348 S.E.2d 839, 844 (Ct.App 1986) (quoting *Ford,* 276 S.C. at 162, 276 S.E.2d at 778)).

The determination of "whether a defendant's conduct may be reasonably regarded as so extreme and outrageous as to allow recovery is a question for the court to determine in the first instance."*Butts v. AVX Corp.,* 292 S.C. 256, 262–63, 355 S.E.2d 876, 880 (Ct.App.1987); *see Andrews v. Piedmont Air Lines,* 297 S.C. 367, 371, 377 S.E.2d 127, 129 (Ct.App.1989) (noting that question of whether a defendant's conduct may be reasonably regarded as so extreme and outrageous as to permit recovery for intentional infliction of emotional distress is question for the trial court to determine). After the initial showing is made that "conduct is shown which may be reasonably regarded as extreme and outrageous," the matter should be submitted to the jury to determine "whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability."*Fleming v. Rose,* 338 S.C. 524, 537, 526 S.E.2d 732, 739 (Ct.App.2000), *rev'd on other grounds,* 350 S.C. 488, 567 S.E.2d 857 (2002).

With these considerations in mind, we turn to the case at hand. To support their claim for intentional infliction of emotional distress, the Does contend they suffered severe emotional distress due to the School District's failure to. (1) provide appropriate sexual harassment training to staff, students, and parents; and (2) follow mandatory federal guidelines.

On the outset, we observe the Does' arguments are not preserved for review. To preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court *See Staubes v. City of Folly Beach,* 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that

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an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.").

Although the Does allege in their memorandum in opposition to summary judgment that the School District failed to follow federal guidelines and failed to provide appropriate sexual harassment training to staff, these issues were argued as part of the Does' claim for negligence. The Does did not raise these arguments in either their memorandum or at the hearing with respect to their claim for intentional infliction of emotional distress The trial court, in summarily denying the School District's motion for summary judgment as to the Does' claim for negligence, presumably found the arguments persuasive on the issue of the School District's negligence. However, it is clear from the trial court's order that it did not consider these arguments with respect to the claim for intentional infliction of emotional distress. The trial court's order only refers to the Does' allegations that the School District failed to provide them with written reports and failed to prevent Rojas' misconduct. Thus, the trial court did not rule on the issues with regard to the claim for intentional infliction of emotional distress. Additionally, the Does failed to make any Rule 59(e), SCRCP, motion. Therefore, the issues are not preserved for our review on appeal *See Washington v. Washington,* 308 S.C. 549, 551, 419 S.E.2d 779, 781 (1992) (holding when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion to amend, the issue is not properly presented to an appellate court for review) Accordingly, we decline to address the Does' points of error on the above mention grounds.

*4 The Does also contend the School District's failure to act preemptively to prevent the harm which occurred constituted extreme and outrageous behavior. Specifically, the Does point to the School District's failure to follow school policies which they believe, if followed, would have prevented the abuse and the School District's failure to make any changes following the two sexual harassment incidents that preceded the Rojas incident The Does also argue the School District's actions after the Rojas incident occurred constituted extreme and outrageous behavior. They allege that because the School District failed to act in a timely manner, upon Coach Lynch's knowledge of Rojas' sexual harassment, Rojas was able to further victimize KK. They also argue the School District failed to appropriately discipline administrators for failing to prevent the abuse. Additionally, they contend the School Distract failed to provide them with written follow-up reports in accordance with school policy. The Does maintain these failures constituted extreme and outrageous behavior on the part of the School District for which they are entitled to recover.

South Carolina law limits claims of intentional infliction of emotional distress to egregious conduct *toward a plaintiff* proximately caused by the defendant. *See Upchurch v. N Y. Times Co* , 314 S C. 531, 536, 431 S E.2d 558, 561 (1993) ("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."). We note the 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

Moreover, even if the School District's actions could be construed as being directed toward the Does, we find the Does have not presented any factual allegations of the type of extreme or outrageous conduct committed by the School District that gives rise to a claim for intentional infliction of emotional distress. Viewed in a light most favorable to the Does, the School District's behavior in this instance is not sufficiently severe to rise to the level of conduct considered "so extreme and outrageous as to exceed all possible bounds of decency [that] must be regarded as atrocious and utterly intolerable in a civilized community "*Upchurch,* 314 S.C. at 536, 431 S.E.2d at 561. The Does have shown "no hostile or abusive encounters, or coercive or oppressive conduct "*Gattison v. S.C. State College,* 318 S.C. 148, 157, 456 S.E.2d 414, 419 (Ct.App.1995) (finding although plaintiff alleged "unprofessional, inappropriate behavior," the defendant's conduct did not exceed all possible bounds of decency).

While it is still to be determined whether the School District may have acted negligently in failing to follow certain policies, or by failing to make changes after the two prior incidents, the record fails to reveal any conduct by the School District that was so extreme or outrageous that would enable the Does to survive summary judgment. *See Bergstrom v. Palmetto Health Alliance,* 358 S.C. 388, 401, 596 S E.2d 42, 49 (2004) (finding while staff arguably may have acted negligently in failing to follow policies, the staff did not act "recklessly or intentionally in the extreme or outrageous manner described in the complaint"). Accordingly, we affirm

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the trial court's grant of summary judgment as to the Does' claim for intentional infliction of emotional distress [4]

CONCLUSION

*5 We hold the Does have no viable cause of action for intentional infliction of emotion distress because the Does failed to allege any conduct directed towards them that is sufficiently extreme and outrageous on the part of the School District to allow recovery. Therefore, the order of the trial court is

AFFIRMED.

HUFF, BEATTY, and WILLIAMS, JJ., concur.

Footnotes

1 It is difficult to discern from the record who the appellants are in this case. After reviewing the order and the record, it appears KK has settled all her individual claims. Therefore, her parents are the only parties appealing.

2 Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.

3 The complaint is not included in the Record on Appeal.

4 In light of our disposition of this case, we need not reach the issue of whether the Tort Claims Act is a statutory bar to a cause of action for intentional infliction of emotional distress. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E 2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

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DEFENDANT'S EXHIBIT A

I. EMPLOYING DEPARTMENT

Employee Name:	Employee ID (Last 4 of SSN):	Department:
Louis N. ReVille	0699	Writing and Learning Center
Position Number:	**Effective Date of Separation:**	**Position Type:**
HT0205	4/20/07	☐ Permanent ☑ Temporary

Type of Separation:

- ☑ Resignation
- ☐ Retirement
- ☐ Reduction in Force
- ☐ Termination
- ☐ Deceased
- ☐ End of Temporary Employment

Reason for Separation (Please attach any documentation)

- ☐ Accept Other Employment (110)
- ☐ Job Dissatisfaction (111)
- ☐ Domestic Duties or Pregnancy (112)
- ☐ Attend School (113)
- ☐ Failure to Report to Work (114)
- ☐ Personal Reasons (115)
- ☐ Long Term Disability (116)
- ☐ Resign While on Layoff (117)
- ☑ Mutually Satisfactory Release (118)
- ☐ Moving to New Location (119)
- ☐ Abandoned Position (230)
- ☐ Inaptitude for Job (231)
- ☐ Chronic Absenteeism/Tardiness (232)
- ☐ Expired Layoff Rights (233)
- ☐ Unsatisfactory Performance (234)
- ☐ Physical or Mental Impairment (235)
- ☐ Dismissed for Cause (237)
- ☐ Layoff (240)
- ☐ Other (242)
- ☐ Contract Expiration (350)
- ☐ Regular Retirement (460)
- ☐ Early Retirement (461)
- ☐ Disability Retirement (470)
- ☐ 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 Lindsey
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

BENEFITS

- ☐ Exit Interview
- ☐ HRS
- ☐ Insurance Division
- ☐ Retirement System
- ☐ Other: _____

J. Minjarez
Signature

Date

Signature

Date

HR-402

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RECIDIVISM AMONG SEX OFFENDERS IN SOUTH CAROLINA

By:

The South Carolina Department of Corrections

The South Carolina Department of Probation, Parole and Pardon Services

The South Carolina Budget & Control Board, Office of Research and Statistics

The South Carolina Department of Public Safety

September 2007

Foreword

Concern about sex offenders and their behavior is quite understandably, not only a topic of great public concern, but also the target of numerous public policy proposals. Recent examples of such proposals include, but are not limited to, enhanced sanctions for convicted and repeat sex offenders, civil commitment for predatory sex offenders, the development of sex offender registries, the use of advanced technology to monitor sex offenders and residency restrictions. Unfortunately, the quality and extent of the body of knowledge concerning sex offender behavior has not kept pace with either the sophistication or potential cost of some of these proposed policies. This study represents a collaborative attempt on the part of four state agencies, the South Carolina Department of Corrections (SCDC), the South Carolina Department of Probation, Parole and Pardon Services (SCDPPPS), the South Carolina Budget & Control Board Office of Research and Statistics (ORS) and the South Carolina Department of Public Safety (SCDPS) to add to the existing body of knowledge concerning the behavior of convicted sex offenders by replicating analysis previously undertaken by the Bureau of Justice Statistics (BJS). Although the analysis of South Carolina sex offender recidivism was undertaken as part of a larger, multi-state effort, this report represents only the findings for South Carolina.

This report would not have been possible without the efforts of staff from the above mentioned agencies. John Ward, Meesim Lee and other SCDC staff coordinated the statistical analysis of the inmate cohort. Ken Wagner and Marchar Stagg from SCDPPPS coordinated the statistical analysis of the community corrections client cohort. Charles Bradberry of ORS provided important technical assistance concerning the use of Computerized Criminal History Records (CCHR) data. Additionally, special appreciation is due to Major Stackhouse and her staff at the State Law Enforcement Division (SLED) for making CCHR data available for the purpose of this analysis. Funding for this project was the result of a grant from the Justice Research and Statistics Association (JRSA), to the SCDPS Office of Justice Programs, Statistical Analysis Center. JRSA is a non-profit organization which conducts and promotes policy-relevant research concerning justice issues. Any points of view or opinions stated are those of the principal researcher and do not necessarily represent the opinion or official position of JRSA.

Rob McManus
SCDPS

Recidivism Among Sex Offenders in South Carolina

The purpose of this study is to shed light on the behavior of sex offenders in South Carolina, by replicating the methods of BJS special report *Recidivism of Sex Offenders Released from Prison in 1994*. That study followed prisoners released from prison in 15 states during 1994 over a three year period, examining their patterns of arrest, conviction and incarceration. This report seeks to replicate, to the degree possible, the analysis and resulting data tables for sex offenders released from SCDC in 2001. Additionally, this report also seeks to replicate the BJS report for sex offenders admitted to the SCDPPPS in 2001. The rationale for this inclusion was that offenders under community correctional supervision are a population of special interest, and that determining the progress of a group which had been subjected to supervision in the community might also have important policy implications. As with the BJS study, each group was followed for a period of three years to identify arrests, convictions and re-incarcerations. Other deviations from the original BJS report are noted throughout the report, primarily such deviations consist of omitted data tables resulting from the unavailability of out-of-state arrest data and in some cases, victim age data.

Sex offenders were classified generally into two groups: rapists and sexual assaulters. This classification was based on imprisonment offense, individuals convicted of offenses that involved forcible sexual intercourse were classified as rapists, all other violent sex offenders were classified as sexual assaulters. The sub-category child molester was defined as any sex offender where the offense code specifically indicated that the victim was a minor. These three groups overlap in that the victim of a rapist or a sexual assaulter might victimize a child, in which case the offender would also be considered a child molester. Although the BJS report identified statutory rapists as a separate category, neither the SCDC or SCDPPPS groups had any offenders who were identified as statutory rapists. Outcome data (criminal history records used to determine recidivism) were taken from the CCHR computerized criminal history provided by the SLED.

Table 6. Prior criminal record of child molesters and statutory rapists released from prison in 2001, by type of sex offender

Prior to the sex crime for which imprisoned		Child molesters	Statutory rapists
Percent with at least 1 prior arrest for -			
Any crime	122	61.0%	NA
Any sex offense	23	11.5	NA
sex offense against a child	13	6.5	NA
Prior arrest for any crime			
Mean		4.3	NA
Median		3	NA
Percent with at least 1 prior conviction for -			
Any crime	105	52.5%	NA
Any sex offense	21	10.5	NA
sex offense against a child	12	6.0	NA
Prior conviction for any crime			
Mean	3.8	1.3	NA
Median	2	1	NA
Percent with prior prison sentence for any crime	70	35.0%	NA
Percent who were first releases	165	82.5%	NA
Total released		200	NA

Note: These counts include incidents of arrests/convictions reported by South Carolina criminal justice entities irrespective of whether they pertain to felony, serious misdemeanor, or minor offenses at municipal court level. In South Carolina, felony and misdemeanor are defined by statute.

Prior does not include the arrest, conviction, or prison sentence that was the reason the sex offenders were in prison in 2001. First releases include only those offenders leaving prison for the fist time since beginning their sentence First releases exclude those who left prison in 2001 but who had previously been released under the same sentence and had returned to prison for violating the conditions of release

Among child molesters, 2.5% were re-arrested for a new sex crime and 1.5% were re-convicted of a new sex crime.

Table 22. Of child molesters and statutory rapists released from prison in 2001, percent rearrested and percent reconvicted for any new sex crime

		Child Molesters	Statutory Rapists
Percent rearrested for any new sex crime within 3 years	5	2.5%	NA
Percent reconvicted for any new sex crime within 3 years	3	1.5%	NA
Total released	200		NA

Of the child molesters released from prison in 2001, 2 (1%) were rearrested for a sex crime against a child. Both had been incarcerated for their first arrest for a sex crime against a child. No child molesters who had prior arrests (other than the offense responsible for their 2001 incarceration) were re-arrested for a sex offense against a child.

Table37. Of child molesters and statutory rapists released from prison in 2001, percent re-arrested for a sex crime against a child, by prior arrest for a sex crime against a child

Arrest prior to 2001 release		**Child Molesters**	**Statutory Rapists**
Percent re-arrested for a sex crime against a child within 3 years			
Total		1.0%	NA
The arrest responsible for their being in prison in 2001 was - *			
Their first arrest for a sex crime against a child	2	1.1	NA
Not their first arrest for a sex crime against a child	0	0.0	NA
	2		
Percent of released prisoners			
Total		100%	NA
The arrest responsible for their being in prison in 2001 was - *			
Their first arrest for a sex crime against a child	187	93.5	NA
Not their first arrest for a sex crime against a child	13	6.5	NA
Total released	200		NA

Note: *By definition, all sex offenders had at least 1 arrest prior to their release namely, the arrest responsible for their being in prison in 2001.

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John W. Fletcher
jfletcher@barnwell-whaley.com

April 24, 2015

VIA HAND DELIVERY
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 the Defendant's Notice of Motion and Renewed 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. We would appreciate you filing the original Motion and returning the clocked copy.

Thank you for your assistance in this regard.

Sincerely,

John W. Fletcher

JWF/mel
Encl: (as stated above)

cc: W. Mullins McLeod, Jr., Esquire - Counsel for the Plaintiff

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STATE OF SOUTH CAROLINA **COUNTY OF CHARLESTON**	)	**COURT OF COMMON PLEAS** **NINTH JUDICIAL CIRCUIT** **CASE NO: 2012-CP-10-1858**
JOHN DOE 2, Plaintiff, vs. THE CITADEL, Defendant.	)	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR SUMMARY JUDGMENT**

FILED
2015 JUN -4 AM 10:44
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Plaintiff in the above-captioned action, by and through his undersigned counsel of record, submits this Memorandum in Opposition to Defendant's Renewed Motion for Summary Judgment. By reference, Plaintiff incorporates his previously filed Memorandum in Opposition to Summary Judgment, filed on April 18, 2014; Plaintiff's Reply Memorandum in Opposition to the same, filed on April 18, 2014; and Plaintiff's Supplemental Memorandum in Opposition, filed on April 18, 2014.

I. The Citadel is Not Entitled to Summary Judgment Because Genuine Issues of Material Fact Exist.

Defendant is not entitled to summary judgment in this case. First, in moving for summary judgment, Defendant ignores numerous material facts at issue in order to erroneously contend that there are no genuine issues of material fact supporting Plaintiff's claims of negligence and intentional infliction of emotional distress by Defendant. *See* Rule 56(c), SCRCP. Second, The Citadel argues that the only facts necessary for the Court to make a determination as to summary judgment are that ReVille met Plaintiff in 2005, began abusing him prior to April 23, 2007, and had access to Plaintiff outside of The Citadel. The Citadel's argument requires completely ignoring the numerous negligent actions taken by The Citadel dating back to 1998 when ReVille

was a cadet, dating back to 2001 when ReVille was a camp counselor, and dating back to 2006 when ReVille began employment once again with The Citadel. The Citadel would have the Court artificially limit its inquiry at summary judgment in order to prevent an application of negligence law to this case in light of all the relevant facts, which Rule 56, SCRCP does not allow. Instead, "[s]ummary 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.*, 307 S.C. 310, 311, 414 S.E.2d 802, 803 (Ct. App. 1992). A review of the material facts demonstrates that The Citadel is not entitled to summary judgment. Plaintiff's sexual abuse by ReVille occurred after The Citadel's negligent actions, which date back to 1998 when ReVille received mental health counseling at The Citadel and continued during his tenure as a camp counselor and then as an employee in The Citadel's Writing Center.

ReVille met Plaintiff in the summer of 2005 through AAU basketball and began a grooming process of Plaintiff to gain his trust, which included showing Plaintiff pornography and eventually escalated to masturbation and followed with various acts of physical sexual abuse up until Plaintiff moved to Georgia in late August of 2007. (Exhibit 137 *Doe 2 Deposition*, p. 19:2-5; 78:16-72; 146:9-13). Specifically, ReVille's access to Plaintiff increased once he moved into the Doe's garage apartment in late summer or fall 2006, during the time that The Citadel employed ReVille in its Writing Center. Plaintiff's father and mother relied on ReVille's employment in the Citadel Writing Center to make their decision to rent out the garage apartment to ReVille, as well as to enlist ReVille as a tutor for Plaintiff and his brother in writing skills. (Exhibit 138 *Mother Doe Deposition*, April 9, 2015, P. 100:10-16). Father Doe relied on ReVille's association with The Citadel to develop his opinion of ReVille, as ReVille appeared to him to be "[s]omebody who

wanted to develop young men, that's who I saw, from his background at The Citadel. I saw somebody as a mentor... he took these kids up to Alabama for a weekend to try to prepare them for The Citadel." (Exhibit 139 *Father Doe Deposition*, April 23, 2015, p. 58:2-8).

