

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 V OF V

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Court of Common Pleas

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BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Whether The Citadel owed a duty to Doe 2 based on:
 - A. The Citadel voluntarily undertaking the duty to investigate and charge acts of sexual abuse by ReVille at the summer camp and after its receipt of the April 23, 2007 complaint of his sexual abuse;
 - B. The Citadel's negligent actions that created the risk of Doe 2's sexual abuse by ReVille; and
 - C. The Citadel's duty under Title IX to not conceal ReVille's sexual abuse after it received the April 2007 complaint of sexual abuse by ReVille.
- II. Whether the Tort Claims Act bars Doe 2's claim of Outrage against The Citadel, and, if not, whether genuine issues of material fact exist as to whether The Citadel directed its conduct at Doe 2 so as to preclude summary judgment for The Citadel.

STATEMENT OF THE CASE

This is a case brought by a young man, Doe 2, who as a child was sexually abused by Louis “Skip” ReVille. On March 19, 2012, Doe 2 commenced a civil action against The Citadel, alleging claims of negligence/gross negligence and outrage for The Citadel’s actions that caused him to suffer the child sexual abuse. (*Complaint*, R., pp. 84-105). On June 20, 2012, The Citadel Answered. (*Answer*, R. pp. 106-118). On March 6, 2014, The Citadel filed a *Notice of Motion and Motion for Summary Judgment* and on April 17, 2014, filed its *Memorandum in Support of Motion for Summary Judgment*. (R. pp. 171-477). The Citadel argued that it did not owe a duty to Doe 2 at any time; that even if a duty existed, Doe 2’s claims were barred by the two-year statute of limitations of the South Carolina Tort Claims Act [TCA], S.C.Code Ann. 15-78-110 (1976), or the statute of limitations of S.C.Code Ann. 15-3-40 (1976); and that Doe 2’s outrage claim was barred by the TCA, barred by the availability of other remedies, and that the evidence did not support outrage. (*Memo In Support of Motion for Summary Judgment*, R. pp.176-477).

On April 18, 2014, Doe 2 filed three briefs: his *Memorandum in Opposition to Motion for Summary Judgment*, a *Reply in Opposition to Motion for Summary Judgment*, and a *Supplemental Response in Opposition to Motion for Summary Judgment*. (R. pp. 478-1534). Doe 2 argued that The Citadel owed him a duty based on its own affirmative actions taken without due care and based on the five common law circumstances where the duty to control the conduct of another or to warn of the danger exists, *see Faile v. South Carolina Dep’t of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002); that The Citadel’s conduct constituted the claim of outrage and is not barred by the TCA or availability of other remedy; and that Doe 2’s claims are governed by the sexual abuse statute of limitations that extends the limitation period for actions arising out of child sexual

abuse to six years from the victim's twenty-first birthday, pursuant to S.C.Code Ann. 15-3-555 (1976).

On April 18, 2014, the Honorable R. Markley Dennis, Jr. heard oral argument on The Citadel's Motion for Summary Judgment. (*Transcript of Hearing, April 18, 2014*, R. pp. 119-143). On December 9, 2014, Judge Dennis issued a written order, denying summary judgment for The Citadel because The Citadel owed a duty to Doe 2, that neither the TCA or pleading another tort bars the claim of outrage and a genuine issue of material fact exists as to the claim, and that Doe 2's claims are governed by the statute of limitations in S.C. Code § 15-3-555. (*Order Denying Summary Judgment*, R. pp. 3-69).

On April 24, 2015, The Citadel filed a *Renewed Motion for Summary Judgment*. (R. pp. 1575-1824). On June 4, 2015, Doe 2 filed his *Memorandum in Opposition to the Renewed Motion for Summary Judgment*. (R. pp. 1825-1876). Also on June 4, 2015, The Citadel filed a *Supplemental Brief in Support of Motion for Summary Judgment*. (R. pp.1877-1904). On June 5, 2015, Judge Dennis heard oral argument on the renewed motion. (*Transcript of Hearing, June 5, 2015*, R. pp. 144-170). After the hearing, Judge Dennis issued a Form Order granting The Citadel summary judgment and indicating that a formal order would follow. (*Form Order, June 5, 2015*, R. p. 70). Thereafter, on July 6, 2015, Judge Dennis filed his formal order granting The Citadel's renewed motion for summary judgment, finding The Citadel did not owe Doe 2 a duty and that Doe 2's claim of outrage failed as a matter of law. (*Order Granting Renewed Motion for Summary Judgment*, R. pp. 71-83).

Doe 2 hereby appeals the lower court's grant of summary judgment to The Citadel on his claims of negligence/gross negligence and outrage. On July 7, 2015, Doe 2 served his Notice of Appeal.

STANDARD OF REVIEW

In reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRPC. *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). "Summary judgment should not be granted except where it is perfectly clear that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify application of the law." *Grooms v. Marlboro County School Dist.*, 307 S.C. 310, 311, 414 S.E.2d 802, 803 (Ct.App.1992). Furthermore, to determine "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 the nonmoving party"—Doe 2 in this case. *Pye*, 369 S.C. at 563, 633 S.E.2d at 509.

STATEMENT OF FACTS

Louis "Skip" ReVille was a cadet at The Citadel from 1998-2002. In 1998, ReVille self-reported to The Citadel Counseling Center for treatment and received on-going mental health services through 2001, during which he revealed that at age 15 he was court ordered to counseling for his sexual misconduct with adolescent boys.¹ (R. pp. 1850, 1857-1858). On January 18, 2001, Citadel counselor Dr. Bradham and a MUSC psychiatrist discussed monitoring ReVille for bi-polar disease, and by February 2001, The Citadel knew that

¹ On December 2000, ReVille signed an authorization for the release of his mental health records to third parties because he sought to receive academic accommodations due to his mental health issues. (R. pp. 1854-1856).

ReVille was non-compliant with his prescription psychiatric medications. (R. pp. 1852-1854).

The Citadel operated a summer camp on its campus each summer from approximately 1957-2006. The Citadel's Office of The Commandant of Cadets operated the Camp and selected current and former Citadel cadets to serve as staff and senior camp counselors. The camp counselors were housed in barracks (dorm rooms) alongside the campers on various parts of The Citadel campus in order to supervise the children and ensure their safety. From at least 2001, the following policies, among others, were in effect at The Citadel: *The Counselor Code of Conduct*, prohibiting sexual activity at camp and requiring immediate dismissal if violated; *The Official Camp Policies Regarding Sexual Misconduct Issues*, prohibiting all sexual relations between counselors and campers, mandating immediate dismissal of counselors in violation and prosecution to the fullest extent of the law, prohibiting counselors from being behind closed doors with campers, and requiring any sexually inappropriate conduct reports to be thoroughly investigated by The Citadel's own Department of Public Safety regardless of when sexual misconduct occurred or whether or not the counselor is still affiliated with the camp; and *Barracks Guard Duties, Memo of Instruction*, requiring guards to conduct walk-through checks of barracks at night during camp sessions. (R. pp. 983, 1342, 1351).

The Citadel employed former Citadel cadet and Captain in the United States Marine Corps Michael Arpaio as the Senior Camp Counselor during the summers of 1995-2001. In the summer of 2001, The Citadel learned that Arpaio sexually abused several campers in his barracks room. Several victims of Arpaio's sexual abuse filed suit against The Citadel to redress the injuries they suffered as campers entrusted to the care of the Camp. In the

summer of 2001, The Citadel also employed ReVille as a camp counselor and continued to do so for the following summer camp sessions through 2003. Specifically, in the first summer of ReVille's employment as a counselor, he sexually abused up to eight male campers at the Camp. (R. pp. 1308-1311). In late summer 2001, after praying for over three hours at The Citadel's chapel, ReVille attempted to self-report his acts of sexual abuse of campers to The Citadel's Department of Public Safety. (R. pp. 1859-1860). At the end of the camp in August 2001, ReVille's camp employee evaluation noted him as "senior counselor material if learns to distance himself from campers..." (R. p. 1319).

Also in the summer of 2001, on August 6th, in the wake of discovering Arpaio's sexual abuse at the Camp, Sergeant Middleton of the Charleston Police Department, by letter, advised The Citadel of concerning and inappropriate practices taking place at the Camp by counselors, to include counselors allowing campers to spend the night in counselors' rooms and in the same bed as counselors, sexual conversation in front of campers, and counselors taking campers off campus for non-camp activities without parental consent. (R. p. 1304). Sgt. Middleton offered his assistance to The Citadel in addressing the practices. (*Id.*). However, The Citadel never sought any assistance and instead took no action to cease the inappropriate counselor practices. The Citadel did not interview counselors or campers or implement any safety practices in regards to counselors having campers in their rooms at night.

The following summer, in 2002, Camp Deputy Director Jennifer Garrott caught ReVille alone with a minor camper in his barracks room. Deputy Garrott and Director Bill Bates discussed with ReVille that his actions violated the rule against being behind closed doors with campers, but despite the rule also requiring immediate termination for a

violation, Garrott and Bates decided not to terminate ReVille or even to document his offense. (R. pp. 1308-1312). ReVille went on to sexually abuse multiple campers numerous times in his barracks room at night during the 2002 summer sessions. (R. p. 1352, lines 4-12; p. 1353, line 18 through 1354, line 19).

The next summer, in 2003, Garrott, now camp Director, caught Reville engaged in inappropriate physical contact with another camper [hereinafter referred to as Camper Doe 6] alone behind closed doors in ReVille's barracks room. Again Director Garrott decided not to terminate ReVille, despite the rule mandating his termination as a counselor. (R. pp. 983, 1308-1312). Director Garrott admits that she caught ReVille in direct violation of the rule and that she should have fired him. (R. pp. 968-969). Also, during the 2003 camp sessions, Director Garrott's assistant, Anna Brock, spoke to ReVille multiple times about his being alone with campers in his room, and counselor O.C. Evans made a report to Ms. Garrott's supervisor, Colonel Lackey, that ReVille had campers in his room at night, to include one of Evans's campers. In response, Colonel Lackey only told ReVille not to be alone with campers and informed Director Garrott of the complaint. Colonel Lackey and Garrott did not terminate ReVille or take any further action. (R. pp. 1308-1312).

Additionally, in the summer of 2003, The Citadel employed Camper Doe 6 as a junior counselor, and ReVille sexually abused Camper Doe 6 at the Camp in the barracks. (R. pp. 1861-1866). In the summer of 2004, The Citadel employed Camper Doe 6 as a counselor, and he visited ReVille's home and learned that ReVille was sexually abusing boys and applied to be a foster parent of a male child. (R. pp. 1862-1866, 1241-1243). In summer 2005, The Citadel again employed Camper Doe 6 as a counselor, during which time he received training on child sexual abuse and after the training asked to speak with

Director Garrott. Garrott agreed but once Camper Doe 6 told her he wanted to speak to her about ReVille in an attempt to disclose ReVille's pedophilia, she abruptly stopped the conversation and sent him to his barracks room. A short while later, Director Garrott ordered Camper Doe 6's immediate termination from employment at the Camp, under the guise that he had called a camper an inappropriate name.

In the summer of 2005, Doe 2 met ReVille through AAU basketball. ReVille began a grooming process of Doe 2 to gain his trust by befriending him and giving him special attention, which eventually led to ReVille exposing Doe 2 to pornography, masturbation, and various acts of physical sexual abuse that continued up until late August 2007, when Doe 2 moved to Georgia. (R. pp. 1374, lines 2-5; 1433-1437; 1530-1531).

On or about August 16, 2006, The Citadel hired ReVille to serve as a tutor in its writing center. On April 23, 2007, a former camper's father called the President of The Citadel, General John W. Rosa, in his office at the Citadel, because the father had just learned that his son had been sexually abused by an adult male counselor at The Citadel Camp. The Citadel's General Counsel, Mark Brandenburg, returned the phone call and spoke with the father who reported that his son had been sexually abused by camp counselor Skip while his son was a camper in the summer of 2002—that Skip showed pornography and masturbated with his son, showered with the campers, and had done this to another identified camper. (R. p. 672-675, 687). On that same day, Mr. Brandenburg had a telephone conversation with the former camper [hereinafter Camper Doe], where he told Mr. Brandenburg that the counselor who abused him was Skip; that Skip had campers watch pornography and masturbate and Skip joined in; that Skip did this with other

campers for more than one year; and other counselors were never involved. (R. p. 688-690).

Doe 2 asserts that the facts establish that The Citadel, thereafter, acted to conceal the complaint while The Citadel argues that it investigated the complaint. Regardless, it is undisputed that The Citadel took actions in regards to Camper Doe's complaint against ReVille once it received the disclosure.

On April 24, 2007, the day after Camper Doe's complaint came to The Citadel, Mr. Brandenburg apparently knew ReVille was working in the Citadel's writing center because he left a message for ReVille there to contact him. Later that day, ReVille met with Mr. Brandenburg and Colonel Trez, Executive Assistant to President Rosa, in The Citadel's Bond Hall where they disclosed details of Camper Doe's complaint to ReVille. Mr. Brandenburg and Colonel Trez conveyed The Citadel's requirement of a quid pro quo from ReVille for him to leave Citadel employment and "lay low" in exchange for The Citadel's silence as to his pedophilia. (R. pp. 692-697). ReVille left his employment with The Citadel.

That same day, Mr. Brandenburg also met with Ms. Garrott, where she relayed that in 2003, she had caught ReVille in his barracks room alone with a camper engaged in inappropriate physical contact. She also disclosed to Mr. Brandenburg that ReVille had been let go by his former employer prior to his current employment with The Citadel, suggesting that it was for sexual misconduct with children. (R. pp. 958-959, 963-967). By at least May 1, 2007, The Citadel knew that the other camper who was coerced to masturbate by and with ReVille currently was a cadet at the Citadel, and by May 6, 2007, Mr. Brandenburg had informed President Rosa of the sexual abuse complaint against

ReVille. (R. p. 918). By May 16, 2007, The Citadel— specifically at least Mr. Brandenburg and President Rosa— knew that multiple campers were coerced by ReVille into his room to watch pornographic movies and masturbate with him. (R. pp. 921-923). During the month of May 2007, Mr. Brandenburg memorialized The Citadel’s intent to cover up ReVille’s child sexual abuse, as well as the school’s knowledge of it: “I am hopeful that by conducting an investigation on behalf of the school, no “formal” investigation—criminal or civil—will occur.” (R. p. 555).

In May 2007, ReVille’s sexual abuse of Doe 2 escalated, as ReVille was now unemployed and had increased time and access to Doe 2. ReVille sexually abused Doe 2 by way of sexual Truth or Dare games, oral sex, physical touching, and masturbation. (R. pp. 1527-1529, 1846-1849).

Jennifer Shiel, Administrative Assistant in the President’s Support Office in 2007, testified that based on her personal experience, President Rosa directed the concealment of the April 2007 complaint from the get-go. (R. pp. 930-933). Mr. Brandenburg and President Rosa concealed details of the April 2007 complaint against ReVille from The Citadel’s Board of Visitors. In June and September 2007, Mr. Brandenburg made presentations to the Board of Visitors on the complaint, where Mr. Brandenburg concealed the details to such an extent that the Board members did not understand that he was briefing them on a child sexual abuse claim. President Rosa attended with Mr. Brandenburg and made no corrections or additions to the presentations in order to change the Board’s misperceptions, despite his knowledge that the complaint was of a pedophile on their campus. (R. pp. 556-607, 1183-1192). The Citadel’s Margolis Healy Report² concluded

² In 2012, The Citadel hired Margolis Healy to conduct an investigation into the school’s

that the Board of Visitors “assumed, based on what they were told, that it was an insurance defense and civil claim matter, and believed from what they were told that this was the case of a father displeased with his son’s unsuccessful application for admission to the College.” (R. pp. 556-607). The Board of Visitor’s uniform recollection that the complaint was not a sex based complaint contrasts with Mr. Brandenburg’s testimony that he “gave them [Board] all that information.” (R. pp. 1193-1194).

The Citadel also ensured that the General Counsel files did not indicate in any way a child sexual abuse claim against ReVille. In October 2007, the General Counsel file list did not contain Camper Doe’s sexual abuse claim against ReVille anywhere, despite listing other “possible litigation” files. (R. pp. 703-716). However, in 2010, Camper Doe’s name appears on the File List annotated with code 113, signifying that it is litigation involving the Citadel, and specifically described as “alleged sexual abuse at summer camp.” (R. pp. 717-720). Yet, instead of annotating that the complaint was against ReVille, the entry’s keyword is “Arpaio”. (R. p. 718). The lack of including Camper Doe’s complaint in October 2007 but then including it three years later disguised as an Arpaio complaint is evidence of The Citadel’s concealment of its knowledge of child sexual abuse by ReVille.

On July 1, 2007, Mr. Brandenburg flew to Dallas, Texas and met with Camper Doe and his parents in person. A portion of the meeting was recorded and transcribed. (R. pp. 1015-1174). Camper Doe repeated his complaint of sexual abuse by ReVille at the Camp and relayed that ReVille did the same to “about 5 other” boys multiple times and acknowledged to Mr. Brandenburg that ReVille may have touched other boys at the camp. Camper Doe emphasized to Mr. Brandenburg that the reason he reported the abuse to

handling of the April 2007 complaint of ReVille’s pedophilia. (R. pp. 556-607).

President Rosa was to make sure that ReVille did not have the opportunity to sexually abuse any more boys. (R. pp. 995-997). Contrary to The Citadel's expressed goal of preventing any formal civil or criminal investigation into the ReVille allegations³, Mr. Brandenburg led Camper Doe to believe that his transcribed interview meant that The Citadel would ensure that ReVille would not abuse any more children. (R. pp. 995-997). After the July 1, 2007 meeting, The Citadel continued to take actions to conceal ReVille's pedophilia and the school's knowledge of it.

For instance, in May 2007, ReVille applied for unemployment benefits after The Citadel required a quid pro quo for him to leave Citadel employment in exchange for The Citadel's silence as to his pedophilia. The S.C. Employment Security Commission found ReVille eligible for unemployment benefits, and initially, The Citadel appealed his eligibility. (R. p. 980). A hearing was noticed to determine whether ReVille "voluntarily quite (for good cause)" or was discharged "for disqualifying cause" and, thereby, ineligible for benefits. However, four days after Mr. Brandenburg met in person with Camper Doe, The Citadel withdrew its appeal and accepted ReVille's eligibility for unemployment benefits. ReVille believes the Citadel withdrew the appeal in order to avoid a confrontation over the circumstances of his departure from Citadel employment.

Governing Citadel Policies and Procedures

In 2007, the following policies and procedures were in effect and governed The Citadel's actions taken in response to the April 2007 complaint of sex abuse by ReVille. The *Employee Misconduct Policy* required that The Citadel not terminate any investigation in exchange for resignation by the employee; provide factual and candid responses to

³ (R. p. 555).

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

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

Sexual Harassment, Memo. No. 51 established procedures for reporting and investigating sexual harassment complaints, specifying that: “[w]hen ever there is an incident of sexual assault or sexual abuse, the incident **will be reported to the police.**” (R. p. 1228) (emphasis added). *The Citadel's Sexual Assault Crisis Intervention Policy, Memo. No. 4*, also mandated that, “THE CITADEL WILL PUNISH ANY INDIVIDUAL(S) WHO IS FOUND TO HAVE COMMITTED SEXUAL ASSAULT,” and “THIS POLICY APPLIES TO ALL MEMBERS OF THE CITADEL COMMUNITY.” (R. pp. 1215-1218). In addition, *The Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues* requires that “[r]egardless of validity of the violation, any sexually inappropriate conduct reports concerning any camper or employee of the camp **will be turned over to The Citadel Public Safety Department** and a thorough investigation will

be conducted,” and **no time limit exists** for conducting such investigations **of current or former individuals associated with the camp.** (R. p. 983) (emphasis added).

In the “Message from the President,” President Rosa himself publically called on The Citadel community to report immediately “any criminal offense, suspected criminal activity, or other emergency **directly to Citadel Public Safety,**” stressing that Public Safety “has complete police authority to apprehend and arrest anyone involved in illegal acts on campus, and also in areas immediately adjacent to the campus.” (R. p. 985) (emphasis added). The Citadel’s head of Public Safety, Colonel Fletcher in 2007, was a State Constable, and his police powers went beyond the gates of the Citadel and applied to any type of foreseeable crime, just as any other law enforcement officer’s jurisdiction would cover. (R. p. 1872). Yet, no one at The Citadel reported the April 2007 complaint to Public Safety or to any law enforcement entity, and The Citadel did not arrest ReVille or punish him in any way.

ARGUMENT

The Citadel owed a duty to Doe 2 to use reasonable care when it voluntarily undertook the duty to investigate, charge, and arrest ReVille for pedophilia, dating back to 2003 when The Citadel caught ReVille engaged in inappropriate conduct with a minor in his room alone, in 2004 when The Citadel had constructive knowledge of ReVille’s sexual abuse of boys, in 2005 when The Citadel fired Camper Doe 6 for attempting to disclose ReVille as a pedophile, and again in 2007 when The Citadel acted to investigate ReVille’s pedophilia and instead further concealed it. Additionally, The Citadel negligently created the risk of Doe 2’s sexual abuse by its actions to conceal ReVille’s pedophilia and the school’s knowledge of ReVille’s dangerous proclivities, as well as The Citadel had a duty

not to conceal ReVille's pedophilia pursuant to 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. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546. Therefore, the trial court erred in granting summary judgment to The Citadel based on finding that The Citadel did not owe any duty to Doe 2. (*Order Granting Defendant's Renewed Motion for Summary Judgment*, July 6, 2015, R. pp. 71-83).

At the hearing on The Citadel's Renewed Motion for Summary Judgment, Judge Dennis specifically found that The Citadel owed a duty of due care to Doe 2 once it learned of the sexual abuse complaint against ReVille on April 23, 2007 and, thereafter, voluntarily took upon itself to investigate the complaint.⁴ Judge Dennis also found that without doubt Plaintiff suffered damages after The Citadel's duty to Plaintiff arose, as he was sexually abused by ReVille through late August 2007. There are no questions, ifs, ands or buts that had The Citadel acted in accordance with their policies and procedures and arrested ReVille

⁴ "I believe without the action taken by The Citadel once they received some notice that something had happened, then they--....I think The Citadel has to do something to get you over the hurdle that is created by this long line of cases." (*Transcript of Hearing, June 5, 2015*, R. p. 145, line 17-19, 25 through p 146, line 2). "The question is, what happens when the pedophile acts consistent with that disorder. That's what I think triggers this. That is what I think is the egregious act that gets you over the hurdles of the present law. That is founded/encapsulated in what happened when the camper, or the father, came and said 'this is what happened.' Because you've got all the policies of what they were supposed to do, to report them. That's criminal conduct." (*Id.*, R. p. 152, line 25 through p. 153, line 10). "That's the problem that I have, that it is only from that date forward. I don't have to roll the clock back and say, 'yeah, what about all these other things that you knew and should have known?'" (*Id.*, R. p. 153, lines 14-19). "The problem is that under the present law the exceptions are, and we went through them, and the only one that I can get you there is voluntarily putting themselves in the fray. They did that by investigating something and then didn't take any steps. That's the problem." (*Id.*, R. p. 157, lines 19-25). "You have a duty by virtue of what you said that you would do once you knew, and you didn't. By virtue of your not doing that, not following your own policy, that person was injured. Totally." (*Id.*, R. p. 163, lines 3-7).

that Plaintiff would not have been abused from late April 2007 onward. However, Judge Dennis explained that since he found a duty arose only after April 23, 2007, the issue of how to present Doe 2's damages existed—the jury could either consider only the sexual abuse suffered after April 23, 2007 or hear evidence of the earlier abuse and determine whether the subsequent abuse aggravated previous harm done by abuse occurring before April 23, 2007.⁵

Judge Dennis considered limiting damages or granting summary judgment for the determination on appeal of the scope of The Citadel's duty prior to April 2007: "my thought was, 'well, deny it and that cuts his damages in half' and maybe the best way to frame this issue---is to send this up. Even though there is damage after the notice." (*Transcript of Hearing, June 5, 2015*, R. p. 148, lines 14-19. In contrast to the rulings at the hearing, Judge Dennis's written order granting The Citadel's renewed motion for summary judgment finds that The Citadel did not owe Doe 2 a duty of care at any time, even after voluntarily undertaking a duty to investigate the April 2007 complaint and arrest ReVille accordingly. (*Order Granting Defendant's Renewed Motion for Summary Judgment*, July 6, 2015, R. pp. 73-80).

Whether ReVille sexually abused Doe 2 before or after certain acts of negligence by The Citadel is a question of fact for the jury, as he suffered sexual abuse by ReVille prior to and after April 23, 2007. Furthermore, the lower court erred in granting summary

⁵ "[A]t least from my standpoint the only point that I can allow a jury to consider would be the damage(s) that accrued after." (*Transcript of Hearing, June 5, 2015*, R. p. 147, lines 11-14). "Maybe you could give the charge of – the only thing that I could think of is the charge you give for preexisting conditions where you say that you are only entitled to the damage that occurred after—that you aggravated. The problem is, I agree with you, I don't know how you separate them. It's so intertwined and therefore it flows from the get-go." (*Id.*, R. p. 159, lines 22-25 through 160, line 5).

judgment for The Citadel on Doe 2's claim of outrage, as it is not barred by the TCA and the evidence at summary judgment supports more than a scintilla of evidence that The Citadel's conduct was outrageous and directed towards Doe 2. Accordingly, summary judgment for The Citadel should be reversed on all counts.

I. The Citadel Owed Doe 2 A Duty Of Due Care.

The duty The Citadel owed to Doe 2 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, as it was on notice of the danger ReVille posed from as early as 1998, when The Citadel treated ReVille for mental health issues and learned that ReVille previously had engaged in sexual misconduct with adolescent boys. Thereafter, in 2001, The Citadel learned of Arpaio's sex abuse at the camp and received notice from the Charleston Police Department of inappropriate sexual conduct by other counselors; caught ReVille with a camper behind closed doors in 2002 and again in 2003, where ReVille was engaged in inappropriate conduct with the minor; had constructive knowledge of ReVille's pedophilia in 2004; terminated Camper Doe 6 when he attempted to disclose ReVille's pedophilia to the camp director in 2005; and then acted to conceal ReVille's pedophilia, along with its knowledge of ReVille's pedophilia, in and after April 23, 2007.

The trial court at the hearing found that The Citadel owed Doe 2 a duty after it received the April 2007 sex abuse complaint against ReVille based on its voluntarily undertaking the duty to investigate the complaint. (*Transcript of Hearing, June 5, 2015*, R. pp. 144-170). However, the *Order Granting the Renewed Motion for Summary Judgment* does not reflect the court's holding. (R. pp. 71-83). Furthermore, the lower

court erred in holding that no duty existed prior to April 2007, as The Citadel voluntarily undertook the duty to investigate and charge acts of sexual abuse at the summer camp by its counselors, to included ReVille, and had notice of ReVille's dangerous proclivities as early as 1998. Moreover, The Citadel's duty to Doe 2 arises not only out of the school's voluntarily undertaking of the duty to investigate and arrest ReVille but also out of its negligent actions that created the risk of Doe 2's abuse, as well as based on Title IX's imposition of a duty on The Citadel not to conceal ReVille's sex abuse.

To establish a claim of negligence, a plaintiff must show: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; (3) damage actually and proximately resulting from that breach; and (4) injury or damages suffered by Plaintiff. *See, e.g., Madison ex rel Bryant v. Babcock Center, Inc.; S.C. Dep't of Disabilities and Special Needs; and Batchelor*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006). "Due care" is defined as "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973)). It is well established that South Carolina recognizes the following five circumstances where the duty to control the conduct of another or to warn a potential victim of danger exists: (1) where the defendant has a special relationship with the victim; (2) where the defendant has a special relationship with the injurer; (3) where the defendant voluntarily undertakes a duty; (4) where the defendant negligently or intentionally creates the risk; or (5) where a statute imposes a duty on the defendant. *Faile*, 350 S.C. at 334, 566 S.E.2d at 546.

In opposition to the renewed motion for summary judgment, Doe 2 does not contend that The Citadel owed him a duty under the “special relationship” exceptions. (*Memo in Opposition to Renewed Motion for Summary Judgment*, R. pp. 1834-1835; *Transcript of Hearing, June 5, 2015*, R. pp. 150-152). A special relationship does not create a duty 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), *cert. granted*, (January 16, 2015). However, when a defendant’s duty arises 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 Doe 2 does not rest on the “special relationship” exceptions. Instead, The Citadel is liable for its own failure to act with due care in voluntarily undertaking the duties to investigate, arrest, and punish ReVille; for taking

actions that negligently created the risk that ReVille would sexually abuse Doe 2; and for action to conceal ReVille's pedophilia in violation of Title IX.

A. The Citadel owed a duty to Doe 2 to act with due care when it voluntarily undertook the duty to investigate and charge acts of sexual abuse by ReVille at the summer camp and after its receipt of the April 23, 2007 complaint of sexual abuse.

The Citadel's own conduct of voluntarily undertaking the duty to investigate claims of sexual abuse on its campus and/or by its employees, turn offenders over to its own Public Safety Department or other law enforcement entity, and arrest offenders establish its duty to Doe 2. First, The Citadel's duty to Doe 2 arises out of its voluntarily undertaking the duty. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546. "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." *Madison ex rel Bryant*, 371 S.C. at 134, 638 S.E.2d at 655 (quoting Restatement (Second) of Torts § 323 (1965)).

Whether such a duty arises in a given case may depend on the existence of particular facts. *Miller v. City of Camden*, 329 S.C. 310, 313, 494 S.E.2d 813, 815-16 (1997) (internal citations omitted). Also, 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 establishes triable issue as to whether City voluntarily undertook duty to maintain sidewalk).