After the April 23, 2007 complaint, The Citadel required a quid pro quo from ReVille for ReVille to leave his employment with the Writing Center and "lay low" in exchange for the Citadel not revealing his pedophilia. Thereafter, ReVille was unemployed with time on his hands. Plaintiff explains that ReVille's sexual abuse of him increased after ReVille no longer worked at The Citadel:

> It occurred more, I would say, and basically every day. More as in, like, let's say we had nothing to do that day, he would, like, masturbate me like that whole day and things like that. Because once I got out of school, if I didn't want to play golf or it was raining one day, what did I have to do? You know what I'm saying? So we would just sit and watch porn all day.

(Exhibit 137 *Doe 2 Deposition*, p. 175:17-25; 176:1-13). Furthermore, ReVille has explained that the number of times he testified to abusing Plaintiff is an estimate based on his recollection seven years later, and he defers to Plaintiff as to when he was abused. (Exhibit 140 *ReVille Deposition Vol. II*, p. 370-371). As ReVille unequivocally states, "I had 51 victims, they had one abuser." (*Id.*, p. 372:24-25).

Accordingly, whether Plaintiff was abused before or after certain acts of negligence by The Citadel is a question of fact for the jury. The following time line demonstrates the facts at issue that do not entitle The Citadel to summary judgment[1]:

DATE	ACTION
1998	ReVille enters Citadel as a cadet.

[1] A more extensive recitation of the facts at issue are stated in Plaintiff's previously filed Memorandum in Opposition to Summary Judgment and Reply Memorandum in Opposition to Summary Judgment, incorporated by reference herein.

1998-2001	ReVille self reports for counseling at The Citadel Counseling Center and receives mental health treatment for four years. (Exhibit 141 *ReVille Citadel Counseling Records*, Citadel 0003848).
Dec. 7, 2000	ReVille reveals to Citadel Counseling Center he was court mandated at age 15 to attend counseling sessions, and Citadel notes indicate more information as to the counseling will be gathered at next session. ReVille testifies that at age 15, he was caught playing naked truth or dare with adolescent boys at a country club and court ordered to counseling sessions for his sexual misconduct. (Exhibit 142 *ReVille Deposition*, August 15, 2014, p. 412-413).
Dec. 2000	ReVille requests Citadel Counseling Center contact Citadel administrators to discuss his clinical mental health impressions; Counselor does so and writes letter for ReVille to use as he sees fit to seek academic accommodations due to mental health issues. ReVille signs authorization for the release of his mental health records to third parties. (Exhibit 141 *ReVille Citadel Counseling Records*, Citadel 0003884-0003885; Citadel 0003904).
Jan. 18, 2001	Dr. Bradham with the Citadel Counseling Center and MUSC psychiatrist discuss monitoring ReVille for bi-polar disease. (Exhibit 141 *ReVille Citadel Counseling Records*, Citadel 0003866, Citadel 0003868).
Feb. 2001	Citadel has knowledge that ReVille is non-compliant with prescription psychiatric medications. (Exhibit 141 *ReVille Citadel Counseling Records*, Citadel 0003864).
Summer 2001	The Citadel employs ReVille as a counselor at The Citadel Summer Camp.
2001 onward	*Counselor Code of Conduct* in effect prohibiting sexual activity at camp and requiring immediate dismissal if violated. (Exhibit 131).
2001 onward	*Official Camp Policies Regarding Sexual Misconduct Issues* in effect prohibiting counselors from being behind closed doors with campers and mandating immediate dismissal. Also requires any sexually inappropriate conduct reports to be thoroughly investigated by Public Safety regardless of when sexual misconduct occurred. (Exhibit 63).
2001 onward	*Barracks Guard Duties, Memo of Instruction* requires guards to conduct walk-through checks of barracks at night. No one visits ReVille's room at night during his employment as a camp counselor despite frequency of campers coming and going. (Exhibit 134).
Summer 2001	Citadel learns well-respected counselor and Citadel Graduate, Michael Arpaio, sexually abused a 10 year old camper at the Summer Camp.
Summer 2001	ReVille sexually abuses up to 8 campers at the Summer Camp. (Exhibit 126 *ReVille Affidavit*, Sept. 20, 2013).
Late Summer 2001	After praying in the Citadel Chapel for over 3 hours, ReVille attempts to self-report his acts of pedophilia at the Summer Camp to Citadel Public Safety Department. (Exhibit 143 *Mount Pleasant Police Department File*, p. 290; *SLED File*, p. 7).
Aug. 6, 2001	Sgt. Middleton of Charleston Police Department by letter advises The Citadel of concerning and inappropriate practices by camp counselors with

	Middleton offers his assistance. The Citadel does not take Middleton up on offer and instead takes no action to cease the inappropriate counselor practices.
Summer 2001	The Citadel does not interview counselors or campers or implement any safety practices in regards to counselors having campers in their rooms at night.
Aug. 2001	Citadel Summer Camp Employee Evaluation of ReVille notes he is "senior counselor material if learns to distance himself from campers..." (Exhibit 127 *2001 Employee Evaluation*).
Summer 2002	Camp Deputy Director, Jennifer Garrott, catches ReVille alone with minor camper in his barracks room.
Summer 2002	Garrott and Director Bill Bates discuss with ReVille that he is violating rule against having campers in his room after Taps but despite policy requiring ReVille's immediate termination for the violation, they decline to terminate him or document offense. (Exhibit 126 *ReVille Affidavit*, Sept. 20, 2013).
Summer 2002	ReVille abuses Camper Doe at least 5 times in ReVille's barracks room at night at the summer camp, along with other campers. (Exhibit 135 *Camper Doe Deposition*, March 25, 2014, p. 145:4-12; 146:18-25; 147:5-19).
Summer 2003	Garrott catches ReVille engaged in inappropriate physical contact with Camper Doe 6 in ReVille's barracks room. Garrott takes no action against ReVille. (Exhibit 126 *ReVille Affidavit*, Sept. 20, 2013). Garrott admits that she caught ReVille in direct violation of the policy and admits that she should have fired him. (Exhibit 54 *Garrott Deposition*, Vol. II, p. 55-56).
Summer 2003	Garrott's assistant, Anna Brock, speaks to ReVille multiple times about his inappropriate conduct of having campers in his room. (Exhibit 126 *ReVille Affidavit*, Sept. 20, 2013).
Summer 2003	Counselor O.C. Evans reports to COL Lackey that ReVille has campers in his rooms at night, including one of Evans's campers. COL Lackey informs Garrott and also advises ReVille not to be alone with campers. No further action taken. (Exhibit 142 *Deposition of ReVille*, p. 165:18-166:15).
Summer 2003	Camper Doe 6, now employed by the Citadel as a junior counselor, is sexually abused by ReVille at the Summer Camp in the barracks. (Exhibit 144 *Camper Doe 6 Deposition Ex 1 Sworn Statement of Camper Doe 6 Provided to SLED*).
Summer 2004	Camper Doe 6, now employed by the Citadel as a Camp Counselor, visits ReVille's home during the summer and learns that ReVille is sexually abusing boys and has been a foster parent of a male child. (Exhibit 144 *Camper Doe 6 Deposition Ex 1 Sworn Statement of Camper Doe 6 Provided to SLED*).
Summer 2005	Camper Doe 6, now employed by the Citadel as a Camp Counselor, attempts to report ReVille's sexual abuse to Garrott. However, Garrott abruptly stops the report and directs him to his room. Thereafter, Garrott directs that Camper Doe 6 be fired from employment as a counselor immediately.

Summer 2005	**Plaintiff meets ReVille through AAU basketball and grooming process begins.** (Exhibit 137 *Plaintiff's Deposition*, p. 78:16-72).
August 2006	The Citadel hires ReVille, and ReVille begins employment in The Citadel's Writing Center.
Late Summer or Fall 2006	Plaintiff's parents rent out garage apartment to ReVille. (Exhibit 138 *Mother of Doe 2 Deposition*, p. 51:1-6).
Fall 2006 onward	ReVille's sexual abuse of Plaintiff continues.
April 23, 2007	Former camper's father telephones President Rosa to report that his son was sexually abused at the summer camp in 2002. Father and the camper speak to General Counsel Mark Brandenburg that day and disclose that the counselor was named Skip and that he sexually abused other campers as well.
April 23, 2007 onward	The Citadel violates its own policies requiring the report of all incidents of sexual abuse or assault to law enforcement, never reporting the camper's complaint against ReVille. (Exhibit 97 *Sexual Harassment, Memo. No. 51*; Exhibit 91 *Serious Incidents, Memo.*; Exhibit 63 *Official Camp Policies Regarding Sexual Misconduct Issues*).
April 24, 2007	Brandenburg leaves message for ReVille in the Writing Center, and later that day, ReVille meets with Brandenburg and COL Trez in Bond Hall where details of the complaint are disclosed to ReVille. Convey Citadel's requirement of quid pro quo from ReVille to leave Citadel employment and lay low in exchange for Citadel's silence as to his pedophilia, in violation of *The Citadel's Employee Misconduct Policy* requiring investigation of sexual misconduct and prohibiting an employee from resigning in lieu of an investigation. (Exhibit 95).
April 24, 2007	Brandenburg meets with Garrott, where she discloses to him inappropriate physical contact with a camper by ReVille at the summer camp. (Exhibit 53 *Garrott Deposition, Vol. 2*, p. 93:11-15).
May 6, 2007	No later than this date does Brandenburg inform President Rosa of the sexual abuse complaint against ReVille.
May 2007 onward	President Rosa orders a cover up of the complaint against ReVille. (Exhibit 41 *Jennifer Shiel Deposition*, January 21, 2014, p. 36:9-20; Exhibit 42 p. 46:12-20).
May 2007	ReVille's sexual abuse of Plaintiff escalates as he is unemployed and has increased access to Plaintiff. ReVille sexually abuses Plaintiff by way of sexual Truth or Dare games, oral sex, physical touching, and masturbation. (Exhibit 137 *Doe 2 Deposition*, March 28, 2014, p. 172-174; Exhibit 140 *ReVille Deposition Vol. II*, p. 369:6-23).
May 16, 2007	Brandenburg memorializes in writing information The Citadel has in regards to the complaint: that the camper was "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 *Brandenburg May 16, 2007 Letter*).

June 2007	ReVille sexually abuses Plaintiff by way of sexual Truth or Dare games, oral sex, physical touching, and masturbation. (Exhibit 137 *Doe 2 Deposition*, March 28, 2014, p. 172-174; Exhibit 140 *ReVille Deposition Vol. II*, p. 369:6-23).
June 8, 2007	ReVille applies for unemployment, and S.C. Employment Security Commission finds ReVille eligible for unemployment benefits after his employment with Citadel ends. (Exhibit 61 *Notice to The Citadel and Notice to ReVille*)
June 20, 2007	Citadel files Notice of Appeal to the tribunal of ReVille's eligibility for unemployment. The issues to be heard and determined are "Voluntary Quit (for good cause)" verses "Discharge (for disqualifying cause)". (Exhibit 61 *Notice of Appeal, Notice to Claimant of Appeal Filed by Former Employer, and Notice of Hearing*)
July 2007	ReVille sexually abuses Plaintiff by way of sexual Truth or Dare games, oral sex, physical touching, and masturbation. (Exhibit 137 *Doe 2 Deposition*, March 28, 2014, p. 172-174; Exhibit 140 *ReVille Deposition Vol. II*, p. 369:6-23).
July 1, 2007	Brandenburg meets in person with the camper who made the complaint against ReVille in April, along with his parents, and a court reporter transcribes part of the meeting.
July 5, 2007	The Citadel withdraws its appeal of ReVille's eligibility for unemployment prior to the July 12, 2007 scheduled hearing. (Exhibit 61 Decision of Appeal Tribunal).
August 2007	ReVille sexually abuses Plaintiff by way of sexual Truth or Dare games, oral sex, physical touching, and masturbation. (Exhibit 137 *Doe 2 Deposition*, March 28, 2014, p. 172-174; Exhibit 140 *ReVille Deposition Vol. II*, p. 369:6-23).
Late Aug. 2007	Plaintiff moves to Georgia at "the very end of that summer" and only then does the sexual abuse by ReVille end. (Exhibit 137 Doe 2 Deposition, p. 19:2-5; 146:9-13).

Furthermore, on November 3, 2011, Detective Bacon with the Mount Pleasant Police Department returned a phone call to Citadel General Counsel, Mr. Brandenburg. (Exhibit 147 *Supplemental Report, Mount Pleasant Police Department*). In the telephone call, Mr. Brandenburg told Det. Bacon that in April 2007, a family made a complaint to The Citadel of "inappropriate behavior" by ReVille with their son when he was a camper in 2002. (*Id.*). However, in 2007, Mr. Brandenburg previously acknowledged in writing that the camper's complaint was of child sexual abuse- not "inappropriate behavior." (Exhibit 34 *Brandenburg May 16, 2007 Letter*). Mr. Brandenburg further mislead law enforcement by telling Det. Bacon that the

"inappropriate behavior" was "ReVille show[ing] a pornographic movie to the camper and suggest[ing] he masturbate with him," (Exhibit 147 *Supplemental Report, Mount Pleasant Police Department*), when in fact, in 2007, Mr. Brandenburg and President Rosa knew that the camper did not report that ReVille "suggested" he should masturbate but that ReVille coerced the camper to masturbate with him, which Mr. Brandenburg acknowledged in writing. (Exhibit 34 *Brandenburg May 16, 2007 Letter*).

Mr. Brandenburg further misled law enforcement by telling Det. Bacon that The Citadel was unable to corroborate the camper's "story", when in fact in his interview of the camper on July 1, 2007, Mr. Brandenburg acknowledged that ReVille was a pedophile. (Exhibit 80 *Camper Doe Interview Transcript*, July 1, 2007, p. 114; and Exhibit 68 *Camper Doe Deposition*, p. 233). Furthermore, back on April 24, 2007, Ms. Garrott had disclosed to Mr. Brandenburg that she caught ReVille touching a camper alone in his room at the camp in the summer of 2003. (Exhibit 53 *Garrott Deposition*, Aug 28, 2013, p. 56-57, 93). On August 8, 2007, Mr. Brandenburg also memorialized his assessment that the camper's report of sexual abuse by ReVille was "believable." (Exhibit 69 *Brandenburg Email*, August 8, 2007).

Det. Bacon also asked Mr. Brandenburg if The Citadel had reported the incident to law enforcement, and he told her they had not "because there wasn't any touching involved." (Exhibit 147 *Supplemental Report, Mount Pleasant Police Department*). Det. Bacon admonished Mr. Brandenburg "that law enforcement should have been notified even though there wasn't any touching involved....that what Mr. ReVille did was still criminal in nature, thus should have been investigated by law enforcement." (*Id.*). Det. Bacon also asked Mr. Brandenburg which law enforcement agency handles sexual assaults on campus, and he replied that Citadel Public Safety

handles initial reports. (*Id.*). However, The Citadel ensured that no report was made to Public Safety.

The Citadel's actions, dating back to when ReVille was a cadet and up through its actions to conceal the report made to The Citadel of ReVille's pedophilia, maintained ReVille's anonymity as a pedophile and supported ReVille's sexual abuse of Plaintiff thereafter. Dr. David Lisak, Ph.D. and clinical psychologist, has studied the impact of childhood physical and sexual abuse of males for the last three decades and has extensive experience evaluating and treating adult males who have been sexually abused as children. (Exhibit 145 *Affidavit of David Lisak*, June 5, 2014). Dr. Lisak confirms that each and every instance of child sexual abuse harms the child and repeated acts of abuse do not eradicate or lessen the injurious effect of the abuse:

> Victims of sexual abuse who suffer repeated acts of assault and/or molestation are unequivocally harmed by each act. Repeated sexual abuse reinforces extremely damaging emotional states, extremely damaging feelings and ideas about the child's self-worth, and extremely damaging feelings and ideas about the adults in the child's life who are failing to stop the repeated abuse.

(*Id.*). The sooner the abuse is disclosed, the more likely the damage caused by the abuse may be mitigated, such that "[a]ny delay in disclosure therefore increases the risk of damage, as well as the actual damage caused to the child." (*Id.*). Dr. Lisak explains that most children, and in particular boys, however, do not spontaneously disclose that they have been abused, and disclosure is more likely to occur because the abuse is discovered and stopped by an adult. (*Id.*).

In this case, The Citadel's actions prevented disclosure of ReVille's sexual abuse and concealed him as a pedophile in the community. A genuine issue of fact exists as to whether, and which, actions by The Citadel caused Plaintiff to be sexually abused by ReVille. Summary judgment "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, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Accordingly, genuine issues of material fact foreclose summary judgment for The Citadel, and The Citadel's renewed motion should be denied.

II. The Citadel's Duty To Plaintiff Is NOT Premised On The "Special Relationship" Circumstances Creating a Duty to Control the Conduct of Another, And, As Such, The Citadel's Liability In This Case Is Not Determined By Whether It Knew Plaintiff Was A Victim of ReVille.

The Citadel also contends that it owed no legal duty to Plaintiff; however, The Citadel bases its argument of no duty on the application of one exception to the general common law that there is no duty to control the conduct of another or to warn a third person or potential victim of danger. *See Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007); *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002). Specifically, Defendant cites to a number of cases that apply the "special relationship" exception, recognized as creating a duty to control the conduct of another where the defendant has a special relationship with the victim or with the injurer. (*Defendant's Notice of Motion and Renewed Motion for Summary Judgment*, p. 5-8). Under the "special relationship" exceptions, the defendant's duty cannot arise unless the defendant has knowledge of a specific threat of harm to a specific individual. *See, e.g., Roe v. Bibby*, 410 S.C. 287, 296, 763 S.E.2d 645, 650 (Ct. App. 2014).

However, when a defendant's duty arises to control the conduct of another because the defendant voluntarily undertakes a duty, negligently or intentionally creates the risk of harm by the third party, or a statute imposes a duty on the defendant **there is no requirement that the threat of harm be to a known, specific individual**. *See, e.g., Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 547-548 (1990) (where defendant created risk of injury committed by third party it is sufficient that defendant should have foreseen his negligence "would probably cause injury to **someone**"); *Bryant v. City of North Charleston*, 304 S.C. 123,

403 S.E.2d 159 (1991) (city voluntarily undertook maintenance of sidewalk, owing duty to **those injured** by sidewalk); *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 103, 374 S.E.2d 910, 914-915 (Ct. App. 1988) (duty arises under statute where statute's essential purpose is to protect from the kind of harm plaintiff suffered and plaintiff is **member of class of persons** statute intends to protect).

In this case, The Citadel's duty to Plaintiff does not rest on the "special relationship" exceptions. Instead, The Citadel is liable for its own failure to act with due care or, alternatively, for negligently or intentionally creating the risk that ReVille would sexually abuse Plaintiff and for its actions taken in violation of Title IX and its own policies and procedures.

III. The Citadel Is Liable For Its Own Failure To Act With Due Care.

The Citadel's duty to Plaintiff is grounded in the legal proposition that one who assumes to act may become subject to the duty to act with due care. *See Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985). The Citadel is liable to Plaintiff for its own failure to act with due care from as early as 1998 up to and through its concealment of ReVille's pedophilia and its concealment of The Citadel's knowledge of ReVille's pedophilia in and after April 23, 2007. As our Supreme Court holds:

> [I]n order to establish liability, it is not necessary the person charged with negligence should have contemplated the particular event which occurred. It is sufficient that he should have foreseen his negligence would probably cause injury to someone. He may be held liable for anything which appears to have been a natural and probable consequence of his negligence.

Greenville Memorial Auditorium, 301 S.C. at 245, 391 S.E.2d at 547-548 (internal citations omitted) (affirming jury finding state entity auditorium liable for injuries suffered by patron at concert injured by other patron throwing beer bottle due to the auditorium's own negligence in securing the premises).

In this case, The Citadel is liable for its own negligent actions. The Citadel should have contemplated that its actions taken while ReVille was a cadet, was a camp counselor, and was an employee in 2006 to 2007 maintained and supported ReVille's continued sexual abuse of children, and The Citadel should have foreseen that its negligent actions would probably cause injury to someone in the form of sexual abuse by ReVille. *See id.*

In addition, The Citadel's employment of ReVille at the summer camp and later in the writing center, led Plaintiff's parents to believe that the Citadel had looked into ReVille's background and found it acceptable. Instead, unbeknownst to Plaintiff and his parents, The Citadel took affirmative actions to allow ReVille to continue sexually abusing boys, to support ReVille in the community unknown as a pedophile, and to conceal The Citadel's knowledge of ReVille's pedophilia. A person of ordinary reason and prudence would have known that the concealment of a child molester leads to the reasonable foreseeability that children will continue to be sexually abused. *See Crowley*, 285 S.C. at 406, 329 S.E.2d at 780.

Further, 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. (Exhibit 90 *Gary Margolis Deposition*, February 2014, p. 14:13-p. 15:4). Thus, Defendant's assertion that one cannot assume that a person who sexually abuses a minor once will re-offend is unsupported by its own expert testimony. (*Defendant's Notice of Motion and Renewed Motion for Summary Judgment*, FN 2). Further off point is Defendant's attempt to correlate the arrest rates of sexual predators with the rate of recidivism. The arrest rate of sexual predators does not indicate in any way the number of sex acts occurring by those who remain free of police custody. All Defendant's reference to the arrest rate shows is that numerous

sexual offenders remain free in the community and, thus, able to continue abusing, which emphasizes all the more the foreseeability of ReVille's continued abuse of boys while ReVille remained free until his arrest in 2011.

Moreover, The Citadel's deviation from its own policies and procedures demonstrates its lack of due care under the relevant circumstances. *See Peterson v. National Railroad Passenger Corporation, CSX, and Southco Sweeping and Maintenance, Co.*, 365 S.C. 391, 396, 618 S.E.2d 903, 906 (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.*, 306 S.C. 27, 31 410 S.E.2d 21, 24 (Ct. App. 1992) (internal citations omitted); *see also Madison ex rel Bryant*, 371 S.C. 123, 140, 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*, 352 S.C. 179, 186, 573 S.E.2d 789, 793 (2002) (holding evidence of industry safety standards relevant to establishing standard of care in negligence case); *Tidwell v. Columbia Ry., Gas & Elec. Co.*, 109 S.C. 34, 95 S.E. 109 (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)).

Therefore, the evidence at summary judgment establishes that The Citadel failed to exercise due care, as well as failed to abide by the standard of care it created by its own policies governing the summer camp and its handling of the camper's report of ReVille's sexual abuse in

April 2007. Despite clear policies and protocols available, The Citadel ensured that none were followed from 2001 onward and that ReVille's sexual abuse of adolescent boys would continue. The Citadel owed Plaintiff a duty of due care in its actions, and The Citadel is liable for its own negligent conduct resulting in the foreseeable injuries to Plaintiff. *See, e.g., Crowley*, 285 S.C. at 406, 329 S.E.2d at 780.

IV. Additionally, The Citadel Is Liable To Plaintiff For Its Own Actions Taken Negligently Or Intentionally To Create The Risk of Sexual Abuse And For Voluntarily Undertaking The Duty To Warn Or Control The Conduct Of ReVille.

The Citadel's liability to Plaintiff is not based on a nebulous failure to prevent abuse of Plaintiff. Rather, The Citadel is liable for its own distinct acts of negligence that created the risk that ReVille would sexually abuse Plaintiff. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546 (recognizing duty to control the conduct of a third party or to warn of third party's danger where defendant negligently or intentionally creates the risk of danger by the third party). In addition, 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 and to arrest individuals for criminal activity, among other policies and procedures, establish The Citadel's duty to warn or to control the conduct of ReVille. *See Bryant*, 304 S.C. 123, 403 S.E.2d 159 (city voluntarily undertook maintenance of sidewalk, owing duty to those injured by sidewalk).

Whether such a duty arises in a given case may depend on the existence of particular facts. *Miller v. City of Camden*, 329 S.C. 310, 313, 494 S.E.2d 813, 815-16 (1997) (internal citations omitted). Prior conduct or internal memoranda may serve as evidence of a voluntary undertaking. *See, e.g , Vaughan v. Town of Lyman*, 370 S.C. 436, 444, 635 S.E.2d 631, 637–38 (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*, 372 S.C. 597, 606-607, 643 S.E.2d 110, 115-116 (Ct. App. 2007) (fielding complaints, maintaining a log of calls, and having a policy and employees in place to repair sidewalks used by court to find triable issue as to 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*, 370 S.C. at 444, 635 S.E.2d at 637–638.

The Citadel's own policies and procedures established required action by The Citadel in the face of complaints of sexual abuse. *See Madison ex rel. Bryant*, 371 S.C. at 140, 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). First, The Citadel violated its *Employee Misconduct Policy* when it required a quid pro quo from ReVille for him to leave Citadel employment and lay low in exchange for The Citadel's concealment of his pedophilia. (Exhibit 95). The Citadel's policy required The Citadel not expunge molestation findings from the employee's record; not terminate any investigation in exchange for resignation by the employee; provide factual and candid responses to inquiries by potential employers; and fully cooperate with law enforcement. (*Id.*).

The Citadel also violated its own policies requiring the report of all incidents of sexual abuse or assault to law enforcement, along with the arrest of criminal suspects. (Exhibit 97 *Sexual Harassment, Memo. No. 51*; Exhibit 91 *Serious Incidents Memo.*; Exhibit 63 *Official Camp Policies Regarding Sexual Misconduct Issues*). *Serious Incidents Memorandum* required that when criminal activity involving anyone affiliated with The Citadel as a suspect or victim occurs, the "first member of the Citadel community learning of the occurrence" is responsible for reporting it to the Public Safety Department. (Exhibit 91). In addition, *The Summer Camp Official Camp*

Policies Regarding Sexual Misconduct Issues, mandated 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." (Exhibit 63). It specifies that no time limit exists for investigating sexual misconduct issues that arise out of the Camp and that individuals currently or formerly associated with the Camp will be investigated. Moreover, in his Message from the President, President Rosa himself publically called on the Citadel community to report immediately "any criminal offense, suspected criminal activity, or other emergency directly to Citadel Public Safety," stressing that Public Safety "has complete police authority to apprehend and arrest anyone involved in illegal acts on campus, and also in areas immediately adjacent to the campus." (Exhibit 64).

In addition to The Citadel's policies, The Citadel's head of Public Safety, Colonel Fletcher was also a State Constable, and his police powers went beyond the gates of the Citadel and applied to any type of foreseeable crime, just as any other law enforcement officer's jurisdiction would cover. (Exhibit 146 *Fletcher Deposition*, p. 36:1-6). The Citadel had the duty to arrest ReVille, and had the power and jurisdiction to arrest ReVille on or off the campus. Instead, The Citadel violated its own policies requiring the arrest of ReVille. Citadel expert Ann Franke testified that an institution can self-impose mandatory reporter duties by undertaking policies obligating certain officials to report. (Exhibit 119 *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. (*Id.*). The Citadel's deviation from its own policies and procedures demonstrates its lack of due care under the relevant circumstances. *Peterson*, 365 S.C. at 396, 618 S.E.2d at 906. Accordingly, whether The Citadel exercised such care is a question of fact for the jury.

V. Title IX Not Only Imposed A Duty On The Citadel To Not Conceal The 2007 Report of Abuse, But The Citadel's Statutory Violations Are Evidence Of Its Failure To Act With Due Care.

A statute creates a duty of care and supports an action for negligence when the statute's essential purpose is to protect from the kind of harm the plaintiff has suffered and the plaintiff is a member of the class of persons the statute is intended to protect. *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914 (deriving test from comparison of *Clifford v. Southern Railway*, 87 S.C. 324, 69 S.E. 513 (1910) and *Hutto v. Southern Railway*, 100 S.C. 181, 84 S.E. 719 (1915)). Accordingly, a statute may create a duty of care of which the violation of constitutes proof of negligence per se. *Id* at 103, 915.

Here, 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, created a duty of care for The Citadel to follow when it received the camper's complaint of sexual abuse by ReVille in April 2007. Title IX's essential purpose to eliminate sex discrimination and harassment by definition intends and seeks to protect other individuals from the possibility of such abuse, which includes Plaintiff. Title IX created a duty of care that The Citadel violated and breached in respect to Plaintiff.

Furthermore, evidence of The Citadel's statutory violations are indicative of The Citadel's negligence in this case. Title IX imposed requirements on how The Citadel was to respond to the April 2007 complaint of sexual abuse by ReVille, and The Citadel's actions taken counter, rather than in accordance with Title IX, establish The Citadel's failure to act with due care. *See Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (holding that when one undertakes to act, he has the duty to act with due care). The Citadel's

actions taken in violation of its own policies and procedures likewise establish The Citadel's failure to act with due care.

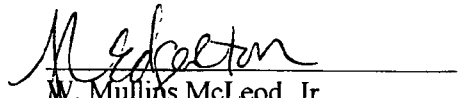
VI. The Citadel Is Not Entitled To Summary Judgment On Plaintiff's Claim Of Outrage Against The Citadel.

Plaintiff incorporates by reference *Plaintiff's Memorandum in Opposition to Summary Judgment*, p. 53-56, where he details his arguments against summary judgment for The Citadel on his Outrage claim. Of additional note, The Citadel errs in contending that there is no evidence that it targeted Plaintiff to be harmed by its intentional concealment of the 2007 report of child sexual abuse by ReVille. *See Upchurch v. New York Times Co.*, 314 S.C. 531, 536, 431 S.E.2d 558, 561 (1993) (holding conduct for claim of outrage must be targeted at plaintiff to be harmed by the allegedly tortious acts). Evidence establishes that The Citadel's administrators actively told ReVille to "lay low" and leave The Citadel as a quid pro quo for The Citadel's silence as to ReVille's child sexual abuse, without any arrest or even 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 specifically took these actions despite the reasonable foreseeability that ReVille would continue molesting children, children that included Plaintiff. As such, The Citadel targeted the Plaintiff for sexual abuse by ReVille in its conduct of concealing ReVille as a pedophile. The evidence supports Plaintiff's claim of outrage against The Citadel.

VII. Conclusion

Based on the foregoing reasons, Defendant is not entitled to summary judgment, and Plaintiff respectfully requests that The Citadel's motion and renewed motion be denied.

Respectfully submitted,



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June 3, 2015
Charleston, South Carolina

that sort of thing?

A. No.

Q. So he never did give you any specifics of the reasons that there were differences in philosophies?

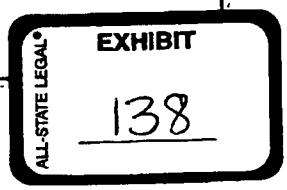
A. No.

Q. He didn't quantify it; he just said, There's differences?

A. Yes.

Q. What about in -- 2006 and '07, did he ever talk to you about his tutoring at the Writing Center at The Citadel?

A. I knew that he was a tutor there, and that's why when he asked if he could help the boys with their papers, I felt like he was highly qualified in that. I knew he was coming and going. I mean, he wouldn't check in and say, {Mother Doe 2}, I'm working until nine at the Writing Center. But, you know, when I would see him come and go, he's like, Oh, I just got off work. So I knew he was employed there. Basically said, you know, some days were boring; some days he helped kids; some days they wouldn't come; some days they would. He would do some of his schoolwork there. And that's basically all I



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Q. And those are --

A. Develop young men. Somebody who wanted to develop young men, that's who I saw, from his background at The Citadel. I saw somebody as a mentor, somebody who wanted to develop young men and be -- I saw him with {John Doe JC} and -- he went to a -- he took these kids up to Alabama for a weekend to try to prepare them for The Citadel. Just a guy that I felt was -- always had the best interest of these kids at heart is what I thought.

Q. Is that an opinion that you felt was shared by the parents who knew him?

A. Yes.

Q. Was there any parent that you were in discussions with or that ever said anything that you recall that would have been unflattering?

A. No.

Q. Did you feel as though you had a good opportunity to observe Skip ReVille and to effectively evaluate and assess him?

A. Yes.

Q. And do you consider yourself a pretty good judge of character?

A. Yes.

Q. Have there ever been people that you

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kind of after a month of not hearing anything, I took that as news that I was not going to get in trouble. And as much as I wish my conscience had been stronger, it wasn't. And I fell to the temptation of resuming the habits as before.

Q. And the abuse that John Doe 2 and John Doe 3 sustained that summer of 2007, was there -- let's just talk about John Doe 2 first. Was there oral sex?

A. Yes.

Q. And there was physical touching?

A. Yes.

Q. And that occurred in {John Doe 2's} house; is that right?

A. That's correct.

Q. And it occurred in your house?

A. That's correct.

Q. And that occurred up until the time that he moved to Atlanta?

A. Yes.

Q. And then with John Doe 3, was it the same abuse?

A. The same.

Q. And if you want -- turn to page 176, it's the last page.

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A. Yes.
Q. And it actually starts -- the question starts on 175 on the bottom and goes into 176, if you want to read that to yourself.
A. Yes. That's accurate.
Q. So that statement, "It occurred more, I would say, and basically every day," that's an accurate statement?
A. Yes.
Q. That's because you had more access to {John Doe 2} that summer?
A. Yes.
Q. And more access to John Doe 3?
A. Yes.
Q. And you testified that after about three weeks, after you met with Brandenburg and you knew there was going to be no investigation, that's when you felt comfortable going back to the abuse?
A. That's correct.
Q. And by not reporting you, The Citadel not reporting you, did that enable you to abuse more children?
MR. KOVACH: Objection to form.
A. Yes.
Q. And so when you testified earlier today,

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you were asked how many times you abused John Doe 2 and John Doe 3 in certain months in 2007 and -- in June of 2007 and July. Do you remember being asked those questions?

A. I do.

Q. And were those just estimates based on your recollection?

A. Yes.

MR. KOVACH: Objection to form.

Q. Are you certain those were the amount of times that you abused those two young boys?

A. No.

Q. And would you defer to the testimony of {John Doe 2} that it was occurring on almost a daily basis?

MR. KOVACH: Objection to form.

A. I would defer to his recollection over mine, but a daily basis in 2007 -- the summer of 2007, that's right?

Q. Yes.

A. And that's when I was employed with Mt. Pleasant Rec, that's right? That's -- daily seems excessive, but I would say at least once or twice a week.

Q. Okay. And when did you start working --

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I know that you were terminated from The Citadel the end of April, beginning of May. When did you begin working with Mt. Pleasant?

A. I remember working their first summer camp session, whenever that was. That was a day camp. I was at Park West teaching, which would put me in Mt. Pleasant -- I mean, I taught there -- this is why I'm saying daily might have been excessive with my abuse, because I was teaching at least two to three full days out of the week during that summer with all the programs that the rec department had. But, certainly, the father and the mother of the {W} family were either working or away, and I was the only other adult figure in their lives. So when they were not at home, they were with me.

Q. And so it's difficult for you today to look back and give an accurate number as to how many times you abused them?

A. That's correct.

Q. And with there being the amount of victims that there were, I'm sure that makes it more difficult as well, correct?

A. I had 51 victims, and they had one abuser.

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Intake Report

Name: Reville, Louis
Class/Rank/Comp: 02/PVT/D
SSN: [redacted]
Date of Visit: 9/15/98

The Citadel
171 Moultrie Street
The Counseling Center
207 Thompson Hall
Charleston, SC 29409

CC: "It's hard for me to focus on the court."

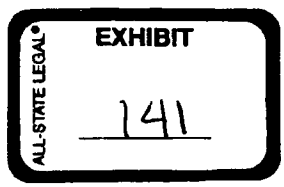
HPI: This was the first visit to the counseling center for this 19 y/o SWM cadet private, freshman, in D Co., self-referred following freshmen orientation. He stated that he does not focus well mentally at tennis, and wants to work on performance enhancement training. He stated that he has trouble with his anger, in that he focuses on the bad things and not the good ones on the court. He endorsed being too relaxed, which leads to a decrease in motivation. He stated that he was eating and sleeping an adequate amount.

PERSONAL HX: 1/2 children from a broken family in Birmingham, AL. He stated that his parents divorced when he was 4 y/o, and then his mother remarried when he was 5 y/o. He reported having 3 step-siblings. He described his mother as fair and loving, and his step-father as caring, but with no affection. He stated no physical, verbal, or sexual abuse. He reported having a many friends, and being picked on growing up. He endorsed that he received karate lessons so that kids would not pick on him. He stated that he had a 3.2 GPA in HS, worked throughout HS, and was on the tennis team in HS. He stated that he dated on and off in HS, and currently does not have a girlfriend. He reported coming to The Citadel b/c of the cohesion and leadership aspects of the school. He described his career goal to do something in the business field. He stated that he enjoys to play all sports, and likes mind challenging games.

PSYCH HX: Pt reported seeing a psychiatrist once.

MED/SURG HX: Pt reported no hx.

ETOH/DRUG HX: He stated that he has never drank. He stated that his father has developed alcoholism. He reported no drug hx.