Here, the *Order Granting The Citadel's Renewed Motion for Summary Judgment, July 6, 2015*, conflicts with *Fickling*, in holding that The Citadel did not voluntarily undertake a duty to investigate the 2007 complaint or to address, punish, and report sexual misconduct by ReVille at the camp. The lower court relies on *Underwood v. Coponen*, 367 S.C. 214, 217-18, 625 S.E.2d 236, 238 (Ct.App.2006) to hold that The Citadel did not assume a duty of care to Doe 2. (*Order Granting The Citadel's Renewed Motion for Summary Judgment, July 6, 2015*, R. p. 76). However, *Underwood* is not on point with this case. In *Underwood*, the plaintiff sued a land owner for negligence in allowing his tree to grow over a stop sign, which obscured her view of a parked car that she then hit. 367 S.C. at 215, 625 S.E.2d at 237. This Court granted summary judgment for the defendant, because South Carolina law imposes a duty on a landowner to protect others from "defective or unsound trees on his premises," and the evidence established that the tree at issue was not unsafe or defective. *Id.* at 217-18, 238. Thus, the determinative factor in finding that the defendant did not voluntarily undertake a duty to the plaintiff was the health of the tree, not that a duty could not exist as to that plaintiff. If the evidence had shown that the tree was unsafe or defective, the defendant would have owed a duty to protect roadway users from the unsafe tree. *See id.* Thus, *Underwood* is specific as to liability for

tree maintenance and is not controlling here in analyzing whether The Citadel owed a duty to Doe 2.

Guiding and controlling is the *Fickling* opinion, where a pedestrian filed a negligence action against the City, alleging the City failed to maintain the sidewalk that proximately caused her injuries when she stepped into a hole in the sidewalk and fell. 372 S.C. at 601, 643 S.E.2d at 113. This Honorable Court held that there was a genuine issue as to whether the City exercised some measure of control over the sidewalk, given that the City had repaired sidewalks within the municipality, and control over the premises is the determinative factor over whether a common law duty exists. *Id.* at 607, 116. Furthermore, evidence was presented that “the City fielded complaints from residents about hazards to the sidewalks, had maintained a log of calls from residents, including repair calls, and had a policy in place, as well as employees, to handle repairs to sidewalks.” This Court held that whether the City had voluntarily undertaken a duty of maintaining sidewalks, to include the sidewalk at issue, was a genuine issue of material fact for the jury. If the City had voluntarily undertaken the duty, the City’s duty was to users of the sidewalk, to include the plaintiff. Therefore, the Court held the plaintiff stated a claim of negligence against the City, and genuine issues of material fact as to the City’s duty existed to present to the jury. *Id.* at 608, 611; 116, 118.

“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. at 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)).

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 637-38. Evidence in this case of The Citadel's deviation from its own policies and procedures can demonstrate its lack of due care under the relevant circumstances. *See Peterson v. National Railroad Passenger Corporation*, 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).

Here, ReVille was a Citadel camp counselor in 2001 through 2003 and a Citadel employee in 2006-2007. The evidence presented at summary judgment establishes that The Citadel had notice of ReVille's pedophilia as far back as 1998, when ReVille received services at the school's counseling center. By 2001, The Citadel was on notice of sexual abuse of campers at the camp when it learned of Arpaio's abuse. Also in 2001, The Citadel received independent notice from Sergeant Middleton of the Charleston Police Department

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that counselors were engaging in inappropriate conduct with campers, including allowing campers to sleep in their rooms and beds and engaging in sexual conversation in front of campers. Thereafter, Garrott caught ReVille alone in his barracks room with a camper at least twice, in 2002 and 2003, with the 2003 incident involving inappropriate physical contact with the boy. Garrott received complaints against ReVille of the same from a number of individuals in 2003. In place at the time was *The Official Camp Policies Regarding Sexual Misconduct* that required a counselor's immediate termination for sexual misconduct and required investigation by The Citadel's Public Safety. However, Garrott, Bates, and Lackey decided on multiple occasions not to terminate ReVille when he was caught in violation of the rule and to not turn the complaints over to Public Safety.

Furthermore, in 2004, The Citadel employed Camper Doe 6 as a camp counselor, and during his employment that summer, he visited ReVille's home and learned that ReVille was sexually abusing boys and had applied to be a foster parent in South Carolina. As a counselor that summer, Doe 6 was an agent/employee of The Citadel. It was within Camper Doe 6's authority and responsibility to maintain the safety of the campers, and Camper Doe 6's knowledge of ReVille's pedophilia related to maintaining campers' safety. Again, *The Official Camp Policies Regarding Sexual Misconduct* applied to ReVille as a former counselor and required investigation by The Citadel's Public Safety regardless of whether the counselor was currently affiliated with the camp. "It is well established that a principal is affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Crystal Ice. Co. of Columbia, Inc. v. First Colonial Corp.*, 273 S.C. 306, 309, 257 S.E.2d 496, 497 (1979). Accordingly, The Citadel had constructive knowledge of ReVille's pedophilia in 2004.

Thereafter, in 2005, Director Garrott terminated Camper Doe 6 from his employment as a counselor when he attempted to report ReVille's pedophilia to her. These actions by The Citadel from 1998 to 2005 raise a triable issue as to whether The Citadel voluntarily assumed the duty to investigate and arrest ReVille for sexual abuse of children. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546.

Moreover, a genuine issue of fact exists as to whether The Citadel voluntarily assumed the duty to investigate and arrest ReVille's pedophilia after it received the sexual abuse complaint against him on April 23, 2007. The Citadel's own policies and procedures in effect in April 2007 established required action by The Citadel in the face of the complaint 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 evidence shows 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. (R. p. 1214). The Citadel's policy required that it not terminate any investigation in exchange for resignation by the employee, that it provide factual and candid responses to inquiries by potential employers, that it fully cooperate with law enforcement, and that it not expunge molestation findings from the employee's record. (*Id.*). Here, The Citadel did not make any record of the complaint against ReVille in his employment file and instead concealed its knowledge of his pedophilia.

The Citadel also violated its own multiple policies in effect requiring the report of all incidents of sexual abuse or assault to law enforcement, along with the arrest of criminal suspects, to include the *Sexual Harassment, Memo. No. 51; Serious Incidents*

Memorandum; and *The Citadel's Sexual Assault Crisis Intervention Policy, Memo. No. 4*. (R. pp. 1198-1210, 1215-1234). Again, The Citadel also violated its *The Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues*, because the policy mandated that no time limit exists for turning complaints over to Public Safety and the policy applies even if the counselor is no longer affiliated with the camp. (R. pp. 983-984). The Citadel had the duty to arrest ReVille and had the power and jurisdiction to arrest ReVille on or off the campus. (R. p. 1872).

Instead, The Citadel violated its own policies requiring the arrest of ReVille. By adopting policies for the protection and well-being of prospective and foreseeable victims, the Citadel also acquired a duty under state common law to act with due care in the investigation and arrest of ReVille in 2007. The evidence establishes The Citadel acted to conceal ReVille's pedophilia, along with The Citadel's knowledge of his dangerous proclivities, and specifically concealed the 2007 complaint from the community, the Board of Visitors, and the S.C. Employment Security Commission, as well as within the school's own files. The Citadel's deviation from its own policies and procedures, along with evidence of its concealment of the complaint, demonstrate its lack of due care under the relevant circumstances. *Peterson*, 365 S.C. at 396, 618 S.E.2d at 906.

Therefore, whether The Citadel voluntarily undertook the duty to investigate and arrest ReVille for pedophilia in 2002, 2003, 2004, 2005, and in 2007 presents questions for the jury, and summary judgment should be reversed. *See Fickling*, 372 S.C. at 606-607, 643 S.E.2d at 115-116.

B. The Citadel is liable for negligently creating the risk that ReVille would sexually abuse Doe 2.

The Citadel also owed a duty to Doe 2 based on its own actions that negligently created the risk that ReVille would sexually abuse him. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546. On point is our Supreme Court's decision in *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 547 (1990), where the plaintiff claimed that the state auditorium was negligent in adequately securing and maintaining the premises during a concert where the plaintiff was injured by a bottle thrown by an unknown person from the balcony onto him. The plaintiff in that case did not allege that the auditorium was liable because of the third party's actions; rather, his complaint was that the auditorium was liable for its own negligence in creating a reasonably foreseeable risk of such third party conduct. The Supreme Court upheld the jury verdict for the plaintiff:

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

Id. at 247, 549.

In this case, Doe 2 does not seek to hold The Citadel liable for creating ReVille's desire to sexually abuse Doe 2. Nor does Doe 2 seek to hold The Citadel liable merely based on its position as an employer of ReVille. Rather, the Citadel's duty to Doe 2 and liability is based on The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse Doe 2.⁶ The Citadel should have foreseen that its negligent

⁶ The Order granting The Citadel's Renewed Motion for Summary Judgment cites to a number of cases from foreign jurisdictions as support for holding that an employer is not liable for abuse by the employee occurring after the employment ends and outside of the employment context. (*Order Granting Renewed Motion for Summary Judgment*, R. p. 79). However, the cases do not involve conduct by a defendant that created the risk of

actions would probably cause injury to someone in the form of sexual abuse by ReVille.

See *Greenville Memorial Auditorium*, 301 S.C. at 242, 391 S.E.2d at 547-548. Where a duty exists based on the negligent or intentional creation of the risk of injury, our Supreme Court explains:

[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.

Id.

Continued sexual abuse of children by a pedophile is the natural and probable consequence of negligent actions taken to conceal a known pedophile and keep him out of police custody. The Citadel's own expert, Mr. Margolis, confirms that ReVille had a propensity to abuse victims within a discrete class of society, calling him a preferential child molester, and opined to the reasonable foreseeability that ReVille would continue molesting boys once he left Citadel campus. (R. p. 1195). Mr. Margolis also 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. (R. pp. 1196-1197). 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.

subsequent abuse or involve a defendant voluntarily undertaking any duty. Thus, these cases are not controlling, as The Citadel's duty is based on distinct actions it took to create the risk of Doe 2's abuse and a duty it voluntarily assumed by its actions and governing policies and procedures.

In sum, The Citadel is liable for its own negligent actions. The evidence at summary judgment includes that The Citadel violated its policies requiring investigation and arrest of ReVille and instead concealed ReVille's pedophilia in 2003, when Garrott caught ReVille engaged in inappropriate conduct with a minor behind closed doors; in 2004, when The Citadel had constructive notice of Reville's sexual abuse of boys; in 2005, when The Citadel terminated Camper Doe 6 for making a disclosure about ReVille's pedophilia; and then again when The Citadel received the April 23, 2007 complaint about ReVille's abuse at the camp. The Citadel violated its own policies by not arresting ReVille or even turning the complaints over to law enforcement, and The Citadel acted to maintain an apparent ignorance of ReVille's pedophilia, all the while knowing of his dangerous proclivities. The Citadel's actions maintained ReVille in the community undetected and supported his continuing sexual abuse of children.

The Citadel is liable for its own conduct of concealing a known child sexual predator. *See Madison ex rel Bryant*, 371 S.C. at 135, 638 S.E.2d at 656; *Faile*, 350 S.C. at 334, 566 S.E.2d at 546. The Citadel should have contemplated that its actions taken while ReVille was a cadet, was a camp counselor, and was an employee 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 Greenville Memorial Auditorium*, 301 S.C. at 242, 391 S.E.2d at 547-548.

C. Federal statute imposed a duty on The Citadel not to conceal ReVille's sexual abuse after it received the April 2007 complaint.

In South Carolina, the test for determining when a statute creates a duty of care and supports an action for negligence is (1) whether the statute's essential purpose is to protect

from the kind of harm the plaintiff has suffered and (2) whether the plaintiff is a member of the class of persons the statute is intended to protect. *Rayfield*, 297 S.C. at 102, 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)). Therefore, a statute may create a duty of care of which the violation of constitutes breach and establishes negligence per se. *Rayfield*, 297 S.C. at 103, 374 S.E.2d at 915.

The Citadel's conduct in response to the 2007 report of child sexual abuse by ReVille violated Title IX of the Education Amendments of 1972. The essential purpose of Title IX is to eliminate, with certain exceptions, discrimination on the basis of sex in any education program or activity⁷ receiving federal financial assistance. 20 U.S.C. § 1681; 34 C.F.R. § 106.1. Title IX bestows an affirmative action requirement on institutes of undergraduate higher education to take such remedial action as necessary to overcome the effects of such discrimination. 34 C.F.R. § 106.3(a). Therefore, Title IX's essential purpose to eliminate sex discrimination by definition seeks to protect other individuals from subsequent sex discrimination. For eliminating known sexual discrimination, whether it be in the form of harassment or abuse, prevents the future sexual harassment of other individuals. Accordingly, Doe 2 is a member of the class of persons Title IX intends to protect.

⁷ Under Title IX, an education program recipient of Federal financial assistance means "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof." 34 C.F.R. § 106.2(i). "Institutions" include those of higher education as defined by 34 C.F.R. § 106.2(l), (m), (n), and (o), which includes The Citadel as an institute of undergraduate higher education.

Furthermore, evidence of The Citadel's violations of Title IX is 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. The Citadel's actions taken counter, rather than in accordance with Title IX, are evidence of its failure to act with due care in handling the complaint, as well as evidence of The Citadel's negligent creation of the risk of Doe 2's abuse.

As far back as 2000, the Office of Civil Rights [OCR] provided guidance to schools on their obligations under Title IX in regards to complaints of sexual discrimination and harassment. (R. pp. 1257-1278; *see also* "Dear Colleague Letter," April 4, 2011, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. OCR highlighted that the United States Supreme Court in *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274 (1998), expressly affirmed that the school must take remedial action to remedy the effects of the harassment on the victim. (R. p. 1260). Schools must "disseminate a policy against sex discrimination" and "adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints, including complaints of sexual harassment." (R. p. 1260).

The Citadel's expert, Mr. Margolis, highlights the definition of sexual harassment under Title IX:

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

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

(R. p. 1279).

As discussed, *see infra* pp. 13-14, in 2007, The Citadel disseminated policies against sex discrimination and harassment that governed its actions in regards to the complaint of ReVille's sexual abuse. Title IX also requires schools to designate at least one employee to coordinate compliance with the regulations implementing Title IX. (R. p. 1265). Despite President Rosa himself bringing in Janet Shealy as the Citadel's Sexual Assault Response Coordinator, neither he nor any other Citadel administrator referred the ReVille sexual abuse complaints to her, per the explanation that she was there "to handle current cases." (R. pp. 1280-1281). The Citadel did not refer the complaint to Ms. Shealy in order to keep ReVille's pedophilia concealed.

Title IX also requires that if the school knows, or even reasonably should know, of sexual harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. (R. p. 1267). Even if the school does not learn of the sexual harassment from the victim but from some other source, the school violates Title IX if it fails to take "immediate and effective corrective action." (R. p. 1267). Defendant's own expert stresses corrective action must be taken whether the complaint comes from the victim, a parent, or a third party. (R. p. 1282). The OCR also highlights, "if harassment has occurred, doing nothing is always the wrong response." (R. p. 1263).

Title IX makes clear:

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

(R. p. 1271) (emphasis added). Title IX required The Citadel to assist the victim who came forward on April 23, 2007, as emphasized by OCR—“school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effects on the victim.” (R. pp. 1266, 1282).

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

Q. Looking back on the period of time when you were working within the President’s office....do you believe that President Rosa was indifferent towards concerns that he should have been worried about; for example, other victims who may be abused?

Mr. Kovach: Objection.

A. Yeah, I do think he was indifferent to it.

(R. p. 1283, line 20 through p. 1284, line 4).

The Citadel’s failure to abide by the duty of care established by Title IX further is evident in its decision to give responsibility for investigating the 2007 complaint to the Citadel’s General Counsel. Title IX specifically requires an impartial investigation, and The Citadel’s own expert agrees and stipulates that college attorneys are not an impartial party to investigate such claims. (R. pp. 1285-1286). In addition, The Citadel allowed the South Carolina Insurance Reserve Fund to be part of the process of investigating the complaint of child sexual abuse by a Citadel employee. (R. pp. 1288-1290). The Citadel’s decision directly violates OCR’s caution against using insurance company investigations to guide the school’s response to complaints of sexual abuse or harassment, because “[t]he purpose of an insurance investigation is to assess liability under the insurance policy, and

the applicable standards may well be different than those under Title IX.” (R. p. 1271). President Rosa’s direction to the General Counsel to “investigate” the child sexual abuse and allowance of the Insurance Reserve Fund to be part of the process directly contradict the duty of care owed under Title IX.

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

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

A: Correct.

(R. p. 1291, lines 8-16).

Q: You would agree with me that the Title IX coordinator at The Citadel didn’t oversee those allegations and the investigation of them by Mark Brandenburg, correct?

A: That is correct.

Q: That would be a violation of Title IX, correct?

A: It would be a violation of this, correct.

(R. p. 1292, lines 11-20).

In light of the foregoing, The Citadel’s actions in response to the 2007 report of child sex abuse violated its duty of care established by Title IX to Doe 2, and its breach of the duty constitutes negligence per se. *See Rayfield*, 297 S.C. at 103, 374 S.E.2d at 914.

II. The Citadel Is Not Entitled To Summary Judgment On Doe 2’s Outrage Claim.

Doe 2 brought a claim of outrage, or intentional infliction of emotional distress, by

The Citadel for its conduct of deliberately concealing child sexual abuse by ReVille and facilitating ReVille's continued access to children in the Charleston community where it was reasonably foreseeable that he would sexually abuse Doe 2. The elements of the tort of outrage include: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain or substantially certain that such distress would result from his conduct; (2) the defendant's conduct was "so extreme and outrageous so as to exceed all possible bounds of decency" to be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the defendant's actions caused the plaintiff's emotional distress; and (4) the plaintiff's emotional distress was "severe such that no reasonable man could be expected to endure it." *Argoe v. Three Rivers Behavioral Health, L.L.C.*, 392 S.C. 462, 475, 710 S.E.2d 67, 74 (2011) (citing *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 70 (2007)).

A. The TCA does not bar a claim of outrage against The Citadel.

The lower court erred in holding that the TCA bars the claim of outrage against a state entity, because of the definition of the word "loss" within the TCA. The definition of "loss" qualifies the "actual damages recoverable in actions for negligence" by excluding intentional infliction of emotional harm as a damage of such negligence:

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

S.C.Code Ann. 15-78-30(f) (1976).

The reference to intentional infliction of harm in the "loss" definition is not an exclusion of tort liability for outrage against a state entity. Rather, state entities "are liable

for their torts in the same manner and to same extent as a private individual under like circumstances,” subject to the limitations and exemptions from liability and damages contained in the code. S.C.Code Ann. 15-78-40 (1976). The limitations and exemptions from liability and damages are delineated as specific circumstances where the state entity will not be liable for any loss, rather than a list of torts the state entity is exempt from. *See* S.C.Code Ann. 15-78-60 (1976). The TCA does not grant state entities blanket immunity from outrage liability.

This Honorable Court recently ruled on a complaint against a state entity where the jury entered verdicts for the plaintiff on claims of gross negligence and outrage under the TCA. *See Bass v. S.C. Dept. of Social Services*, 403 S.C. 184, 742 S.E.2d 667 (Ct.App.2013), *cert. granted*, (July 18, 2014). At trial, DSS had moved for a directed verdict on the outrage claim, making the same argument as The Citadel that the TCA definition of loss excluded the claim, and renewed its motion at the close of its case. *Id.* at 189, 670. On appeal, this Court reversed the trial court’s denial of DSS’s JNOV motions; however, the Court did not base its reversal on the TCA excluding outrage claims. Rather, the Court addressed the evidence in the case and whether the elements of outrage had been met. *Id.* at 189-193, 670-672 (holding since evidence did not establish gross negligence by DSS, claim of outrage based on reckless conduct must fail because conduct cannot be reckless where it is not at least grossly negligent). If the TCA exempted outrage liability against a state entity, the Court would not have had to go through the analysis of whether the elements of outrage were made by the plaintiff. Likewise, there is no basis to bar Doe 2’s claim of outrage against The Citadel under the TCA’s limitation on damages recoverable from state entity negligence.

B. The evidence supports more than scintilla of evidence that The Citadel's conduct was outrageous and that The Citadel's conduct was directed toward Doe 2.

In this case, more than a scintilla of evidence exists to establish the elements of outrage against The Citadel, and The Citadel's conduct may "reasonably be regarded as so extreme and outrageous as to permit recovery" and submission of the issue to the jury. *See Argoe*, 392 S.C. at 475, 710 S.E.2d at 74. First, the evidence establishes that The Citadel was certain or substantially certain that severe emotional distress would be inflicted on Doe 2 when it intentionally concealed ReVille's pedophilia in 2003, 2004, 2005 and again in 2007 with the report of child sexual abuse by ReVille at the camp. The Citadel's administrators actively required a quid pro quo from ReVille to "lay low" and leave The Citadel in exchange for The Citadel's silence as to his pedophilia, without any disclosure to any law enforcement or arrest, and, in essence, without any indication attached to ReVille that he was a child molester. Furthermore, The Citadel's actions maintained ReVille as an esteemed Citadel alumnus and former employee so that ReVille could continue to gain employment with children based on his Citadel credentials. The Citadel took these actions despite the reasonable foreseeability that ReVille would continue molesting children, to include Doe 2. It was certain or substantially certain that emotional distress of Doe 2 would result from The Citadel's conduct, as The Citadel's conduct led to Doe 2's sexual abuse by ReVille. *See Argoe*, 392 S.C. at 475, 710 S.E.2d at 74.

The lower court also erred in holding that there is no evidence that The Citadel targeted Doe 2 to be harmed by its intentional or reckless concealment of ReVille's pedophilia. *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). The Citadel specifically acted despite the reasonable foreseeability that ReVille would continue molesting children, children that included Doe 2. As such, The Citadel targeted the Doe 2 for sexual abuse by ReVille in its conduct of concealing ReVille as a pedophile.

Second, concealing a child sexual predator and taking actions that allow the predator to continue to be around children and further victimize children is conduct “so extreme and outrageous so as to exceed all possible bounds of decency.” *See Argoe*, 392 S.C. at 475, 710 S.E.2d at 74. Such conduct readily may be regarded as “atrocious, and utterly intolerable in a civilized community.” *Id.* Third, it was The Citadel’s actions of concealing the sexual abuse by ReVille and supporting him in the community that directly caused Doe 2’s emotional distress by allowing ReVille access to abuse Doe 2. The emotional distress suffered by Doe 2 included years of suffering in silence out of fear that his parents would not love him anymore if he told them of his abuse by ReVille and would have been prevented had The Citadel not concealed its knowledge of ReVille as a pedophile. Fourth, Doe 2’s emotional distress is so severe “that no reasonable man could be expected to endure it.” *See Argoe*, 710 S.E.2d at 74. Therefore, the evidence supports Doe 2’s claim of outrage against The Citadel, and The Citadel is not entitled to summary judgment on the claim of outrage.

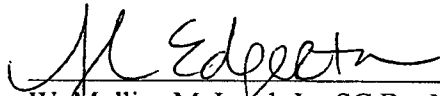
CONCLUSION

The trial court erred in concluding that The Citadel did not owe a duty to Doe 2 as a matter of law at summary judgment. The evidence at summary judgment supports that The Citadel owed a duty to Doe 2 based on voluntarily undertaking the duty to investigate sexual misconduct by ReVille and arrest ReVille; based on The Citadel’s negligent creation of the risk of Doe 2’s sexual abuse by ReVille; and based on duties imposed on The Citadel

by Title IX. Whether The Citadel voluntarily undertook a duty to investigate ReVille's pedophilia and arrest him based on its actions in 2002, 2003, 2004, 2005, and again from April 2007 onward present genuine issues of material fact for a jury. *See Fickling* 372 S.C. at 610-11, 643 S.E.2d at 118. In addition, the lower court erred in granting summary judgment for The Citadel on Doe 2's claim of outrage, as a genuine issue of material fact exists as to whether The Citadel targeted Doe 2 for sexual abuse by ReVille in its conduct of concealing ReVille as a pedophile, and the TCA does not bar a claim of outrage against a state entity.

Accordingly, Doe 2 respectfully requests that the Court reverse the lower court's July 6, 2015 Order and deny summary judgment for The Citadel and remand the case in its entirety for trial.

Respectfully submitted this 26th day of October 2015,



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OCT 29 2015

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

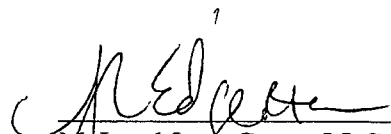
John Doe 2, ...Appellant,

v.

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CERTIFICATE OF COMPLIANCE

Appellant's counsel certifies that his final brief complies with Rule 211(b),
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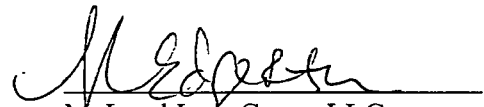
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PROOF OF SERVICE OF FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly conclude that The Citadel did not undertake a duty of care to Plaintiff where there is no evidence that it knew Plaintiff or ever intended to protect him from ReVille?
2. Did the trial court properly conclude that The Citadel did not "create" the danger to Plaintiff so as to require the imposition of a duty of care?
3. Did the trial court properly conclude that Title IX does not impose a negligence duty of care on The Citadel under the circumstances of this case?
4. Did the trial court properly conclude that Plaintiff may not base his claims on events occurring during the operation of the summer camp, years before his abuse?
5. Can Plaintiff show proximate causation under the facts of this case?
6. Did the trial court properly conclude that the South Carolina Tort Claims Act ("SCTCA") prohibits Plaintiff's outrage claim?
7. Did the trial court properly conclude that Plaintiff's outrage claims fail because no conduct of The Citadel was directed toward him?
8. Must Plaintiff's outrage claims fail where he presents no evidence that The Citadel acted in an outrageous manner?
9. Must Plaintiff's outrage claims fail where he had other remedies available to him?

STATEMENT OF THE CASE

A. Procedural History

John Doe 2 (“Doe”) sued The Citadel, The Military College of South Carolina (“The Citadel”) for failing to prevent Louis “Skip” ReVille, a former counselor at The Citadel’s former summer camp, from sexually abusing him. Doe concededly never attended the camp and had no affiliation with The Citadel. Doe alleges claims against The Citadel sounding in negligence/gross negligence and outrage. (*See R. pp.84-105*). On or about April 24, 2015, The Citadel filed a Renewed¹ Motion for Summary Judgment. (*See R. pp. 1575-1824*). On June 4, 2015, Plaintiff filed an opposition to that motion (*R. pp. 1825-75*) and The Citadel filed a Supplemental Memorandum in Support of Renewed Motion for Summary Judgment (*R. pp. 1877-1904*). On July 6, 2015, the Court granted The Citadel's Renewed Motion for Summary Judgment, which Plaintiff has appealed to this Court. (*See R. pp. 71-83 ("Order")*). Although Plaintiff posits in his Brief, taking isolated portions of a hearing transcript out of context, that the trial judge somehow concluded that The Citadel owed him a duty, this is belied by the Order. The Order expressly holds that law does not impose a duty on The Citadel under where there was no specific threat to a specific victim. The trial court specifically rejected that The Citadel owed a duty to protect *everyone* from potential abuse by ReVille at some point in the future.

¹ The Citadel had previously filed a Notice of Motion and Motion for Summary Judgment on March 6, 2014 in this and in other related cases. It filed a Memorandum in Support of Motion for Summary Judgment on April 14, 2014 (*See R. pp. 171-477*). Plaintiff filed memoranda in Memorandum in Opposition to Defendant's Motion for Summary Judgment on April 16, 2014 (*See R. pp. 478-1334*). On April 18, 2014, Plaintiff filed a Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment, supplementing the record with Doe's deposition (*See R. pp. 1355-1534*). The Citadel filed a Supplemental Memorandum in Support Concerning the Existence of a Duty of Care on April 28, 2014. On June 6, 2014, The Citadel filed another Supplemental Memorandum in Support of Motion for Summary Judgment. The trial court denied that Motion by order dated December 9, 2014. Subsequently, The Citadel renewed its Motion for Summary Judgment in this case.

B. Factual Background

1. The 2007 Report

On April 23, 2007, the father of a nineteen year-old former camper at The Citadel's summer camp ("Camper Doe") — who is *not* the Plaintiff in this lawsuit — informed The Citadel that ReVille had engaged in sexual misconduct with his son five years prior. Camper Doe's father spoke by telephone with Mark Brandenburg, The Citadel's General Counsel ("Brandenburg"), and told Brandenburg that once during Camper Doe's stay at the camp, a counselor named "Skip" invited his son into his room, where they watched pornography and masturbated. (*See* R. p. 232 ¶ 3). Brandenburg subsequently spoke on the phone with Camper Doe, who confirmed that "Skip" once invited him into his room, showed him pornography and convinced him to masturbate. (*See id.* ¶ 4). Brandenburg telephoned ReVille, who coincidentally submitted his resignation on March 22, 2007 to pursue other interests and had recently worked his final day. (*See* R. pp. 239-43). ReVille emphatically denied Camper Doe's allegations.

Brandenburg continued his investigation on July 1, 2007, when he met with Camper Doe and his parents in Texas. Camper Doe's father expressed a desire for privacy, stating, "I don't want to be another name in the Charleston papers" or to become "a part of Charleston gossip." (*See* R. p. 246-48). Camper Doe's father noted that Camper Doe had applied for admission to The Citadel but The Citadel had not accepted him and suggested that The Citadel "can be part of the root cause to fix him" by admitting him. (*See* R. p. 247 lines 16-17). Camper Doe's father opined that admitting his son as a cadet would be, "a very inexpensive way for The Citadel to say, do you know what – we'll fix our own." (*See* R. p. 247 lines 19-23).

In accordance with the wishes of Camper Doe and his family, Brandenburg worked with Citadel admissions staff in an effort to allow Camper Doe's admission as a cadet. (*See* R. p. 251 line 25 to p. 252 line 25). When The Citadel determined that Camper Doe lacked the requisite academic qualifications, Brandenburg proposed that the

South Carolina State Insurance Reserve Fund pay for courses to permit him to reapply to The Citadel. (*See* R. p. 253 line 1 to p. 254 line 16). After this meeting, Brandenburg never heard again from Camper Doe or his parents. There is no evidence that he ever received any independent corroboration of Camper Doe's claim of having been victimized at the summer camp, which was no longer in operation.