THE CITADEL COUNSELING CENTER

PROGRESS NOTE

Client Name: Skip ReVille

Date: 2/7/01

Session Number: 7

Skip presented for today's session as scheduled. He began the session with a confession that he has stopped taking his Celexa. He reported that he has not had any medication in the past week and a half, but he reports that he is still doing well. He reported the medication left his cognitive processes a bit muddled and less spontaneous and he did not like the way that felt. Since deciding to stop the medication, however, he reports increased spontaneity and clarity in his thinking. He was advised against non-compliance with his psychiatrist's directives and was advised to contact Dr. Douglas at MUSC to notify her of his decision to stop the medication. He understood and agreed to follow through with Dr. Douglas. The remainder of the session was used continuing to help this client identify what is working for him as well as to continue to educate him about the interplay between thoughts, feelings, and behaviors. The cadet reports that he is making concerted efforts to stop himself from over-thinking things and is working towards identification and then experiencing of feelings connected to various situations. The cadet acknowledges that this is still new and awkward for him, but that he feels he is making progress with it. Since trying to be more balanced between his thoughts and feelings, he reports that he is more productive in his day to day activities, and that more people are seeking him out for positive interactions. Both of these feel good to the cadet and are identified as signs that he is making progress. The cadet will continue to work towards becoming more familiar in affective territory, less dependent on cognitive defenses, and more balanced between the two. He appears to be doing well, reports stable and positive mood with normal fluctuations, reports good making straight A's so far this semester, and feels good about his interpersonal relationships at present. In compliance with the cadet's wishes to continue to meet up to the ten session limit, future sessions will continue to help the client identify what is working and encouraging more of it. However, the ideas of personal boundaries and dangers of having his pendulum swing too far too the affective side will be explored as well. The cadet is scheduled to retun 2/21/01 for follow up.

Joseph W. Bradham, Psy.D.
Postdoctoral Supervisee in Clinical Psychology

THE CITADEL COUNSELING CENTER
ANCILLARY CONTACT FORM #10

Name of Client/Potential Client: Skip ReVille

SS# (If known): See Chart

Phone #: See Chart Company: See Chart

☒ Current/former client; Primary Therapist: Bradham
☐ Potential client (e.g., infirmary consultation)

Person making contact with the Counseling Center staff (if other than client/potential client): Dr. Susan Douglas (MUSC Institute of Psychiatry)

Phone #:

Time of Contact: 10:15 a.m. Date of Contact: 1/18/01

Type of contact:

☐ Clinical emergency (form to client folder & copy form to director)
☒ Ancillary contact (form to client folder & primary therapist notified)
☐ Phone Contact Form, Non-client (form returned to director)

Method of contact: ☒ Phone ☐ Letter ☐ Person

Problem Assessment: Dr. Douglas apparantly did not receive the message I left for her yesterday and she was calling to see if I had heard from Skip. I relayed to her that he and I met yesterday, that he said he would follow up with her either yesterday or today, and that he wants to finish his ten sessions here. The content of our last session was also relayed to Dr. Douglas as was this therapist's request that she continue to monitor for the presence of bipolar symptoms when she meets with him again.

Problem resolution with disposition noted: No follow up is planned with Dr. Douglas at this time.

Signature of Counselor: [signature] Date: 1/18/01

Typed or printed counselor's name: Joseph W. Bradham, Psy.D.

THE CITADEL COUNSELING CENTER

PROGRESS NOTE

Client Name: Skip ReVille

Date: 1/17/01

Session Number: 5

Skip presented for his appointment today as scheduled. He reported that his holiday break was good for him in that in allowed him the opportunity to slow down and re-group. He also reported that he took advantage of the time away from here to participate in a great deal of introspection and pursuit of enlightenment through reading. He reported that he does feel better in general, that his mood has improved, that his sense of security and structure in his life has returned, and that he has a solid plan for self care and continued improvement. He reported that he has decided to slow down his academic track and take an extra semester. He feels this will lighten some of his burden and pressure. However, he also reports a goal of focusing more on himself and meeting his own needs rather than "spreading himself so thin" and do for everybody else. The bottom line is that he seems to have come up with an intellectual coping plan that he feels comfortable with and that he feels will mediate against further discomfort. However, while he was supported in finding a way to improve his comfort level, he was challenged at his degree of avoidance of affect in favor of the more comfortable domain of intellectualization. He was able to see that as long as he continued to fear and avoid affect, that he would have to place increasing pressure on his intellectualization defense and that ultimately there is the risk that this defense would fail (as was the case at the end of last semester). Therefore, he was encouraged to continue to take comfort in his ability to intellectualize his way through various life situations, but to also begin to work towards gaining more comfort in the area of affect and emotion. It is thought that this will afford him a better opportunity to get his emotional needs met, while still protecting himself from any undue vulnerability.

As a side note, this cadet reported that one of the ways he was going to take care of himself was by not thinking he knew everything already and was being unfairly prevented from applying such knowledge, but rather would accept the fact that he does not know everything and therefore would focus on learning. He reported that he has tossed out many of the books he read for pleasure previously and plans on taking a wider diversity of classes here in an effort to become more well-rounded of a person. The diagnosis of bipolar disorder was discussed again with this cadet and he is willing to be medication compliant, plans to follow through with Dr. Douglas at MUSC today or tomorrow, and is aware of his need to monitor extreme shifts in mood or functioning. He will return here for follow up on 1/24/01.

Joseph Bradham, Psy D. /s/ Bradham PhD
Postdoctoral Supervisee
in Clinical Psychology
Citadel Counseling Center
Charleston, SC

"CONFIDENTIAL INFORMATION"
(PROTECTIVE ORDER)

THE CITADEL COUNSELING CENTER
ANCILLARY CONTACT FORM CONSULT #2

Name of Client/Potential Client: Skip ReVille

SS# (If known): See Chart

Phone #: See Chart Company: See Chart

☒ Current/former client; Primary Therapist: Bradham
☐ Potential client (e g., infirmary consultation)

Person making contact with the Counseling Center staff (if other than client/potential client): Col. Rembert (English Dept., Cadet's Academic Advisor)

Phone #: 3-5016

Time of Contact: ~3:30 p.m. Date of Contact: 12/7/00

Type of contact:

☐ Clinical emergency (form to client folder & copy form to director)
☒ Ancillary contact (form to client folder & primary therapist notified)
☐ Phone Contact Form, Non-client (form returned to director)

Method of contact: ☒ Phone ☐ Letter ☐ Person

Problem Assessment: With the cadet's written consent, Col. Rembert was contacted by this therapist and given the initial impressions of this cadet based on our initial intake interview. The Col. was requesting that this therapist write a letter stating such impressions, as well as a request that he be granted incompletes for his final exams based on his current level of functioning.

Problem resolution with disposition noted: This request was agreed to initially as the cadet's level of functioning did appear to be impaired such that he would not be able to adequately prepare for, or perform on, final exams. However, subsequent to consultation with my clinical supervisor, it was agreed that making such a request was not an appropriate function for the counseling center, in this particular case. Therefore, no letter was written and/or submitted to Col. Rembert. However, a letter was written that simply summarized initial clinical imressions and this letter was given to the cadet to use as he saw fit.

Signature of Counselor: [signature] Date: 12/7/00

Typed or printed counselor's name: Joseph W. Bradham, Psy.D.

Louis Neal (Skip) ReVille
December 7, 2000

Citadel Counseling Center
Consultation #1

Consultation with Dean Ozment
4:15 pm- Without using student's name, left message with Dean Ozment requesting consultation regarding Incomplete Grade policy

4:45 pm- Received return call from Dean Ozment
Without using student's name, informed Dean Ozment that I was requesting consultation regarding the college's Incomplete Grade policy, the specific criteria for I grade, and information needed from CCC to professors or faculty advisors. Ozment indicated that she had just spoken with Skip ReVille about Incomplete grades and that he had disclosed that he had just come from speaking with Dr. Bradham at the Counseling Center. She also disclosed that ReVille reported the following:
-his current grades include A in Leadership Theory & Music Appreciation, B in Physics, "okay" in Spanish, "fine in Rembert's class until stop doing work a few weeks ago", and "F in Mailloux's English class because of incomplete work"
-he did not want to go to CCC when Professor Rembert suggested it, but received an "ultimatum" from Rembert who said "Go to CCC or I'll bring you there myself"

Then, Ozment disclosed that Professor Rembert disclosed the following:
-Rembert wants ReVille to receive Incomplete grades
-Rembert indicated that ReVille initially declined to meet with Ozment at 4 pm today because he "needed to go to intramural tennis", but Rembert strongly encouraged it

After thanking her for this information, I asked Ozment to describe the specific criteria needed to receive an I grade, and the information that a professor may need from the CCC to make a decision about an I grade. Ozment provided the following suggestions:
Incomplete grade can be considered if:
1. Currently passing class at time of Incomplete grade request
2. Extenuating emergency circumstances, such as illness, injury, or family emergency that makes it impossible to complete class, noting that the issue is impossible to "complete" class, not to "do well" in class

Information needed from CCC includes:
1. Determination if there is a severe legitimate situation/problem that would clearly account for the student's inability to complete a class/classes
2. Description of the situation/problem/symptoms
3. Description of how long the situation/problem/symptoms were evident
4. Description of the extent student is unable to function due to illness/injury/emergency

Ozment indicated that in ReVille's situation, he would not be eligible for an I grade in Mailloux's class since he is currently failing it but it may be appropriate for him to receive I grades in other classes, based on information provided by CCC. Ozment indicated that she encouraged ReVille to sign a consent at the CCC to release information to her so that she could advocate for him as appropriate. S. Bufano, Ph.D.

Suzanne Bufano, Ph.D.
Licensed Clinical Psychologist
License #746
Citadel Counseling Center
Charleston, SC

"CONFIDENTIAL INFORMATION
(PROTECTIVE ORDER)

THE CITADEL

THE MILITARY COLLEGE OF SOUTH CAROLINA
171 MOULTRIE STREET
CHARLESTON, S.C. 29409

Counseling Center
203 Richardson Avenue

(843) 953-6799
(843) 953-6344, Fax

Authorization for Release of Information

Client Name: Louis Neal "Skip" Nevill

Date of Birth: 7/11/79 SS#: [redacted]

I give authorization and permission to:

Name/Title: The Citadel Counseling Center

Address/Phone Number: 171 Moultrie Street - Charleston, S.C.

to: Release to ____ Obtain from ____ Exchange with X

Name/Title: Col James Rembert (Academic Advisor) 3-5737

Address/Phone Number: 171 Moultrie St. Charleston, S.C.

Information regarding my medical/psychological treatment.

Purpose of Release: Provide initial clinical impressions and data as needed to facilitate academic decisions and support.

Information to be released/obtained:

____ Intake and psychosocial history
____ Treatment summary including diagnosis
____ Discharge summary
____ Psychiatric consult/evaluation materials
____ Psychological testing/evaluation materials
____ Other ____

Restrictions: ____

This consent for release of information expires within ninety days, unless otherwise indicated, and may be revoked in writing at any time. Any release of information made between the time authorized and the time revoked shall not constitute a breach of confidentiality. Date this release expires: 4/30/08

Reproduction of this authorization is as authentic as the original signed authorization.

I, the undersigned, hereby acknowledge that I have read this authorization prior to its execution and fully understand the nature of the release.

Client signature: Louis N Nevill Date: 8 December 2000

Parent/Guardian (if under 18 yrs. old): ____

Witness Signature: [signature] Date: 12/7/00

To Recipient of Release: This information has been disclosed to you from records protected by Federal confidentiality rules (42 CFR Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 CFR Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally prosecute any alcohol or drug abuse patient.

between 2001 and 2011, three of those individuals were abused exclusively in {Location 12}, and the other 29 would have been abused at other locations as well --

A. That's correct.

Q. -- is that your understanding? Mr. ReVille, are there any other locations that we have not discussed in which abuse would have occurred?

A. No.

Q. Mr. ReVille, in your prior deposition, you had discussed an incident that occurred at a country club in Alabama. Do you recall that?

A. I do.

Q. And correct me if I'm wrong, you had stated that there was an incident at a country club involving some boys and a swimming pool and that you were taken to the police for that; is that correct?

A. That's correct.

Q. What happened when you went to the police department?

A. My mother and I went in. There were two officers or agents, I'm not sure exactly which agency they were from -- I know it was the

EXHIBIT
ALL-STATE LEGAL
142

Electronically signed by Eve Wilbanks (101-177-349-6970)

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Irondale Police Department -- and they told me what -- the two kids and their parents had come forward and said what had happened, that Truth or Dare had been played, that kids were unclothed, and that I was present and encouraged that behavior.

Q. Do you recall the names of those officers?

A. I do not.

Q. Do you recall whether they were male or female?

A. They were both male.

Q. And how old were you at that time?

A. I was 15, turning 16.

Q. What was the outcome of that discussion with the police department when you were 15?

A. No -- I was not put into a program. I was assigned counseling and banned from the premises of the country club for, I believe, 90 days.

Q. Did you ever have to appear in court?

A. No.

Q. Are you aware if any charges were filed against you?

A. I don't believe any were.

Electronically signed by Eve Wilbanks (101-177-349-6970)

09f7b095-3a9d-4cac-82ce-9d157c74aaed

PAGE 11 of 12 Mount Pleasant COMPLAINT # 11-13461

~~NORTH CHARLESTON~~ POLICE DEPARTMENT

DEFENDANT STATEMENT

STATEMENT OF Louis Neal Reville

HOME ADDRESS _____ HOME PHONE _____

EMPLOYER _____ BUSINESS ADDRESS _____

BUS. PHONE _____ OCCUPATION _____

THIS STATEMENT IS GIVEN 10/30/2011 (DATE) AT 1910hrs (TIME)

Q- How did you [redacted] the boys? (LOCATION)

A- [redacted]

Q- Why didn't you tell your wife or the school would've filed a Police Report?

A- Because I knew that I needed help and that I probably would not stop on my own.

I just made a comment to Det. Bacon and finished it with: "I hate to piss you off by saying this, but in the late Summer of 2001, after praying in the Citadel Chapel for over three hours, I walked to the Campus police office and asked how I could file a case of sexual misconduct at the Summer Camps." They replied with "not us. We don't handle those." They did not refer me anywhere, but I knew that I could have followed-up at the Mt. Pleasant police department but I didn't. I was trying to turn myself in.

I HAVE READ THE FOREGOING STATEMENT OR HAVE HAD IT READ TO ME AND IT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE. I HAVE GIVEN THIS STATEMENT FREELY AND VOLUNTARILY AND HAVE BEEN PROVIDED A COPY OF MY STATEMENT.

WITNESS: _____

WITNESS: _____ SIGNATURE: _____

EXHIBIT 143

ALL-STATE LEGAL®

SLED
CF003 5/95

VOLUNTARY STATEMENT
SUPPLEMENTAL

Louis ReVille
Statement of, Continued.

between me and any campers in 2002. At that time, I said, "Guys, you know me." Mr. Brandenburg replied, "Yeah, and we thought we knew Arpaio, but he is now serving 7-10 years in prison." From that point on, I evaded any question that implied that anything inappropriate happened between me and any camper. They directly told me of the allegation by [redacted], and I denied it. A year later, I called Mr. Brandenburg's office to ammend my statement and ask his permission to visit the campus for an invitation to be the keynote speaker for the rising honor committee. To my knowledge, no other Citadel officials knew anything about these allegations.

Q: In a previous interview, you described a time that you went to the Public Safety office on the campus. Can you provide more detail about that time and do you think you could identify who you spoke to?

A: After graduation of the second session in 2001, I left the Summerall Chapel and went to Public Safety. While I stood in the doorway, I asked the officer, who was not in uniform, "How would I report a situation of misconduct between counselors and campers?" — or similar word usage. The officer (male, 45-55) replied, "We don't handle that." — or something similar. And then I left. I do not think that I could identify him with certainty.

Q: Do you recall any other meetings or allegations that involved The Citadel that we have not discussed?

A: No sir

12/10/11 D.J. Beacham
Person giving statement to place initials behind last word of statement as appears on last page.

5h

x [signature] Revill
Signature of person giving voluntary statement

SWORN STATEMENT



I, _____, _____, _____
(Name) (DOB) (Address)

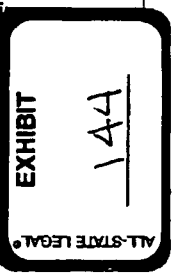
_____, on this the 27 day of January 2012
(Telephone) (Day) (Month) (Year)

do hereby state the following:

I was a camper at the Citadel Summer Camp in the summer of 2001. I met Skip ReVille, who told me to call him Skip, not Mr. Reville,. At the overflow table in the mess hall that year. He told me to come by his room sometime in the 2nd Large November room, which was him room. About a week later he told me to wake him up at 4pm because he was up all night studying and took a nap. I came into his room to wake him up and I saw his reflection that he was awake, but when I walked in further I saw that he was laying pretending to be asleep but had no clothes on. I know he was covered when I first walked in the room because I could see a reflection in a computer screen. He heard some moving around and that's when he I saw that he was uncovered, naked and pretending to sleep. I looked away and he sat up and began to talk to me while he was completely naked. A couple days later he starting talking about masturbation with his friends when he was young and how they would play "cream or the cracker or cookie" and he explained that it was a game where he and his friends would all masturbate at the same time and whoever "came" last would have to eat the cracker. He would complement me when I walked out of the shower that I must have a big penis because he saw all the girls looking at me. The last thing that happened that summer he mentioned he walked into his room and there were kids in his room and he heard a "slapping sound" and it was, _____ and other boys masturbating to a video.

During the summer session of 2002 Citadel Summer Camp, the first thing that Skip said to me was that he did not see an ounce of fat on me. At the time, it made me a little uncomfortable because I had not seen him in a year. A couple of days later he asked me if I masturbated and I said yes, but not while at Citadel. He proceeded to tell me how unhealthy that was and that I should. He told me he used to work in a clinic and knows what he is talking about.