The following facts with regard to Camper Doe's report in 2007 and The Citadel's response thereto are undisputed (*see generally* R. pp. 244-48):

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

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

In October 2011, ReVille's sexual misconduct came to light, and various law enforcement agencies initiated investigations. ReVille was ultimately charged with crimes in Charleston, Berkeley, and Dorchester counties. On June 13, 2012, ReVille pleaded guilty to numerous charges of criminal sexual conduct with minors, solicitation

of minors, lewd acts upon a minor, and dissemination of obscene material. The Honorable R. Markley Dennis, Jr., sentenced ReVille to fifty years imprisonment.

2. Plaintiff's Abuse

The following timeline of key events underlying this action will help the Court place this appeal into context (*see generally* R. pp. 1575-1824):

<u>DATE</u>	<u>DESCRIPTION</u>
June, 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"
June 16-July 6, 2002	ReVille is Senior Counselor at the camp.
June, 2002	ReVille allegedly views pornography with Camper Doe and encourages him to masturbate.
July 14-August 3, 2002	Camp supervisor Jenni Garrott ("Garrott") allegedly sees ReVille sitting on a couch next to a camper and admonishes him about being alone with campers.
April 15, 2003	ReVille submits application to work at summer camp containing flippant information such as "likes to cook" and "enjoys walks on the beach" in an apparent attempt at humor.
June, 2003	Garrott allegedly observes ReVille applying Icy Hot to the leg of a 16 year old counselor during daytime hours in a room with the door open. She notes that neither of them stopped what they were doing when she came into the room.
August, 2003	ReVille's employment at the camp ends.
Early summer, 2005	ReVille, then a teacher at Pinewood Prep, meets Doe through AAU basketball. (<i>See</i> R. 1597 line 16 to p. 1600 line 3). During that summer, ReVille began "grooming" Doe, showing Doe pornography, and encouraging him to masturbate. (<i>See</i> R. p. 1601 lines 4-17, R. p. 1602 line 16 to p. 1603 line 3).
Late summer, 2005	ReVille started abusing Doe at ReVille's home, including masturbating him, performing oral sex on him and touching him. (<i>See</i> R. p. 1604 line 4 to p. 1605 line 10).
2005-06 School Year	During Doe'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 victims who viewed pornography and masturbated. (<i>See</i> R. p. 1609 line 23 to p. 1602 line 14).
August 22, 2006	ReVille begins working as a part-time, temporary tutor in The Citadel's writing center working with college students. No evidence exists that ReVille was exposed to minors through this employment.

<u>DATE</u>	<u>DESCRIPTION</u>
Into fall of 2006	ReVille continued to abuse Doe through 2005 and 2006, with ReVille moving into a bachelor suite at Doe's home as early as May of 2006, when Doe's father was working in Atlanta. (See R. p. 1605 line 19 to p. 1606 line 8; R. p. 1607 line 21 to p. 1608 line 6; R. p. 1625 lines 22-24). ReVille moved into the family home, in part to assist with family duties. (See R. p. 1612 line 13 to p. 1613 line 7). Plaintiff presents no evidence that The Citadel knew that ReVille lived with Doe or anything about their interactions.
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 R. p. 1615 line 25 to p. 1616 line 14).
November, 2006	ReVille listed Doe's mother as a reference in a November, 2006 job application. (See R. pp. 1635-36).
March 22, 2007	ReVille resigns from The Citadel's writing center. (See R. p. 1816).
<i>April 23, 2007</i>	<i>Camper Doe first contacts The Citadel.</i>
June 1, 2007	ReVille moves from Doe's 's home to Mount Pleasant.
July 1, 2007	Brandenburg interviews Camper Doe.
Late Summer 2007	Doe's family moved to Georgia. (See R. p. 1614 lines 8-15). ReVille testified that Doe moved to Georgia "well before school started." (See R. p. 1630 lines 20-23). ReVille stopped abusing Doe when he and his family moved to Georgia.

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

<u>DATE</u>	<u>DESCRIPTION</u>
2005	ReVille abused Doe at least 12 times at his home and in his car. (See R. p. 1622, line 2 to p. 1624, line 20).
2006	ReVille abused Doe "three, four times a week" in 2006, approximately 200 times. (See R. p. 1626, line 17 to p. 1628, line 2).
2007 (prior to April 23, 2007)	From the beginning of 2007 through April 23, 2007, ReVille abused Doe approximately "two to three times a week." (See R. p. 1632, line 25 to p. 1633, line 4).
<u>April 23, 2007</u>	<u>Date of Camper Doe's call to The Citadel.</u>
May, 2007	ReVille only had two or three interactions with Doe in May, 2007. (See R. p. 1631, lines 12-20; R. p. 1632, lines 3-15).
June, 2007	There were only six to eight interactions. (See <i>id.</i>).

<u>DATE</u>	<u>DESCRIPTION</u>
<u>July 1, 2007</u>	<u>Brandenburg interviewed Camper Doe.</u>
July, 2007	ReVille only had four to six interactions with Doe in July of 2007. (<i>See id.</i>).
August, 2007	ReVille does not believe he abused Doe in August of 2007 (or any time after July, 2007). (<i>See</i> R. p. 1631, lines 21-23; R. p. 1632, lines 16-24).

ReVille confirmed that he abused Doe approximately twelve times between May, 2007 and the time Doe's family moved out of state. (*See* R. p. 1629, lines 15-25).

C. Plaintiff's Misstatements of Fact

Plaintiff's Brief is replete with factual misstatements. Ordinarily, appeal – let alone appeal from summary judgment – is not the place to argue over interpretation of evidence. However, Plaintiff's misstatements are so pervasive, and some are so serious, that they cannot go unanswered.

First, Plaintiff's Brief states, on numerous occasions, that The Citadel's policies required that it fire ReVille as a camp counselor. This is simply not true. In fact, no policy *required* The Citadel to fire a camp counselor for merely being in a room with a camper; Plaintiff cites nothing in the record establishing this as a matter of policy, but instead relies on the *ipse dixit* of his counsel. While a document entitled "OFFICIAL SUMMER CAMP POLICIES REGARDING SEXUAL MISCONDUCT ISSUES" made "sexual relationships" between counselors and campers a ground for immediate termination, it did not make simply being alone in a room with a camper grounds for firing. (*See* R. pp. 983-84). Plaintiff presents no evidence that The Citadel ever knew that ReVille, while a counselor, engaged in a sexual relationship (or improper contact) with a camper. At most, The Citadel was aware that ReVille had been in a room with minors. He was appropriately admonished not to do that. Plaintiff cites no Citadel policy in the record that *required* that ReVille be fired for such an incident.

The following chart identifies some of Plaintiff's additional factual misstatements in his brief and seeks to correct them:

<u>PLAINTIFF'S STATEMENT</u>	<u>REALITY</u>
p.4: Plaintiff claims that in 1998, ReVille self-reported to The Citadel Counseling Center for treatment and received on-going mental health services through 2001, during which he revealed that at age 15 he was court ordered to counseling for sexual misconduct with adolescent boys.	In 1998, ReVille sought counseling assistance for two months to improve his focus on the tennis team. He also sought guidance in 2000-2001. The records for that counseling that are properly part of the appellate record nowhere state or imply that ReVille disclosed anything about prior mental health services. Plaintiff certainly provides no evidence that ReVille revealed anything about being ordered into counseling for "sexual misconduct." Plaintiff also cites no authority for his implied contention that a mental health counselor would have been at liberty to disclose confidential counseling information to Citadel officials.²
p.4: Plaintiff claims that on January 18, 2001, Citadel counselor Dr. Bradham and a MUSC psychiatrist discussed monitoring ReVille for bipolar disease, and by February 2001, The Citadel knew that ReVille was non-compliant with his prescription psychiatric medications.	The record does not support that The Citadel was involved in monitoring ReVille's alleged bipolar condition or medication compliance. Dr. Bradham's January 18, 2001 record makes clear that he communicated that MUSC was to monitor ReVille's potential bipolar condition: "The content of our last session was also relayed to Dr. Douglas as was this therapist's request <i>that she continue to monitor for the presence of bipolar symptoms when she meets with him again.</i>" (See R. p. 1852). Similarly, Dr. Bradham made clear in February of 2001 that ReVille needed to discuss compliance with medications with MUSC: "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." (See R. p. 1851).
p.5: Plaintiff claims that in the summer of 2001 The Citadel learned that Arpaio abused numerous campers in his room.	This is untrue. In the summer of 2001, the Citadel learned of an <i>allegation</i> of abuse involving one camper, in which the Charleston Police Department closed its investigation on August 1, 2001, stating that it "could not establish probable cause" to make an arrest upon. (See R. p. 1304).

² In fact, statutes would have prohibited ReVille's counselors from disclosing any confidences about ReVille without his consent. See generally S.C. Code § 19-11-95.

<u>PLAINTIFF'S STATEMENT</u>	<u>REALITY</u>
<u>p.6:</u> Plaintiff claims that in 2001 ReVille "attempted to self report" his abuse to The Citadel's Department of Public Safety. (<i>Citing R. pp. 1857-58</i>).	The document that Plaintiff relies upon does not support his proposition, and it is not true. After his arrest, ReVille made a statement to the police, which he later recanted, that he had asked a Public Safety officer "how I could file a case of sexual misconduct at the summer camp." Even if this event occurred, Plaintiff presents <i>no</i> evidence that ReVille disclosed that this involved abuse of children, that he wished to make a criminal report, or that he was the perpetrator.
<u>pp.6-7:</u> Plaintiff claims that in 2002, Camp Garrott "caught" ReVille alone with a minor camper in his room. Plaintiff claims that ReVille should have been fired because a "rule . . . require[ed] immediate termination" for that alleged "violation."	As set forth herein, there was no rule that required ReVille's termination for simply being in a room with a camper. Moreover, there is no evidence that ReVille was "caught" doing anything improper, suspicious or sexual with the camper.
<u>p.7:</u> Plaintiff claims that in 2003, Garrott witnessed Reville "engaged in inappropriate physical contact with another camper [hereinafter referred to as Camper Doe 6] alone behind closed doors in ReVille's barracks room." Again, Plaintiff claims that ReVille should have been fired for that incident. (<i>Citing R. pp. 983-84, 1308-12</i>).	This is incorrect in several respects. First, Camper Doe 6 was not, at that time, a camper; he was a junior counselor. Second, the record does not support that the room door was closed (it was actually open, with only a screen door closed). Finally, there is no evidence that ReVille was engaging in "inappropriate physical contact" with Camper Doe 6 (he was, actually, applying Icy Hot to Camper Doe 6's leg after a run). In fact, ReVille's affidavit states that he "had not yet sexually abused him at the time Ms. Garrott caught the two of us alone." (<i>See R. p. 1310 ¶ 10</i>).
<u>p.7:</u> Plaintiff states that Garrott admitted that she caught ReVille in direct violation of a camp rule and should have fired him.	This is not in the record before the Court. Garrott testified that: At the time I thought it was a lapse in judgment, and I did not think that it was a violation of that. I -- you know, in that position a lot of people go to him and I -- yes, sir, I was very mad. (<i>See R. p. 969, lines 21-25</i>). This is a far cry from admitting that she "should have fired" him.
<u>p.7:</u> Plaintiff claims that Anna Bronk, Garrott's assistant, spoke to ReVille "multiple times about his being alone with campers in his room."	This is not stated anywhere in the record, particularly in the documents Plaintiff cites. (<i>See R. pp. 1308-12, 1857-58</i>).

<u>PLAINTIFF'S STATEMENT</u>	<u>REALITY</u>
p.7: Plaintiff claims that counselor OC Evans reported to Garrott's supervisor, Colonel John Lackey ("Lackey"), that ReVille had campers in his room at night.	This is not stated in the record, particularly in the documents Plaintiff cites. The record does not reflect that that Evans reported anything to Lackey about ReVille. (See R. pp. 1308-12 and 1857-58).
p.8: Plaintiff claims that in 2005, Camper Doe 6 was employed as a counselor. Plaintiff claims that, following sexual abuse training, Camper Doe 6 asked to speak with Garrott. Plaintiff further claims that when Camper Doe 6 told her he wanted to report ReVille, she abruptly dismissed him from the room. Plaintiff finally claims that in retaliation The Citadel fired Camper Doe 6 later that day, on the pretense that he called a camper an inappropriate name.	The only record evidence that Plaintiff cites for this proposition does not support this factual claim, aside from mentioning that Camper Doe 6 was fired. (See R. pp. 1861-67).
p.9: Plaintiff claims that in 2007 Re Ville met with Brandenburg and Trez, who disclosed details of Camper Doe's complaint to him. Plaintiff claims that Brandenburg and Trez conveyed The Citadel's requirement of a <i>quid pro quo</i> with Re Ville, under which he would leave his part-time employment in The Citadel's Writing Center and "lay low," in exchange for The Citadel's silence as to his pedophilia.	There is no evidence whatsoever of a <i>quid pro quo</i> for a cover up. Assuming, <i>arguendo</i> , that this meeting occurred, the only evidence is ReVille's allegation, in an affidavit that Plaintiff's counsel procured after ReVille had been incarcerated, that Brandenburg and/or Trez told him to "lay low" and stay off campus. There is nothing in the record of an exchange or <i>quid pro quo</i> for ReVille's silence.
p.10: Plaintiff claims that in May, 2007, Brandenburg memorialized The Citadel's intent to cover up ReVille's child sexual abuse, writing "I am hopeful that by conducting an investigation on behalf of the school, no 'formal' investigation — criminal or civil — will occur."	The cited email, directed to a potential witness of ReVille's conduct, does not, in any way suggest cover up. At most, Brandenburg's email expresses hope that Camper Doe's complaints would be unfounded and that no abuse occurred. Nothing in the email suggested that The Citadel intended to conceal anything. In fact, the email recognizes that Camper Doe could, at any time, file a report with police.
p.11: Plaintiff claims that The Citadel also ensured that certain General Counsel file lists did not refer to a child sexual abuse claim against ReVille as part of an effort to cover up ReVille's abuse.	The record does not suggest that this was concealment." Plaintiff presents no evidence that these file lists are anything more than internal documents for the use of The Citadel's General Counsel.
p.12: Plaintiff claims that The Citadel bought ReVille's silence by withdrawing an objection to his application for unemployment.	Plaintiff has no evidence supporting this rank speculation. First, there is no evidence that The Citadel ever expressed that its withdrawal of objections had anything to do with the allegations against ReVille. Moreover, there is not even any evidence that ReVille received unemployment benefits after The Citadel withdrew its objection (because he did not).

ARGUMENTS

I. Standard of Review

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining 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. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine [or material].

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (citations omitted). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." See *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010) (citation omitted).

When the underlying action requires proof by a preponderance of the evidence, the non-movant must submit a "scintilla of evidence" to survive summary judgment. See *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court.” *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). This Court “may affirm the grant of summary judgment on any ground found in the record.” *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (citing Rule 220(c), S.C.A.C.R. (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”)); accord Rule 208(b)(2) (“Respondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).”).

II. The Trial Judge Properly Granted Summary Judgment Because The Citadel Did Not Owe Doe a Duty of Care Under South Carolina Law

The trial court first held that The Citadel did not owe Doe a duty of care. For the reasons that follow, this Court should affirm the trial court’s grant of summary judgment to The Citadel. In fact, the Court should go further than the trial court did and hold that The Citadel owed Doe and others similarly situated no duty regardless of when ReVille began molesting him. Unqualified affirmation of the state of the law will guide the trial court in dealing with claims by ReVille’s other victims who had no relationship with The Citadel, but whose molestation began after Camper Doe’s 2007 report about ReVille.

A plaintiff must prove three elements to recover on a claim for negligence:

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

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

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

Except in limited circumstances, South Carolina courts have refused to impose a duty of care to prevent third persons from committing acts of violence:

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

See Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (finding duty where defendant had *custody* of actor).

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 defined group in a fixed location and time*. This is logical, since a duty flows from the relationship between the defendant and injured party:

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

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

Here, there was no relationship whatsoever between The Citadel and Doe. To impose a duty upon The Citadel in this case would be to impose a duty upon everyone, to everyone. Taken to its logical conclusion, any person who fails to catch a criminal would be liable to virtually all of the criminal's future victims. There would be no logical reason not to extend this duty to all schools, churches, and law enforcement agencies.

Although Plaintiff focuses his argument on the foreseeability of injury to potential unknown victims, South Carolina has never recognized that as a basis for duty in facts such as those presented here. No South Carolina appellate court has imposed a duty to prevent acts of a third person without evidence of knowledge of a threat to *specific* persons:

- In its most recent case, this Court held that the spouse of a sexual abuser — despite knowing her husband's predilection — did not owe a duty to a minor that her husband abused *in her home*. The Court rejected the "special relationship" theory 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).
- In *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007), the plaintiff alleged sexual abuse by pediatrician Marion, who the defendant treated for a "predilection for child molestation." The Supreme Court rejected 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."

- In *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006), the Supreme Court held that a dialysis center might owe a duty to third-persons to warn patients of risks of driving home from treatment. 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. Notably, the risk was immediate and of fixed duration and scope.
- In *Bishop v. South Carolina Dep't of Public Health*, 331 S.C. 79, 502 S.E.2d 78 (1998), the Supreme Court held that a duty to warn flowed from an institution discharging a mother who later harmed her child, where the mother had threatened to harm *that child*: "[T]he Department was aware mother had made specific threats to harm victim in the past. . . . This knowledge was sufficient to trigger the Department's duty to warn victim of mother's release because a specific threat had been made by mother to harm a specific person." *See id.*, 331 S.C. at 88, 502 S.E.2d at 82.
- In *Rogers v. South Carolina Dep't of Parole and Community Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995), the Court held that the defendants did not owe a duty to warn that they were releasing a prisoner on furlough, even though he was jailed for burglarizing *plaintiff's home*, because "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.
- In *Gilmer v. Martin*, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996), this Court held that a psychiatrist did not owe a duty though he knew that a patient with suicidal tendencies worked with vulnerable 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."
- In *Rogers v. South Carolina Dep't of Mental Health*, 297 S.C. 363, 377 S.E.2d 125 (Ct. App. 1989), the court did not impose a duty on a doctor to warn family members of a risk of violence because "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." *See id.*, 297 S.C. at 366, 377 S.E.2d at 126.
- In *Sharpe v. South Carolina Dep't of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987), the court refused to impose a duty 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. . . . Nothing in the record indicates Sevits and Sharpe knew each other prior to Sevits's discharge.").

These cases make clear that South Carolina has never recognized a duty to prevent violence by third-parties in the absence of evidence of knowledge of a specific threat to specific persons. Contrary to Plaintiff's request here, South Carolina has never imposed a duty to the general public or even a demographic subgroup.

Plaintiff's arguments would open a Pandora's Box of potential liability that would extend far beyond any reasonable bound. The South Carolina Supreme Court has never even suggested that this is the law. Focusing entirely on foreseeability, Plaintiff suggests that because ReVille was a "known pedophile," The Citadel owed a duty to all children he might encounter. (*See* Pl.'s Init. Br., at p.28). First, there is no evidence that The Citadel knew before Doe's abuse that ReVille was a pedophile or might abuse unknown victims at unknown times. In any event, this would be far too general a threat for the law to impose a duty. 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). Plaintiff cites no authority that The Citadel owed a duty to every minor in Charleston County or South Carolina to prevent ReVille from abusing them into perpetuity. Under Plaintiff's argument, one who fails to apprehend a rapist would breach a duty to all women. One who fails to apprehend a bank robber would breach a duty flowing to all banks. An identifiable (but large) "class" of potential victims simply is not a substitute for the specifically identified potential victim, to whom our courts have heretofore limited the duty of care.

Plaintiff argues that "when a defendant's duty arises 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* Pl.'s Init. Br., at 19). However,

he fails to address the fact that South Carolina has *never* recognized a duty of care in the absence of a very specific and identifiable threat. Moreover, the cases Plaintiff cites do not support his argument:

- (a) *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), involved a rock concert attendee's claim that he was struck by a bottle thrown from a balcony. The Supreme Court affirmed the denial of the property owner's motion for a directed verdict, holding that the injury was "foreseeable." The *Martin* Court was not addressing whether a duty of care existed in the first place; rather, the Court only determined that there was sufficient evidence of *proximate cause* to submit the case to the jury. Additionally, the *Martin* plaintiff was part of a readily identifiable group of people at a specific place in a specific, limited time.
- (b) *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (1991), involved maintenance of a sidewalk, not the alleged failure to prevent the actions of a third person. Therefore, it is irrelevant to whether a duty of care exists here. In any event, even if the name of the potential victims were unknown in that case, it involved a risk confined to a very specific geographic location.
- (c) *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), involved claims that a prisoner killed decedents after his release. This Court held that no duty of care existed under state statutes because the purpose of those statutes was not "to guard members of the public against violent crimes by released prisoners." Notably, this Court did not conclude random members of the general public were within an identifiable "class" of victims the statutes were intended to protect. This case plainly does not support Plaintiff's argument.

As the trial court noted, Plaintiff's claims of a duty of care are particularly weak here, because Doe's abuse occurred almost entirely before Camper Doe's report to The Citadel and interview. Plaintiff has not cited to any authority that would permit him to succeed on a claim where ReVille had begun abusing him years before The Citadel was ever even notified of Camper Doe's allegations. As a matter of duty and causation, the trial judge properly held that this issue of the timing of Plaintiff's abuse forecloses his claims:

The vast majority of Re Ville 's abuse of Plaintiff occurred prior to

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

(See R. p. 73). Likewise, this reason justifies the affirmance of the entry of summary judgment for The Citadel. However, beyond that, it is clear that as a matter of law, The Citadel simply did not owe a duty of care to Plaintiff (or to any similarly situated future victim) to prevent future acts of abuse by ReVille, because there is no evidence of a specific threat to a particular victim.

Plaintiff argues that the trial court erred in granting summary judgment because The Citadel owed a duty of care on the following bases: (a) The Citadel voluntarily undertook a duty to Doe; (b) The Citadel negligently created the risk to Doe; and (c) federal statute imposed a duty on The Citadel. For the reasons that follow, this Court should affirm the grant of summary judgment to The Citadel.

A. The Citadel Did Not Voluntarily Undertake a Duty of Care

1. Plaintiff Has Not Presented Evidence Supporting the Voluntary Undertaking of a Duty of Care

South Carolina recognizes voluntary assumption of a duty of care in limited circumstances:

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

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

the undertaking.

See Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting Restatement (Second) of Torts § 323 and refusing to extend duty beyond Section 323 formulation). The Supreme Court has declined to recognize an assumed duty of care to a third person under the broader Section 324A³:

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

Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997); *accord Johnson*, 401 S.C. at 505 n.5, 737 S.E.2d at 514 n.5 (Section 324A "has not been adopted by our courts"). A voluntary undertaking of a duty requires that the duty be undertaken specifically *to plaintiff* and (in the absence of actual creation of the danger) that the plaintiff know of and rely on the undertaking:

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. 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.

See Johnson, 401 S.C. at 506, 737 S.E.2d at 514. Plaintiff can cite to no South Carolina law recognizing undertaking of a duty to the general public, rather than a specific person.

³ The Restatement (Second) of Torts § 324A states:

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

In *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006),⁴ this Court refused to find an undertaken duty where plaintiff did not know of the undertaking:

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.

See *id.*, 367 S.C. at 218-19, 625 S.E.2d at 239. Without a specific connection between *the undertaking and the plaintiff*, there could not be a voluntarily assumed duty of care.

On another occasion, this Court again recognized that undertaking of a duty requires either that the plaintiff rely on the undertaking or that the Defendant actually increase the danger (which is not present here):

[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.

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

Plaintiff cannot show a voluntary undertaking because there is no evidence that The Citadel acted to protect Doe, a complete stranger. 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

⁴ Plaintiff tries to evade *Underwood* by arguing that "the determinative factor in finding that the defendant did not voluntarily undertake a duty to the plaintiff was the health of the tree, not that a duty could not exist as to that plaintiff." (See Pls' Init. Br., at pp.21-22). That is simply not true. While the Court considered the general common law duty to maintain trees, it *also* analyzed the separate question of voluntary undertaking of a duty and concluded that the defendant had not undertaken a duty. That analysis had nothing to do with the health of the tree.

(1998) (“[P]laintiff’s voluntary undertaking theory . . . fails at the outset because plaintiff never alleged that defendant undertook services for *plaintiff*. . . .”) (emphasis in original). Plaintiff presents no evidence that The Citadel engaged in any action undertaking a duty of care to *him* under Section 323. The Citadel did not know Doe or his circumstances and could not have undertaken to protect him. Although Plaintiff cites to numerous Citadel policies, he presents no evidence that any of these policies was intended to benefit him specifically. He presents no evidence that The Citadel actually *increased* the risk of abuse beyond what previously existed; that contention is particularly baseless as ReVille had been abusing Doe (even at Doe’s home for years before Camper Doe’s report). Further, there is no evidence that Doe acted in reliance on The Citadel.

Plaintiff argues, in essence, that the foreseeability that ReVille might abuse *someone* is the equivalent of a voluntary assumption to all minors to whom ReVille might ever be exposed. This flies in the face of South Carolina law, which requires an undertaking to a particular person, not merely foreseeability. At most, Plaintiff relies on general policies of The Citadel that he claims required that The Citadel act in a certain way.⁵ However, none of these alleged policies are specifically directed to Plaintiff. Moreover, there has been no

⁵ Moreover, Plaintiff has not shown that The Citadel actually violated any of the policies. (See Pl.’s Br., at p.26).

- The "Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues" would not have applied because, at the time of Camper Doe’s report, that policy was no longer in effect as the summer camp was closed. (See R. pp. 983-84).
- The "Sexual Harassment" memorandum would not have been triggered because as it applies only to harassment in the context of "employment" and "student" and "academic" areas. This policy would not, by its definition of sexual harassment, apply to the abuse of summer campers. Moreover, if the policy could apply, Camper Doe’s report would have been an "informal" complaint, for which a report to law enforcement was not required. (See R. pp. 1219-34).
- The "Serious Incidents" memorandum would not apply because that policy relates to ongoing incidents or occurrences. It would not govern a report of an event from years prior. (See R. pp. 1198-1210).
- The "Sexual Assault Crisis Intervention" policy would not have applied because, by its terms, it only applies to circumstances involving *touching*. Moreover, that policy does not mandate a report, but rather requires respect for the wishes of the victim. (See R. pp. 1215-18).

showing that The Citadel ever knew that Plaintiff existed. Without evidence that The Citadel intended to undertake a duty to Doe, an unknown stranger, Plaintiff's argument fails.⁶

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

2. The Cases Plaintiff Cites Are Inapposite

The cases that Plaintiff cites to support that The Citadel voluntarily undertook a duty to him are distinguishable and do not support his position. First, Plaintiff posits that *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007), is "[g]uiding and controlling." In that case, this Court held that a city might have voluntarily undertaken a duty to ensure the safe condition of sidewalks in a state right-of-way (emphasis added):

Fickling presented evidence that the City had fielded complaints from residents about hazards to the sidewalks, had maintained a log of calls from residents, including repair calls, and had a policy in place, as well as employees, to handle repairs to sidewalks within the municipal limits, including those that were City-owned and those that were non-owned. The trial court expressly found the City *admittedly* engaged in a voluntary undertaking in this instance, but noted in its order: 'Although the City in the instant case *admits that it undertakes an obligation to maintain and repair public sidewalks*, it only does so when it has notice of the dangerous condition or when the City creates the condition itself. In this case as in *Vaughan*, however, we believe there was a genuine issue of material fact as to whether the City had undertaken a duty of maintaining streets within the municipality, including Meeting Street.

See id., 372 S.C. at 609-10, 643 S.E.2d at 116-17; *accord Vaughan v. Town of Lyman*, 370

⁶ In furtherance of his misplaced argument, Plaintiff argues that The Citadel knew in 2004 that ReVille was abusing campers, through the knowledge of Camper Doe 6. This proposition is baseless for a number of reasons. First, in any event, this alleged knowledge would not constitute an undertaking of a duty of care to Plaintiff, a stranger to The Citadel. Mere knowledge or foreseeability is not equivalent to an undertaking of a duty. Second, there is no evidence that Camper Doe 6's alleged knowledge, as a junior camp counselor (and alleged victim) would be attributed to The Citadel. Specifically, Plaintiff makes no showing to support a claim that Camper Doe 6 was an agent whose knowledge could be attributed to The Citadel or that he learned information in the scope of his employment. Finally, there is no first-hand evidence as to what Camper Doe 6 knew and when.

S.C. 436, 444, 635 S.E.2d 631, 637-38 (2006). The City of Charleston *admitted* that it had undertaken a duty to deal with certain public sidewalks, and there was evidence that this duty might encompass the subject sidewalk. Importantly, the claimed duty concerned outwardly visible property conditions at specific geographic location within the jurisdiction of a municipality that was already charged with maintaining some sidewalks. Such a duty would be precisely the type of duty that the city had undertaken as to other sidewalks. One could scarcely imagine a more fundamental municipal undertaking than the maintenance of streets and sidewalks directed to those who use those sidewalks.

Fickling (and *Vaughan*) are inapposite, as this case does not involve maintenance of property within The Citadel's boundaries. Doe was not, in any way, within the custody or control of The Citadel at the time of his abuse. Moreover, there is no evidence that a condition of The Citadel's property caused Doe's abuse. Plaintiff applies a case governing municipal maintenance of sidewalks to impose a duty to protect unknown future victims from abuse. Plaintiff stretches *Fickling* to the point of breaking. It does not support the imposition of a duty under the facts of this case.

Plaintiff also relies on *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), where a mentally challenged resident of a treatment center filed suit, alleging that the center failed to properly supervise her, permitting residents to abuse her. The Supreme Court held, *inter alia*, that defendants undertook a duty:

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 contractual undertaking of a duty *for consideration* to protect and supervise custodial victims. Conversely, Plaintiff has not presented a scintilla of evidence that The Citadel agreed to protect Doe, took custody of Doe or was paid to monitor Doe. Rather, Doe proffers no evidence of any relationship between himself and The Citadel. He presents no evidence that anyone at The Citadel knew ReVille abused him — or even that the two knew each other — prior to this lawsuit. He presents no evidence that he was ever led to believe that The Citadel would protect him from ReVille. *Madison* is unavailing.

Plaintiff cites *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), to support his argument that The Citadel undertook a duty. In *Miller*, a plant operator constructed a dam adjacent to the plant, which it conveyed to the City. The City used the reservoir to supplement its water supply, and the plant operator was permitted to draw water for production. The City agreed to maintain the lake at the level of the spillway. If the water level got too high, the plant operator would contact the City to open sluice gates. An Army Corps of Engineers report deemed the dam unsafe, and plant employees and the City attended a meeting with the Land Resources Commission. Although the plant operator indicated that it did not own the dam, it attended the meeting and included its employees on the Land Resources Commission's emergency notification forms as personnel monitoring the dam. A heavy rainfall caused the lake to overtop the dam, injuring plaintiffs, who sued the City and plant operator. The plant operator obtained summary judgment, arguing that no duty of care existed. The Supreme Court held that issues of fact existed as to whether the plant operator voluntarily might have undertaken a duty, since its agent was listed on an emergency notification form and it had an employee present at the meeting at which an emergency plan was formulated. *See id.*, 329 S.C. at 315, 494 S.E.2d at 815. The Court made clear that it did not recognize a duty beyond the limits described above:

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*, there is no evidence that The Citadel intended – through its operation of the summer camp or handling of Camper Doe's report – to benefit Doe, a complete stranger. The plant operator in *Miller* undertook duties that by their nature protected third-persons who might be impacted by a breach of the dam. There are no similar facts in this case. Instead, Plaintiff repeatedly tries to impose a duty to “the public” under the rubric of voluntary undertaking, an approach that no South Carolina court has ever taken.

3. To the Extent Doe Claims The Citadel Voluntarily Undertook a Duty of Care Through Internal Policies, His Argument Fails

Plaintiff cites numerous cases for the proposition that The Citadel's internal policies constitute the voluntary undertaking of a duty of care. However, the cases Plaintiff cites do not support that internal policies might impose a duty of care. Rather, they *only* suggest that *after the law imposes a duty of care*, internal policies may be evidence of what might satisfy that duty, *i.e.*, the scope of the duty. *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1992) involved slander and false imprisonment, *not negligence*. This Court held only that internal policies could be evidence of whether the defendant acted “reasonably” as required for a statutory defense to false imprisonment; it did not use the policies to impose a duty, but only mentioned in *dicta* that internal policies are sometimes “relevant on the issue of failure to exercise due care,” *i.e.*, whether a defendant satisfied an *existing* duty. Plaintiff cites no authority *imposing* a duty through internal policies unknown to Plaintiff.

In fact, the Supreme Court has expressly held that internal policies *cannot be used to impose a duty of care*:

It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this

internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law.

See Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011). The Citadel's policies were not directed specifically at Doe and merely governed The Citadel's general operations in various respects. To the extent Doe argues that The Citadel undertook a duty through internal policies, his claims fail.

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

B. Plaintiff Has Not Presented Evidence That The Citadel Created the Danger So As to Impose a Duty of Care

Doe next argues that The Citadel owed him a duty of care because it "created the risk" that ultimately occurred or increased it. However, Doe has not presented any evidence that The Citadel "created" any danger. Instead, he focuses on the alleged general "foreseeability" that ReVille *might* abuse minors in the Charleston area. He suggests that The Citadel somehow "created" a risk by concealing ReVille's abuse. However, this is not equivalent to creating a risk in the first instance. Rather, Doe is merely repackaging allegations that The Citadel failed to protect him from an existing risk.

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

Doe posits that he does "not seek to hold The Citadel liable for creating ReVille's

desire" to abuse him, but rather seeks to base liability "on The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse" him. (*See* Pl.'s Init. Br., at pp. 27-28). However, Doe's own words make clear that he is not seeking to hold The Citadel liable for creating a risk. Rather, Doe merely tries to recast a "failure to protect" claim as one for creation of a risk by arguing that the risk was foreseeable. His argument focuses solely on a claim that ReVille's abuse of Doe, a stranger to The Citadel, was "foreseeable"; however, foreseeability alone is not enough to impose a duty for creation of a risk. Semantics aside, irrespective of how foreseeable ReVille's acts might have been, Doe presents no evidence that The Citadel *created* a dangerous situation; rather, Doe's claim boils down to an allegation that The Citadel failed to prevent ReVille from abusing him. If Plaintiff's position carries the day, the "creation of risk" exception to non-liability for the acts of a third-person would expand in a way no South Carolina court has ever permitted.

In a recent opinion, the United States Court of Appeals rejected this Plaintiff's argument that there was a "state-created danger" in the context of a claim against an administrator of The Citadel under 42 U.S.C. § 1983:

Nor did Rosa create or increase the risk of the Does' abuse specifically during the early summer months of 2007, as the Does posit. As horrific as the abuse of the Does by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by Rosa. . . . [A]llowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. . . . There was simply nothing new about ReVille's perverted abuse of the Does in the summer of 2007 that had not already been occurring for months. Rosa did not make the Does' danger any worse, and he had no constitutional duty to save them from ReVille's existing abuse. . . . [T]he Does were in no different situation with ReVille after the Camper Doe complaint than they had been the previous two years.

See Doe v. Rosa, 2015 WL 4548009, at *9-*10 (4th Cir. July 28, 2015) (attached hereto as Ex. B). In addition, the Court held that Section 1983 liability did not exist because the defendant in that case did not engage in "affirmative" acts, but simply failed to act to prevent abuse. While this case is not controlling, confirms that The Citadel (and its agents) did not

undertake any acts to "create" the danger that ultimately befell Doe.

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

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

See Edwards v. Lexington Cty. Sheriff's Dep't, 386 S.C. 285, 293-94, 688 S.E.2d 125, 130 (2010) (emphasis added). Unlike *Edwards*, The Citadel did not *create* the scenario in which ReVille could abuse Doe and then fail to take reasonable security steps. Rather, notwithstanding this is a garden-variety failure-to-protect claim.

Application of the "creation of risk" exception here would cause the exception to swallow the rule, imposing potential liability in all "failure to-protect: cases, since anyone who fails to prevent an injury could be said to have enhanced a foreseeable danger. The Citadel did not create ReVille's desire to abuse children or actively assist ReVille to abuse children. It did not control ReVille or have custody of Doe. Under such circumstances, The Citadel cannot be said to have created the danger to Doe. *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.").

In *Staples v. Duell*, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997), this Court observed the difference between negligently 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.*" See 329 S.C. at 510, 494 S.E.2d at 643 (emphasis added). On the other hand, in this case, there is no evidence that The Citadel did anything that caused ReVille to abuse when he otherwise would not. There is no evidence that The Citadel's conduct caused ReVille to select Doe as a victim or to abuse in that particular time frame. In the language of *Staples*, Doe's claim consistently reduces itself to a claim that The Citadel negligently patrolled for dead trees.

Plaintiff relies heavily on *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), where a bottle thrown from a balcony of the defendant auditorium struck a rock concert attendee. The auditorium only had 14 guards to control a crowd of 6,000 and had no reserved seating on the main floor. Multiple witnesses testified that patrons were openly drinking from liquor bottles and that there were liquor bottles and glass on the floor during the concert. In addition, the crowd was unruly. The court rejected the auditorium's argument that it was immune from liability under S.C. Code § 15-78-60(20), which provides, *inter alia*, that a governmental entity is not liable for criminal acts of third persons:

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

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

First, *Greenville Memorial Auditorium* does not address the imposition of a duty, but instead concerns the applicability of an exception to liability under the SCTCA. Second, *Greenville Memorial Auditorium* concerns actions on the defendants' property, under its supervision and in such circumstances that the law imposed a duty to provide for the safety of attendees. Here, (aside from Doe's one-time presence on campus,

unknown to The Citadel, with ReVille to attend a basketball game), ReVille did not abuse Doe at The Citadel or in the context of a formal Citadel activity.

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

C. Plaintiff Has Not Presented Evidence That Title IX Imposed a Duty of Care on The Citadel

Plaintiff next argues that federal statute, 20 U.S.C. §§ 1681, *et seq.* (also known as Title IX), imposes a duty of care on The Citadel. Importantly, Doe has not asserted a private cause of action under Title IX; instead, Doe posits that Title IX imposes and defines a duty of care on The Citadel for his benefit. For the reasons that follow, the trial court properly granted summary judgment to The Citadel, as Title IX does not create a duty of care.

1. Title IX Cannot Impose a Duty of Care As a Matter of Law

Initially, Doe's claim that Title IX imposed a duty of care on The Citadel fails because he does not even attempt to use the statute itself to impose civil liability. Instead, Plaintiff relies on certain non-statutory "administrative" standards in an effort to manufacture a duty of care. However, under the law of the United States Supreme Court and other jurisdictions, those standards cannot be misapplied in such a manner.

Plaintiff first cites to a regulation promulgated under the authority of Title IX: "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." *See* 34 C.F.R. § 106.3(a). This regulation does not apply on its face, insofar as the Assistant Secretary for Civil Rights of the Department of Education never made a finding that The Citadel discriminated against any persons relative to ReVille. As a result, The Citadel was not obligated to take any remedial action under this regulation. Moreover, the regulation does not impose a duty of care, because it seeks to *remedy past* discrimination, not to *prevent future* discrimination. The regulation also *permits* entities

to take certain affirmative actions if it so chooses in the absence of such a finding of discrimination: "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." *See* 34 C.F.R. § 106.3(b). However, Plaintiff does not identify anything in this permissive regulation that could impose a duty on The Citadel for Plaintiff's benefit.

Plaintiff also bases his argument heavily on the United States Office for Civil Rights, Department of Education's 2000 "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("OCR Guidance"). Plaintiff devotes several pages of his Brief to detailing various "administrative" provisions of the OCR Guidance governing how certain entities should respond to complaints of sexual harassment, including:

- Disseminating a policy against sexual harassment (*See* 65 Fed. Reg. 66095).
- Adopting grievance procedures providing for prompt resolution of sexual discrimination complaints, including sexual harassment complaints. (*See id.*).
- Designating an employee to coordinate Title IX regulation compliance. (*See* 65 Fed. Reg. at 66100).
- Taking "immediate and corrective action" when learning of sexual harassment. (*See* 65 Fed. Reg. at 66100).
- Taking "effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effect on the victim." (*See* 65 Fed. Reg. at 66101).
- Not using "insurance" investigations because the "standards may well be different than those under Title IX." (*See* 65 Fed. Reg. at 66108).

(*See* Pl.'s Init. Br., at pp.31-34). Aside from the obvious point that a Guidance issued in 2000 could not have created a standard of care in 1997, there is nothing in the language of the OCR Guidance suggesting that these requirements should be imposed as a negligence standard of care actionable in tort. In fact, the OCR Guidance makes clear

that its revisions from its 1997 version solidify that it is *not* intended to create tort liability standards:

The 1997 guidance contained a section titled "Liability of a School for Sexual Harassment." To the extent this section could be interpreted as being applicable to a school's liability in a private lawsuit for monetary damages, the proposed revised guidance clarifies that the guidance addresses the Department's administrative enforcement of Title IX; *it does not address standards applicable to private litigation for monetary damages.*

See 65 Fed. Reg. 66094 (emphasis added). The OCR Guidance further clarifies that the United States Supreme Court had foreclosed the use of its "administrative" standards to define liability for money damages: "The discussion of liability in the 1997 guidance contained a section on the effect of grievance procedures. To the extent this section could be interpreted to guide courts regarding liability for monetary damages, this section was affected by *Gebser* and *Davis*." See 65 Fed. Reg. 66095. *Gebser* confirms that the OCR Guidance administrative requirements may not form the basis for a civil claim:

[T]he failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. [Citation omitted.] We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.

See *Gebser v. Lago Vista Indep Sch. Dist.*, 524 U.S. 274, 292 (1998).

Applying *Gebser*, one court has held that it was error to use the OCR Guidance's "administrative" provisions to impose a civil standard of care:

Plaintiffs continue to assert negligence per se claims, arguing that "34 C.F.R. 106.8(b) ... requires a school receiving Title IX funds to establish 'procedures providing for the prompt and equitable resolution of student complaints' relating to all forms of sexual harassment, including sexual assault," and that this regulation incorporates an Office of Civil Rights of the Department of Education (OCR) Guidance requiring a school's procedures to "accord[] due process to both parties involved." . . . If the

Court were to allow a regulation used in administering a federally-created right to create a state negligence *per se* claim, it would effectively eviscerate the *Gebser* rule.

In fact, Defendant noted in its motion for summary judgment that Plaintiffs' strategy of "mak[ing] an end run around these principles by asserting state-law negligence-based claims and relying on Title IX regulations and OCR Guidance to establish the duty element of those claims ... [is] preempted by the Supreme Court's jurisprudence on the private right of action under Title IX"

Doe v. University of the South, 2011 WL 1258104, at *14 (E.D. Tenn. March 31, 2011) (see R. pp. 301-16); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 707 n.13 (E.D. Pa. 2007) ("[The OCR] Guidance provides just that: guidance. It is not binding ...").

Plaintiff cites no authority permitting Title IX — in particular its "administrative" regulations and OCR Guidance provisions — to be used to *create* a state law negligence duty of care. To the contrary, those provisions — most of which are geared toward remedying *past* discrimination — are only intended to assist in guiding school actions and federal administrative governances of schools. There is no legal authority — particularly South Carolina authority — supporting Doe's contention.

If Doe believes that he possesses a Title IX claim, he should have asserted such a claim; he may not use the Title IX regulations and guidances to manufacture a duty of care where none exists under state law. See *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1457 (D. Colo. 1994) ("[S]ince both Title VII and Title IX provide a specific means of enforcing legal duties unknown at common law, the remedies under these statutes are exclusive. [Citation omitted.] The Houston's attempt to recover such damages under a negligence *per se* theory is therefore improper.").

Therefore, because Title IX does not impose a duty of care, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

2. Doe Is Not Member of a Class That Title IX Protects

In addition to the foregoing, Doe cannot demonstrate that Title IX can support a

negligence *per se* claim. "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." *Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988).

Under South Carolina law, the "public duty rule" rejects a statute-created duty to the general public. See *Trask v. Beaufort Cty.*, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (Ct. App. 2011) ("[P]ublic 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.") (quoting *Vaughan v. Town of Lyman*, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006)). Courts in South Carolina are especially reluctant to recognize a duty arising out of a statute governing the duties of a public official:

[W]hen the statute at issue creates or defines the duties of a public official, the public duty rule applies. [*Rayfield*, 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. The presumption may be overcome when the statute creates a "special duty" to the plaintiff. 297 S.C. at 106, 374 S.E.2d at 916. In *Rayfield*, this court stated:

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

Trask v. Beaufort County, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (S.C. App. 2011) (no private right of action against county coroner for violating statute prohibiting destruction of human remains); accord *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010) (family court litigant assaulted in family court could not sue for violating statute requiring Sheriff to provide courthouse security).

Title IX cannot support a negligence *per se* claim because this is not the type of injury Title IX is designed to prevent and because Doe is not within the class of persons Title IX is intended to protect. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." See 20 U.S.C. § 1681(a). Courts have agreed that Title IX only applies to protect and benefit students and participants in educational programs. See *e.g.*, *Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs—and not the participants' parents—have standing to bring claims under Title IX."); *Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("On its face, the statutory language of Title IX, applies only to students and participants in educational programs."); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) ("On its face, [Title IX] applies only to students and participants in educational programs. Mrs. Bosley is neither and, therefore, is an improper plaintiff.").

Doe can cite to no authority that he is within the class of persons Title IX is intended to protect. Title IX is geared to the protection of the civil rights of students. It is not a general statute for the prevention of violence where the Defendant happens to be an educational institution. There is no evidence or law supporting the claim that Title IX is intended to protect unknown future victims of sexual abuse who do not attend an institution within its scope. Rather, Title IX is intended to vindicate the civil rights of *participants* in educational programs to ensure that there is no discrimination in those

programs. Doe cites no authority using Title IX to impose a duty of care extending to a non-student who has no relationship with the defendant. Plaintiff's construction of Title IX would convert Title IX into a general statute for the protection of the public from sexual abuse. Title IX cannot be used to impose a duty of care flowing to an unknown person who was not a student at The Citadel and had no relationship with The Citadel.

The Citadel anticipates that Doe will argue that he is within the protections of Title IX under a "Dear Colleague" letter that was circulated in 2011 — almost four years after ReVille stopped abusing Doe:

Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall.

See Letter from Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ. (April 4, 2011) (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>), at 4 n.11. However, this Dear Colleague letter only extends Title IX protection to persons who: (a) have a relationship with the school and (b) are physically present in connection with that relationship. Doe is not within the contemplation of the Dear Colleague letter. Unlike a visiting athlete or recruit, Doe was not on The Citadel's campus and did not have *any* relationship with The Citadel. Doe cites no authority suggesting that Title IX protect unknown, potential future victims with no tie to the school who might be abused under circumstances having no connection to the school.

Although no court has decided the specific question presented here, at least one court has recently suggested that distant connections to a school are likely insufficient to trigger Title IX. *See Kinsman v. Florida State Univ. Bd. of Trustees*, No. 4:15-cv-00235-MW-CAS (N.D. Fla. Aug. 12, 2015) (attached hereto as Ex. A) ("Ms. Kinsman has not offered any other authority for the proposition that Title IX extends to all persons coming into contact with students at off-campus establishments. This Court need not decide that

issue today. But if Ms. Kinsman means to rely on such a theory, she may need more convincing legal authority to support her position."). Plaintiff can cite to no authority that would support expanding Title IX to impose a duty to persons who never attended The Citadel or had an actual relationship with it.

Therefore, because Title IX does not impose a duty of care, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

D. Doe's Claims Fail to the Extent They Rely on Allegations Regarding the Operation of the Camp

Doe argues that The Citadel owed a duty of care in the operation of the summer camp itself, even though those events occurred long before ReVille abused him. Specifically, Doe claims that The Citadel should have: (a) fired ReVille or noted in his personnel file several events — completely non-sexual in nature — that occurred in 2002 or 2003; and (b) known (or did know) that ReVille was abusing campers while a counselor. Plaintiff cannot proffer any evidence that The Citadel knew or suspected that ReVille committed sexual improprieties while he was still employed at the summer camp. These allegations involve conduct years before Camper Doe's report or Doe's abuse.

Doe cannot base his claim on alleged acts during the operation of the summer camp, two years before ReVille started abusing him, because there an employer cannot owe a duty to a victim of abuse by a *former* employee. Doe presents no evidence and cites no law that The Citadel owed a duty to foresee that a failure to properly monitor an employee might lead to that employee engaging in violence *years after the employment* terminates and in circumstances entirely unrelated to it. Doe's focus on what he believes The Citadel should have done while ReVille was a counselor would create catastrophic precedent that would make employers guarantors of all former employees into perpetuity. This is simply not consonant with any proper application of South Carolina law.

Authority from other jurisdictions demonstrates that Doe's claim cannot succeed. In *Roe No. 1 v. Children's Hosp. Med. Ctr.*, 16 N.E.3d 1044 (Mass. 2014), abuse victims of a pediatrician at a North Carolina hospital filed a negligence action against a Massachusetts hospital that had previously employed him. They alleged that that hospital failed to properly train, supervise, or discipline him during his employment, knew or should have known that he was conducting inappropriate genital examinations, and failed to report him to various licensing authorities and his future employer. The court concluded that the first hospital did not owe a duty of care:

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.

See id., 16 N.E.3d at 1048-49 (emphasis added).

In *Evans v. Ohio State Univ.*, 680 N.E.2d 161 (Ohio Ct. App. 10th Dist. 1996), a mother of an abuse victim sued Ohio State, alleging that it hired a state fair judge and speaker, despite knowledge of prior convictions for gross sexual imposition and corruption of minor. The Court refused to impose a duty of care:

[T]he 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 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.

See id., 680 N.E.2d at 741; *Coleman & Co. Sec., Inc. v. Giaquinto Family Trust*, 236 F. Supp. 2d 288, 304 (S.D.N.Y. 2002) ("[Defendant] owed no such duty to supervise Jedrlnic — as an investment advisor or broker — when Jedrlnic was employed with J. Robbins, Inc. after that time.").

Similarly, in *Philips v. TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 91 Cal. Rptr. 3d 864 (Cal. App. 4th Dist. 2009), the court held that a plumbing service did not owe a duty to a customer's daughter for negligent hiring and retention of a former employee who shot and killed the customer two years after his work was terminated:

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.

See id., 172 Cal. App. 4th at 1144-45, 91 Cal. Rptr. 3d at 872-73. That plaintiff had a much stronger argument than Doe here, insofar as she actually met the assailant through his employment with the defendant. Doe presents no evidence that ReVille met him through The Citadel's summer camp or directly through any act of The Citadel.

Consequently, no duty of care could flow to Doe in connection with the hiring, supervision or retention of ReVille as a counselor. Such a claim is too far removed to support a duty of care.

This result is logical, as South Carolina law would not recognize a claim even if ReVille had still been an employee at the time he abused Plaintiff. An employer only owes a duty to supervise employees who are acting outside the scope of their employment 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. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992) (adopting *Restatement (Second) of Torts* § 317 (1965)); *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); *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). Plaintiff could not show any of these requirements even if ReVille was still a camp employee when he abused Doe. If The Citadel would not be liable if ReVille abused Doe while an employee, it could not be liable for abuse years after ReVille's camp employment ended and the camp closed.

Even if a duty of care could exist, proximate cause requires that the ultimate harm be foreseeable ***at the time of the alleged negligence***:

It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. *Olson v. Faculty House*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001).

To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. *Id.* Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. *Id.* Legal cause turns on the issue of foreseeability. *Id.* An injury is foreseeable if it is the natural and probable consequence of a breach of duty. *Id.* ***Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach.*** *Id.*

See Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001) (emphasis added). It would have been wholly unforeseeable to The Citadel in 2002 or 2003 (or earlier) that their alleged acts or omissions in running the summer camp would harm Doe years later. It is not reasonable to expect Garrott to have foreseen in 2002 that her failure to document an innocent looking event (such as ReVille being in a room with a camper in an entirely non-sexual manner) would cause a child, unrelated to the camp, to be sexually abused years later off of the premises of The Citadel.

To the extent he relies on events occurring while ReVille was employed at the camp, Doe's claims are too remote from ReVille's employment. Doe's claim that more

rigorous supervision of ReVille when he was a camp counselor would have altered his distant future child abuse is highly speculative. If the Court permits Doe to inject such hindsight into this case, it will open novel lines of liability that have never existed before.

Therefore, to the extent Doe's claims relate to the operation of the summer camp itself, the trial court properly granted The Citadel's motion for summary judgment.

E. Plaintiff Cannot Show Proximate Causation

In addition to the reasons set forth above, and as an alternative supporting ground, the trial court's grant of summary judgment was also proper because Plaintiff cannot show that any act of The Citadel — including the failure to report ReVille to law enforcement — was the cause of his abuse.

Proximate cause is the efficient or direct cause of the injury. *See Roof v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988). Proof of proximate cause requires proof of both “causation in fact” and “legal cause.” *See Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Causation in fact is proved by establishing that the injury would not have occurred “but for” the defendant’s negligence; on the other hand, “legal cause” focuses on foreseeability. *See id.*, 477 S.E.2d at 715. “Negligence . . . may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided.” *See Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 547, 694 S.E.2d 1, 5 (2010) (citation omitted).

“[P]roof of causation cannot rest on conjecture, and the mere possibility of such causation is not enough to sustain plaintiff’s burden of proof.” *See Todd v. United States*, 570 F. Supp. 670, 677-78 (D.S.C. 1983) (citation omitted). Speculation or conjecture is insufficient to show factual cause:

When asked if the case would have produced a different outcome had the Respondents not breached their standard of care, Scarminach hedged: “you never know because it's conjecture.” Instead of stating that the Respondents' conduct most probably caused the outcome, Scarminach said, “had [Respondents] done these things, the percentage of success

would have been greater.” Thus, Scarminach's deposition did not establish that the Respondents' actions were the “but for” cause of Harris Teeter's loss.

See Harris Teeter, Inc. v. Moore & VanAllen, P C., 390 S.C. 275, 289-90, 701 S.E.2d 742, 749 (2010).

Initially, as the trial court properly noted, under the specific facts of this case, there can be no legal or factual causation because ReVille's abuse of Plaintiff began long before Camper Doe's 2007 report. As set forth above, ReVille started abusing Plaintiff in 2005, two years before The Citadel was ever made aware of Camper Doe's accusations. The abuse ended in August, 2007, only days after Brandenburg interviewed Camper Doe. Therefore, as the trial court held, "Plaintiff's injuries arose before — and thus were not a proximate result of — any possible breach of duty by The Citadel." (*See Order*, at 3).

In any event, Plaintiff cannot carry his burden of showing causation because there is no evidence that, had The Citadel done any of the things Plaintiff claims it should have done, ReVille would not have abused him. For example, there is no evidence that, had The Citadel documented any of the alleged incidents of being alone with campers or reported ReVille to law enforcement, Doe would not have been abused. Instead, Plaintiff asks the Court to speculate about what might have happened under a hypothetical state of facts. This is plainly insufficient to support a finding of causation in fact. Moreover, Plaintiff cannot show legal cause because there is no evidence that it was foreseeable to The Citadel that its failure to engage in the acts complained of would cause the harm sustained by Plaintiff. *See Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001).

Therefore, the trial court properly granted The Citadel's motion for summary judgment.

III. The Trial Judge Properly Granted Summary Judgment as to Outrage

A. The SCTCA Prohibits Doe's Outrage Claim

Doe's claims exist only to the extent the SCTCA permits them. The SCTCA's

provisions "establishing limitation[s] on an exemption to the liability of the state . . . *must be liberally construed in favor of limiting the liability of the state.*" S.C. Code Ann. § 15-78-20(f) (emphasis added). A "loss" under the SCTCA includes "bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but *does not include the intentional infliction of emotional harm.*" See S.C. Code § 15-78-30(f) (emphasis added). Moreover, a governmental entity may not be held liable for "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice, intent to harm*, or a crime involving moral turpitude." See S.C. Code § 15-78-60(17) (emphasis added). The trial court properly held that these provisions bar Doe's outrage claim.

Construing the SCTCA "liberally in favor of limiting the liability of the state," numerous courts have concluded that the SCTCA bars outrage claims. See *Newman v. South Carolina Dep't of Employment and Workforce*, 2010 WL 4791932, at *2 (D.S.C. Sept. 22, 2010) ("[A]mendment of the Complaint would not save this [outrage] cause of action, since the Department, as a state agency, has sovereign immunity with regard to this tort claim."), *report and rec. adopted*, 2010 WL 4666360 (D.S.C. Nov. 18, 2010) (see R. pp. 391-97); *Ward v. City of N. Myrtle Beach*, 457 F. Supp. 2d 625, 646-47 (D.S.C. 2006) ("[T]he South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of 'loss' for which a government may be liable under the Tort Claims Act."); *Harkness v. City of Anderson*, 2005 WL 2777574, at 4 (D.S.C. Oct. 25, 2005) ("Defendants argue they are immune from suit pursuant to the South Carolina Tort Claims Act . . . on the claim of outrage, otherwise known as intentional infliction of emotional distress. [Citation omitted.] The court agrees. The SCTCA does not waive sovereign immunity for this claim.") (see R. pp. 398-401); *Trask v. Beaufort Cty.*, 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the

Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm.'"); *accord Lindquist v. Tanner*, 2012 WL 3839237, at *4 (D.S.C. April 12, 2012) ("Plaintiff concedes that her claim for 'intentional' infliction of emotional distress against the County Recreation Commission is barred by the South Carolina Tort Claims Act."), *report and rec. adopted in part*, 2012 WL 3839235 (D.S.C. Sept. 4, 2012) (*see* R. pp. 402-11); *Pruitt v. County of Charleston*, 2000 WL 35535239 (June 23, 2000 Comm. Pl. Charleston Cty.) ("Accordingly, based on the clear provisions of the Tort Claims Act, Doe's outrage claim is not actionable against this Defendant."). Likewise, in this case, the SCTCA bars Doe's outrage claim.

Doe argues that these provisions do not bar his claim, because he can succeed on an outrage claim if he can prove that The Citadel acted "recklessly" (rather than with intent to harm). However, bearing in mind that the SCTCA must be construed to minimize the state's liability, this Court should construe the SCTCA's prohibition of claims for "the intentional infliction of emotional harm" to include all claims for outrage. *See* S.C. Code § 15-78-30(f). The SCTCA's use of the phrase "intentional infliction of emotional harm" — rather than "intentional infliction of emotional *distress*" — does not suggest that the legislature intended to impose outrage liability where the defendant's acts are "reckless" rather than intentional.

In support of his contention that the SCTCA does not bar his outrage claim, Plaintiff only cites *Bass v. South Carolina Dep't of Soc. Servs.*, 403 S.C. 184, 742 S.E.2d 667 (Ct. App. 2013), *cert. granted* (July 18, 2014). Specifically, Doe argues that, because this Court reversed the denial of a directed verdict on an outrage claim on *substantive grounds*, rather than the SCTCA, it impliedly rejected The Citadel's argument here. While the *Bass* defendant did make a similar argument, this Court *did not examine or rule upon that argument in its opinion*. To the contrary, this Court reversed on the separate ground that there was no evidence of conduct sufficient to support an outrage claim. As a result, *Bass* does not support Doe's contention that this Court should ignore the plain language of the SCTCA to permit liability for outrage.

For the reasons set forth above, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

B. Doe's Outrage Claim Fails Because There Is No Evidence That The Citadel Directed Any Conduct Toward Him

As the trial court correctly noted, Doe's outrage claim also fails because The Citadel did not direct conduct toward him. Doe's outrage claim will not succeed unless he proves that The Citadel knowingly *directed* its conduct at him *in particular*:

The law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. [Citation omitted.] 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*.