During the summer session of 2003, I was a counselor in training (CIT) at the Citadel. Skip and I took a truck ride to get his sofa and he made a comment, "OK, it's about time". I asked him what he was talking about and he took a breath and said " what is your favorite thing to do with a girl sexually?". And then he told me about what he had done sexually. For example, he told me how good it feels that receive oral sex and whether or not I shave my pubic area. He invited me to watch pornographic videos back at his room at The Citadel. A few days later I was in his room late at night and he put in a pornographic movie on his computer. We watched and he masturbated in the open and he encouraged me to masturbate under a towel or blanket. A couple days later , a fellow counselor a year older than me, approached me and asked "does Skip make you masturbate?" He gave an example of watching porn and masturbates in his room. Later that same session at night Skip told me about



nasturbating and how he did it with his) small penis and that he would but his thumb over the head of his penis while he masturbated. On the last day of the first session of summer camp after campers went home, I traveled with Skip to a cottage he was staying near Pinewood Prep School. He was staying on the property owned by two of his students parents (d he had a young brother whose name I cannot remember, but will mention later). I met the parents and then we went into the cottage and almost immediately he put on a pornographic video (VHS) that he called the "oil beds". It was a video that involved a bunch of people having sex on a bed covered in baby oil . Skip masturbated in the open and continually pressured me to masturbate with him and even offered me a towel. I was really tired and told him I did not want to, but he continued to pressure me over and over. After about an hour, I told him I had was done he grabbed the towel off of me and felt it and said "you liar" and pressured me to continue to masturbate. I eventually fell asleep with my penis in my hand and he kept waking me up to continue. Finally I told him I was going to sleep and stood up and Skip angrily threw the towel against the wall, turned off the TV and told me "you make me feel like a fucking idiot". I had never heard Skip cuss before and surprised me. I tried to go to sleep, but could not sleep until the sun came up so I could feel comfortable to be able to notice if someone was moving around me. The next morning he apologized to me and seemed very shameful and could not look me in the eye. I was supposed to stay with him for a week, but he told the AC broke in the cottage and made me pack up my belongings and drove me back to the Citadel. Later before we left, I walked back into the cottage and the AC was fine, but still returned to the Citadel. Second session of summer camp started and during that session we continued to masturbate in his room approximately ten (10) and I eventually I stopped using a towel. It was always just the two of us in his room. That last thing that happened that summer was during a time when I was getting in Skip's car to go somewhere and I was wearing running shorts and had on a bag pack. His car was parked in front of the front entrance of the 1st battalion Murray barracks. I got in the front seat and he said " I bet those a comfortable (meaning my running shorts) and I said yes they were awesome. He reached over to feel the fabric with his middle and thumb and placing his index finger touching my penis and testicles, but the netting was inside the shorts. I said "what are you doing" and he made comment, "stupid fucking netting". After that he started normal conversation and did not mention the incident again. Also during this summer I told him I figured out a way to masturbate with my clothes on lying on my stomach, basically dry humping the bed, in hopes that we could masturbate without removing any clothes.

In the summer of 2004, Skip was not working at the Citadel, but I was still a camp counselor. Skip did pick me up in between the two camp sessions and I stayed with him at his house in Summerville on Bay Colony Court. During this time I learned that he had been a foster parent. He continued to do our normal masturbation routine and I think it only happened once. While I was there, Skip would pick up ____ (mentioned above) and bring him to the house. Skip told me the boy would watch pornography and masturbate. He mentioned one time for me to join them, but I said no. I let him know I was not comfortable. Skip mentioned to me that he was getting close to another student, "like how we are close", and that the other student also laid on his stomach to masturbate. Skip told me he told the boy this technique was called "the ____".

During February 2005, I went to the Citadel for a college visit. I stayed with Skip on Bay Colony Court. I inadvertently brought a pornographic movie with me and he watched with . He later offered to give me a juicer so he could keep the movie because like the movie.

During the summer of 2005 I was working as a counselor again at the Citadel. After two weeks, I was fired and Skip picked me up and I stayed with him for a week until my mother picked me up. During that week I was with him to go to the movies with his students from Pinewood Prep, including .

came over a lot and went upstairs for hours at a time. I know they were masturbating because Skip told me about masturbating the child ( ).

The last time I spoke to Skip was January of 2006 on the phone.

I, do swear, under oath, that the above information that I am about to give, is the truth, the whole truth and nothing but the truth, so help me God. I further do swear that the information given by me in this statement is the true fact, and that I have been sworn to oath by a Law Enforcement Officer, authorized to take sworn statements.

(Person Providing Sworn Statement)

Law Enforcement Notary

(FDLE Special Agent) 1/27/12 (Date)

31-11-0097-tge

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

INVESTIGATIVE REPORT

FEB 21'12 AM10:35

On Monday, January 23, 2012, the Florida Department of Law Enforcement received a request for assistance from the South Carolina Law Enforcement Division (SLED). SLED is conducting an investigation into allegations of sexual abuse at The Citadel, a military college in South Carolina. A Citadel alumnus, Louis Neal "Skip" ReVille, had been accused of criminal sexual misconduct with a child. SLED requested that FDLE interview three potential victims that now reside in Florida.

On Friday, January 27, 2012, Special Agent (SA) Michelle O'Neal interviewed at the FDLE office located at 921 North Davis Street, Building E, Jacksonville Florida. At the request of SLED, provided a sworn written statement with the assistance of SA O'Neal. provided the following information in his statement:

I was a camper at the Citadel Summer Camp in the summer of 2001. I met Skip ReVille, who told me to call him Skip, not Mr. Reville. At the overflow table in the mess hall that year. He told me to come by his room sometime in the 2nd Large November room, which was him room. About a week later he told me to wake him up at 4pm because he was up all night studying and took a nap. I came into his room to wake him up and I saw his reflection that he was awake, but when I walked in further I saw that he was laying pretending to be asleep but had no clothes on. I know he was covered when I first walked in the room because I could see a reflection in a computer screen. He heard some moving around and that's when he saw that he was uncovered, naked and pretending to sleep. I looked away and he sat up and began to talk to me while he was completely naked. A couple days later he starting talking about masturbation with his friends when he was young and how they would play "cream or the cracker or cookie" and he explained that it was a game where he and his friends would all masturbate at the same time and whoever "came" last would have to eat the cracker. He would complement me when I walked out of the shower that I must have a big penis because he saw all the girls looking at me. The last thing that happened that summer he mentioned he walked into his room and there were kids in his room and he heard a "slapping sound" and it was and other boys masturbating to a video.

During the summer session of 2002 Citadel Summer Camp, the first thing that Skip said to me was that he did not see an ounce of fat on me. At the time, it made me a little uncomfortable because I had not seen him in a year. A couple of days later he asked me if I masturbate and I said yes, but not while at Citadel. He proceeded to tell me how unhealthy that was and that I should. He told me he used to work in a clinic and knows what he is talking about.

During the summer session of 2003, I was a counselor in training (CIT) at the Citadel. Skip and

Case Number:JA-73-1519	Serial #:1
Author:O'Neal, Michelle E.	Office:Jacksonville
Activity Start Date:01/23/2012	Activity End Date:01/23/2012

Approved By:Nehrbass, Gary A

Description:Request for Assistance

THIS REPORT IS INTENDED ONLY FOR THE USE OF THE AGENCY TO WHICH IT WAS DISSEMINATED AND MAY CONTAIN INFORMATION THAT IS EITHER PRIVILEGED OR CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. ITS CONTENTS ARE NOT TO BE DISTRIBUTED OUTSIDE YOUR AGENCY.

Case Number:	JA-73-1519
IR Number:	1

I took a truck ride to get his sofa and he made a comment, "OK, it's about time". I asked him what he was talking about and he took a breath and said "what is your favorite thing to do with a girl sexually?" And then he told me about what he had done sexually. For example, he told me how good it feels that receive oral sex and whether or not I shave my pubic area. He invited me to watch pornographic videos back at his room at The Citadel. A few days later I was in his room late at night and he put in a pornographic movie on his computer. We watched and he masturbated in the open and he encouraged me to masturbate under a towel or blanket. A couple days later ', a fellow counselor a year older than me, approached me and asked "does Skip make you masturbate?" He gave an example of watching porn and masturbate in his room. Later that same session at night Skip told me about I masturbating and how he did it with his small penis and that he would but his thumb over the head of his penis while he masturbated. On the last day of the first session of summer camp after campers went home, I traveled with Skip to a cottage he was staying near Pinewood Prep School. He was staying on the property owned by two of his students parents and he had a young brother whose name I cannot remember, but will mention later). I met the parents and then we went into the cottage and almost immediately he put on a pornographic video (VHS) that he called the "oil beds". It was a video that involved a bunch of people having sex on a bed covered in baby oil. Skip masturbated in the open and continually pressured me to masturbate with him and even offered me a towel. I was really tired and told him I did not want to, but he continued to pressure me over and over. After about an hour, I told him I had was done he grabbed the towel off of me and felt it and said "you liar" and pressured me to continue to masturbate. I eventually fell asleep with my penis in my hand and he kept waking me up to continue. Finally I told him I was going to sleep and stood up and Skip angrily threw the towel against the wall, turned off the TV and told me "you make me feel like a fucking idiot". I had never heard Skip cuss before and surprised me. I tried to go to sleep, but could not sleep until the sun came up so I could feel comfortable to be able to notice if someone was moving around me. The next morning he apologized to me and seemed very shameful and could not look me in the eye. I was supposed to stay with him for a week, but he told the AC broke in the cottage and made me pack up my belongings and drove me back to the Citadel. Later before we left, I walked back into the cottage and the AC was fine, but still returned to the Citadel. Second session of summer camp started and during that session we continued to masturbate in his room approximately ten (10) and I eventually I stopped using a towel. It was always just the two of us in his room. That last thing that happened that summer was during a time when I was getting in Skip's car to go somewhere and I was wearing running shorts and had on a bag pack. His car was parked in front of the front entrance of the 1st battalion Murray barracks. I got in the front seat and he said "I bet those a comfortable (meaning my running shorts) and I said yes they were awesome. He reached over to feel the fabric with his middle and thumb and placing his index finger touching my penis and testicles, but the netting was inside the shorts. I said "what are you doing" and he made comment, "stupid fucking netting". After that he started normal conversation and did not mention the incident again. Also during this summer I told him I figured out a way to masturbate with my clothes on lying on my stomach, basically dry humping the bed, in hopes that we could masturbate without removing any clothes.

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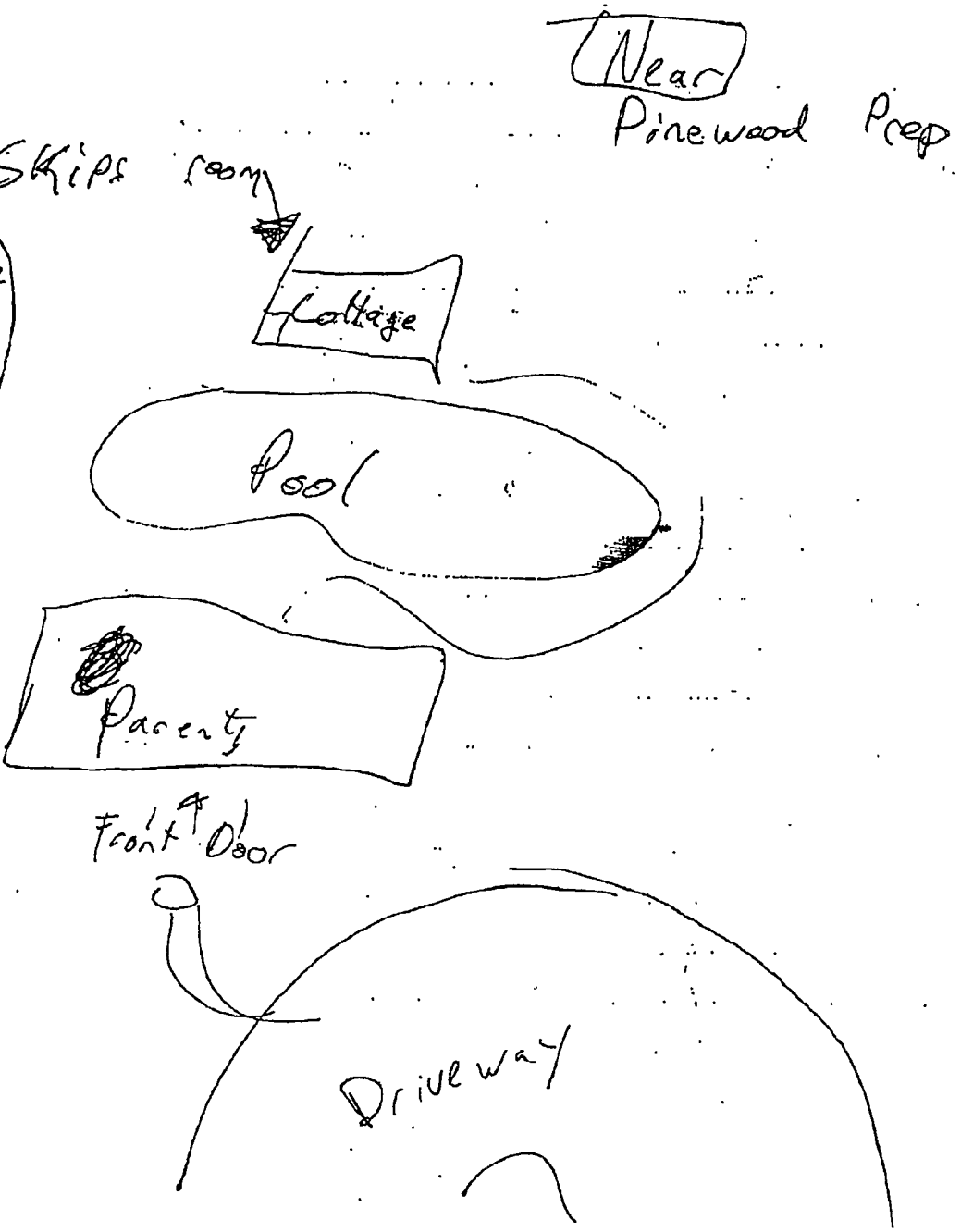
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The last time I spoke to Skip was January of 2006 on the phone.

also provided photographs from one of his years as a camper at The Citadel and a drawing of the house ReVille stayed in during the summer of 2003. Those items and a copy of the sworn statement will be maintained as a Related Item in this case file. The original statement, photographs and drawing will be forwarded to Special Agent Theresa Beacham with SLED.

Description of home Skip lived in; in Summer 2003



David Lisak, Ph.D.

Forensic Consultation and Training
www.davidlisak.com

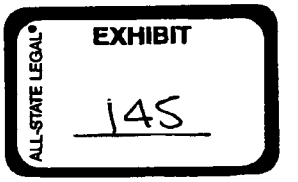
42 Agua Sarca Road, Placitas, New Mexico, 87043
617-947-4119
david@davidlisak.com

Affidavit

Qualifications

1. I am a clinical psychologist and, until May, 2012, I was an Associate Professor of Psychology at the University of Massachusetts Boston, where I taught, conducted and supervised research in the doctoral program in clinical psychology. For the past three decades I have been researching the causes and consequences of interpersonal violence, and I have studied the impact of childhood physical and sexual abuse on later development, especially in men. My research has been published in numerous scholarly journals, and I have presented scores of papers, symposia, and workshops at conferences throughout the United States and Canada.

2. I am an active member and a Fellow of the American Psychological Association (APA). I was the founding editor of the journal, *Psychology of Men and Masculinity*, a scholarly journal published by APA. In addition, I was a founding member of the National Organization on Male Sexual Victimization, now re-named *Male Survivor*, I am a founding board member and current board chair of *1in6*, a Los Angeles-based non-profit organization focused on outreach and treatment for male victims of sexual abuse, and I serve on the national advisory board of *Peace Over Violence*, another LA-based non-profit organization that provides services to victims of violence.



3. In addition to my research and teaching, I am a licensed health care provider in the State of Massachusetts. For many years, I maintained a part-time private practice specializing in the treatment of adult men who had been sexually and/or physically abused as children. Currently, I serve as a consultant and expert in a variety of forensic contexts across the United States and Canada. I have been qualified by courts as an expert on psychological trauma and childhood abuse and violence, and I have testified in state, federal and military courts. I have conducted detailed evaluations of scores of men either charged with or convicted of homicide and/or sex offenses at prisons and jails across the United States. I have served as faculty at judicial, prosecutor, and law enforcement training conferences on sexual aggression and psychological trauma in all 50 states, and have consulted to the U.S. Department of Justice, the Federal Bureau of Investigation, the U.S. Air Force, the U.S. Army, the U.S. Navy, the U.S. Marine Corps, the U.S. Coast Guard, the U.S. Department of Defense, local police departments, and to individual judges and prosecutors on matters pertaining to perpetrators of non-stranger sexual aggression, to the psychological and neurobiological consequences of trauma, and to the prevention of sexual violence.

4. Over the past 26 years, in clinical, research or forensic contexts, I have treated or evaluated hundreds of men who suffered childhood trauma.

5. My CV is attached.

6. I have been asked by attorney Mullins McLeod to address the following two questions: 1) In a situation where there is ongoing sexual abuse, does every incident of abuse add to the harm inflicted on the victim? 2) What is the effect on

the victim of any delay in disclosure of the sexual abuse that they are or have been suffering?

7. Victims of sexual abuse who suffer repeated acts of assault and/or molestation are unequivocally harmed by each act. Repeated sexual abuse reinforces extremely damaging emotional states, extremely damaging feelings and ideas about the child's self-worth, and extremely damaging feelings and ideas about the adults in the child's life who are failing to stop the repeated abuse.

8. In addition, children who are being chronically sexually abused are simultaneously advancing through distinct developmental stages. Their cognitive and emotional capacities are changing even as the sexual abuse continues. As such, the impact that the abuse has on them, and the damage that it causes, increases as they get older. New layers of damage are added. For example, a child at age 10 who is being abused may feel abandoned by their parents because they are not stopping the abuse. That same child, if the abuse continues into later, pre-adolescence or into adolescence, is very likely to feel abandoned by the entire adult world. With his increased awareness of the adult world, a product of his normal development, he makes different meanings of his experience, and these add new layers to the damage caused by the abuse.

9. Disclosure is an extremely important factor in determining the impact of sexual abuse. The sooner a child can disclose, the sooner that child can receive help, the more likely it is that the damage caused by the abuse can be mitigated.

Any delay in disclosure therefore increases the risk of damage, as well as the actual damage caused to the child.

10. Disclosure can occur by the child spontaneously telling an adult that they are being abused. However, most children who are abused are frightened and shamed into silence, and this is particularly true of boys. Therefore, early disclosure – disclosure that occurs when the child is still a child – is far more likely to occur because the abuse is discovered and stopped by an adult that it is to occur by a spontaneous act of the abused child.

David Lisak, Ph.D.

5 June 2014

Date

OFFICIAL SEAL
Luke Tanner
Notary Public
State of New Mexico
My Comm Expires 11-26-16

Q All right. So as a State constable, your police powers individually go beyond those gates and apply to any type of foreseeable crime that any other law enforcement officer would investigate or be involved with?

A That's correct.

Q All right. At any time while you've worked at The Citadel, have you ever read The Citadel's policies on sexual harassment or sexual abuse?

A Yes.

Q And when was the first time you read those policies?

A I can't remember a date, but whenever they came out. I try to keep up with all that.

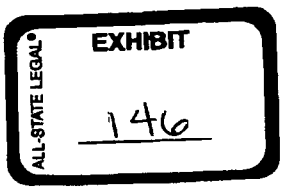
Q Okay. Is that part of your job responsibility, to make sure you're familiar with The Citadel's policies and procedures?

A All employees.

Q Okay. And when I say "policies and procedures," that would be all of The Citadel's policies and procedures, is that right?

A Within reason, yes.

Q Okay. Let me show you -- this is Bates stamped No. 0001701, and I'll just ask you, this is an excerpt from the 2002 White Book.