See Upchurch v. New York Times, Inc., 314 S.C. 531, 536-37, 431 S.E.2d 558, 561-62 (1993) (emphasis added); *Roberts v. Simmons*, 2014 WL 7005250, at *6 (D.S.C. Dec. 11, 2014) ("[I]t is not clear that Defendant's alleged conduct was directed at the Plaintiff.") (see R. pp. 1805-09); *Fulghum v. Wise Seats, Inc.*, 2012 WL 1032594, at *4 (D.S.C. Mar. 27, 2012) ("[T]he conduct upon which Plaintiff bases his claim . . . is not tortious conduct that was specifically directed towards Plaintiff."). In this vein, this Court has held that parents of a minor abuse victim could not sue for outrage where there was no evidence that the defendant directed actions at them. *See Doe v. Rojas*, 2007 WL 8327520, at *4 (Ct. App. April 26, 2007) ("[T]he record contains no evidence that the School District, in failing to take any preemptive action to prevent the abuse, targeted or directed any of its conduct towards the Does.") (see R. pp. 1811-14).

Doe has not proffered any evidence that The Citadel knowingly directed any actions against him. There is no evidence that The Citadel knew Doe, knew that ReVille abused Doe or had any contact with Doe. There is no evidence that Doe was a camper at the summer camp or that he had any relationship with The Citadel. There is no evidence that The Citadel directed (or even could have directed) any conduct toward Doe, who

ReVille abused *after* his employment at the summer camp. At most, Doe argues that The Citadel should have known — or, more accurately, speculated — that ReVille might abuse some unknowable person at some uncertain time in the future. He does not argue that The Citadel had any way of knowing that Doe was specifically at risk of abuse or that ReVille was, in fact, abusing him. Therefore, this Court should affirm the entry of summary judgment as to Doe's outrage claim.

C. **This Claim Fails Because There Is No Evidence of Outrageous Conduct**

The trial court also properly granted summary judgment to The Citadel as to Doe's outrage claim because Doe has not proffered a scintilla of evidence that The Citadel engaged in the sort of egregious conduct required for him to succeed on that claim. Doe must prove the following elements for his outrage claim:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
- (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
- (3) the actions of the defendant caused plaintiff's emotional distress; and
- (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could expect to endure it."

Bass v. South Carolina Dep't of Soc. Servs., 403 S.C. 184, 193, 742 S.E.2d 667, 672 (2013) (citations omitted). "Facts which may show extreme insensitivity on the part of the defendant do not necessarily establish the tort of outrage." *Hawkins v. Greene*, 311 S.C. 88, 91, 427 S.E.2d 692, 694 (Ct. App. 1993).

South Carolina appellate courts rarely find conduct sufficient to support an outrage claim, even where defendants acted egregiously. *See e.g., Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921 (Ct. App. 1994) (supervisor threatened and ridiculed employee with cerebral palsy); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994)

(homeowner's association president refused access to records); *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994) (doctor mistakenly told patient's daughter that father had died); *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 411 S.E.2d 664 (1991) (newspaper published unflattering statements about plaintiff's murdered daughter); *Manley v. Manley*, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) (plaintiff was involuntarily committed to state hospital); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986) (verbally abusive accusations that plaintiff owed taxes and filed fraudulent returns); *Save Charleston Found'n v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985) (converting promissory note and maliciously bringing action).

One of the rare deviations from this trend was *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991), where an employer forced an employee to perform exercises that aggravated a known health condition and caused plaintiff to lose bladder control in front of others. The Court found that the jury could find this conduct "outrageous and intolerable in a civilized society." *Id.* at 29, 402 S.E.2d at 892; *accord Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (finding conduct sufficiently severe where home buyer subjected realtor to repeated public browbeatings, obscenities, and threats over two years and entered home without permission).

Bearing in mind that the Court must focus on The Citadel's conduct (not ReVille's), Plaintiff presents no evidence that The Citadel acted in an "extreme and outrageous" manner. There is no evidence that The Citadel acted to intentionally harm Doe or with reckless disregard for Doe's rights. Doe can point to no evidence that The Citadel intended for ReVille to abuse Doe (or anyone else) or cause emotional distress. There is no evidence that The Citadel took any act with conscious knowledge that Doe would suffer extreme emotional distress. There is no evidence that The Citadel took pleasure in ReVille's abuse or wished him to abuse any victims. There is no evidence that anyone at The Citadel acted in such a despicable manner. Despite Plaintiff's semantic gymnastics, his claim boils down to the allegation that The Citadel was failed to

prevent ReVille from abusing him. This is not the sort of conduct contemplated by the tort of outrage.

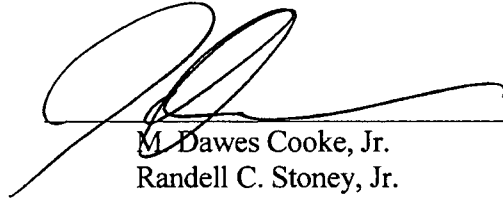
Therefore, this Court should affirm the trial court's entry of summary judgment on Doe's outrage claim.

D. Doe's Outrage Claim Fails Because He Possessed an Alternative Claim That He Could Have Pursued

Doe's outrage claim also fails because he had other potential causes of action that he could pursue for his injuries. The law is clear that Doe may only assert an outrage claim when *no other* claim is available: "The tort of outrage was designed *not as a replacement* for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct *where no remedy previously existed*." See *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 175, 321 S.E.2d 602, 613 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985) (emphasis added); *Levine v. Walterboro City Police Dep't*, 2006 WL 2228993, at *2 (D.S.C. Aug. 3, 2006) ("Intentional infliction of emotional distress is a claim of last resort. . . . Since that alternative remedy was available, *Todd* suggests that a claim for intentional infliction of emotional distress cannot lie."). Doe has already asserted negligence/gross negligence claims against The Citadel. His recovery, if any, is limited to those claims. Because Doe has alternative theories available, he should not be allowed to use the tort of outrage in addition to those claims. Therefore, this Court should affirm the trial court's entry of summary judgment on Doe's outrage claim.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below granting summary judgment to The Citadel.



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Dated: October 23, 2015
Charleston, South Carolina

Exhibit A

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

ERICA KINSMAN,

Plaintiff,

v.

Case No. 4:15cv235-MW/CAS

**FLORIDA STATE UNIVERSITY
BOARD OF TRUSTEES,**

Defendant.

_____ /

ORDER DENYING MOTION TO DISMISS

This is an action under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688. Erica Kinsman is a former student at Florida State University (“FSU”). The Board of Trustees administers the university.¹ In her complaint, Ms. Kinsman alleges that another FSU student—the football player Jameis Winston—raped her at an off-campus apartment in Tallahassee, Florida. She claims that FSU failed to investigate properly or respond to the reported assault and that this denied her educational benefits. FSU moves to dismiss the

¹ Florida law provides that the Board has capacity for suit. § 1001.72, Fla. Stat. For convenience, this order refers to Defendant as “FSU.”

complaint, arguing that under Federal Rule of Civil Procedure 12(b)(6) it fails to state a claim upon which relief can be granted. This order denies the motion to dismiss the complaint.

I

The relevant part of Title IX says that “No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The Supreme Court has found an implied right of action for individuals to enforce that requirement. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979). A person may bring a claim for known student-on-student sexual harassment, which is “discrimination” under Title IX. *See Davis v. Monroe Count Bd. of Educ.*, 526 U.S. 629, 650 (1999).

A plaintiff seeking recovery for student-on-student sexual harassment must prove four things. First, the defendant must be a recipient of federal funds under Title IX. *Williams v. Bd. of Regents of Univ. Sys. of Georgia*, 477 F.3d 1282, 1293 (11th Cir. 2007). It is undisputed that FSU is a Title IX funding recipient. ECF No. 35, at 5. No further discussion of this requirement is necessary.

Second, “an ‘appropriate person,’ must have actual knowledge of the discrimination or harassment the plaintiff alleges occurred.” *Williams*, 477 F.3d at 1293 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

“[A]n appropriate person . . . is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination.” *Id.* (internal quotation marks omitted).

Third, “a funding recipient is liable for student-on-student harassment only if ‘the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.’ ” *Id.* (quoting *Davis*, 526 U.S. at 633). A funding recipient is deliberately indifferent “only where [its] response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.” *Id.* at 1296 (quoting *Davis*, 526 U.S. at 648). Put another way, it must amount to “an official decision by the recipient not to remedy the violation.” *Gebser*, 524 U.S. at 290. The deliberate indifference asserted must subject the plaintiff to further harassment; that is, it must cause the complaining student to undergo harassment or make the student liable or vulnerable to it. *Davis*, 526 U.S. at 644; *Williams*, 477 F.3d at 1296.

Fourth, “the discrimination must be ‘so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.’ ” *Williams*, 477 F.3d at 1293 (quoting *Davis*, 526 U.S. at 633).

II

On January 7, 2015, Ms. Kinsman filed her Title IX complaint in this Court. She asserts that officials at FSU knew she reported that Mr. Winston raped her,

that its response to that information was clearly unreasonable, and that had FSU not been deliberately indifferent, she would not have been subjected to further discrimination. She seeks money damages, injunctive relief, and attorney's fees.

FSU seeks dismissal of that complaint. It identifies three forms of discrimination alleged in the complaint: (1) harassment caused by Ms. Kinsman having to be on campus with Mr. Winston; (2) harassment from third parties via social media; and (3) harassment in not being able to return to school. For each of these categories, FSU argues that the complaint fails to meet one or more of the four requirements for a Title IX claim. For that reason, FSU says the complaint does not state a Title IX claim.

When considering a motion to dismiss under Rule 12(b)(6), this Court must accept the allegations in a complaint as true and read them in the light most favorable to the plaintiff. *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004). The sole issue before this Court is whether the complaint, considered through this lens, has sufficient factual matter to state a Title IX claim that is plausible on its face. In short, it does. For the following reasons, the motion to dismiss will be denied.

III

In its first major point, FSU says it is not liable for any alleged harassment caused by Ms. Kinsman having to be on campus with Mr. Winston. First, FSU

argues that no “appropriate person” had knowledge of Ms. Kinsman’s allegation until November 2013. Second, even if one did, FSU says its response before then of providing a victim advocate to give assistance and explain the student-disciplinary process was not “clearly unreasonable.” Third, FSU says that merely being on campus with Mr. Winston for some months was not harassment under Title IX. This Court will address each argument in turn.

A

FSU’s first argument is that the complaint fails to allege that any “appropriate person” had actual knowledge of Ms. Kinsman’s report until November 2013. Basically, FSU says two officials did not have either enough authority or knowledge to take corrective action.

FSU asserts that neither its associate athletics director nor its head football coach is an “appropriate person” under Title IX. An appropriate person is one with “authority to take corrective action to end the discrimination.” *Williams*, 477 F.3d at 1293. But the “ultimate question of who is an appropriate person is ‘necessarily a fact-based inquiry’ because of the varying roles of educational officials.” *Doe v. Sch. Bd. of Broward Cnty.*, Fla., 604 F.3d 1248, 1256 (11th Cir. 2010) (quoting *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999)). It is plausible that the facts will show that one or both of these officials had enough authority over a member of the football team to take corrective action. *See, e.g.*,

Williams, 477 F.3d at 1294–95. This Court cannot say now, as a matter of law, that these officials are not appropriate persons under Title IX.

Next, FSU argues that these persons did not know enough to have “actual knowledge” under Title IX. FSU says that Ms. Kinsman “does not—and cannot—allege that [the head football coach] and [the associate athletics director] knew that Winston’s alleged victim was an FSU student, much less that they knew the actual identity of Winston’s alleged victim.” ECF No. 35, at 9. This is not sufficient for a Title IX claim, FSU argues, because the law protects against *known* student-on-student harassment. At least for this type of claim, it follows that the school official must know that *both* the student *and* the alleged assailant are students, or at least connected to the funding recipient’s educational programs.²

² To defeat FSU’s argument that those official had insufficient knowledge, Ms. Kinsman argues in part that “Title IX not only protects students; it also protects third parties from harassment by individuals under the school’s control such as Winston.” See ECF No. 44, at 8–9 n.4. The support for that proposition is a Dear Colleague Letter (“DCL”) issued by the U.S. Department of Education, Office of Civil Rights. Office for Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter: Sexual Violence* 4 (2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (included in this record at ECF No. 44-2). The DCL says that Title IX “protects third parties from sexual harassment or violence in a school’s educational programs and activities.” It gives examples of “a high school student participating in a college’s recruitment program, a visiting student athlete, . . . a visitor in a school’s on-campus residence hall,” and “employees of a recipient.” ECF No. 44-2, at 4, n.11. What those examples have in common is some connection to the to the school’s educational programs. Notably, Ms. Kinsman has not offered any other authority for the proposition that Title IX extends to all persons coming into contact with students at off-campus establishments. This Court need not decide that issue today. But if Ms. Kinsman means to rely on such a theory, she may need more convincing legal authority to support her position.

It is true that the complaint does not specifically allege that TPD disclosed Ms. Kinsman's name or student status to the FSU athletics department on January 22, 2013. But it does allege that "[s]enior FSU Athletics Department . . . officials had actual knowledge that Plaintiff reported being raped by Winston as of no later than January 22, 2013, six weeks after the rape." ECF No. 1 ¶ 78. Elsewhere in the complaint, Ms. Kinsman refers to herself at that time as "an FSU freshman." *Id.* ¶ 9.³ For the purposes of this motion to dismiss, this Court assumes those allegations are true.

Taken together, the complaint plausibly alleges that an appropriate person had actual knowledge as of January 22, 2013.

B

In its second argument, FSU insists that even if an appropriate person had actual knowledge of Ms. Kinsman's allegation before November 2013, its response up until then was not clearly unreasonable. Under Title IX, a funding recipient is liable for student-on-student harassment only when it acts with deliberate indifference; that is, where its "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

³ This Court notes that Ms. Kinsman initially filed her complaint anonymously as "Jane Doe" and referred to herself throughout the complaint only as "Plaintiff."

FSU says it immediately provided Ms. Kinsman with a victim advocate who explained how to change a class shared with Mr. Winston, that the victim advocate informed Ms. Kinsman of the student-disciplinary process, and that FSU honored what it describes as Ms. Kinsman's "informed decision not to initiate that process between January and November 2013, when she left campus." ECF No. 35, at 13. Should the facts bear this out, there is some support for the general proposition that such a response might not be clearly unreasonable. *See, e.g., Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014) (holding deliberate indifference was not established where administrator offered resources and explained how to file rape complaint but alleged victim declined to do so). But the facts relevant now are those alleged in the complaint.

In the complaint, there is nothing about Ms. Kinsman affirmatively declining a student-disciplinary hearing. She alleges that no one at FSU offered any safety precautions. She further alleges that between January 22, 2013, and November 13, 2013, senior athletics officials took little if any action to investigate or respond to the alleged rape of a student by another student in their charge.

The complaint plausibly alleges deliberate indifference during this period.

C

In its third argument, FSU claims that Ms. Kinsman being on campus with Mr. Winston until November 2013 was not serious enough to constitute “further discrimination” under Title IX.

“[A] Title IX plaintiff at the motion to dismiss stage must allege that the Title IX recipient’s deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination.” *Williams*, 477 F.3d at 1297. That is, the deliberate indifference must cause the complaining student to undergo harassment or make the student liable or vulnerable to it. *Id.* at 1296.

As other courts have recognized, educational benefits are “not ‘equally available’ if the educational environment is ‘disparately hostile.’ ” *S.S. v. Alexander*, 177 P.3d 724, 744 (Wash. Ct. App. 2008) (quoting *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 750 (2d Cir. 2003)). Under Title IX, though, the discrimination complained of must be so “severe, pervasive, and objectively offensive” such that it effectively bars the victim’s access to an educational opportunity or benefit. *Davis*, 526 U.S. at 633. “Whether gender-oriented conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and victim, and the number of individuals involved.” *Id.* at 651 (citations omitted).

When it comes to Title IX sexual harassment, such as rape, it is said that “[t]he effect of such abusive conduct on a victim does not necessarily end with a cessation of the abusive conduct, particularly if the victim and abuser retain the same or similar roles in an educational institution.” *See Wills v. Brown Univ.*, 184 F.3d 20, 36–37 (1st Cir. 1999). This Court agrees that the possibility of further encounters “between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.” *Kelly v. Yale Univ.*, No. CIV.A. 3:01-CV-1591, 2003 WL 1563424, at *4 (D. Conn. Mar. 26, 2003); *see also Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (holding the “constant potential for interactions” between harasser and rape victim could support conclusion that harassment was “severe, pervasive, and objectively offensive”). It does not require mental gymnastics to reach this conclusion.

Among other things, Ms. Kinsman alleges that over a ten-month period (albeit with a summer break in between semesters) she was fearful of Mr. Winston (with whom she shared a class), she struggled with her coursework, she altered or avoided social activities at school, and she was frightened when she saw Mr. Winston during a midterm examination. She specifically asserts that the presence of her alleged attacker on campus and its impact on her educational opportunities forced her to leave school and prevented her from returning to

continue her education. ECF No. 44, at 18. In similar circumstances, the Eleventh Circuit has called such a decision “reasonable and expected.” *Williams*, 477 F.3d at 1298.

For Title IX purposes, it is certainly plausible that this alleged harassment was severe and pervasive enough to deprive her of educational benefits. *See Davis*, 526 U.S. at 650–51.

IV

In its second major point, FSU further asserts that it is not liable for third-party harassment via social media. FSU concedes that exposure to such comments can constitute harassment that is sufficiently severe for purposes of Title IX. ECF No. 35, at 15. FSU says it is not responsible for this harassment because it could not control the context in which it occurred. Cast in slightly different terms, FSU further asserts that any alleged deliberate indifference on its part could not have been the proximate cause of any harassment Ms. Kinsman suffered through social media or the internet.

Ms. Kinsman responds that if FSU had taken action back in January 2013 when officials allegedly learned of her report to TPD, Mr. Winston “ ‘would have been removed as a threat to [her] long before ever suiting up to play football in a Seminoles jersey,’ thereby reducing the likelihood that [she] would have been relentlessly vilified by the press and the Seminole football community.” ECF No.

44, at 19 (quoting ECF No. 1 ¶ 146). FSU says that theory relies on “rank speculation.” Ms. Kinsman says it does not.

Under *Davis*, a Title IX funding recipient’s liability for damages is limited to “circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.” 526 U.S. at 645. At least one court, though, has found that while similar third-party harassment is not itself actionable, it may bear on the “severity and offensiveness of having to go to school” with one’s alleged attacker. *Derby*, 451 F. Supp. 2d at 445.

This Court has already found that the complaint states a claim on those grounds. *See* Part IV, above. It need not decide today the whole scope of the claim. This is especially true when, as here, the parties have only briefly addressed the issue of causation and third-party harassment in their respective submissions and the record is undeveloped.

V

In its third major point, FSU argues that it is not liable for harassment in the form of Ms. Kinsman’s alleged exclusion from school. It says that Ms. Kinsman’s inability to return has not been caused by its alleged deliberate indifference.

The Eleventh Circuit confronted somewhat similar facts in *Williams*. 477 F.3d at 1296–97. In that case the plaintiff reported a rape and left school the next day. *Id.* at 1289. The police investigated but the university waited eleven months

from the incident and eight months after having a full report before conducting a disciplinary hearing. *Id.* at 1296–97. The plaintiff alleged that she may return if the university implemented more effective procedures to deal with student-on-student harassment. *Id.* at 1298. But the university took no precautions to prevent future attacks. *Id.* at 1297. The court said the university’s failure to take action was “inexplicably and discriminatory.” *Id.* The court concluded that, viewed in the light most favorable to the plaintiff, the university acted with deliberate indifference. *Id.* at 1296.⁴ The deliberate indifference in *Williams* was “followed by further discrimination, this time in the form of effectively denying [the plaintiff] an opportunity to continue to attend” the school. *Id.* at 1297.

The result is the same in this case. According to the complaint, Ms. Kinsman left campus on November 14, 2013. Though there are some indications to the contrary,⁵ the complaint fairly alleges that she wishes to remain an FSU student. ECF No. 1 ¶¶ 27, 122. Through her lawyers she repeatedly asserted a willingness to cooperate with a Title IX investigation and asked “what response the school believes would address the harassment and allow her to re-enroll in classes

⁴ To be sure, *Williams* involved two types of claims. One of the claims was as described above. The second was that the university recruited the student athlete with knowledge of past misconduct, failed to supervise him, and the plaintiff was raped as a result. 477 F.3d at 1294. Ms. Kinsman does not bring that sort of claim.

⁵ See, e.g., ECF No. 1 ¶¶ 113, 145(j).

at Florida State.”⁶ *Id.* ¶ 122. FSU had its own police officer’s report as well as TPD’s reports. Presumably, TPD’s reports contained the contents of the two interviews of Ms. Kinsman which TPD performed the day after the alleged rape. Yet the disciplinary hearing did not happen until December 2014. The complaint does not mention any precautions taken by FSU to prevent future harassment. According to the complaint, on November 12, 2013, the dean of students told the chief of police about a second student accusing Mr. Winston of sexual assault and assured the chief that a code of conduct proceeding against Mr. Winston *would not* move forward. *Id.* ¶ 101.

FSU says that after it learned of the allegation in November 2013, it waited for the state attorney to conclude the criminal investigation. After that, FSU says it reviewed the evidence, attempted unsuccessfully to interview Mr. Winston, and concluded it lacked sufficient evidence to bring charges. The remaining reason for

⁶ FSU has attached both the letters from Ms. Kinsman’s lawyers and FSU’s responses as exhibits to the motion to dismiss, and urges this Court to consider them. Although ordinarily a court will consider nothing beyond the complaint when deciding a motion to dismiss, there is an exception “in cases in which a plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss.” *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). It may be that the letters are significant. But they are not central to Ms. Kinsman’s claim the way, for example, a written contract is in a breach-of-contract case. This Court declines to consider them in deciding this motion to dismiss.

the year-long delay in arriving at a disciplinary hearing, according to FSU, was its inability to interview Ms. Kinsman.

In sum, FSU offers a different take on some of the facts in the complaint and additional facts that are not in the complaint in an attempt to show its efforts to respond were diligent and genuine, or at least not “clearly unreasonable” under Title IX. This Court does not resolve such factual disputes on a motion to dismiss.

Viewed in the light most favorable to Ms. Kinsman, the complaint plausibly alleges deliberate indifference during this period that effectively denied her the ability to attend FSU. *See Williams*, 477 F.3d at 1297–97.

VI

The complaint states a claim under Title IX upon which relief may be granted.

For these reasons,

IT IS ORDERED:

Defendant’s motion to dismiss, ECF No. 35, is **DENIED**.

SO ORDERED on August 12, 2015.

s/Mark E. Walker
United States District Judge

Exhibit B

2015 WL 4548009

Only the Westlaw citation is currently available.

United States Court of Appeals,
Fourth Circuit.

John DOE 2, Plaintiff–Appellant,
v.

President John W. ROSA,
individually, Defendant–Appellee.

Mother Doe, on behalf of John
Doe 3, Plaintiff–Appellant,

v.

President John W. Rosa,
individually, Defendant–Appellee.

Nos. 14–1748, 14–1749. | Argued:
March 24, 2015. | Decided: July 28, 2015.

Synopsis

Background: Older brother, and mother on behalf of younger brother, brought separate actions against president of public military college, alleging that president violated affirmative duty under Due Process Clause to protect brothers from being molested at summer camp held at college. The United States District Court for the District of South Carolina, Richard M. Gergel, J., granted president's motion for summary judgment in both actions. Mother and older brother appealed.

[Holding:] The Court of Appeals, Agee, Circuit Judge, held that president did not create danger of camp counselor's molesting brothers.

Affirmed.

West Headnotes (14)

[1] **Civil Rights**

↔ Rights Protected

Section 1983 imposes liability on state actors who cause the deprivation of any rights, privileges, or immunities secured by the Constitution. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[2] **Constitutional Law**

↔ Protection of Children; Child Abuse, Neglect, and Dependency

State actions that result in sexual abuse of children can be actionable under § 1983, based on Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] **Civil Rights**

↔ Failure to Act or Protect or to Enforce Law

When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive in determining whether a state actor can be liable under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4] **Civil Rights**

↔ Failure to Act or Protect or to Enforce Law

Constitutional Law

↔ Creation of Danger or Risk

The creation of a danger implicates the alternate framework of § 1983 liability, based on the Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity, wherein a plaintiff alleges that some conduct by an officer directly caused harm to the plaintiff. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[5] **Constitutional Law**

↔ Creation of Danger or Risk

To establish § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity based on a state-created danger theory, a plaintiff must show that the state actor

created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[6] **Constitutional Law**

⇒ Duty to Protect; Failure to Act

Constitutional Law

⇒ Creation of Danger or Risk

State actors may not disclaim § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity when they themselves throw others to the lions, but that does not entitle persons who rely on promises of aid to some greater degree of protection from lions at large. U.S.C.A. Const Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[7] **Civil Rights**

⇒ Vicarious or Respondeat Superior Liability in General

Principles of respondeat superior do not apply in imposing liability under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[8] **Constitutional Law**

⇒ Protection of Children, Child Abuse, Neglect, and Dependency

Infants

⇒ School Authorities and Staff

President of public military college, at which summer camp was held, did not create danger of counselor at camp molesting two brothers, and thus president could not be liable under § 1983 for alleged violation of brothers' substantive due process rights against state actor conduct that deprived them of bodily integrity, where abuse of brothers occurred two years before president could have been aware of such abuse through complaint from other camper who was also molested, counselor's abuse of brothers

did not get any worse after date of complaint, and president did not take any affirmative acts, but instead allegedly failed to notify authorities of counselor's past conduct. U.S.C.A. Const Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[9] **Civil Rights**

⇒ Failure to Act or Protect or to Enforce Law

There simply is no constitutional right to be protected by the state against criminals or madmen, and a state actor's failure to do so is not actionable under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[10] **Constitutional Law**

⇒ Creation of Danger or Risk

A key requirement for § 1983 liability, for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity, under the state-created danger doctrine is that the state actor increase or create the danger through affirmative conduct. U.S.C.A. Const Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[11] **Constitutional Law**

⇒ Creation of Danger or Risk

In order for § 1983 liability, for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity, under the state-created danger doctrine to apply, the state, through its affirmative acts, must itself create the dangerous situation that resulted in a victim's injury, such that it becomes much more akin to an actor itself directly causing harm to the injured party. U.S.C.A. Const Amend 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[12] **Constitutional Law**

⇒ Creation of Danger or Risk

No constitutional liability under § 1983, for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity, pursuant to the state-created danger doctrine exists where the state actors had no hand in creating the danger but simply stood by and did nothing when suspicious circumstances dictated a more active role for them. U.S.C.A. Const Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[13] **Constitutional Law**

↔ Creation of Danger or Risk

Affirmative acts, as required for § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity under the state-created danger doctrine to apply, are quite limited in scope; it cannot be that the state commits an affirmative act every time it does anything that makes injury at the hands of a third party more likely, and although inaction can often be artfully recharacterized as action, courts should resist the temptation to inject this alternate framework into omission cases. U.S.C.A. Const Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[14] **Constitutional Law**

↔ Creation of Danger or Risk

The concept of affirmative acts, as required for § 1983 liability for a violation of the substantive due process right against state actor conduct that deprives an individual of bodily integrity under the state-created danger doctrine to apply, should not extend beyond the context of immediate interactions between the state actor and the plaintiff. U.S.C.A. Const Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

Attorneys and Law Firms

ARGUED: Jacqueline LaPan Edgerton, McLeod Law Group, LLC, Charleston, South Carolina, for Appellants. Morris Dawes Cooke, Jr., Barnwell Whaley Patterson & Helms, LLC, Charleston, South Carolina, for Appellee. **ON BRIEF:** W. Mullins McLeod, Jr., James B. Moore III, McLeod Law Group, LLC, Charleston, South Carolina, for Appellants. John W. Fletcher, Randell C. Stoney, Jr., Jeremy E. Bowers, Barnwell Whaley Patterson & Helms, LLC, Charleston, South Carolina, for Appellee.

Before SHEDD, DUNCAN, and AGEE, Circuit Judges.

Opinion

Affirmed by published opinion. Judge AGEE wrote the opinion, in which Judge SHEDD and Judge DUNCAN joined.

AGEE, Circuit Judge:

*1 The appellants in this consolidated appeal were the plaintiffs below, John Doe 2 and Mother Doe, on behalf of John Doe 2's younger brother, Doe 3 (together, "the Does").¹ Beginning in 2005 and continuing through July or August 2007, Louis "Skip" ReVille provided childcare for the Doe family and sexually abused the two minor boys. ReVille, a graduate of The Citadel, The Military College of South Carolina ("The Citadel"), had previously worked as a counselor at The Citadel's youth summer camp.

Defendant John W. Rosa was the president of The Citadel during the time period relevant in this case. In April 2007, his office received a phone call from the father of a former camper, who reported that a counselor at the summer camp—later identified to be ReVille—had molested his son in 2002. Rosa did not report the complaint to law enforcement and instead, the Does contend, took steps to conceal the allegations. The Does argue that Rosa's actions allowed ReVille to continue his abuse of Doe 2 and Doe 3 during the summer of 2007.

The Does brought suit against Rosa under 42 U.S.C. § 1983, alleging that Rosa had violated an affirmative duty to protect them under the Due Process Clause of the Fourteenth Amendment. The district court granted summary judgment in favor of Rosa on the ground that Rosa had no duty to

protect the Does from a pre-existent danger. For the reasons explained below, we affirm the judgment of the district court.

I. Background

The Citadel is a public military college in Charleston, South Carolina. From 1957 to 2006, it operated The Citadel Summer Camp for young children, employing current and former Citadel cadets to serve as staff and camp counselors. The Citadel housed the camp counselors on campus in rooms near the campers. In 2001, The Citadel learned that a former cadet named Michael Arpaio had sexually abused campers while working as a camp counselor from 1995 through 2001. Several victims sued the Citadel based on Arpaio's abuse and collected damages.²

A. Camper Doe Allegations

On April 23, 2007, Rosa's office received a phone call from the father of a former Citadel Summer Camp camper ("Camper Doe," unrelated to the plaintiffs and not a party in this case). Rosa was not present that day, and his administrative assistant referred the call to The Citadel's general counsel, Mark Brandenburg.

When Brandenburg returned the call, Camper Doe's father "asked whether [Brandenburg] was calling on behalf of President Rosa," because the family "did not want anything to fall through the cracks." J.A. 1753. The father told Brandenburg that Camper Doe had been sexually abused by a counselor known as "Skip" while attending the Citadel Summer Camp in 2002. Skip had allegedly shown Camper Doe pornography and masturbated with him and showered with the campers. The father also identified a second camper who was similarly victimized. Brandenburg then spoke on the phone with Camper Doe himself, who explained that Skip abused him and other campers in this way for over a year. J.A. 1830, 1862, 1865–1867.

^{*2} Brandenburg reviewed camp records for the 2001 and 2002 years and found that Camper Doe's description matched a counselor named Louis "Skip" ReVile, who had been a Citadel cadet from 1998 to 2002. ReVile had worked as a camp counselor at the Citadel Summer Camp during the summers of 2000 to 2004 and as a tutor in The Citadel's Writing Center from August 2006 until sometime in April 2007.

Brandenburg called ReVile at the Writing Center on April 24, 2007, the day after talking with Camper Doe's father. According to ReVile, Brandenburg arranged to meet with him and Rosa's Executive Assistant, Colonel Trez. At the meeting, Brandenburg and Colonel Trez told ReVile about Camper Doe's accusations, all of which he denied. They explained to ReVile that "from the Citadel's standpoint their main concern was to protect the institution" and that during their investigation he should "lay low and stay off the campus." J.A. 2416–17, 4622.

The Does suggest that Brandenburg then terminated ReVile's employment at the Writing Center, but ReVile's time records as a Citadel tutor indicate that he last worked at the Writing Center on April 19, 2007, four days before Camper Doe's father called the Citadel. *See* J.A. 280. Similarly, a form that ReVile's supervisor at the Writing Center completed on March 22, 2007 lists the "Effective Date" of ReVile's "Resignation" as April 20, 2007. J.A. 279. The conflict between ReVile's testimony that he was at the Writing Center when he received Brandenburg's call on April 24, 2007 and the contradictory employment forms is not resolved in the record, but we must credit the Does' account for summary judgment purposes.

Brandenburg also met with the former director of The Citadel Summer Camp, Jennifer Garrott, on April 24, 2007, who disclosed that ReVile had been asked to leave his prior job at a prep school. In addition, Garrott told Brandenburg that in the summer of 2003, she caught ReVile in his barracks room alone with a camper rubbing Icy Hot on the camper's leg, which is against camp policy forbidding counselors from being alone in a room with campers—a terminable offense.

Brandenburg reported back to Rosa by May 6, 2007 about his investigation of the allegations against ReVile. The Does contend that Brandenburg "memorialized .. his and President Rosa's intentions" to conceal the Camper Doe complaint in a May 8, 2007 email, Appellant's Br. 9, and quote a portion of the email that states, "I am hopeful that by conducting an investigation on behalf of the school, no 'formal' investigation—criminal or civil—will occur." J.A. 1005. However, the Does appear to take the email out of context as it was written to provide a background explanation to a potential witness in advance of an interview by Brandenburg. Further, the Does offer no evidence that Rosa was aware of the contents of the email or ever saw it.

On July 1, 2007, Brandenburg went to Dallas, Texas to personally speak to Camper Doe and his parents. During the interview, which was recorded and transcribed, Camper Doe provided a detailed account of the abuse, including that it happened to “about five other” boys J.A. 3591. Asked whether he reported the complaint to law enforcement, Camper Doe replied, “Well, I mean, I’ve talked to you,” and “Most of all, the thing I want the most is just to make sure that [ReVille] doesn’t have a chance to do this to anyone else.” J.A. 3659–61. Camper Doe later testified, “I would have absolutely reported it to police had I known that the Citadel didn’t.” J.A. 2399

*3 At the close of the July 1 interview, Camper Doe’s father mentioned that The Citadel had not accepted Camper Doe for admission as a cadet. He stated that The Citadel had been “part of the root cause” of Camper Doe’s problems and by admitting him could “be part of the root cause to fix him.” J.A. 288 The father considered this “a very inexpensive way for The Citadel to say, do you know what—we’ll fix our own.” J.A. 288.³

B. The Alleged Cover-Up

The Does contend that Rosa “deliberately conspired to conceal” the allegations by Camper Doe against ReVille. J.A. 35, 61 (Compls. ¶ 25). Jennifer Shiel, an administrative assistant who worked in Rosa’s office, testified that “President Rosa [was] in charge” of a “conscious effort to cover up or conceal [the] report of sexual abuse.” J.A. 975. She testified that Rosa used the term “close hold,” which she interpreted to mean that “only people that needed to know about it were supposed to know about it.” J.A. 985. Further, Shiel testified that Brandenburg and Rosa had nearby offices and met on business at least three times a week. Brandenburg was deferential to Rosa and “there was no way that [Brandenburg] would have done something on his own without running it past [Rosa] first.” J.A. 970.

The Does posit that Rosa ignored policies of both The Citadel and its summer camp that required him to report the Camper Doe claim to the Citadel Public Safety Department. J.A. 35, 61 (Compls. ¶ 29); *see also Serious Incidents, Memorandum No. 39*, J.A. 1376–88 (directing that when criminal activity involving someone affiliated with The Citadel as a suspect or victim occurs, the “first member of the Citadel community learning of the occurrence” is responsible for reporting it to the Public Safety Department); *Summer Camp Official Camp*

Policies Regarding Sexual Misconduct Issues, J.A. 1389 (mandating 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”). Shiel testified that Rosa “made sure that did not happen.” J.A. 976

The Does also assert that Rosa violated The Citadel’s Employee Misconduct Policy by allowing ReVille to resign his position at the Writing Center and to leave with a clean record. J.A. 37, 63 (Compls. ¶ 37). According to the Does, The Citadel policy forbids expunging molestation findings from an employee’s record or terminating an investigation in exchange for the employee’s resignation. J.A. 2418. The Does, however, offer no evidence that Rosa expunged findings from ReVille’s record.

The Does also point to multiple policies they contend required Rosa to report sexual assault or harassment to the college’s Title IX Coordinator. J.A. 37, 63 (Compls. ¶ 35); *see also Sexual Assault Crisis Intervention Policy*, J.A. 1415–20; *Sexual Harassment*, J.A. 1421–36; *General Procedures for Conducting Formal Investigations of Sexual Harassment*, J.A. 1437–38. In addition, the Does allege Rosa violated Title IX’s requirement for an impartial investigation of sexual abuse by leaving the investigation to The Citadel’s general counsel (Brandenburg) and its insurer, the South Carolina Insurance Reserve Fund. *See* 20 U.S.C. § 1681.

*4 In addition to failing to report the Camper Doe allegations or initiate a proper investigation, the Does contend that Rosa actively concealed the allegations. For example, in October 2007, the Camper Doe complaint was omitted from a list of “possible litigation” files kept in The Citadel’s General Counsel’s office. J.A. 2421–34. In 2010, Camper Doe’s name appeared in the list with the description “alleged sexual abuse at summer camp,” but the entry was annotated as being against “Arpaio,” not ReVille. J.A. 2435–38. The Does argue that this “is evidence of President Rosa’s cover up” and that an accurate file, listing ReVille’s name, would have notified the South Carolina Budget and Control Board that potential liability extended beyond the Arpaio sex abuse complaints Appellant’s Br. 17⁴

As further evidence of a cover-up, the Does point out that The Citadel did not include the Camper Doe complaint in the 2007 crime statistics that it was required to keep under the Clery Act. *See* 20 U.S.C. § 1092(f). The Clery Act requires schools to report statistics of crimes “that are reported to local police

agencies or to a campus security authority” during “the three most recent calendar years.” 34 C.F.R. § 668.46. According to the **Dōēs, Rōšā** “effectively prevent[ed] the trigger of any duty to report pursuant to the Clery Act” by withholding Camper **Dōē**’s complaint from law enforcement. Appellant’s Br. 18; *see also* J.A. 36, 62 (Compls. ¶ 31).

The Does also assert that The Citadel further hid the Camper Doe allegations by withdrawing a challenge to ReVille’s application for unemployment benefits. On June 8, 2007, the South Carolina Employment Security Commission found ReVille eligible for unemployment benefits due to job loss from The Citadel, and on June 20, 2007, The Citadel filed a Notice of Appeal to challenge that decision. However, on July 5, 2007, four days after Brandenburg met with Camper Doe in Dallas, The Citadel withdrew its appeal of ReVille’s unemployment benefits. ReVille testified that he believed The Citadel withdrew the challenge because Brandenburg and Colonel Trez “did not want to have anything to do with [him] as far as any kind of confrontation or anything.” J.A. 4687.

Finally, in June and September 2007, Brandenburg appeared with **Rōšā** before The Citadel’s Board of Visitors to provide information on Camper Doe’s allegations against ReVille. The Does argue that Brandenburg gave such minimal detail on the issue that the Board could not understand the true nature of the complaint. According to a third-party investigative report commissioned by The Citadel, the Board “assumed, based on what they were told, that it was an insurance defense and civil claim matter, and believed from what they were told that this was the case of a father displeased with his son’s unsuccessful application for admission to the College.” J.A. 4043.

C. ReVille’s Abuse of the Does

ReVille met Doe 2 in the summer of 2005, about two years before Camper Doe’s father called **Rōšā**’s office. Doe 2 had just finished 6th Grade, and ReVille was a volunteer coach for his youth basketball team, which held practice at the prep school where ReVille worked. At some point, ReVille invited Doe 2 to his home to help with yardwork and began sexually abusing him shortly thereafter. ReVille testified he abused Doe 2 at least 12 times in 2005 and “three, four times a week” in 2006. J.A. 4721–26.

*5 ReVille became increasingly close with Doe 2 and his family, and during Doe 2’s 8th grade year, ReVille was

invited by the Doe family to move into their home as a part-time caregiver for Doe 2 and his younger brother, Doe 3. ReVille then increased his abuse of Doe 2 and also began to abuse Doe 3. The abuse—which consisted of sexual truth-or-dare games, oral sex, physical touching, and masturbation—occurred from three to four times a week to “nearly daily” between the summer of 2006 through early 2007. J.A. 4989, 5044, 5231–33. In April 2007, prior to learning about Camper Doe’s allegations, ReVille was abusing Doe 2 approximately “two to three times a week” and Doe 3 “three to four times a week.” J.A. 4730–31, 4736.

After meeting with Brandenburg and Colonel Trez on April 24, 2007, ReVille briefly curtailed his sexual abuse of the Does. However, he heard nothing further from The Citadel or law enforcement and, taking the silence as “news that [he] was not going to get in trouble,” ReVille resumed the abuse before the end of May 2007. J.A. 5043–44. By that time, ReVille was no longer working at the Writing Center and used his additional free time to abuse the Does more frequently. The abuse ended by August, when the Doe family moved to Atlanta.

After leaving his employment at the Writing Center, ReVille returned to The Citadel several times, to speak to the Honor Committee and incoming freshman, and in 2010 to attend the unveiling of the remodeled Honor Court. Finally, in October 2011, Mount Pleasant, South Carolina police arrested ReVille, apparently based on separate allegations of child sexual abuse. At that time, Camper Doe’s April 2007 allegations against ReVille came to light.

D. Legal Proceedings

The Does filed two complaints against Rosa (one each for Doe 2 and Doe 3) on March 19, 2012 in the District of South Carolina, which were later amended. The amended complaints assert a substantive due process violation under 42 U.S.C. § 1983, as well as two other claims that the district court dismissed. In effect, the Does allege that Rosa caused their abuse during the late spring and early summer of 2007 by covering up the Camper Doe complaint and thereby allowing ReVille to remain a respected member of the community. J.A. 34, 62 (Compls. ¶ 34).

On June 27, 2014, the district court granted summary judgment in favor of Rosa in both cases. The district court concluded that the Supreme Court’s holding in *DeShaney v*

Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), bars the *Dōēs'* § 1983 claim because *Rōsā* "cannot be said to have created a danger which already existed." J.A. 5244. By the time *Rōsā* learned of the Camper *Dōē* complaint, "ReVille had been abusing [the *Dōēs*] for nearly two years and this abuse had occurred wholly independent of any act or involvement of [*Rōsā*]." J.A. 5251. The *Dōēs* therefore "[c]ould [not] demonstrate that [*Rōsā*] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille." *Id*

*6 The Does timely appealed their respective orders, and we have jurisdiction over their consolidated appeal under 28 U.S.C. § 1291.

II. Standard of Review

We review de novo the district court's grant of summary judgment. *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.1994). Summary judgment is appropriate only when the evidence shows that "there is no genuine issue as to any material fact," Fed.R.Civ.P. 56(c), such that "a reasonable jury could [not] return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). "In addition to construing the evidence in the light most favorable to [the Does], the non-movant, we also draw all reasonable inferences in [their] favor." *World Fuel Servs Trading, DMCC v Hebei Prince Shipping Co., Ltd.*, 783 F.3d 507, 512 (4th Cir.2015).

III. Discussion

On appeal, the Does argue that they have established a triable cause of action against Rosa under 42 U.S.C. § 1983 for the abuse that occurred after the Camper Doe allegation. They contend Rosa's alleged conduct constituted affirmative acts which created, or at least increased, the risk of their later abuse by ReVille. The Does' central argument is that the district court erred in applying the state-created danger doctrine when it concluded that Rosa was not liable because ReVille had already been abusing the Does long before the Camper Doe complaint.

A. The State-Created Danger Doctrine

[1] [2] Section 1983 imposes liability on state actors who cause the "deprivation of any rights, privileges, or immunities secured by the Constitution."⁵ Under established precedent, these constitutional rights include a Fourteenth Amendment substantive due process right against state actor conduct that deprives an individual of bodily integrity. *See, e.g., Hall v. Tawney*, 621 F.2d 607, 612–13 (4th Cir.1980). Accordingly, state actions that result in sexual abuse of children can be actionable under § 1983. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir.1994) (addressing a "student's constitutional right to bodily integrity in physical sexual abuse cases"); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724–25 (3rd Cir.1989) (recognizing § 1983 liability for school administrators' "actions in adopting and maintaining a practice, custom or policy of reckless indifference to instances of known or suspected sexual abuse of students by teachers").

State actor liability, however, is significantly limited as the Supreme Court explained in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In that case, a child's mother brought a § 1983 action against a social worker and other local officials on behalf of her child, who had been beaten and permanently brain damaged by his father. The mother alleged that the state officials failed to remove the child from his father's custody, despite repeated reports and evidence of the father's abuse, and that failure to act deprived the child of a liberty interest in violation of his due process rights. *Id.* at 191, 109 S.Ct. 998.

*7 The Supreme Court rejected DeShaney's asserted federal constitutional cause of action because

nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of

oppression[.]” Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195–96, 109 S.Ct. 998 (citations omitted). In establishing a brightline rule regarding due process causes of action involving the state-created danger doctrine, the Court concluded that because “the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.” *Id.* at 196–97, 109 S.Ct. 998.

The Supreme Court noted, nonetheless, that state actor liability might attach in two narrow circumstances. The first exception arises “when the State takes a person into its custody and holds him there against his will.” *Id.* at 199–200, 109 S.Ct. 998 (sometimes referred to as the state-custody or special-relationship exception). For example, individuals confined in a penal institution or mental hospital are due certain protections by the state during the time of confinement because

when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitations which it has imposed on his freedom to act on his own behalf.

Id. at 199–200, 109 S.Ct. 998.

The Does do not contend that their asserted cause of action can be sustained under the state custody exception.

[3] [4] The second exception, implicit in *DeShaney*, gives rise to the state-created danger doctrine and is at issue here.⁶ In *DeShaney*, the Supreme Court observed that “[w]hile the State may have been aware of the dangers that [the child] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.” *Id.* at 201, 109 S.Ct. 998 (emphasis added). Under “th[o]se circumstances,” the State had no constitutional duty

to protect the child. *Id.* Thus, “When the state itself creates the dangerous situation that resulted in a victim's injury, the absence of a custodial relationship may not be dispositive.” *Pinder*, 54 F.3d at 1177.

*8 The leading case in the Fourth Circuit on the state-created danger doctrine is *Pinder*, where Ms. Pinder, the mother of three children, brought a § 1983 action against a police officer who had responded to a report of domestic violence at her home. *Id.* at 1171–72. Her ex-boyfriend, Pittman, had broken into Pinder's home, assaulted her, and threatened to kill her and her three children. Pinder told the investigating officer that Pittman also had threatened her in the past and had just been released from jail for the attempted arson of her home. Fearing that Pittman could return to harm her or her children, she asked the officer whether she could safely return to work that evening. The officer assured her that Pittman would be incarcerated overnight on assault charges and could not be released until the county commissioner became available for a hearing in the morning. With that assurance, Pinder went to work that evening leaving her children at home

Instead of the assault charge, the officer filed lesser charges against Pittman, and he was released from custody that night. Pittman then returned to Pinder's home after she had gone to work and set it on fire. Pinder's children were sleeping inside, and all three died of smoke inhalation.

Pinder then brought a § 1983 due process claim against the police officer. Lacking a custodial relationship with the state, she sought to invoke the state-created danger doctrine by alleging that the officer's assurances of Pittman's overnight detention were affirmative misconduct by a state actor that increased the danger to her children. *Id.* at 1175. We concluded, however, that Pinder could not sidestep the broad rule in *DeShaney* by “characterizing her claim as one of affirmative misconduct by the state in ‘creating or enhancing’ the danger, instead of an omission.” *Id.*

We reasoned that if Pinder's theory was correct, “every representation by the police and every failure to incarcerate would constitute ‘affirmative actions,’ giving rise to civil liability.” *Id.* Such a rule could not survive scrutiny under *DeShaney*:

No amount of semantics can disguise the fact that the real “affirmative act” here was committed by Pittman, not by Officer Johnson. As was true in *DeShaney*, the state did not “create” the danger, it simply failed to provide adequate protection from it. In both cases, “[t]he most that can be

said of the state functionaries ... is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." Thus, like *DeShaney*, Pinder's case is purely an omission claim.

Id. at 1175–76 (citation omitted). In light of *DeShaney*, the officer lacked a "clearly established" duty under the due process clause to protect Pinder or her children and was therefore entitled to qualified immunity. *Id.* at 1176.

[5] [6] Under the narrow limits set by *DeShaney* and *Pinder*, to establish § 1983 liability based on a state-created danger theory, a plaintiff must show that the state actor created or increased the risk of private danger, and did so directly through affirmative acts, not merely through inaction or omission. Put another way, "state actors may not disclaim liability when they themselves throw others to the lions," but that does not "entitle persons who rely on promises of aid to some greater degree of protection from lions at large." *Pinder*, 54 F.3d at 1177.

B. Rosa's § 1983 Liability

*9 [7] [8] Given the clear rule under *DeShaney* and *Pinder*, we conclude that the Does cannot make a § 1983 state-created danger claim against Rosa. As the district court found in granting summary judgment, the Does' claim fails because they "cannot demonstrate that [Rosa] created or substantially enhanced the danger which resulted in [their] tragic abuse at the hands of ReVille." ⁷ J.A. 5244. ReVille began abusing the Does in 2005 and 2006, two years before Rosa could have been aware through the Camper Doe complaint that he was a pedophile. Quite simply, Rosa "could not have created a danger that already existed." ⁸ *Armijo v. Wagon Mound Pub. Sch.*, 159 F.3d 1253, 1263 (10th Cir.1998)

Nor did Rosa create or increase the risk of the Does' abuse specifically during the early summer months of 2007, as the Does posit. As horrific as the abuse of the Does by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by Rosa. As *DeShaney* makes clear, allowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. The father's abuse in *DeShaney* was a pre-existent danger, and the fact that the state had taken temporary custody of the child and returned him to the father's care "d[id]

not alter the analysis." 489 U.S. at 201, 109 S.Ct. 998, *see also Armijo*, 159 F.3d at 1263 (concluding that a state actor cannot be liable for a pre-existent danger, "even if the state put the plaintiff back in that same danger"). Here, Rosa is alleged to have done even less than the acts claimed in *DeShaney* and *Pinder*, at worst, he failed to take actions that might have removed them from an ongoing danger that had been present for a long time.

[9] The Does were thus placed in "no worse position than that in which [they] would have been had [Rosa] not acted at all." *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. There was simply nothing new about ReVille's perverted abuse of the Does in the summer of 2007 that had not already been occurring for months. Rosa did not make the Does' danger any worse, and he had no constitutional duty to save them from ReVille's existing abuse "[T]here simply is 'no constitutional right to be protected by the state against ... criminals or madmen,' " and a state actor's " 'failure to do so is not actionable under section 1983.' " *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir.1983) (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982)). To paraphrase *Pinder*, "[n]o amount of semantics can disguise the fact that the real 'affirmative act' here was committed by [ReVille], not by [Rosa]. As was true in *DeShaney*, the state did not 'create' the danger, it simply failed to provide adequate protection from it." *Pinder*, 54 F.3d at 1175.

In arguing for the opposite conclusion, the Does rely almost exclusively on an unpublished case *Robinson v. Lioi*, 536 Fed.Appx. 340 (4th Cir.2013). However, the state actor in *Robinson* substantially changed a pre-existent danger—he did not simply fail to intervene to stop it. In *Robinson*, a woman was stabbed and killed after a police officer, Lioi, actively conspired with her husband and enabled him to evade an arrest warrant for domestic violence, thus creating the opportunity for him to murder his wife. Though the risk of domestic abuse already existed, the officer "directly enabled [the husband] to perpetrate the harm to [the wife]" and "affirmatively placed [the wife] in a position of danger." *Id.* at 345 (citation and internal quotation marks omitted). Unlike here or in *DeShaney*, the police officer in *Lioi* put the victim in a far "worse position" by acting to thwart the arrest warrant. *DeShaney*, 489 U.S. at 201, 109 S.Ct. 998. By contrast, the Does were in no different situation with ReVille after the Camper Doe complaint than they had been the previous two years.

*10 Even if the Does did face a new or increased risk of abuse, which they did not, their claim would still fail because the danger was not the result of Rosa's "affirmative acts."

[10] [11] [12] A "key requirement" for liability under the state-created danger doctrine is that the state actor increase or create the danger through "affirmative conduct." *Butera v. District of Columbia*, 235 F.3d 637, 650 (D.C.Cir 2001); see also *DeShaney*, 489 U.S. at 200, 109 S.Ct. 998 (observing that "it is the State's affirmative act" that "trigger[s] the protections of the Due Process Clause"); *Sargi v Kent City Bd. of Educ.*, 70 F.3d 907, 913 (6th Cir.1995) ("There is no evidence that the Board took any affirmative action that exposed decedent to any danger to which she was not already exposed."). The state, through its affirmative acts, must "itself create[] the dangerous situation that resulted in a victim's injury," such that "it becomes much more akin to an actor itself directly causing harm to the injured party." *Pinder*, 54 F.3d at 1177. "No constitutional liability exists where the State actors 'had no hand in creating the danger but [simply] stood by and did nothing when suspicious circumstances dictated a more active role for them.'" *Butera*, 235 F.3d at 650 (citation omitted).

[13] [14] "Affirmative acts," in the state-created danger context, are quite limited in scope "It cannot be that the state 'commits an affirmative act' .. every time it does anything that makes injury at the hands of a third party more likely." *Pinder*, 54 F.3d at 1175 ("If so, the state would be liable for every crime committed by the prisoners it released."). And although "inaction can often be artfully recharacterized as 'action,' courts should resist the temptation to inject this alternate framework into omission cases." *Id.* at 1176 n. *. The "concept of 'affirmative acts' " should not extend "beyond the context of immediate interactions between the [state actor] and the plaintiff." *Id.*

Here, Rosa's alleged "affirmative acts" boil down to a particular inaction: his failure to alert the authorities about ReVille's past conduct. He did not follow Citadel policies and report the ReVille allegations to campus police or file required notices under Title IX. But even what the Does offered at oral argument as their strongest "affirmative act"—failing to fully explain the allegations against ReVille at the Board of Visitors meetings in June and September 2007—is something that Rosa *did not do*. As the Does argued, Rosa "sat idly by," Oral Arg. at 3 16, and "did not correct the misperception by the Board," Appellant's Br. 20. But that course of events clearly fails to establish state actor liability

under *DeShaney*. See 489 U.S. at 203, 109 S.Ct. 998 ("The most that can be said of the state functionaries .. is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.").

The Does cannot "sidestep" this problem by "artfully recharacteriz[ing]" Rosa's conduct in terms of affirmative violations of Citadel policies and misrepresentations in Citadel records. *Pinder*, 54 F.3d at 1175–76 & n. *; see Oral Arg. at 5-56 ("[Rosa] acted when he *didn't do* what his school policies told him to." (emphasis added)). Rosa's failure to report ReVille to the Citadel police or to a Title IX agency is an inaction on his part and not a cognizable affirmative act for liability under the state-created danger doctrine.

*11 We rejected a similar in *Pinder*. Although the plaintiff "emphasize[d] the 'actions' that [the officer] took in making assurances, and in deciding not to charge Pittman with any serious offense," the failure to file more serious charges amounted to an inaction on the part of a state actor. *Pinder*, 54 F.3d at 1175 ("At some point on the spectrum between action and inaction, the state's conduct may implicate it in the harm caused, but no such point is reached here."). Rosa's decision not to report ReVille is no different from the officer's decision not to file the more serious charges against Pittman. As in *Pinder* and *DeShaney*, the Does' claim against Rosa is "purely an omission claim," and "[n]o amount of semantics can disguise the fact that the real 'affirmative act' here was committed by [ReVille], not by [Rosa]." *Id.* at 1175–76.

In addition, the Does' claim lacks the nexus necessary for any of Rosa's alleged conduct to be "affirmative acts." We cannot "stretch[] the concept of 'affirmative acts' beyond the context of immediate interactions between the [state actor] and the plaintiff." *Id.* at 1176 n. *. Here, Rosa did not meet or speak with the Does, and by all accounts, was not even aware the Does existed. Further, he could only speculate that the Camper Doe allegations were true and that ReVille would pose future danger. If anything, the case at bar stands on weaker ground than in *DeShaney*, in which the state-actor defendants knew the child victim and were aware of the specific danger the father posed to him. The Supreme Court rejected liability there, and we must do the same here. The same distinction can be drawn to *Pinder*, where the officer was well aware of the potential danger to Pinder's children, but made his charging decision nonetheless. The downstream, but-for connection alleged here simply stretches the "affirmative acts" concept too far.

Here, again, the Does look only to *Robinson* for support, by arguing that case recognized that actions to keep a violent husband out of custody are “affirmative acts.” But (in addition to being unpublished) that case featured conduct of an entirely different nature than what the Does have alleged. Lioi had “conspired with [the husband] to help [him] avoid being arrested”; “actively interfered with the execution of the warrant by not only failing to turn the warrant over to the proper unit ..., but also by warning [the husband] and giving him advice about how to avoid service of the warrant”; and “lied to avoid service of the arrest warrant by falsely contending that it could not be found.” *Robinson*, 536 Fed Appx. at 344. The conduct thus “was far more than a mere passive failure to act; the type of omission claim which the court rejected in *Pinder*.” *Id.* at 344. In contrast, Rosa did not collaborate with ReVille to assist him to avoid custody or detection; he merely failed to take actions that he was under no constitutional obligation to take.

IV.

*12 For the foregoing reasons, the state-created danger doctrine does not impose liability on Rosa for ReVille's ongoing abuse of the Does. While Rosa's undisputed failure to act brought dishonor to him and The Citadel, it did not create a constitutional cause of action.⁹ Rosa's alleged conduct neither created nor increased the danger ReVille already posed to the Does, and in any event, did not constitute cognizable affirmative acts with respect to ReVille's abuse of the Does.¹⁰ Accordingly, the district court's judgment is

AFFIRMED.

All Citations

--- F.3d ----, 2015 WL 4548009

Footnotes

- 1 Although both Doe 2 and Doe 3 were minors at the time of the events underlying this case, Doe 2 is now an adult and brings suit in his own right
- 2 Consistent with the governing standard at the summary judgment stage, the facts are recounted in the light most favorable to the Does even where there are disputed events that the Does may not ultimately be able to prove. See *Walker v. Mod-U-Kraf Homes, LLC*, 775 F.3d 202, 205 n. 1 (4th Cir 2014).
- 3 The Citadel considered Camper Doe for admission to its 2007 class, but could not admit him because he lacked several high school courses that the state of South Carolina required as prerequisites in order for him to matriculate. The Citadel offered to pay for Camper Doe to take those classes at a community college and consider him for admission to the 2008 freshman class but received no response from Camper Doe.
- 4 Rosa responds that this argument “defies logic” because the South Carolina Insurance Reserve Fund, to which Brandenburg did report Camper Doe's allegations, is a division of the Budget and Control Board. Appellee's Br. 15; see also *S.C. Dep't of Disabilities and Special Needs v. Hoover Universal, Inc.*, 535 F.3d 300, 302 (4th Cir 2008).
- 5 There is no disagreement that Rosa could be a state actor for § 1983 purposes when acting in his capacity as the President of The Citadel, as The Citadel is a public university of the state of South Carolina
- 6 Although commonly referred to as a second “exception” to *DeShaney's* general rule, we have noted that this terminology “is not strictly accurate.” *Pinder v. Johnson*, 54 F.3d 1169, 1176 n. * (4th Cir.1995). “Rather, ‘creation’ of a danger implicates the alternate framework of § 1983 liability wherein a plaintiff alleges that some conduct by an officer directly caused harm to the plaintiff.” *Id.*
- 7 The Does' claim may suffer from an additional defect. Even if their theory were legally viable, it is not altogether clear that the evidence establishes Rosa's culpability. Because “principles of respondeat superior do not apply in imposing liability under § 1983,” *McWilliams v. Fairfax Cnty. Bd. of Supervisors*, 72 F.3d 1191, 1197 (4th Cir 1996), it is not enough that Rosa had general supervisory authority over Brandenburg and other Citadel employees. His “own individual actions” must violate the Does' rights. *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S.Ct. 1937, 173 L.Ed 2d 868 (2009). Rosa did not receive the initial call from Camper Doe's father, and the Does provide at best speculative evidence that Rosa directed Brandenburg's subsequent actions. Nonetheless, because we find the claim fails as a matter of law, we need not delve further into the sufficiency of the Does' proof.
- 8 At oral argument, Rosa's counsel represented that this fact might not be dispositive if Rosa had specifically known that the Does would be victims of ongoing abuse. But see *Pinder*, 54 F.3d at 1175 (“*DeShaney* rejected the idea that [an

affirmative] duty can arise solely from an official's awareness of a specific risk or from promises of aid."). Because this case does not present that situation, we need not address the issue.