Mount Pleasant Police Department

SUPPLEMENTAL REPORT

INFORMATION ONLY ☐

CASE NUMBER 2011-P-13461

NCIC INQ. | ENTD

☐ ORIGINAL REPORT ☑ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY

☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

ORIGINAL INCIDENT TYPE

ORIGINAL INCIDENT DATE ▶ TIME ▶

LOCATION NO

ORIGINAL INCIDENT LOCATION

NAME OF COMPLAINANT

SUSPECTS NAME | RACE | SEX | DATE OF BIRTH | AGE

SUSPECTS ADDRESS | HEIGHT | WEIGHT | HAIR | EYES

NARRATIVE

On 10/28/2011 (Friday) at approximately 0845hrs I, Det. Michele Bacon, was advised by Det. Paula Wilson that she received a call from Donna Slipko (Intake Coordinator) of the Lowcountry Children's Center (LCC) in reference to alleged sexual abuse involving suspect, Louis "Skip" ReVille. Ms. Slipko forwarded an email to Det. Wilson written by Mr. ReVille. See Det. Wilson's supplemental report. Based on this information, it was determined to locate and interview Mr. ReVille. We notified our supervisor, Det. Sgt. Justin Hembree, of the situation. He located Mr. ReVille at Coastal Christian Preparatory School in the Old Village. School was not in session that day; however, Mr. ReVille was at his office. Mr. ReVille agreed to come to the Mount Pleasant Police Department (MPPD) for questioning. He left his vehicle at the school and was transported to MPPD by Det. Sgt. Hembree. Once at MPPD, Det. Sgt. Hembree introduced me to Mr. ReVille. Det. Sgt. Hembree read Mr. ReVille his Miranda Warnings. Mr. ReVille waived his rights, agreeing to answer questions. A Mount Pleasant Advisement of Rights form was completed. I then met with Mr. ReVille in the Patrol Interview Room, where I began the interview (approximately 1400hrs). The interview began with some background information, i.e. what his occupation was, what brought him to Charleston, family life, etc. I then explained to Mr. ReVille that we received a call from the Lowcountry Children's Center and that I had a copy of the email he sent to several parents. Mr. ReVille stated he knew we (Police) may be coming and indicated that he mentioned to his wife, Carrie, to possibly expect us at their residence. Mr. ReVille admitted to "inappropriate behavior / locker room games" occurring between him and some of the players on the Moultrie Middle School basketball team. He stated nothing more than that occurred. I then advised Mr. ReVille of the importance of telling the whole truth and that it was not uncommon for people to tell "half-truths" when questioned by Police. Mr. ReVille then stated more occurred to include masturbation and oral sex with several juvenile victims. NOTE – his admission came within the first half-hour of the interview. I then began his written statement at 1510hrs. See written statement for details. He permitted me to take photos of text messages on his cell phone showing correspondence between him and several parents. During the interview, I showed Mr. ReVille a copy of the email he sent to the victims' parents and asked him if he wrote that email. He stated he did. I then advised him to write on the email printout that he wrote the email, which he did (included in case file). It is important to note that I asked Mr. ReVille numerous times during the interview if he wanted a bathroom break, something to eat, something to drink, etc. His response was always, "No thank you." Therefore, at some point (1757hrs) I gave Mr. ReVille water to drink without him asking for it. He took one or two sips from it. His demeanor was polite and meek, and he seemed intelligent. While I was interviewing Mr. ReVille, Capt. Amy McCarthy and Det. Adam Willis began contacting the victims' parents to advise them of what Mr. ReVille admitted to. At the conclusion of the interview, I permitted Mr. ReVille to use the phone to call his wife. Three families pursued charges that evening:

1.
2.
3.

Mr. ReVille was transported to the Charleston County Detention Center (CCDC) by Pfc. Andrew Scott and booked in for (3) counts of Criminal Sexual Conduct with a Minor 2nd Degree and (3) counts of Committing Lewd Act Upon a Child. I secured his iPhone into Evidence. NOTE – Mr. ReVille stated he has been praying for "this day to come." He stated he was relieved that he was caught because he knew what he was doing to the boys was wrong.

I directed Det. Willis to prepare a search warrant for Mr. ReVille's vehicle. See Det. Willis' supplemental report for details. The search warrant

SUBJECT IDENTIFIED	SUBJECT LOCATED	S.F.			
☑ YES ☐ NO	☑ YES ☐ NO		☐ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 18 ☑ ARRESTED 18 AND OVER	☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE-NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	NUMBER
	12/15/2011				
			FOLLOWUP INVESTIGATION ☐ YES ☐ NO	OFFICER	

Chas Solicitor's Office-142

EXHIBIT 147

ALL-STATE LEGAL

Mount Pleasant Police

SUPPLEMENTAL REPORT

INFORMATION ONLY ☐

CASE NUMBER 2011-P-13461

NCIC INQ | ENT

☐ ORIGINAL REPORT ☑ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY

☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

ORIGINAL INCIDENT TYPE

ORIGINAL INCIDENT DATE ▶ TIME ▶

LOCATION NO

ORIGINAL INCIDENT LOCATION

NAME OF COMPLAINANT

SUSPECTS NAME	RACE	SEX	DATE OF BIRTH	AGE

SUSPECTS ADDRESS	HEIGHT	WEIGHT	HAIR	EYES

NARRATIVE

was executed by Cpl. Tyrone Simmons and Pfc. Vance Stephenson.

At approximately midnight, Det Willis and I went to 2662 Lohr Drive and met with Mr ReVille's wife, Carrie ReVille, and her mother, Jeanne Henry (115 Bent Grass Drive, Roswell GA 30076, 770-639-1417). I explained to Mrs. ReVille what her husband was charged with. I then obtained a written statement from her. See written statement for details. I asked her if they had a home computer and she stated they didn't. She stated they shared a Macbook Pro laptop.

On 10/29/2011 (Saturday) I received a call from Captain Ritchie. He advised me that he received a call from regarding her son, disclosed that Mr. ReVille molested him too. I then called and she advised me that told her Mr. ReVille molested him. I advised her of what her options were – have meet with a therapist at LCC or meet with a Detective. She stated she would discuss the matter with her husband and to call them on Monday.

On 10/30/2011 (Sunday) I went to the CCDC and met with Mr ReVille for a second interview, which took place in the Interview Room of the booking area. I advised him that I received a call yesterday from a parent of Coastal Christian Preparatory School (CCPS) regarding their son I then asked him "who else" and he lowered his head and stated ' After he told me what he did to , I asked him if there was anyone else. I explained to him that he needed to be forthcoming about everything because at some point down the line, we would find out eventually. He then stated, "I'm sorry that you are going to have another long night " He stated there were more boys he molested in the past from The Citadel Summer Camp and Pinewood Preparatory School (North Charleston and Summerville). See statement for further details. NOTE – I ran out of MPPD statement forms / borrowed several NCPD statement forms from a NCPD patrol officer at CCDC

On 10/31/2011 I called .

I directed Det. John Byrd and CSI Ray Haupt to execute the search warrant for Mr. ReVille's vehicle. A second search warrant was obtained due to the vehicle being moved/towed from its original location (parking lot of CCPS) to Palmetto Towing. See Det. Byrd's supplemental report for details.

I called) and arranged to meet with this Friday at 1600hrs.

On 11/01/2011 I spoke with . She stated she still needed more time to talk to her son

I spoke with . She stated she wanted the case to "die down" and will get back to me.

I spoke with father). He stated he will get back to me after talking to his son

NOTE – In my conversations with the victims' parents I advised them they had the option of going to LCC or having their child meet with a Detective.

ADMINISTRATIVE

SUBJECT IDENTIFIED	SUBJECT LOCATED	S F	☐ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 18 ☑ ARRESTED 18 AND OVER	☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER
☑ YES ☐ NO	☑ YES ☐ NO	☐			

REASON FOR EXCEPTIONAL CLEARANCE 1 ☐ OFFENDER DEATH 2 ☐ NO PROSECUTION 3 ☐ EXTRADITION DENIED 4 ☐ VICTIM DECLINES COOPERATION 5 ☐ JUVENILE-NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
	12/15/2011				
			FOLLOWUP INVESTIGATION ☐ YES ☐ NO OFFICER	Chas Solicitor's Office-143	

Mount Pleasant Police Department

SUPPLEMENTAL REPORT

INFORMATION ONLY ☐

CASE NUMBER 2011-P-13461

NCIC INQ ENTD

☐ ORIGINAL REPORT ☑ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY

☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

PAGE 3 of 14 PAGES

ORIGINAL INCIDENT TYPE

ORIGINAL INCIDENT DATE ▶ TIME ▶

LOCATION NO

ORIGINAL INCIDENT LOCATION

NAME OF COMPLAINANT

SUSPECTS NAME | RACE | SEX | DATE OF BIRTH | AGE

SUSPECTS ADDRESS | HEIGHT | WEIGHT | HAIR | EYES

At approximately 1500hrs I met with at the MPPD CIB Interview Room. See statement

I spoke with father). He stated he will talk to his son and get back to me

Det. Wilson interviewed juvenile victim, MPPD. See written statement for details.

On 11/02/2011 at 1055hrs I contacted Carrie ReVille and advised her that she could retrieve the vehicle from Palmetto Towing She stated she would send Frank & Carolyn Cothran to retrieve the vehicle.

I obtained additional arrest warrants for Mr ReVille for victims -- .I . I went to the CCDC and served the warrants on ReVille (Lewd Act Upon a Child x2). I also obtained an additional statement from Mr. ReVille He advised me that he retained aig Jones as an attorney but indicated he was still willing to answer questions without his attorney present. He advised me of an external rd drive at his house that he used to download child pornography onto Upon my return to MPPD, I prepared a search warrant for Mr ReVille's residence, issued by Mount Pleasant Municipal Judge David Michel. Det Willis and I went to the residence to execute the warrant. Mrs ReVille and her mother were there. We seized (1) black external hard drive, 8 discs, and 5 journals from the residence.

On 11/03/2011 at approximately 1000hrs Det. Wilson and I attended Mr. ReVille's bond hearing. His attorney, Craig Jones, was present. Mr. Jones advised me that Mr. ReVille was still willing to cooperate with Police and answer questions. I advised him that if I have any further questions for Mr. ReVille, I would contact him first.

On 11/03/2011 at approximately 1200hrs I spoke with . I asked him if he was willing to take LCC (based on utting down during his initial interview with Det Willis). said he was considering it. He advised me that he already met with Dr Elsey and felt comfortable with Dr. Elsey conducting the interview. I asked I if I could meet with him, as he was the person who initially approached Mr ReVille about the allegations. agreed to meet with me for a statement. I arrived at MPPD. See written statement for details permitted me to take photos of his cell phone of text messages between him and Mr. ReVille.

Based on the publicity of this case, I received numerous phone calls / phone messages from various people.

On 11/03/2011 I returned a phone call to Mark Brandenburg, The Citadel General Counsel, 953-5252. He stated he saw our request on the news this past Tuesday (i e if anyone has any information to pass on to contact MPPD) He stated in April of 2007 they had a family of a camper from 2002 contact them and make a complaint that Mr ReVille had engaged in "inappropriate behavior" with their son. I asked Mr. Brandenburg what the inappropriate behavior was. He stated Mr ReVille showed a pornographic movie to the camper and suggested he masturbate with him. Mr. Brandenburg advised me that he questioned Mr ReVille, and he denied it. He stated they were unable to corroborate the camper's story. They lost contact with the family in August of 2007. He stated they've made attempts to contact the family. He stated he has left several messages and has not received a phone call in response. I asked Mr. Brandenburg if he reported the incident to law

SUBJECT IDENTIFIED	SUBJECT LOCATED	S F			
☑ YES ☐ NO	☑ YES ☐ NO		☐ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 18 ☑ ARRESTED 18 AND OVER	☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1 ☐ OFFENDER DEATH 2 ☐ NO PROSECUTION 3 ☐ EXTRADITION DENIED 4 ☐ VICTIM DECLINES COOPERATION 5 ☐ JUVENILE/NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
	12/15/2011				
			FOLLOWUP OFFICER		

Chas Solictor's Office-144

INVESTIGATION ☐ YES ☐ NO

Mount Pleasant Police Department

SUPPLEMENTAL REPORT

INFORMATION ONLY ☐

CASE NUMBER 2011-P-13461

NCIC INQ | ENTD

☐ ORIGINAL REPORT ☑ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY
☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

PAGE 4 of 14 PAGES

ORIGINAL INCIDENT TYPE

ORIGINAL INCIDENT DATE ▶ TIME ▶

LOCATION NO

ORIGINAL INCIDENT LOCATION

NAME OF COMPLAINANT

SUSPECTS NAME | RACE | SEX | DATE OF BIRTH | AGE

SUSPECTS ADDRESS | HEIGHT | WEIGHT | HAIR | EYES

enforcement and he advised me that they did not because there wasn't any touching involved. I advised him that law enforcement should have been notified even though there wasn't any touching involved. I advised him that what Mr. ReVille did was still criminal in nature, thus should have been investigated by law enforcement. I advised him to reference statute 63-7-310 Persons Required to Report. Several days later I called Mr. Brandenburg to ask him which law enforcement agency handle sexual assaults on campus. He stated their public safety handles the initial report and from there he was unsure which LE agency investigates the sexual assault. He stated he would get back to me. I advised him that we were having a meeting on the ReVille case and I wanted to ensure we contacted all of the necessary LE entities. NOTE - I later received confirmation from Asst. Sol. Debbie Herring-Lash that Charleston PD investigates sexual assaults on The Citadel campus. She gave me Det. Leslie Ambrose's contact information. I received a call from Capt. Rodger Hilliard, The Citadel Public Safety. He stated Mr Brandenburg informed him of our meeting and told him that someone from there needed to attend the meeting. I then advised Capt. Hilliard that the meeting was only specific to LE agencies that would be investigating sexual assault cases. Capt. Hilliard advised me that if anything occurred on campus, they should be present at the meeting. I informed Capt. Hilliard that I would pass this information to Det. Ambrose. I later received a call from Mr. Brandenburg. He stated he received a FOIA request from the media and asked me if they should release information related to the 2007 complaint against Mr. ReVille. I advised Mr. Brandenburg that while I could not tell him what to do, I suggested that he hold off until I was able to pass on information to Charleston PD at our meeting (as Mr. ReVille admitted to the allegations in the 2007 complaint to myself in his confession and that it would now be a criminal matter that Charleston PD would be investigating).

I returned a phone call to Odessa Williams, Regional Manager, Dorchester County DSS, 297-0539. She indicated Travis Lincoln was the supervisor of the foster home.

I returned a phone call to : NOTE – Mr. ReVille listed as one of his prior victims. stated he is a sophomore at The Citadel (Age: 20). He stated he wanted to meet with me. We arranged a date/time to meet.

I returned a phone call to Mike Turner, Dorchester County District 2, 609-8165 / 873-2901 ext 3020. He wanted to pass on that Mr. ReVille had applied to be a substitute teacher with their district. Mr. ReVille was cleared but never worked at the school. However, he was a volunteer at Rollings Middle School basketball team .

I returned a phone call to She stated her son, (Age: 9 at the time) was at the Park West Tennis Camp in the summer of 2008. She stated Mr ReVille sent a letter in the mail to their home address. It had all of his contact information, i.e. email address, phone number, etc. The letter stated that if ever needed anything, to call him anytime. stated she saw a red flag. She went to the person in charge at the Town of Mount Pleasant Recreation Center and advised him that the letter was totally inappropriate. She stated she feels fairly certain that she nipped it in the bud for her family. She wanted to let me know that she had a feeling about him back then.

I returned a phone call to . She wanted to pass on some information regarding her son, (current age 19). She stated he used to go to Pinewood Prep during his 8th grade year. She stated Mr ReVille was super friendly with kids. The kids liked him. Mr. ReVille took interest in and recommended a book, "The Perks of Being a

SUBJECT IDENTIFIED ☑ YES ☐ NO | SUBJECT LOCATED ☑ YES ☐ NO | S F ☐ | ☐ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED | ☐ ARRESTED UNDER 18 ☑ ARRESTED 18 AND OVER | ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE 1 ☐ OFFENDER DEATH 2 ☐ NO PROSECUTION 3 ☐ EXTRADITION DENIED 4 ☐ VICTIM DECLINES COOPERATION 5 ☐ JUVENILE-NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
	12/15/2011				

Chas Solicitor's Office 445

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,	)	**SUPPLEMENTAL MEMORANDUM IN**
v.	)	**SUPPORT OF RENEWED MOTION FOR**
	)	**SUMMARY JUDGMENT**
THE CITADEL,	)	
	)	
Defendant.	)	

FILED
2015 JUN -4 PM 12:01
JULIE J. ARMSTRONG
CLERK OF COURT

AND NOW COMES Defendant The Citadel and files this Supplemental Memorandum in Support of Renewed Motion for Summary Judgment:

INTRODUCTION

The Citadel submits this brief to address the potential impact of *Doe v. Bibby*, 410 S.C. 287, 763 S.E.2d 645 (Ct. App. 2014), *cert. granted* (Jan. 16, 2015), which is pending before the South Carolina Supreme Court. Even if the Supreme Court reverses *Bibby*, that result would be consistent with, and would probably actually support, The Citadel's motion for summary judgment. The crux of the victim's claim in *Bibby* is that the defendant, the wife of the abuser, owed a duty because: (a) she specifically knew the plaintiff victim and (b) the abuse occurred while the plaintiff was a known, specifically-invited licensee on the defendant's property. By contrast, The Citadel's Renewed Motion for Summary Judgment argues that The Citadel did not owe a duty to Doe 2, an unknown, unidentified future victim of abuse by ReVille, where none of the abuse occurred through any connection to The Citadel.[1] South Carolina has *never* recognized a cause of action under the

---

[1] Doe 2's only presence on The Citadel's property was as a member of the public attending a basketball game with ReVille, while ReVille was living with Doe 2's family. Plaintiff does not allege that The Citadel knew or should have known that he was on campus or in ReVille's company.

Doe 2 testified that he would, on occasion, go to Citadel basketball games with ReVille, to help educate him about basketball to assist with his performance on the AAU team ReVille coached. (*See* Ex. B, at pp.130:12-131:9). On one occasion, ReVille drove Doe 2 around the campus, but they did not exit ReVille's vehicle or go into any buildings. (*See id.*, at p.131:10-24). The only building on The Citadel's campus that Doe 2 ever entered with ReVille was the gym. (*See id.*, at pp.131:25-132:5). The

circumstances of this case but rather has consistently rejected such a claim; even a reversal in *Bibby* would not change this. While the Supreme Court might clarify or even expand the law concerning the duty of care in *Bibby*, the arguments that the plaintiff is making in that case would not help the Plaintiff in this case, even if the Supreme Court completely agrees with them.