- 9 Rosa now agrees that The Citadel should have done more in response to Camper Doe's allegations and that the matter should have gone to the police. See J.A. 4030 ("When you read that transcript [of Camper Doe's interview], with my experience in the sexual assault world, there was much more going on than what we were led to believe (by Mark Brandenburg).").
- 10 Because we agree with the district court that Rosa lacked an affirmative duty to the Doe's and therefore did not violate their constitutional rights, we need not address Rosa's additional argument as to qualified immunity.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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In The Court of Common Pleas

SC Court of Appeals

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

Appellate Case No. 2015-001505

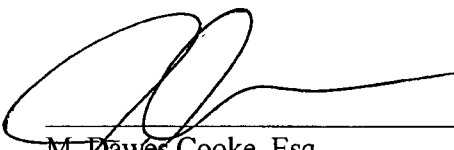
John Doe 2, ... Appellant,

v.

The Citadel Respondent.

RULE 211 CERTIFICATE

The undersigned certifies that this Respondent's Final Brief complies with Rule 211(b), SCACR.


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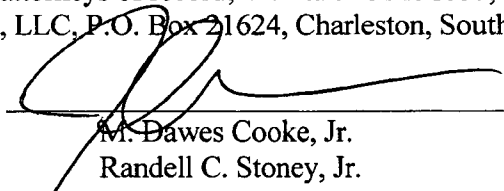
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I certify that I have served the Final Brief of Respondent and Rule 211 Certificate on Appellant John Doe 2 by depositing a copy of it in the United States Mail, postage prepaid, on October 23, 2015, addressed to their attorneys of record, W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, McLeod Law Group, LLC, P.O. Box 21624, Charleston, South Carolina 29413.



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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly conclude that The Citadel did not undertake a duty of care to Plaintiff where there is no evidence that it knew Plaintiff or ever intended to protect him from ReVille?
2. Did the trial court properly conclude that The Citadel did not "create" the danger to Plaintiff so as to require the imposition of a duty of care?
3. Did the trial court properly conclude that Title IX does not impose a negligence duty of care on The Citadel under the circumstances of this case?
4. Did the trial court properly conclude that Plaintiff may not base his claims on events occurring during the operation of the summer camp, years before his abuse?
5. Can Plaintiff show proximate causation under the facts of this case?
6. Did the trial court properly conclude that the South Carolina Tort Claims Act ("SCTCA") prohibits Plaintiff's outrage claim?
7. Did the trial court properly conclude that Plaintiff's outrage claims fail because no conduct of The Citadel was directed toward him?
8. Must Plaintiff's outrage claims fail where he presents no evidence that The Citadel acted in an outrageous manner?
9. Must Plaintiff's outrage claims fail where he had other remedies available to him?

STATEMENT OF THE CASE

A. Procedural History

John Doe 2 (“Doe”) sued The Citadel, The Military College of South Carolina (“The Citadel”) for failing to prevent Louis “Skip” ReVille, a former counselor at The Citadel’s former summer camp, from sexually abusing him. Doe concededly never attended the camp and had no affiliation with The Citadel. Doe alleges claims against The Citadel sounding in negligence/gross negligence and outrage. (*See R. pp.84-105*). On or about April 24, 2015, The Citadel filed a Renewed¹ Motion for Summary Judgment. (*See R. pp. 1575-1824*). On June 4, 2015, Plaintiff filed an opposition to that motion (*R. pp. 1825-75*) and The Citadel filed a Supplemental Memorandum in Support of Renewed Motion for Summary Judgment (*R. 1877-1904*). On July 6, 2015, the Court granted The Citadel's Renewed Motion for Summary Judgment, which Plaintiff has appealed to this Court. (*See R. pp. 71-83 ("Order")*). Although Plaintiff posits in his Brief, taking isolated portions of a hearing transcript out of context, that the trial judge somehow concluded that The Citadel owed him a duty, this is belied by the Order. The Order expressly holds that law does not impose a duty on The Citadel under where there was no specific threat to a specific victim. The trial court specifically rejected that The Citadel owed a duty to protect *everyone* from potential abuse by ReVille at some point in the future.

¹ The Citadel had previously filed a Notice of Motion and Motion for Summary Judgment on March 6, 2014 in this and in other related cases. It filed a Memorandum in Support of Motion for Summary Judgment on April 14, 2014. (*See R. pp. 171-477*). Plaintiff filed memoranda in Memorandum in Opposition to Defendant's Motion for Summary Judgment on April 16, 2014. . (*See R. pp. 478-1334*). On April 18, 2014, Plaintiff filed a Supplemental Memorandum in Opposition to Defendant's Motion for Summary Judgment, supplementing the record with Doe's deposition. The Citadel filed a Supplemental Memorandum in Support Concerning the Existence of a Duty of Care on April 28, 2014. On June 6, 2014, The Citadel filed another Supplemental Memorandum in Support of Motion for Summary Judgment. The trial court denied that Motion by order dated December 9, 2014. Subsequently, The Citadel renewed its Motion for Summary Judgment in this case.

B. Factual Background

1. The 2007 Report

On April 23, 2007, the father of a nineteen year-old former camper at The Citadel's summer camp ("Camper Doe") — who is *not* the Plaintiff in this lawsuit — informed The Citadel that ReVille had engaged in sexual misconduct with his son five years prior. Camper Doe's father spoke by telephone with Mark Brandenburg, The Citadel's General Counsel ("Brandenburg"), and told Brandenburg that once during Camper Doe's stay at the camp, a counselor named "Skip" invited his son into his room, where they watched pornography and masturbated. (*See* R. p. 232 ¶ 3). Brandenburg subsequently spoke on the phone with Camper Doe, who confirmed that "Skip" once invited him into his room, showed him pornography and convinced him to masturbate. (*See id.* ¶ 4). Brandenburg telephoned ReVille, who coincidentally submitted his resignation on March 22, 2007 to pursue other interests and had recently worked his final day. (*See* R. pp. 239-43). ReVille emphatically denied Camper Doe's allegations.

Brandenburg continued his investigation on July 1, 2007, when he met with Camper Doe and his parents in Texas. Camper Doe's father expressed a desire for privacy, stating, "I don't want to be another name in the Charleston papers" or to become "a part of Charleston gossip." (*See* R. p. 246-48). Camper Doe's father noted that Camper Doe had applied for admission to The Citadel but The Citadel had not accepted him and suggested that The Citadel "can be part of the root cause to fix him" by admitting him. (*See* R. p. 247 lines 16-17). Camper Doe's father opined that admitting his son as a cadet would be, "a very inexpensive way for The Citadel to say, do you know what — we'll fix our own." (*See* R. p. 247 lines 19-23).

In accordance with the wishes of Camper Doe and his family, Brandenburg worked with Citadel admissions staff in an effort to allow Camper Doe's admission as a cadet. (*See* R. p. 251 line 25 to p. 252 line 25). When The Citadel determined that Camper Doe lacked the requisite academic qualifications, Brandenburg proposed that the

South Carolina State Insurance Reserve Fund pay for courses to permit him to reapply to The Citadel. (*See* R. p. 253 line 1 to p. 254 line 16). After this meeting, Brandenburg never heard again from Camper Doe or his parents. There is no evidence that he ever received any independent corroboration of Camper Doe's claim of having been victimized at the summer camp, which was no longer in operation.

The following facts with regard to Camper Doe's report in 2007 and The Citadel's response thereto are undisputed (*see generally* R. pp. 244-48):

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

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

In October 2011, ReVille's sexual misconduct came to light, and various law enforcement agencies initiated investigations. ReVille was ultimately charged with crimes in Charleston, Berkeley, and Dorchester counties. On June 13, 2012, ReVille pleaded guilty to numerous charges of criminal sexual conduct with minors, solicitation

of minors, lewd acts upon a minor, and dissemination of obscene material. The Honorable R. Markley Dennis, Jr., sentenced ReVille to fifty years imprisonment.

2. Plaintiff's Abuse

The following timeline of key events underlying this action will help the Court place this appeal into context (*see generally* R. pp. 1575-1824):

<u>DATE</u>	<u>DESCRIPTION</u>
June, 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"
June 16-July 6, 2002	ReVille is Senior Counselor at the camp.
June, 2002	ReVille allegedly views pornography with Camper Doe and encourages him to masturbate.
July 14-August 3, 2002	Camp supervisor Jenni Garrott ("Garrott") allegedly sees ReVille sitting on a couch next to a camper and admonishes him about being alone with campers.
April 15, 2003	ReVille submits application to work at summer camp containing flippant information such as "likes to cook" and "enjoys walks on the beach" in an apparent attempt at humor.
June, 2003	Garrott allegedly observes ReVille applying Icy Hot to the leg of a 16 year old counselor during daytime hours in a room with the door open. She notes that neither of them stopped what they were doing when she came into the room.
August, 2003	ReVille's employment at the camp ends.
Early summer, 2005	ReVille, then a teacher at Pinewood Prep, meets Doe through AAU basketball. (<i>See</i> R. 1597 line 16 to p. 1600 line 3). During that summer, ReVille began "grooming" Doe, showing Doe pornography, and encouraging him to masturbate. (<i>See</i> R. p. 1601 lines 4-17, R. p. 1602 line 16 to p. 1603 line 3).
Late summer, 2005	ReVille started abusing Doe at ReVille's home, including masturbating him, performing oral sex on him and touching him. (<i>See</i> R. p. 1604 line 4 to p. 1605 line 10).
2005-06 School Year	During Doe'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 victims who viewed pornography and masturbated. (<i>See</i> R. p. 1609 line 23 to p. 1602 line 14).
August 22, 2006	ReVille begins working as a part-time, temporary tutor in The Citadel's writing center working with college students. No evidence exists that ReVille was exposed to minors through this employment.

<u>DATE</u>	<u>DESCRIPTION</u>
Into fall of 2006	ReVille continued to abuse Doe through 2005 and 2006, with ReVille moving into a bachelor suite at Doe's home as early as May of 2006, when Doe's father was working in Atlanta. (See R. p. 1605 line 19 to p. 1606 line 8; R. p. 1607 line 21 to p. 1608 line 6; R. p. 1625 lines 22-24). ReVille moved into the family home, in part to assist with family duties. (See R. p. 1612 line 13 to p. 1613 line 7). Plaintiff presents no evidence that The Citadel knew that ReVille lived with Doe or anything about their interactions.
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 R. p. 1615 line 25 to p. 1616 line 14).
November, 2006	ReVille listed Doe's mother as a reference in a November, 2006 job application. (See R. pp. 1635-36).
March 22, 2007	ReVille resigns from The Citadel's writing center. (See R. p. 1816).
<u>April 23, 2007</u>	<u>Camper Doe first contacts The Citadel.</u>
June 1, 2007	ReVille moves from Doe's home to Mount Pleasant.
July 1, 2007	Brandenburg interviews Camper Doe.
Late Summer 2007	Doe's family moved to Georgia. (See R. p. 1614 lines 8-15). ReVille testified that Doe moved to Georgia "well before school started." (See R. p. 1630 lines 20-23). ReVille stopped abusing Doe when he and his family moved to Georgia.

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

<u>DATE</u>	<u>DESCRIPTION</u>
2005	ReVille abused Doe at least 12 times at his home and in his car. (See R. p. 1622, line 2 to p. 1624, line 20).
2006	ReVille abused Doe "three, four times a week" in 2006, approximately 200 times. (See R. p. 1626, line 17 to p. 1628, line 2).
2007 (prior to April 23, 2007)	From the beginning of 2007 through April 23, 2007, ReVille abused Doe approximately "two to three times a week." (See R. p. 1632, line 25 to p. 1633, line 4).
<u>April 23, 2007</u>	<u>Date of Camper Doe's call to The Citadel.</u>
May, 2007	ReVille only had two or three interactions with Doe in May, 2007. (See R. p. 1631, lines 12-20; R. p. 1632, lines 3-15).
June, 2007	There were only six to eight interactions. (See <i>id.</i>).

<u>DATE</u>	<u>DESCRIPTION</u>
<u>July 1, 2007</u>	<u>Brandenburg interviewed Camper Doe.</u>
July, 2007	ReVille only had four to six interactions with Doe in July of 2007. (<i>See id.</i>).
August, 2007	ReVille does not believe he abused Doe in August of 2007 (or any time after July, 2007). (<i>See</i> R. p. 1631, lines 21-23; R. p. 1632, lines 16-24).

ReVille confirmed that he abused Doe approximately twelve times between May, 2007 and the time Doe's family moved out of state. (*See* R. p. 1629, lines 15-25).

C. Plaintiff's Misstatements of Fact

Plaintiff's Brief is replete with factual misstatements. Ordinarily, appeal – let alone appeal from summary judgment – is not the place to argue over interpretation of evidence. However, Plaintiff's misstatements are so pervasive, and some are so serious, that they cannot go unanswered.

First, Plaintiff's Brief states, on numerous occasions, that The Citadel's policies required that it fire ReVille as a camp counselor. This is simply not true. In fact, no policy *required* The Citadel to fire a camp counselor for merely being in a room with a camper; Plaintiff cites nothing in the record establishing this as a matter of policy, but instead relies on the *ipse dixit* of his counsel. While a document entitled "OFFICIAL SUMMER CAMP POLICIES REGARDING SEXUAL MISCONDUCT ISSUES" made "sexual relationships" between counselors and campers a ground for immediate termination, it did not make simply being alone in a room with a camper grounds for firing. (*See* R. pp. 983-84). Plaintiff presents no evidence that The Citadel ever knew that ReVille, while a counselor, engaged in a sexual relationship (or improper contact) with a camper. At most, The Citadel was aware that ReVille had been in a room with minors. He was appropriately admonished not to do that. Plaintiff cites no Citadel policy in the record that *required* that ReVille be fired for such an incident.

The following chart identifies some of Plaintiff's additional factual misstatements in his brief and seeks to correct them:

PLAINTIFF'S STATEMENT	REALITY
p.4: Plaintiff claims that in 1998, ReVille self-reported to The Citadel Counseling Center for treatment and received on-going mental health services through 2001, during which he revealed that at age 15 he was court ordered to counseling for sexual misconduct with adolescent boys.	In 1998, ReVille sought counseling assistance for two months to improve his focus on the tennis team. He also sought guidance in 2000-2001. The records for that counseling that are properly part of the appellate record nowhere state or imply that ReVille disclosed anything about prior mental health services. Plaintiff certainly provides no evidence that ReVille revealed anything about being ordered into counseling for "sexual misconduct." Plaintiff also cites no authority for his implied contention that a mental health counselor would have been at liberty to disclose confidential counseling information to Citadel officials.²
p.4: Plaintiff claims that on January 18, 2001, Citadel counselor Dr. Bradham and a MUSC psychiatrist discussed monitoring ReVille for bipolar disease, and by February 2001, The Citadel knew that ReVille was non-compliant with his prescription psychiatric medications.	The record does not support that The Citadel was involved in monitoring ReVille's alleged bipolar condition or medication compliance. Dr. Bradham's January 18, 2001 record makes clear that he communicated that MUSC was to monitor ReVille's potential bipolar condition: "The content of our last session was also relayed to Dr. Douglas as was this therapist's request <i>that she continue to monitor for the presence of bipolar symptoms when she meets with him again.</i>" (See R. p. 1852). Similarly, Dr. Bradham made clear in February of 2001 that ReVille needed to discuss compliance with medications with MUSC: "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." (See R. p. 1851).
p.5: Plaintiff claims that in the summer of 2001 The Citadel learned that Arpaio abused numerous campers in his room.	This is untrue. In the summer of 2001, the Citadel learned of an <i>allegation</i> of abuse involving one camper, in which the Charleston Police Department closed its investigation on August 1, 2001, stating that it "could not establish probable cause" to make an arrest upon. (See R. p. 1304).

² In fact, statutes would have prohibited ReVille's counselors from disclosing any confidences about ReVille without his consent. See generally S.C. Code § 19-11-95.

<u>PLAINTIFF'S STATEMENT</u>	<u>REALITY</u>
<u>p.6:</u> Plaintiff claims that in 2001 ReVille "attempted to self report" his abuse to The Citadel's Department of Public Safety. (<i>Citing R. pp. 1857-58</i>).	The document that Plaintiff relies upon does not support his proposition, and it is not true. After his arrest, ReVille made a statement to the police, which he later recanted, that he had asked a Public Safety officer "how I could file a case of sexual misconduct at the summer camp." Even if this event occurred, Plaintiff presents <i>no</i> evidence that ReVille disclosed that this involved abuse of children, that he wished to make a criminal report, or that he was the perpetrator.
<u>pp.6-7:</u> Plaintiff claims that in 2002, Camp Garrott "caught" ReVille alone with a minor camper in his room. Plaintiff claims that ReVille should have been fired because a "rule . . . require[ed] immediate termination" for that alleged "violation."	As set forth herein, there was no rule that required ReVille's termination for simply being in a room with a camper. Moreover, there is no evidence that ReVille was "caught" doing anything improper, suspicious or sexual with the camper.
<u>p.7:</u> Plaintiff claims that in 2003, Garrott witnessed Reville "engaged in inappropriate physical contact with another camper [hereinafter referred to as Camper Doe 6] alone behind closed doors in ReVille's barracks room." Again, Plaintiff claims that ReVille should have been fired for that incident. (<i>Citing R. pp. 983-84, 1308-12</i>).	This is incorrect in several respects. First, Camper Doe 6 was not, at that time, a camper; he was a junior counselor. Second, the record does not support that the room door was closed (it was actually open, with only a screen door closed). Finally, there is no evidence that ReVille was engaging in "inappropriate physical contact" with Camper Doe 6 (he was, actually, applying Icy Hot to Camper Doe 6's leg after a run). In fact, ReVille's affidavit states that he "had not yet sexually abused him at the time Ms. Garrott caught the two of us alone." (<i>See R. p. 1310 ¶ 10</i>).
<u>p.7:</u> Plaintiff states that Garrott admitted that she caught ReVille in direct violation of a camp rule and should have fired him.	This is not in the record before the Court. Garrott testified that: At the time I thought it was a lapse in judgment, and I did not think that it was a violation of that. I -- you know, in that position a lot of people go to him and I -- yes, sir, I was very mad. (<i>See R. p. 969, lines 21-25</i>). This is a far cry from admitting that she "should have fired" him.
<u>p.7:</u> Plaintiff claims that Anna Bronk, Garrott's assistant, spoke to ReVille "multiple times about his being alone with campers in his room."	This is not stated anywhere in the record, particularly in the documents Plaintiff cites. (<i>See R. pp. 1308-12, 1857-58</i>).

<u>PLAINTIFF'S STATEMENT</u>	<u>REALITY</u>
p.7: Plaintiff claims that counselor OC Evans reported to Garrott's supervisor, Colonel John Lackey ("Lackey"), that ReVille had campers in his room at night.	This is not stated in the record, particularly in the documents Plaintiff cites. The record does not reflect that that Evans reported anything to Lackey about ReVille. (See R. pp. 1308-12 and 1857-58).
p.8: Plaintiff claims that in 2005, Camper Doe 6 was employed as a counselor. Plaintiff claims that, following sexual abuse training, Camper Doe 6 asked to speak with Garrott. Plaintiff further claims that when Camper Doe 6 told her he wanted to report ReVille, she abruptly dismissed him from the room. Plaintiff finally claims that in retaliation The Citadel fired Camper Doe 6 later that day, on the pretense that he called a camper an inappropriate name.	The only record evidence that Plaintiff cites for this proposition does not support this factual claim, aside from mentioning that Camper Doe 6 was fired. (See R. pp. 1861-67).
p.9: Plaintiff claims that in 2007 Re Ville met with Brandenburg and Trez, who disclosed details of Camper Doe's complaint to him. Plaintiff claims that Brandenburg and Trez conveyed The Citadel's requirement of a <i>quid pro quo</i> with Re Ville, under which he would leave his part-time employment in The Citadel's Writing Center and "lay low," in exchange for The Citadel's silence as to his pedophilia.	There is no evidence whatsoever of a <i>quid pro quo</i> for a cover up. Assuming, <i>arguendo</i> , that this meeting occurred, the only evidence is ReVille's allegation, in an affidavit that Plaintiff's counsel procured after ReVille had been incarcerated, that Brandenburg and/or Trez told him to "lay low" and stay off campus. There is <u>nothing</u> in the record of an exchange or <i>quid pro quo</i> for ReVille's silence.
p.10: Plaintiff claims that in May, 2007, Brandenburg memorialized The Citadel's intent to cover up ReVille's child sexual abuse, writing "I am hopeful that by conducting an investigation on behalf of the school, no 'formal' investigation — criminal or civil —will occur."	The cited email, directed to a potential witness of ReVille's conduct, does not, in any way suggest cover up. At most, Brandenburg's email expresses hope that Camper Doe's complaints would be unfounded and that no abuse occurred. Nothing in the email suggested that The Citadel intended to conceal anything. In fact, the email recognizes that Camper Doe could, at any time, file a report with police.
p.11: Plaintiff claims that The Citadel also ensured that certain General Counsel file lists did not refer to a child sexual abuse claim against ReVille as part of an effort to cover up ReVille's abuse.	The record does not suggest that this was concealment." Plaintiff presents no evidence that these file lists are anything more than internal documents for the use of The Citadel's General Counsel.
p.12: Plaintiff claims that The Citadel bought ReVille's silence by withdrawing an objection to his application for unemployment.	Plaintiff has no evidence supporting this rank speculation. First, there is no evidence that The Citadel ever expressed that its withdrawal of objections had anything to do with the allegations against ReVille. Moreover, there is not even any evidence that ReVille received unemployment benefits after The Citadel withdrew its objection (because he did not).

ARGUMENTS

I. Standard of Review

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining 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. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.

NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine [or material].

Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (citations omitted). "[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." See *Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617 n.4, 698 S.E.2d 879, 882 n.4 (Ct. App. 2010) (citation omitted).

When the underlying action requires proof by a preponderance of the evidence, the non-movant must submit a "scintilla of evidence" to survive summary judgment. See *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court.” *Wells v. City of Lynchburg*, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). This Court “may affirm the grant of summary judgment on any ground found in the record.” *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (citing Rule 220(c), S.C.A.C.R. (“The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.”)); accord Rule 208(b)(2) (“Respondent’s brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).”).

II. The Trial Judge Properly Granted Summary Judgment Because The Citadel Did Not Owe Doe a Duty of Care Under South Carolina Law

The trial court first held that The Citadel did not owe Doe a duty of care. For the reasons that follow, this Court should affirm the trial court’s grant of summary judgment to The Citadel. In fact, the Court should go further than the trial court did and hold that The Citadel owed Doe and others similarly situated no duty regardless of when ReVille began molesting him. Unqualified affirmation of the state of the law will guide the trial court in dealing with claims by ReVille’s other victims who had no relationship with The Citadel, but whose molestation began after Camper Doe’s 2007 report about ReVille.

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

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

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

Except in limited circumstances, South Carolina courts have refused to impose a duty of care to prevent third persons from committing acts of violence:

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

See Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (finding duty where defendant had *custody* of actor).

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 defined group in a fixed location and time*. This is logical, since a duty flows from the relationship between the defendant and injured party:

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

See *Ravan v Greenville Cnty.*, 315 S.C. 447, 467, 434 S.E.2d 296, 308 (Ct. App. 1993). Here, there was no relationship whatsoever between The Citadel and Doe. To impose a duty upon The Citadel in this case would be to impose a duty upon everyone, to everyone. Taken to its logical conclusion, any person who fails to catch a criminal would be liable to virtually all of the criminal's future victims. There would be no logical reason not to extend this duty to all schools, churches, and law enforcement agencies.

Although Plaintiff focuses his argument on the foreseeability of injury to potential unknown victims, South Carolina has never recognized that as a basis for duty in facts such as those presented here. No South Carolina appellate court has imposed a duty to prevent acts of a third person without evidence of knowledge of a threat to *specific* persons:

- In its most recent case, this Court held that the spouse of a sexual abuser — despite knowing her husband's predilection — did not owe a duty to a minor that her husband abused *in her home*. The Court rejected the "special relationship" theory 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).
- In *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007), the plaintiff alleged sexual abuse by pediatrician Marion, who the defendant treated for a "predilection for child molestation." The Supreme Court rejected 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."

- In *Hardee v. Bio-Medical Applications of S.C., Inc.*, 370 S.C. 511, 636 S.E.2d 629 (2006), the Supreme Court held that a dialysis center might owe a duty to third-persons to warn patients of risks of driving home from treatment. 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. Notably, the risk was immediate and of fixed duration and scope.
- In *Bishop v. South Carolina Dep't of Public Health*, 331 S.C. 79, 502 S.E.2d 78 (1998), the Supreme Court held that a duty to warn flowed from an institution discharging a mother who later harmed her child, where the mother had threatened to harm *that child*: "[T]he Department was aware mother had made specific threats to harm victim in the past. . . . This knowledge was sufficient to trigger the Department's duty to warn victim of mother's release because a specific threat had been made by mother to harm a specific person." See *id.*, 331 S.C. at 88, 502 S.E.2d at 82.
- In *Rogers v. South Carolina Dep't of Parole and Community Corrections*, 320 S.C. 253, 464 S.E.2d 330 (1995), the Court held that the defendants did not owe a duty to warn that they were releasing a prisoner on furlough, even though he was jailed for burglarizing *plaintiff's home*, because "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.
- In *Gilmer v. Martin*, 323 S.C. 154, 473 S.E.2d 812 (Ct. App. 1996), this Court held that a psychiatrist did not owe a duty though he knew that a patient with suicidal tendencies worked with vulnerable 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."
- In *Rogers v. South Carolina Dep't of Mental Health*, 297 S.C. 363, 377 S.E.2d 125 (Ct. App. 1989), the court did not impose a duty on a doctor to warn family members of a risk of violence because "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." See *id.*, 297 S.C. at 366, 377 S.E.2d at 126.

- In *Sharpe v. South Carolina Dep't of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (Ct. App. 1987), the court refused to impose a duty 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. . . . Nothing in the record indicates Sevits and Sharpe knew each other prior to Sevits's discharge.").

These cases make clear that South Carolina has never recognized a duty to prevent violence by third-parties in the absence of evidence of knowledge of a specific threat to specific persons. Contrary to Plaintiff's request here, South Carolina has never imposed a duty to the general public or even a demographic subgroup.

Plaintiff's arguments would open a Pandora's Box of potential liability that would extend far beyond any reasonable bound. The South Carolina Supreme Court has never even suggested that this is the law. Focusing entirely on foreseeability, Plaintiff suggests that because ReVille was a "known pedophile," The Citadel owed a duty to all children he might encounter. (*See* Pl.'s Init. Br., at p.28). First, there is no evidence that The Citadel knew before Doe's abuse that ReVille was a pedophile or might abuse unknown victims at unknown times. In any event, this would be far too general a threat for the law to impose a duty. 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). Plaintiff cites no authority that The Citadel owed a duty to every minor in Charleston County or South Carolina to prevent ReVille from abusing them into perpetuity. Under Plaintiff's argument, one who fails to apprehend a rapist would breach a duty to all women. One who fails to apprehend a bank robber would breach a duty flowing to all banks. An identifiable (but large) "class" of potential victims simply is not a substitute for the specifically identified potential victim, to whom our courts have heretofore limited the duty of care.

Plaintiff argues that "when a defendant's duty arises 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 Pl.'s Init. Br., at 19). However, he fails to address the fact that South Carolina has *never* recognized a duty of care in the absence of a very specific and identifiable threat. Moreover, the cases Plaintiff cites do not support his argument:

- (a) *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), involved a rock concert attendee's claim that he was struck by a bottle thrown from a balcony. The Supreme Court affirmed the denial of the property owner's motion for a directed verdict, holding that the injury was "foreseeable." The *Martin* Court was not addressing whether a duty of care existed in the first place; rather, the Court only determined that there was sufficient evidence of *proximate cause* to submit the case to the jury. Additionally, the *Martin* plaintiff was part of a readily identifiable group of people at a specific place in a specific, limited time.
- (b) *Bryant v. City of North Charleston*, 304 S.C. 123, 403 S.E.2d 159 (1991), involved maintenance of a sidewalk, not the alleged failure to prevent the actions of a third person. Therefore, it is irrelevant to whether a duty of care exists here. In any event, even if the name of the potential victims were unknown in that case, it involved a risk confined to a very specific geographic location.
- (c) *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 374 S.E.2d 910 (Ct.App.1988), involved claims that a prisoner killed decedents after his release. This Court held that no duty of care existed under state statutes because the purpose of those statutes was not "to guard members of the public against violent crimes by released prisoners." Notably, this Court did not conclude random members of the general public were within an identifiable "class" of victims the statutes were intended to protect. This case plainly does not support Plaintiff's argument.

As the trial court noted, Plaintiff's claims of a duty of care are particularly weak here, because Doe's abuse occurred almost entirely before Camper Doe's report to The Citadel and interview. Plaintiff has not cited to any authority that would permit him to succeed on a claim where ReVille had begun abusing him years before The Citadel was ever even notified of Camper Doe's allegations. As a matter of duty and causation, the trial judge properly held that this issue of the timing of Plaintiff's abuse forecloses his claims:

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

(See R. p. 73). Likewise, this reason justifies the affirmance of the entry of summary judgment for The Citadel. However, beyond that, it is clear that as a matter of law, The Citadel simply did not owe a duty of care to Plaintiff (or to any similarly situated future victim) to prevent future acts of abuse by ReVille, because there is no evidence of a specific threat to a particular victim.

Plaintiff argues that the trial court erred in granting summary judgment because The Citadel owed a duty of care on the following bases: (a) The Citadel voluntarily undertook a duty to Doe; (b) The Citadel negligently created the risk to Doe; and (c) federal statute imposed a duty on The Citadel. For the reasons that follow, this Court should affirm the grant of summary judgment to The Citadel.