ARGUMENT

In *Bibby*, the Court of Appeals held that a defendant ("wife") did not owe a duty of care to protect a neighbor child ("victim") from sexual abuse that occurred on her property at the hands of her husband ("husband"). In part, the court rejected an argument that a duty of care existed under a "special relationship" theory because, *inter alia*, "the record contains no evidence Respondent had knowledge of a specific threat of harm to a specific individual." *See id.*, 410 S.C. at 296, 763 S.E.2d at 650. Obviously, the Court of Appeals' decision fully supports the granting of summary judgment in this case. However, even if the Supreme Court reverses the Court of Appeals in *Bibby*, that result would not be inconsistent with The Citadel's Renewed Motion for Summary Judgment; in fact, the differences in fact and argument between this case and *Bibby* disclose why summary judgment is appropriate here.

---

only abuse that Doe 2 claims occurred on The Citadel's campus took place in ReVille's car on a trip to watch a basketball game:

> A: One of the games definitely was when he was living -- that was the one I remember. He took me to the game, and we watched the game, and before the game, like, we parked and, like, he grabbed me in an inappropriate manner and kind of played with me a little bit, and then we went in. . . .
>
> When he took them back and they went on and he started like touching me again or whatever, and then it continued on the way home.
>
> Q: Did you ever get out of your car, other than to go with him to a basketball game that time?
>
> A: No, sir.

(*See id.*, at pp.132:10-133:7).

A. The Plaintiff's Arguments in *Bibby*, Even If Accepted By The Supreme Court, Would Support The Citadel's Motion

1. The First Argument in *Bibby* Is That a Duty Existed Because of a Special Relationship Between the Defendant and the Victim, Which Is Utterly Absent in This Case

Although there is normally no duty to control a third person, there are limited exceptions to this rule where the defendant has a special relationship to the victim or to the third-party actor. *See Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002). The first ground that the *Bibby* victim urges in the Supreme Court is that a duty of care exists because of a special relationship between the defendant wife *and the victim*. The argument, at its essence, is that the wife owed a duty to disclose her knowledge of her husband's past abuse because she had an ongoing relationship with the minor victim, even inviting her to play at the wife's home. On the other hand, there is no evidence of any relationship between The Citadel and Doe 2. Doe 2 has not even argued that as a basis for a duty. (*See* Pl.'s Mem. Opp. Def.'s Mot. for Summ. J. (April 16, 2014), at 32 ("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.")).

Reference to the victim's brief in *Bibby* confirms that their first argument seeks to impose a duty exclusively via an actual, specific relationship between the defendant *and the identified, known victim* (attached hereto as Ex. A):

- **Pages 9-10 (emphasis added)**: "Indeed the special relationship test is disjunctive, such that Respondent owes a duty **either** where, 'a special relation exists between the actor and the [molester] which imposes a duty upon the actor to control the [molester's] conduct; **or**, a special relationship exists between the actor and the [victim] which gives the [victim] a right to protection.' Restatement (Second) of Torts, § 315 (1965). (emphasis added). Here, **Respondent's special relationship with Petitioners** is dependent upon

the **relationship between Petitioners and Respondent**, and **Respondent's ability to control her husband becomes immaterial**. Stated differently, the defendant's ability to monitor, supervise, or control the actor is **only relevant when defendant is alleged to have a special relationship with the actor**."

- **Page 10 (emphasis added)**: "Those cases [cited by the Court of Appeals] sought to impose liability on a defendant when the person in that defendant's custody caused harm to another. This case involves the inverse type of special relationship, where **a minor in defendant's custody is harmed by another**. Thus, **the appropriate inquiry is not whether Respondent had the ability to monitor the actor causing harm (Mr. Bibby); but rather, whether Respondent's relationship with Petitioners was such as to give Petitioners a right of protection**."

- **Page 6 (emphasis added)**: "Looking outside South Carolina, other states have considered the question, and held that a duty to warn of potential sexual abuse may arise in the context of a special relationship. For instance, the Wisconsin Court of Appeals stated, '[w]e think it self evident that an adult who voluntarily takes on **supervision, custody or control, even on a temporary basis, of a visiting child** ... stands in a special relationship to such child for purposes of the child's 'protection' under [The Restatement].' *Gritzner v. Michael R.*, 598 N.W.2d 282 (Wis. Ct. App. 1999) *aff'd in part, rev'd in part on other grounds*, 611 N.W.2d 906 (Wis. 2000)."

As a result, a reversal of the Court of Appeals in *Bibby* will have no bearing on The Citadel's motion, since Doe 2 has never argued — and cannot present a scintilla of evidence — that The Citadel ever had a relationship *with him.* Simply put, the recognition of a duty on the wife to a known victim, with whom she had an ongoing relationship, would not support a duty of care here, where The Citadel had no relationship with Doe 2, let alone a "special" one.

2. The Second Argument in *Bibby* Is That a Duty Existed Under Premises Liability Standards Because, Unlike This Case, the Abuse Occurred on the Defendant's Property

The *Bibby* victim's second argument is that a duty is proper under a theory of premises liability, because the abuse occurred *at the defendant's home.* The victim argues that she was a licensee on the wife's property and, as a result, wife was obligated to warn her of any "concealed dangerous conditions or activities" on that property. (*See* Ex. A, at 11 (citation omitted)). Insofar as South Carolina courts have "held that a victim of a sexual assault on another person's

property may bring suit under a premises liability theory," the victim posited that summary judgment was improper as there was evidence that husband was a dangerous condition on the wife's property. (*See id.* (*citing Burns v. South Carolina Comm 'n for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994)).

Doe 2 has never alleged or argued that The Citadel should be liable for premises liability. Doe 2 does not argue that his abuse occurred because of a dangerous condition on The Citadel's property. In fact, aside from a single, isolated instance when ReVille (without The Citadel's knowledge) allegedly abused Doe 2 in ReVille's car on The Citadel's campus, ReVille abused Doe 2 entirely off of The Citadel's property. There is no argument — let alone evidence — that The Citadel specifically knew that ReVille brought Doe 2 to a basketball game (or had any contact whatsoever with Doe 2). Consequently, even if the Supreme Court reverses *Bibby* on the victim's second argument, it would not support Plaintiff's claims. While the *Bibby* Court may delineate a defined duty to a *specific person*, Doe 2 asks this Court to impose a vague, ongoing duty to the general public as a whole, with no specific threat to a particular known person. This would essentially rewrite South Carolina tort law and open a Pandora's box of potential liability with many unintended consequences.

B. The Facts of *Bibby* Are Widely Distinguishable From the Facts of This Case

To assist the Court in comparing the instant case with *Bibby*, The Citadel points out the following major factual distinctions between the cases. These distinctions are not inconsequential; they are substantial and controlling.

Fact in *Bibby*	Fact in This Case
Years before the abuse at issue, the husband actually abused their daughter in their home — the same location where the abuse in question would ultimately occur — and was removed from the home for a time as a result.	There is no similar fact in this case.
The wife was concerned enough that, when her husband moved back into her house, she placed a lock on the door to their daughter's room.	There is no similar fact in this case.

Fact in *Bibby*	Fact in This Case
There was evidence that, a couple of years before the abuse of the petitioner, defendant's son caught the husband viewing child pornography. There was evidence that the husband discarded his computer as a result, and that the defendant was aware he disposed of his computer.	There is no similar fact in this case.
The victim was a neighbor of the defendant, who was known to the defendant and played with her grandchild. Defendant did not notify the victim's parents or grandparents of this abuse.	There is no evidence that anyone at The Citadel knew Doe 2, knew ReVille had a relationship with Doe 2 or knew that ReVille was abusing Doe 2.
The abuse occurred in the defendant's home, where the defendant had *invited* the victim to play at their house anytime.	Aside from an isolated incident (unknown to The Citadel), none of the abuse here occurred on The Citadel's property. In fact, most of the abuse occurred at either the victim's or ReVille's home.
Defendant, thus, *created* the circumstance where the abuse occurred. She specifically brought the abuser and victim together and provided the location where the abuse occurred.	There is no evidence that The Citadel was responsible for bringing ReVille and Doe 2 together.
Defendant knew that she was not always present when children were playing at her house.	There is no evidence that The Citadel was aware Doe 2 had any contact with ReVille.
The defendant knew the specific victim was being exposed to her husband.	There is no evidence that The Citadel was aware Doe 2 had any contact with ReVille.

CONCLUSION

While we believe that this Court and the Court of Appeals' decisions in *Bibby* were soundly reasoned, the plaintiff's arguments in that case are much stronger than Doe 2's argument in this case. Mrs. Bibby was married to, and lived in the same home with, a confessed child molester. She knew the plaintiff victim and invited the victim into their home, thus *directly* exposing the victim to her husband. For these reasons (and those set forth in its prior filings), The Citadel respectfully requests that this Court grant its renewed motion for summary judgment.

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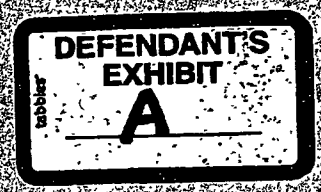
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4th day of June, 2015, a true copy of **Defendant's Supplemental Memorandum in Support of Renewed Motion for Summary Judgment** has been served upon Plaintiff's counsel by U.S. Mail and Electronically, properly addressed with sufficient postage affixed thereto, as follows:

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5273 (S.C. Ct. App. filed October 1, 2014)

Jane Roe, as parent and natural guardian of Judy Roe, James Roe, and Joyce Roe, minor children under the age of eighteen (18),

Petitioners,

v.

Daniel Bibby, Sr. and Michelle Bibby,

Respondent,

Of whom Michelle Bibby is

BRIEF OF PETITIONERS

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TABLE OF CONTENTS

Table of Authorities.....ii

Question Presented 1

Statement of the Case.....1

Statement of Facts.....2

Argument.....4

I. **The Court of Appeals erred in affirming the Trial Court's grant of summary judgment because Respondent owed a duty to warn Petitioners by way of their special relationship and, more fundamentally, because there is evidence on the record to show that Respondent was negligent under basic principles of premises liability law**.....4

A. **Respondent had a duty to warn Petitioners arising out of their special relationship and the circumstances alleged in Petitioners' Complaint**.....5

B. **Respondent had a duty to warn Petitioners as a matter of basic premises liability law**.....10

Conclusion.....14

TABLE OF AUTHORITIES

CASES

Authoritative

Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998).....5, 7, 10

Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct.App. 1994).....11

Doe v. Batson, 338 S.C. 301, S.E.2d 909, 914 (Ct. App. 2000), partially vacated, 345 S.C. 316, 548 S.E.2d 854 (2001).....5, 6

Faile v. S C Dept of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002).....5, 10

Hall v. Fedor, 349 S.C. 169,561 S.E.2d 654 (Ct. App. 2002).....15

Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 637 S.E.2d 560 (2006).....11

Neil v. Byrum, 288 S.C. 472 (1986).....11

Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct. App. 2008).....11

Persuasive

Barmore v. Elmore, 83 Ill.App.3d 1056, 403 N.E 2d 1355(1980).....12

Doe v. Franklin, 930 S.W.2d 921 (Tx.App. 1996).....7

Funkhouser v. Wilson, 89 Wash.App. 644, 950 P.2d 501 (1998).....7

Gritzner v. Michael R., 598 N.W.2d 282 (Wis. Ct.App. 1999) aff'd in part, rev'd in part on other grounds, 611 N.W.2d 906 (Wis. 2000).....6

J.S. and M.S. v. R.T.H., 155 N.J 330, 714 A.2d 924 (1998).....12, 13

Romero v. Superior Court, 89 Cal.App.4th 1068, 107 Cal.Rptr.2d 801 (Ct.App. 2001).....6

Thibeault v. Seifert, 388 So.2d 244 (Fla.Dist Ct.App. 1980).....12

Youngblood v. Schireman, 53 WashApp. 95, 765 P.2d 1312 (1988).....12

OTHER

Am.Jur.2d Premises Liability.....12

Restatement (Second) of Torts (1965).....5, 9

QUESTION PRESENTED

I. **Did the Court of Appeals err in finding that Respondent owed no duty to Petitioners, and therefore err in Affirming the Trial Court's grant of Summary Judgment?**

STATEMENT OF THE CASE

Petitioners, minor children under the age of eighteen (18), were sexually molested at the hands of their neighbor, Daniel Bibby, Sr. The various instances of molestation all occurred in a house owned jointly by Mr. Bibby and his wife, the Respondent, Michelle Bibby ("Respondent"). On October 15, 2010, Petitioners filed suit in the Court of Common Pleas, Berkeley County, alleging as against Daniel Bibby causes of action for Assault, Battery, False Imprisonment, and Intentional Infliction of Emotional Distress, and alleging as against Respondent causes of action for Negligence and Wrongful Infliction of Emotional Distress on a Bystander.

Daniel Bibby failed to file a responsive pleading and, on May 16, 2011, Petitioners obtained a default judgment against him. Respondent Michelle Bibby did Answer and, ultimately, filed a Motion for Summary Judgment, alleging that she owed no duty to these Petitioners.

Respondent's Motion for Summary Judgment was argued before the Honorable R. Markley Dennis, Jr. on July 10, 2012. Subsequently, by Order filed October 12, 2012, the Circuit Court Granted Respondent's Motion for Summary Judgment and dismissed Petitioners' claims with prejudice.

Petitioners served a Notice of Appeal on November 2, 2012 After entertaining oral arguments, a three-member panel of the South Carolina Court of Appeals issued a 2-1 opinion on October 1, 2014, affirming the Trial Court's Order. Petitioners filed a Petition for re-hearing on

October 7, 2014, which was denied October 23, 2014. Petitioners applied for Certiorari on November 21, 2014 which was granted on January 16, 2015.

STATEMENT OF FACTS

Michelle and Daniel Bibby were married September 13, 1969. (App. 78, lines 5-7). The Bibby's had three children, Donald, Daniel Jr., and Michelle Bernadette[1] ("Bernadette"). (App. p. 71, lines 6-23). In or around 1995, when Bernadette was 16, Bernadette disclosed to a family friend that her father, Danial Bibby Sr., had sexually molested her when she was younger. (App. p. 86, line 6-p. 86, line 4). Respondent confronted her husband about these allegations and Mr. Bibby admitted to Respondent that he had touched their daughter inappropriately. (App. p. 93, lines 2-6). The molestation was reported to DSS and Daniel Bibby, Sr. was removed from the house and placed in counseling. (App. p. 87, lines 11-21). Sometime thereafter, Respondent permitted Mr. Bibby to return to the household. (App p 87, lines 23-25-p. 22, lines 1-3).

Upon Mr. Bibby's return to the household, Respondent had a lock installed on Bernadette's bedroom door, and took precautions to hide the key from her husband. (App. p. 129, lines 9-15).

In 2008, Petitioners moved into the neighborhood. Petitioners' house was diagonally located across the street from Respondent's house. (App. p. 200, lines 22-25-p. 201, lines 1-9). Petitioner Jane Roe and Respondent became friendly. Shortly after Petitioners moved in, Respondent came over to introduce herself to Petitioner Roe. (App. p. 199, lines 8-12) Respondent's grandchildren were approximately the same age as the minor Petitioners[2] and the

[1] Michelle Bernadette Bibby's married name is Quattlebaum

[2] Appellant Roe had three minor children The oldest were twins one boy referred to herein as "James" and one girl refereed to herein as "Joyce." Appellants youngest child was a girl, who is referred to herein as "Judy " Pursuant to this Court's Order Regarding Personal Identifiers, Appellants' actual names have been redacted because this matter

[2] Appellant Roe had three minor children. The oldest were twins- one boy referred to herein as "James" and one girl refereed to herein as "Joyce " Appellants youngest child was a girl, who is referred to herein as "Judy." Pursuant to

children became friends. (App. p. 279, lines 20-22). At the time, one of Respondent's adult children was living at Respondent's house along with two of Respondent's grandchildren. (See generally App. pp. 67-179).

The minor Petitioners and Respondent's grandchildren often played with each other and visited each other's houses. (See App. p. 200, lines 5-12, App. p. 133, lines 20-25). Respondent was aware that the Petitioner minors were coming into her house to play with her grandchildren (App. p. 133, lines 17-19) and informed Petitioner Roe that the children were welcome anytime. (App. p. 244, lines 24-25-p. 245 lines 1-2). Respondent admits that she was not always present at her house when the minor Petitioners were over. (App. p. 134, lines 4-7). Respondent also admits that she remembered and was aware of her husband's prior sexual abuse of their daughter. (App. p. 111, lines 3-7). However, Respondent never informed Petitioners of these prior acts of sexual abuse. (App. p. 135, lines 24-25-p. 136, lines 1-16)

In April of 2009, Daniel Bibby, Sr. admitted to a counselor that he had been molesting his granddaughter. (App. p. 104, lines 22-24). Upon learning of this admitted molestation, Petitioner Roe became fearful that Mr. Bibby might have been molesting her minor children as well. (App. p. 206, lines 23-25-p. 207, lines 1-7). Petitioner first discussed the matter with her oldest daughter, "Joyce," who confirmed that Mr. Bibby had touched her chest and threatened to kill her if she told anybody. (App. p. 208, lines 6-9) Petitioner's youngest daughter, "Judy," revealed similar accusations. (App. p 209, lines 11-14). Petitioner immediately called the police. (App. p. 209, lines 14-15). Petitioners were referred to the Dorchester Children's Center and Petitioner Judy was forensically interviewed (App. p. 213, lines 19-24).

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this Court's Order Regarding Personal Identifiers, Appellants' actual names have been redacted because this matter involves allegations of sexual abuse

During her interview, Judy revealed that Mr. Bibby touched her. (App. p. 144, lines 1-19). Judy stated that Mr. Bibby held her in a room with Mr. Bibby's granddaughter and that Mr. Bibby took his clothes off and forced the children to take their clothes off. Id. Judy further stated that Mr. Bibby touched her "boobs" and her "tee tee" with his hands and that Mr. Bibby made Judy touch the granddaughter's boobs and tee tee as well. Id. Judy also disclosed exposure to pornography in the Bibby household. Id.

Petitioner Roe testified that she had no knowledge of Mr. Bibby's prior sexual abuse of his daughter and that she had no reason to suspect that it was unsafe for her children to play at the Bibby household. (App. p. 234, lines 8-25-p. 235, lines 1-3). Petitioner further testified that she never would have allowed her kids to visit the Bibby household had she been warned of Mr. Bibby's sexual propensities. (App. p. 237, lines 13-15).

ARGUMENT

In affirming the Trial Court's grant of summary judgment, the Court of Appeals held that Respondent owed Petitioners no duty, and, therefore, could not be negligent. (App p. 382).

I. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment because Respondent owed a duty to warn Petitioners by way of their special relationship and, more fundamentally, because there is evidence on the record to show that Respondent was negligent under basic principles of premises liability law.

In the present action, the Court of Appeals erred in affirming the Trial Court's determination that Respondent owed Petitioners no duty. The Court of Appeals erred in finding that no special relationship existed between Respondent and Petitioners. Even in the absence of such a relationship, the Court of Appeals should have considered Respondent's liability under basic premises liability law and erred in ruling upon the weight of the evidence. Under either

theory, or both, the order of the trial court should be reversed and the matter remanded for a trial on the merits.

A. Respondent had a duty to warn Petitioners arising out of their special relationship and the circumstances alleged in Petitioners' Complaint.

Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct. Restatement (Second) of Torts, § 315 (1965). However, such a duty may arise where, "a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or, a special relationship exists between the actor and the other which gives the other a right to protection." Id. **(emphasis added)**. Multiple South Carolina cases have addressed and adopted the first prong in various instances. See, e.g., Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998)(holding defendant was aware that mother had made specific threats of harm toward child in the past, and that defendant breached its duty to warn of mother's release); Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002)(holding department had independent duty to control and supervise a known dangerous juvenile in its custody). However, the question of whether there is a duty to warn minor children, and their parents, of potential sexual abuse in order to avoid the potential for child molestation is an issue of first impression.

Although the legal issue is novel, this is not the first time our Courts have considered the question. Particularly, the Court of Appeals considered the special relationship test and noted, "case law from other jurisdictions lends credence [to finding that Defendant] had a duty to warn in this case." Doe v. Batson, 338 S.C. 301, S.E.2d 909, 914 (Ct. App. 2000), partially vacated, 345 S.C. 316, 548 S.E.2d 854 (2001). Judge Williams filed a dissenting opinion in this case, and stated "the supreme court ultimately vacated the portion of Batson I wherein this court found the mother could potentially be liable for her son's sexual abuse of minor boys in her home under a

special relationship exception and a premises liability theory, the supreme court *did not expressly disavow this court's reliance on either of those theories.*"(App. p. 383). Judge Williams further distinguished this case from Batson I because, depositions had been held prior to the summary judgment hearing, and a jury could reasonably find more than a scintilla of evidence to support Respondent's knowledge of the threat of harm by Mr. Bibby. Id. While not strictly precedential, the Court of Appeals' Batson I opinion, as reiterated by Judge Williams' dissent, sheds valuable and well reasoned light on this issue.

Looking outside South Carolina, other states have considered the question, and held that a duty to warn of potential sexual abuse may arise in the context of a special relationship. For instance, the Wisconsin Court of Appeals stated, "[w]e think it self evident that an adult who voluntarily takes on supervision, custody or control, even on a temporary basis, of a visiting child...stands in a special relationship to such child for purposes of the child's 'protection' under [The Restatement]." Gritzner v. Michael R., 598 N.W.2d 282 (Wis. Ct.App. 1999) aff'd in part, rev'd in part on other grounds, 611 N.W.2d 906 (Wis. 2000).

Some states require actual knowledge of the offender's propensities. See, e.g., Romero v. Superior Court, 89 Cal.App.4th 1068, 1083, 107 Cal.Rptr.2d 801, 812 (Ct.App. 2001)("We...hold as a matter of law that an adult defendant who assumed a special relationship with a minor by inviting the minor into his or her home will be deemed to have owed a duty of care to take reasonable measures to protect the minor against an assault by another minor invitee while in the defendant's home when the evidence and surrounding circumstances establish that the defendant had actual knowledge of, and thus must have known, the offending minor's assaultive propensities.").

Other states require only constructive knowledge. See, e.g., Doe v. Franklin, 930 S.W.2d 921, 928 (Tx.App. 1996)("If [defendant] knew or should have known of her husband's proclivities, she should have taken steps to ensure that Doe would not be placed in harm's way or to otherwise ensure that her husband would not be in a position to act on his temptations); Funkhouser v. Wilson, 89 Wash.App. 644, 661, 950 P.2d 501, 509 (1998)("we must determine whether there is sufficient evidence that a rational trier of fact should be allowed to determine whether the risk of harm was reasonably foreseeable at the time [plaintiffs] were molested.").

South Carolina has already adopted the "constructive knowledge" test in other circumstances. See, Bishop, 331 S.C. (holding it is not necessary for the injuring party to have made a threat while under the defendant's control or custody. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person).

In the present case, there is more than a scintilla of evidence on the record from which a reasonable jury could find that Respondent had a special relationship with the Petitioner victims. Respondent readily admits to knowing that the Petitioners were coming over to her house to play. (App. p. 133, lines 17-19). Furthermore, she admits that the Petitioner children were there at her invitation. (App. p. 168, lines 12-13)("I am the one when I was home who let the children in the house"). Based upon Respondent's own admissions, the other evidence on the record, and the reasonable inferences to be drawn therefrom, the Court of Appeals erred in holding, as a matter of law, that no special relationship existed between the Respondent and the minor Petitioners.

Moreover, the Court of Appeals erred in finding "[t]here is no evidence Mr Bibby made a distinct, specific, and overt threat of harm towards the minor Appellants."(App. p. 380). Yet,

there is evidence on the record of a specific threat. Whether this Court applies an actual knowledge or constructive knowledge test is almost immaterial in this instance because the Respondent admits to having actual knowledge of her husband's prior propensities toward pedophilia. (App. p. 110, lines 3-7)(Admitting she was aware that her husband had molested their daughter in the past). Judge Williams' dissent makes clear that discovery achieved prior to summary judgment was "particularly relevant to whether Mr. Bibby posed a specific threat of harm to minor Appellants."(App. p. 384)(discussing Bibby Junior's statement to police concerning Bibby viewing child pornography two years prior to the incidents alleged, as well as discarding the same computer in a dumpster in Myrtle Beach).

The passage of time between the alleged molestations does not, as a matter of law, negate the fact that Respondent had actual knowledge of her husband's proclivities to commit such acts. Whether Respondent truly believed her husband was "rehabilitated" or not is a question of fact for the jury. Indeed, a reasonable jury could conclude, as science would seem to indicate, that a pedophile can never be truly cured. More importantly, there is evidence on the record to suggest that even Respondent, herself, did not actually believe that her husband had been rehabilitated. When her husband returned to the house after the first instance of sexual abuse on their daughter, after the counseling which Respondent allegedly believes to have rehabilitated Mr. Bibby, Respondent nevertheless proceeded to install a lock on her daughter's door and took steps to hide the key from her husband. (App. p. 129, lines 9-15). This action could lead to the reasonable inference that, in fact, Respondent did not believe her husband had been rehabilitated, but rather was concerned that he would re-offend. Simply put, it is for the jury to decide whether to lend credibility to Respondent's rehabilitation theory or not.

Furthermore, the passage of time, alone, does not prove as a matter of law that Mr. Bibby was rehabilitated. Clearly he was not, as he admits to re-offending. Indeed, a long passage of time (coincidentally the time when no minor children were living in the house) might suggest a lack of opportunity, rather than a lack of desire. More importantly, there were other instances of misconduct during that time, of which Respondent had knowledge. In a statement to police, Daniel Bibby, Jr. admitted that, for at least two years leading up to the alleged molestation of Appellants, he had caught his father looking at child pornography on the internet. (App. pp. 288-289). Moreover, Bibby Junior informed Petitioner Roe that he had brought his father's pornography watching to the attention of his mother on several occasions. (App. p. 258, lines 21-25-p. 259, lines 1-3). Respondent admits to having been with Mr. Bibby in Myrtle Beach when he disposed of the computer in a dumpster behind a building. (App. p. 120, lines 16-25-p. 121, lines 1-7). This presents a scintilla of evidence from which a rational juror could surmise Respondent's knowledge of her husband's continuing propensities.

Finally, to the extent the Court of Appeals failed to consider the possibility of a special relationship because "Appellants presented no evidence Respondent had the ability to monitor, supervise, or control the conduct of Mr. Bibby," this analysis is misplaced. (App. p. 380) First, Petitioner's claim is not based on a theory of vicarious liability, that Respondent is vicariously liable for the actions of her husband, but rather is based upon Respondent's own negligence in breaching the duty owed under the special relationship. Indeed the special relationship test is *disjunctive*, such that Respondent owes a duty **either** where, "a special relation exists between the actor and the [molester] which imposes a duty upon the actor to control the [molester's] conduct, **or**, a special relationship exists between the actor and the [victim] which gives the [victim] a right to protection." Restatement (Second) of Torts, § 315 (1965). **(emphasis added)**.

Here, Respondent's special relationship with Petitioners is dependent upon the relationship between Petitioners and Respondent, and Respondent's ability to control her husband becomes immaterial. Stated differently, the defendant's ability to monitor, supervise, or control the actor is only relevant when defendant is alleged to have a special relationship with the actor. Such was the issue in the cases cited by Court of Appeals, e.g., Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 502 S.E.2d 78 (1998) and Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002).

Those cases sought to impose liability on a defendant when the person in that defendant's custody caused harm to another. This case involves the inverse type of special relationship, where a minor in defendant's custody is harmed by another. Thus, the appropriate inquiry is not whether Respondent had the ability to monitor the actor causing harm (Mr. Bibby); but rather, whether Respondent's relationship with Petitioners was such as to give Petitioners a right of protection. Again, Judge Williams' dissent appears more congruent with this developing field of law, where "[i]t is not necessary for the injuring party to have made a threat while under the defendant's control or custody. All that is required to impose a duty to warn is that the defendant knew or should have known of a specific threat made to harm a specific person." (App. p. 383).

For all these reasons, the Court of Appeals erred in finding that Respondent owed Petitioners no duty arising out of their special relationship. The trial court erred in granting Respondent's Motion for Summary Judgment and the ruling should be reversed and remanded for a trial on the merits.

B. Respondent had a duty to warn Petitioners as a matter of basic premises liability law

Even assuming Respondent owed no "special" duty to Petitioners by way of their relationship, Respondent should nonetheless be liable under a premises liability theory. Because

all of the alleged acts of molestation occurred on Respondent's property, Respondent owed, and breached, duties to Petitioners just as any occupier of land would owe to one who came upon the land with consent or permission.

To establish negligence in a premises liability action, a plaintiff must prove (1) a duty of care owed by defendant to the plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. See Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 37, 637 S E.2d 560, 562 (2006), Singleton v. Sherer, 377 S.C. 185, 659 S.E.2d 196 (Ct App. 2008) Therefore, to survive a Motion for Summary Judgment, a plaintiff must establish only a mere scintilla of evidence in support of each element.

The nature of the duty owed is dependent upon the plaintiff's "status" upon the land. Here, it is undisputed that Appellants were licensees. (See App. p. 133, lines 17-19)(admitting that the Appellants were social guests at her house.). A social guest is an example of a licensee. Singleton at 199, 659 S.E.2d 196, 203. One who possesses, manages, or controls a property owes to a licensee the duty "to use reasonable care to discover him and avoid injury to him in carrying on activities upon the land; and to use reasonable care to warn him of any concealed dangerous conditions or activities which are known to the possessor, or of any change in the condition of the premises which maybe dangerous to him, and which he may reasonably be expected to discovery." Neil v. Byrum, 288 S.C. 472, 473 (1986).

Our Courts have already held that a victim of a sexual assault on another person's property may bring suit under a premises liability theory See Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E 2d 589 (Ct.App. 1994). Therefore, the analysis turns on whether Mr. Bibby constituted a dangerous condition known to Respondent, and whether this danger was concealed.

The general state of premises liability law, as it relates to people as "dangerous conditions or activities" can be summarized as follows. "Generally, owners or occupiers of land have no duty to protect visitors to their property from the deliberate criminal conduct of third parties, because the foreseeability of the risk is slight, and because of the social and economic consequences of placing such a duty on a person. However, an exception exists if the owner, by action or omission, unreasonably created or increased the risk of injury from the criminal activity of a third party or *if it is shown that the landowner either knows or has reason to know from past experience that there is a likelihood of conduct dangerous to the safety of the visitor*" 62 Am.Jur.2d Premises Liability § 409 *(emphasis added)*.

Again, in this specific context, the question is somewhat novel to South Carolina. Therefore, we must address the question as a matter of first impression for South Carolina.

Numerous other states seemingly do allow a premises liability action under these circumstances. See, e.g., Thibeault v. Seifert, 388 So.2d 244 (Fla.Dist.Ct.App. 1980); Barmore v. Elmore, 83 Ill.App.3d 1056, 403 N.E.2d 1355(1980); Youngblood v. Schireman, 53 WashApp. 95, 765 P.2d 1312 (1988). Indeed, to the extent this Court chooses to look to other jurisdictions, the facts and law presented by J.S and M.S v. R.T.H., 155 N.J.330, 714 A.2d 924 (1998) seem most instructive to the case at bar. In R.T.H., parents brought an action on behalf of their children against a husband and wife, plaintiff's neighbors, alleging that the husband had assaulted the minor children and that the wife was negligent in failing to warn of or prevent the assault. In a lengthy opinion, the New Jersey Supreme Court reasoned that, where a spouse has actual knowledge or special reason to know of the likelihood of her spouse engaging in sexually abusive behavior, the spouse must warn of the harm. Id. The Court stated, "we conclude that

there is sound, indeed compelling basis for the imposition of a duty on a wife whose husband poses the threat of sexually victimizing young children. Id at 935.

This reasoning is compelling indeed. Common sense, alone, dictates that a pedophile creates an unreasonably dangerous condition in the presence of young children. There seems little difference between a pedophile and, say, a beehive. Each is dangerous. In either scenario, where a landowner knows or has reason to know of its existence, that landowner should, in South Carolina, have a duty to warn licensees on her premises if the danger is concealed. This is particularly true where the pedophile or otherwise dangerous person, as here, is a permanent presence at the residence, rather than a mere guest.

There is no logical reason, nor is there any binding legal authority, to draw a distinction between a dangerous inanimate concealed condition on one's property and a dangerous resident pedophile. South Carolina should not draw such a distinction and should treat both dangers as one in the same, requiring a homeowner with knowledge to warn those unsuspecting guests who are proper licensees on the premises.

There is evidence on the record to support a conclusion that Mr. Bibby did, in fact, molest Petitioners, rendering him dangerous. Moreover, Petitioners' Mother testified that she was unaware of Bibby's dangerous propensities "They gave me no reason not to trust them." (App. p. 229, lines 2-3). "I had no reason not to trust [Respondent]. I saw that she had her grandkids. She looked like a good grandmother to me ..I never saw anything wrong" (App. p. 234, lines 8-13). "[Mr Bibby] looked like a normal – he looked like a grandfather He was clean-cut, he was well-kept. I mean, he was never disrespectful to me He seemed like he was nice to the kids, so I had no reason not to trust him." (App. p 234, 23-25-p. 235, lines 1-3) As to proximate cause, Petitioner testified, "if I would have known what would have happened in

that house, my little girls would have never been over there, never." (App. p. 237, lines 13-15). Respondent admits that she never warned Petitioners of her husband's propensities or past acts of molestation. (App. p. 135, lines 24-25-p. 136, lines 1-16).

Thus, we have, quite simply, a *prima facia* case of premises liability with respect to a licensee because we have a 1) dangerous condition (Mr. Bibby); that is 2) known to Respondent; but 3) concealed to Appellants.

Petitioners do not seek to overhaul premises liability jurisprudence in South Carolina. Instead, we must simply apply the facts of this case to the law as it already exists. Here, all of the elements for a premises liability action are supported by evidence on the record. Once again, Respondent cites to cases from other jurisdictions but cannot stand on any precedential authority that would preclude such a recovery. Accordingly, the trial court's ruling should be reversed and this matter remanded for a proper trial on the merits.

CONCLUSION

Many other states have been forced to address these legal issues As noted above, and as recognized in Judge Williams' dissent, many of these states have ruled in a manner consistent with the arguments set forth, above. Petitioners respectfully request that this Court reverse the Court of Appeals and remand to the Trial Court for a trial on the merits because Respondent owed Petitioners a duty to warn against possible abuse due to their special relationship and under basic principles of premises liability law.

Signature on following page

February 17, 2014

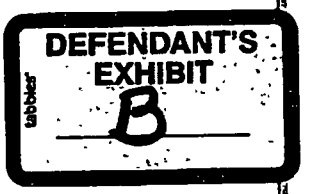
Respectfully submitted,

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points I want to make certain that I understand on.

Going back to those times that you went to The Citadel -- and I think we've talked about each time was some sort of a sporting event; is that correct?



A. Yes, sir.

Q. And sometimes you went with your father?

A. Yes, sir.

Q. And anybody else?

A. My brother would tag along sometimes.

Q. And then there were times you went with Skip ReVille?

A. Yes, sir.

Q. Was there anybody that went with you all when you and ReVille went?

A. No, sir. Just us.

Q. And do you remember what the purpose of your going when you would go with ReVille was?

A. He just wanted to take me to a basketball game and basically show me what those guys did differently than me, like what they did and show me like -- just show me -- like point out things when they did something.

Q. So it was -- you would go to watch The

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Citadel basketball game at McAlister Field House?

A. Yes, sir.

Q. And it was kind of an instructive nature so that ReVille could show you, as a coach, what the basketball team was doing?

A. Yes, sir.

Q. Did that help you understand the game or improve your game any, do you think?

A. I definitely think so, yes, sir.

Q. Did you go anywhere else on campus other than the McAlister Field House with ReVille?

A. He drove me around campus one time, yes, sir. Just like that square area.

Q. The quadrangle?

A. Yes, sir.

Q. Or the parade ground?

A. Yes, sir.

Q. It's got a missile on one corner and a tank?

A. Yeah. He drove me around there and showed me everything.

Q. But you didn't get out of the car and go into any classrooms or any --

A. No, sir. No, sir.

Q. So the only building you ever went in on

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The Citadel campus was the gymnasium?

A. Yes, sir.

Q. And that was either with ReVille or your dad?

A. Yes, sir.

Q. And I would imagine that this was obviously when ReVille was coaching you. Do you remember if this was when he was living with your parents or --

A. One of the games definitely was when he was living -- that was the one I remember. He took me to the game, and we watched the game, and before the game, like, we parked and, like, he grabbed me in an inappropriate manner and kind of played with me a little bit, and then we went in.

And then after the game, two cadets came with us to get Wendy's, and they were "killers" when they were younger as well. And one was the older {Family C} boy I was talking about, and one I don't remember the name. But he was one of the older {Family C} boy's friends. And they were talking about all the stuff they did and like all the stuff that happened. So we took them to Wendy's and we just talked about like the "killer" stuff.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

John Doe 2, ...Appellant,

v.

The Citadel.....Respondent.

CERTIFICATE OF COUNSEL

Appellant's counsel certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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