A. The Citadel Did Not Voluntarily Undertake a Duty of Care

1. Plaintiff Has Not Presented Evidence Supporting the Voluntary Undertaking of a Duty of Care

South Carolina recognizes voluntary assumption of a duty of care in limited circumstances:

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

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

such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

See Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting Restatement (Second) of Torts § 323 and refusing to extend duty beyond Section 323 formulation). The Supreme Court has declined to recognize an assumed duty of care to a third person under the broader Section 324A³:

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

Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997); *accord Johnson*, 401 S.C. at 505 n.5, 737 S.E.2d at 514 n.5 (Section 324A "has not been adopted by our courts"). A voluntary undertaking of a duty requires that the duty be undertaken specifically *to plaintiff* and (in the absence of actual creation of the danger) that the plaintiff know of and rely on the undertaking:

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. 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.

See Johnson, 401 S.C. at 506, 737 S.E.2d at 514. Plaintiff can cite to no South Carolina law recognizing undertaking of a duty to the general public, rather than a specific person.

³ The Restatement (Second) of Torts § 324A states:

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

In *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006),⁴ this Court refused to find an undertaken duty where plaintiff did not know of the undertaking:

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.

See *id.*, 367 S.C. at 218-19, 625 S.E.2d at 239. Without a specific connection between *the undertaking and the plaintiff*, there could not be a voluntarily assumed duty of care.

On another occasion, this Court again recognized that undertaking of a duty requires either that the plaintiff rely on the undertaking or that the Defendant actually increase the danger (which is not present here):

[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.

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

Plaintiff cannot show a voluntary undertaking because there is no evidence that The Citadel acted to protect Doe, a complete stranger. 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

⁴ Plaintiff tries to evade *Underwood* by arguing that "the determinative factor in finding that the defendant did not voluntarily undertake a duty to the plaintiff was the health of the tree, not that a duty could not exist as to that plaintiff." (See Pls' Init. Br., at pp.21-22). That is simply not true. While the Court considered the general common law duty to maintain trees, it *also* analyzed the separate question of voluntary undertaking of a duty and concluded that the defendant had not undertaken a duty. That analysis had nothing to do with the health of the tree.

(1998) (“[P]laintiff’s voluntary undertaking theory . . . fails at the outset because plaintiff never alleged that defendant undertook services for *plaintiff* . . .”) (emphasis in original). Plaintiff presents no evidence that The Citadel engaged in any action undertaking a duty of care to *him* under Section 323. The Citadel did not know Doe or his circumstances and could not have undertaken to protect him. Although Plaintiff cites to numerous Citadel policies, he presents no evidence that any of these policies was intended to benefit him specifically. He presents no evidence that The Citadel actually *increased* the risk of abuse beyond what previously existed; that contention is particularly baseless as ReVille had been abusing Doe (even at Doe’s home for years before Camper Doe’s report). Further, there is no evidence that Doe acted in reliance on The Citadel.

Plaintiff argues, in essence, that the foreseeability that ReVille might abuse *someone* is the equivalent of a voluntary assumption to all minors to whom ReVille might ever be exposed. This flies in the face of South Carolina law, which requires an undertaking to a particular person, not merely foreseeability. At most, Plaintiff relies on general policies of The Citadel that he claims required that The Citadel act in a certain way.⁵ However, none of these alleged policies are specifically directed to Plaintiff. Moreover, there has been no

⁵ Moreover, Plaintiff has not shown that The Citadel actually violated any of the policies. (See Pl.’s Br., at p.26).

- The “Summer Camp Official Camp Policies Regarding Sexual Misconduct Issues” would not have applied because, at the time of Camper Doe’s report, that policy was no longer in effect as the summer camp was closed. (See R. pp. 983-84).
- The “Sexual Harassment” memorandum would not have been triggered because as it applies only to harassment in the context of “employment” and “student” and “academic” areas. This policy would not, by its definition of sexual harassment, apply to the abuse of summer campers. Moreover, if the policy could apply, Camper Doe’s report would have been an “informal” complaint, for which a report to law enforcement was not required. (See R. pp. 1219-34).
- The “Serious Incidents” memorandum would not apply because that policy relates to ongoing incidents or occurrences. It would not govern a report of an event from years prior. (See R. pp. 1198-1210).
- The “Sexual Assault Crisis Intervention” policy would not have applied because, by its terms, it only applies to circumstances involving *touching*. Moreover, that policy does not mandate a report, but rather requires respect for the wishes of the victim. (See R. pp. 1215-18).

showing that The Citadel ever knew that Plaintiff existed. Without evidence that The Citadel intended to undertake a duty to Doe, an unknown stranger, Plaintiff's argument fails.⁶

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

2. The Cases Plaintiff Cites Are Inapposite

The cases that Plaintiff cites to support that The Citadel voluntarily undertook a duty to him are distinguishable and do not support his position. First, Plaintiff posits that *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007), is "[g]uiding and controlling." In that case, this Court held that a city might have voluntarily undertaken a duty to ensure the safe condition of sidewalks in a state right-of-way (emphasis added):

Fickling presented evidence that the City had fielded complaints from residents about hazards to the sidewalks, had maintained a log of calls from residents, including repair calls, and had a policy in place, as well as employees, to handle repairs to sidewalks within the municipal limits, including those that were City-owned and those that were non-owned. The trial court expressly found the City *admittedly* engaged in a voluntary undertaking in this instance, but noted in its order: 'Although the City in the instant case *admits that it undertakes an obligation to maintain and repair public sidewalks*, it only does so when it has notice of the dangerous condition or when the City creates the condition itself. In this case as in *Vaughan*, however, we believe there was a genuine issue of material fact as to whether the City had undertaken a duty of maintaining streets within the municipality, including Meeting Street.

See id., 372 S.C. at 609-10, 643 S.E.2d at 116-17; *accord Vaughan v. Town of Lyman*, 370

⁶ In furtherance of his misplaced argument, Plaintiff argues that The Citadel knew in 2004 that ReVille was abusing campers, through the knowledge of Camper Doe 6. This proposition is baseless for a number of reasons. First, in any event, this alleged knowledge would not constitute an undertaking of a duty of care to Plaintiff, a stranger to The Citadel. Mere knowledge or foreseeability is not equivalent to an undertaking of a duty. Second, there is no evidence that Camper Doe 6's alleged knowledge, as a junior camp counselor (and alleged victim) would be attributed to The Citadel. Specifically, Plaintiff makes no showing to support a claim that Camper Doe 6 was an agent whose knowledge could be attributed to The Citadel or that he learned information in the scope of his employment. Finally, there is no first-hand evidence as to what Camper Doe 6 knew and when.

S.C. 436, 444, 635 S.E.2d 631, 637-38 (2006). The City of Charleston *admitted* that it had undertaken a duty to deal with certain public sidewalks, and there was evidence that this duty might encompass the subject sidewalk. Importantly, the claimed duty concerned outwardly visible property conditions at specific geographic location within the jurisdiction of a municipality that was already charged with maintaining some sidewalks. Such a duty would be precisely the type of duty that the city had undertaken as to other sidewalks. One could scarcely imagine a more fundamental municipal undertaking than the maintenance of streets and sidewalks directed to those who use those sidewalks.

Fickling (and *Vaughan*) are inapposite, as this case does not involve maintenance of property within The Citadel's boundaries. Doe was not, in any way, within the custody or control of The Citadel at the time of his abuse. Moreover, there is no evidence that a condition of The Citadel's property caused Doe's abuse. Plaintiff applies a case governing municipal maintenance of sidewalks to impose a duty to protect unknown future victims from abuse. Plaintiff stretches *Fickling* to the point of breaking. It does not support the imposition of a duty under the facts of this case.

Plaintiff also relies on *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 638 S.E.2d 650 (2006), where a mentally challenged resident of a treatment center filed suit, alleging that the center failed to properly supervise her, permitting residents to abuse her. The Supreme Court held, *inter alia*, that defendants undertook a duty:

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 contractual undertaking of a duty *for consideration* to protect and supervise custodial victims. Conversely, Plaintiff has not presented a scintilla of evidence that The Citadel agreed to protect Doe, took custody of Doe or was paid to monitor Doe. Rather, Doe proffers no evidence of any relationship between himself and The Citadel. He presents no evidence that anyone at The Citadel knew ReVille abused him — or even that the two knew each other — prior to this lawsuit. He presents no evidence that he was ever led to believe that The Citadel would protect him from ReVille. *Madison* is unavailing.

Plaintiff cites *Miller v. City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), to support his argument that The Citadel undertook a duty. In *Miller*, a plant operator constructed a dam adjacent to the plant, which it conveyed to the City. The City used the reservoir to supplement its water supply, and the plant operator was permitted to draw water for production. The City agreed to maintain the lake at the level of the spillway. If the water level got too high, the plant operator would contact the City to open sluice gates. An Army Corps of Engineers report deemed the dam unsafe, and plant employees and the City attended a meeting with the Land Resources Commission. Although the plant operator indicated that it did not own the dam, it attended the meeting and included its employees on the Land Resources Commission's emergency notification forms as personnel monitoring the dam. A heavy rainfall caused the lake to overtop the dam, injuring plaintiffs, who sued the City and plant operator. The plant operator obtained summary judgment, arguing that no duty of care existed. The Supreme Court held that issues of fact existed as to whether the plant operator voluntarily might have undertaken a duty, since its agent was listed on an emergency notification form and it had an employee present at the meeting at which an emergency plan was formulated. *See id.*, 329 S.C. at 315, 494 S.E.2d at 815. The Court made clear that it did not recognize a duty beyond the limits described above:

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*, there is no evidence that The Citadel intended – through its operation of the summer camp or handling of Camper Doe's report – to benefit Doe, a complete stranger. The plant operator in *Miller* undertook duties that by their nature protected third-persons who might be impacted by a breach of the dam. There are no similar facts in this case. Instead, Plaintiff repeatedly tries to impose a duty to “the public” under the rubric of voluntary undertaking, an approach that no South Carolina court has ever taken.

3. To the Extent Doe Claims The Citadel Voluntarily Undertook a Duty of Care Through Internal Policies, His Argument Fails

Plaintiff cites numerous cases for the proposition that The Citadel's internal policies constitute the voluntary undertaking of a duty of care. However, the cases Plaintiff cites do not support that internal policies might impose a duty of care. Rather, they *only* suggest that *after the law imposes a duty of care*, internal policies may be evidence of what might satisfy that duty, *i.e.*, the scope of the duty. *Caldwell v. K-Mart Corp.*, 306 S.C. 27, 410 S.E.2d 21 (Ct. App. 1992) involved slander and false imprisonment, *not negligence*. This Court held only that internal policies could be evidence of whether the defendant acted “reasonably” as required for a statutory defense to false imprisonment; it did not use the policies to impose a duty, but only mentioned in *dicta* that internal policies are sometimes “relevant on the issue of failure to exercise due care,” *i.e.*, whether a defendant satisfied an *existing* duty. Plaintiff cites no authority *imposing* a duty through internal policies unknown to Plaintiff.

In fact, the Supreme Court has expressly held that internal policies *cannot be used to impose a duty of care*:

It is undisputed that Wal-Mart created an internal policy that was subsequently violated when the photo technician destroyed the photos and did not inform the store manager or keep them as evidence. However, this

internal policy cannot be said to constitute the voluntary undertaking of a duty. Rather, it could simply serve as evidence of the standard of care, once that duty was established by law.

See Doe ex rel. Doe v. Wal-Mart Stores, Inc., 393 S.C. 240, 247-48, 711 S.E.2d 908, 912 (2011). The Citadel's policies were not directed specifically at Doe and merely governed The Citadel's general operations in various respects. To the extent Doe argues that The Citadel undertook a duty through internal policies, his claims fail.

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

B. Plaintiff Has Not Presented Evidence That The Citadel Created the Danger So As to Impose a Duty of Care

Doe next argues that The Citadel owed him a duty of care because it "created the risk" that ultimately occurred or increased it. However, Doe has not presented any evidence that The Citadel "created" any danger. Instead, he focuses on the alleged general "foreseeability" that ReVille *might* abuse minors in the Charleston area. He suggests that The Citadel somehow "created" a risk by concealing ReVille's abuse. However, this is not equivalent to creating a risk in the first instance. Rather, Doe is merely repackaging allegations that The Citadel failed to protect him from an existing risk.

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

Doe posits that he does "not seek to hold The Citadel liable for creating ReVille's desire" to abuse him, but rather seeks to base liability "on The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse" him. (*See* Pl.'s Init. Br., at pp. 27-28). However, Doe's own words make clear that he is not seeking to hold The Citadel liable for creating a risk. Rather, Doe merely tries to recast a "failure to protect" claim as one for creation of a risk by arguing that the risk was foreseeable. His argument focuses solely on a claim that ReVille's abuse of Doe, a stranger to The Citadel, was "foreseeable"; however, foreseeability alone is not enough to impose a duty for creation of a risk. Semantics aside, irrespective of how foreseeable ReVille's acts might have been, Doe presents no evidence that The Citadel *created* a dangerous situation; rather, Doe's claim boils down to an allegation that The Citadel failed to prevent ReVille from abusing him. If Plaintiff's position carries the day, the "creation of risk" exception to non-liability for the acts of a third-person would expand in a way no South Carolina court has ever permitted.

In a recent opinion, the United States Court of Appeals rejected this Plaintiff's argument that there was a "state-created danger" in the context of a claim against an administrator of The Citadel under 42 U.S.C. § 1983:

Nor did Rosa create or increase the risk of the Does' abuse specifically during the early summer months of 2007, as the Does posit. As horrific as the abuse of the Does by ReVille was, nothing transpired between them and ReVille in the summer of 2007 that had not been ongoing for two years unrelated to any action by Rosa. . . . [A]llowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger. . . . There was simply nothing new about ReVille's perverted abuse of the Does in the summer of 2007 that had not already been occurring for months. Rosa did not make the Does' danger any worse, and he had no constitutional duty to save them from ReVille's existing abuse. . . . [T]he Does were in no different situation with ReVille after the Camper Doe complaint than they had been the previous two years.

See Doe v. Rosa, 795 F.3d 429, at 439-40 (4th Cir. 2015). In addition, the Court held that Section 1983 liability did not exist because the defendant in that case did not engage in "affirmative" acts, but simply failed to act to prevent abuse. While this case is not

controlling, confirms that The Citadel (and its agents) did not undertake any acts to "create" the danger that ultimately befell Doe.

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

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

See Edwards v. Lexington Cty. Sheriff's Dep't, 386 S.C. 285, 293-94, 688 S.E.2d 125, 130 (2010) (emphasis added). Unlike *Edwards*, The Citadel did not *create* the scenario in which ReVille could abuse Doe and then fail to take reasonable security steps. Rather, notwithstanding this is a garden-variety failure-to-protect claim.

Application of the "creation of risk" exception here would cause the exception to swallow the rule, imposing potential liability in all "failure to-protect" cases, since anyone who fails to prevent an injury could be said to have enhanced a foreseeable danger. The Citadel did not create ReVille's desire to abuse children or actively assist ReVille to abuse children. It did not control ReVille or have custody of Doe. Under such circumstances, The Citadel cannot be said to have created the danger to Doe. *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.").

In *Staples v. Duell*, 329 S.C. 503, 494 S.E.2d 639 (Ct. App. 1997), this Court observed the difference between negligently 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.*” See 329 S.C. at 510, 494 S.E.2d at 643 (emphasis added). On the other hand, in this case, there is no evidence that The Citadel did anything that caused ReVille to abuse when he otherwise would not. There is no evidence that The Citadel's conduct caused ReVille to select Doe as a victim or to abuse in that particular time frame. In the language of *Staples*, Doe's claim consistently reduces itself to a claim that The Citadel negligently patrolled for dead trees.

Plaintiff relies heavily on *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 391 S.E.2d 546 (1990), where a bottle thrown from a balcony of the defendant auditorium struck a rock concert attendee. The auditorium only had 14 guards to control a crowd of 6,000 and had no reserved seating on the main floor. Multiple witnesses testified that patrons were openly drinking from liquor bottles and that there were liquor bottles and glass on the floor during the concert. In addition, the crowd was unruly. The court rejected the auditorium's argument that it was immune from liability under S.C. Code § 15-78-60(20), which provides, *inter alia*, that a governmental entity is not liable for criminal acts of third persons:

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

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

First, *Greenville Memorial Auditorium* does not address the imposition of a duty, but instead concerns the applicability of an exception to liability under the SCTCA. Second, *Greenville Memorial Auditorium* concerns actions on the defendants' property, under its supervision and in such circumstances that the law imposed a duty to provide

for the safety of attendees. Here, (aside from Doe's one-time presence on campus, unknown to The Citadel, with ReVille to attend a basketball game), ReVille did not abuse Doe at The Citadel or in the context of a formal Citadel activity.

For the foregoing reasons, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

C. Plaintiff Has Not Presented Evidence That Title IX Imposed a Duty of Care on The Citadel

Plaintiff next argues that federal statute, 20 U.S.C. §§ 1681, *et seq.* (also known as Title IX), imposes a duty of care on The Citadel. Importantly, Doe has not asserted a private cause of action under Title IX; instead, Doe posits that Title IX imposes and defines a duty of care on The Citadel for his benefit. For the reasons that follow, the trial court properly granted summary judgment to The Citadel, as Title IX does not create a duty of care.

1. Title IX Cannot Impose a Duty of Care As a Matter of Law

Initially, Doe's claim that Title IX imposed a duty of care on The Citadel fails because he does not even attempt to use the statute itself to impose civil liability. Instead, Plaintiff relies on certain non-statutory "administrative" standards in an effort to manufacture a duty of care. However, under the law of the United States Supreme Court and other jurisdictions, those standards cannot be misapplied in such a manner.

Plaintiff first cites to a regulation promulgated under the authority of Title IX: "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." *See* 34 C.F.R. § 106.3(a). This regulation does not apply on its face, insofar as the Assistant Secretary for Civil Rights of the Department of Education never made a finding that The Citadel discriminated against any persons relative to ReVille. As a result, The Citadel was not obligated to take any remedial action under this regulation. Moreover, the regulation does not impose a duty of care, because it seeks to *remedy past*

discrimination, not to *prevent future* discrimination. The regulation also *permits* entities to take certain affirmative actions if it so chooses in the absence of such a finding of discrimination: "[i]n the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex." *See* 34 C.F.R. § 106.3(b). However, Plaintiff does not identify anything in this permissive regulation that could impose a duty on The Citadel for Plaintiff's benefit.

Plaintiff also bases his argument heavily on the United States Office for Civil Rights, Department of Education's 2000 "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" ("OCR Guidance"). Plaintiff devotes several pages of his Brief to detailing various "administrative" provisions of the OCR Guidance governing how certain entities should respond to complaints of sexual harassment, including:

- Disseminating a policy against sexual harassment (*See* 65 Fed. Reg. 66095).
- Adopting grievance procedures providing for prompt resolution of sexual discrimination complaints, including sexual harassment complaints. (*See id.*).
- Designating an employee to coordinate Title IX regulation compliance. (*See* 65 Fed. Reg. at 66100).
- Taking "immediate and corrective action" when learning of sexual harassment. (*See* 65 Fed. Reg. at 66100).
- Taking "effective corrective actions to stop the harassment, prevent its recurrence, and remedy its effect on the victim." (*See* 65 Fed. Reg. at 66101).
- Not using "insurance" investigations because the "standards may well be different than those under Title IX." (*See* 65 Fed. Reg. at 66108).

(*See* Pl.'s Init. Br., at pp.31-34). Aside from the obvious point that a Guidance issued in 2000 could not have created a standard of care in 1997, there is nothing in the language of the OCR Guidance suggesting that these requirements should be imposed as a

negligence standard of care actionable in tort. In fact, the OCR Guidance makes clear that its revisions from its 1997 version solidify that it is *not* intended to create tort liability standards:

The 1997 guidance contained a section titled "Liability of a School for Sexual Harassment." To the extent this section could be interpreted as being applicable to a school's liability in a private lawsuit for monetary damages, the proposed revised guidance clarifies that the guidance addresses the Department's administrative enforcement of Title IX; *it does not address standards applicable to private litigation for monetary damages.*

See 65 Fed. Reg. 66094 (emphasis added). The OCR Guidance further clarifies that the United States Supreme Court had foreclosed the use of its "administrative" standards to define liability for money damages: "The discussion of liability in the 1997 guidance contained a section on the effect of grievance procedures. To the extent this section could be interpreted to guide courts regarding liability for monetary damages, this section was affected by *Gebser* and *Davis*." See 65 Fed. Reg. 66095. *Gebser* confirms that the OCR Guidance administrative requirements may not form the basis for a civil claim:

[T]he failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute. [Citation omitted.] We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.

See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

Applying *Gebser*, one court has held that it was error to use the OCR Guidance's "administrative" provisions to impose a civil standard of care:

Plaintiffs continue to assert negligence per se claims, arguing that "34 C.F.R. 106.8(b) ... requires a school receiving Title IX funds to establish 'procedures providing for the prompt and equitable resolution of student complaints' relating to all forms of sexual harassment, including sexual assault," and that this regulation incorporates an Office of Civil Rights of

the Department of Education (OCR) Guidance requiring a school's procedures to "accord[] due process to both parties involved." . . . If the Court were to allow a regulation used in administering a federally-created right to create a state negligence *per se* claim, it would effectively eviscerate the *Gebser* rule.

In fact, Defendant noted in its motion for summary judgment that Plaintiffs' strategy of "mak[ing] an end run around these principles by asserting state-law negligence-based claims and relying on Title IX regulations and OCR Guidance to establish the duty element of those claims ... [is] preempted by the Supreme Court's jurisprudence on the private right of action under Title IX"

Doe v. University of the South, 2011 WL 1258104, at *14 (E.D. Tenn. March 31, 2011) (see R. pp. 301-16); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 707 n.13 (E.D. Pa. 2007) ("[The OCR] Guidance provides just that: guidance. It is not binding").

Plaintiff cites no authority permitting Title IX — in particular its "administrative" regulations and OCR Guidance provisions — to be used to *create* a state law negligence duty of care. To the contrary, those provisions — most of which are geared toward remedying *past* discrimination — are only intended to assist in guiding school actions and federal administrative governances of schools. There is no legal authority — particularly South Carolina authority — supporting Doe's contention.

If Doe believes that he possesses a Title IX claim, he should have asserted such a claim; he may not use the Title IX regulations and guidances to manufacture a duty of care where none exists under state law. See *Houston v. Mile High Adventist Acad.*, 846 F. Supp. 1449, 1457 (D. Colo. 1994) ("[S]ince both Title VII and Title IX provide a specific means of enforcing legal duties unknown at common law, the remedies under these statutes are exclusive. [Citation omitted.] The Houston's attempt to recover such damages under a negligence *per se* theory is therefore improper.").

Therefore, because Title IX does not impose a duty of care, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

2. Doe Is Not Member of a Class That Title IX Protects

In addition to the foregoing, Doe cannot demonstrate that Title IX can support a negligence *per se* claim. "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." *Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988).

Under South Carolina law, the "public duty rule" rejects a statute-created duty to the general public. *See Trask v. Beaufort Cty.*, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (Ct. App. 2011) ("[P]ublic 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.") (quoting *Vaughan v. Town of Lyman*, 370 S.C. 436, 441, 635 S.E.2d 631, 634 (2006)). Courts in South Carolina are especially reluctant to recognize a duty arising out of a statute governing the duties of a public official:

[W]hen the statute at issue creates or defines the duties of a public official, the public duty rule applies. [*Rayfield*, 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. The presumption may be overcome when the statute creates a "special duty" to the plaintiff. 297 S.C. at 106, 374 S.E.2d at 916. In *Rayfield*, this court stated:

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

members of the class if he fails to do his duty; and (6) the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office."

Trask v. Beaufort County, 392 S.C. 560, 567, 709 S.E.2d 536, 539 (S.C. App. 2011) (no private right of action against county coroner for violating statute prohibiting destruction of human remains); accord *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010) (family court litigant assaulted in family court could not sue for violating statute requiring Sheriff to provide courthouse security).

Title IX cannot support a negligence *per se* claim because this is not the type of injury Title IX is designed to prevent and because Doe is not within the class of persons Title IX is intended to protect. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." See 20 U.S.C. § 1681(a). Courts have agreed that Title IX only applies to protect and benefit students and participants in educational programs. See e.g., *Doe v. Oyster River Co-op. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs—and not the participants' parents—have standing to bring claims under Title IX."); *Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("On its face, the statutory language of Title IX, applies only to students and participants in educational programs."); *Bosley v. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) ("On its face, [Title IX] applies only to students and participants in educational programs. Mrs. Bosley is neither and, therefore, is an improper plaintiff.").

Doe can cite to no authority that he is within the class of persons Title IX is intended to protect. Title IX is geared to the protection of the civil rights of students. It is not a general statute for the prevention of violence where the Defendant happens to be an educational institution. There is no evidence or law supporting the claim that Title IX is intended to protect unknown future victims of sexual abuse who do not attend an

institution within its scope. Rather, Title IX is intended to vindicate the civil rights of *participants* in educational programs to ensure that there is no discrimination in those programs. Doe cites no authority using Title IX to impose a duty of care extending to a non-student who has no relationship with the defendant. Plaintiff's construction of Title IX would convert Title IX into a general statute for the protection of the public from sexual abuse. Title IX cannot be used to impose a duty of care flowing to an unknown person who was not a student at The Citadel and had no relationship with The Citadel.

The Citadel anticipates that Doe will argue that he is within the protections of Title IX under a "Dear Colleague" letter that was circulated in 2011 — almost four years after ReVille stopped abusing Doe:

Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities. For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall.

See Letter from Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ. (April 4, 2011) (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>), at 4 n.11. However, this Dear Colleague letter only extends Title IX protection to persons who: (a) have a relationship with the school and (b) are physically present in connection with that relationship. Doe is not within the contemplation of the Dear Colleague letter. Unlike a visiting athlete or recruit, Doe was not on The Citadel's campus and did not have *any* relationship with The Citadel. Doe cites no authority suggesting that Title IX protect unknown, potential future victims with no tie to the school who might be abused under circumstances having no connection to the school.

Although no court has decided the specific question presented here, at least one court has recently suggested that distant connections to a school are likely insufficient to trigger Title IX. *See Kinsman v. Florida State Univ. Bd. of Trustees*, No. 4:15-cv-00235-MW-CAS (N.D. Fla. Aug. 12, 2015) ("Ms. Kinsman has not offered any other authority

for the proposition that Title IX extends to all persons coming into contact with students at off-campus establishments. This Court need not decide that issue today. But if Ms. Kinsman means to rely on such a theory, she may need more convincing legal authority to support her position."). Plaintiff can cite to no authority that would support expanding Title IX to impose a duty to persons who never attended The Citadel or had an actual relationship with it.

Therefore, because Title IX does not impose a duty of care, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

D. Doe's Claims Fail to the Extent They Rely on Allegations Regarding the Operation of the Camp

Doe argues that The Citadel owed a duty of care in the operation of the summer camp itself, even though those events occurred long before ReVille abused him. Specifically, Doe claims that The Citadel should have: (a) fired ReVille or noted in his personnel file several events — completely non-sexual in nature — that occurred in 2002 or 2003; and (b) known (or did know) that ReVille was abusing campers while a counselor. Plaintiff cannot proffer any evidence that The Citadel knew or suspected that ReVille committed sexual improprieties while he was still employed at the summer camp. These allegations involve conduct years before Camper Doe's report or Doe's abuse.

Doe cannot base his claim on alleged acts during the operation of the summer camp, two years before ReVille started abusing him, because there an employer cannot owe a duty to a victim of abuse by a *former* employee. Doe presents no evidence and cites no law that The Citadel owed a duty to foresee that a failure to properly monitor an employee might lead to that employee engaging in violence *years after the employment* terminates and in circumstances entirely unrelated to it. Doe's focus on what he believes The Citadel should have done while ReVille was a counselor would create catastrophic

precedent that would make employers guarantors of all former employees into perpetuity. This is simply not consonant with any proper application of South Carolina law.

Authority from other jurisdictions demonstrates that Doe's claim cannot succeed. In *Roe No. 1 v. Children's Hosp. Med. Ctr.*, 16 N.E.3d 1044 (Mass. 2014), abuse victims of a pediatrician at a North Carolina hospital filed a negligence action against a Massachusetts hospital that had previously employed him. They alleged that that hospital failed to properly train, supervise, or discipline him during his employment, knew or should have known that he was conducting inappropriate genital examinations, and failed to report him to various licensing authorities and his future employer. The court concluded that the first hospital did not owe a duty of care:

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.

See id., 16 N.E.3d at 1048-49 (emphasis added).

In *Evans v. Ohio State Univ.*, 680 N.E.2d 161 (Ohio Ct. App. 10th Dist. 1996), a mother of an abuse victim sued Ohio State, alleging that it hired a state fair judge and speaker, despite knowledge of prior convictions for gross sexual imposition and corruption of minor. The Court refused to impose a duty of care:

[T]he 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 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.

See id., 680 N.E.2d at 741; *Coleman & Co. Sec., Inc. v. Giaquinto Family Trust*, 236 F. Supp. 2d 288, 304 (S.D.N.Y. 2002) ("[Defendant] owed no such duty to supervise Jedrlnic — as an investment advisor or broker — when Jedrlnic was employed with J. Robbins, Inc. after that time.").

Similarly, in *Philips v. TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 91 Cal. Rptr. 3d 864 (Cal. App. 4th Dist. 2009), the court held that a plumbing service did not owe a duty to a customer's daughter for negligent hiring and retention of a former employee who shot and killed the customer two years after his work was terminated:

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.

See id., 172 Cal. App. 4th at 1144-45, 91 Cal. Rptr. 3d at 872-73. That plaintiff had a much stronger argument than Doe here, insofar as she actually met the assailant through his employment with the defendant. Doe presents no evidence that ReVille met him through The Citadel's summer camp or directly through any act of The Citadel.

Consequently, no duty of care could flow to Doe in connection with the hiring, supervision or retention of ReVille as a counselor. Such a claim is too far removed to support a duty of care.

This result is logical, as South Carolina law would not recognize a claim even if ReVille had still been an employee at the time he abused Plaintiff. An employer only owes a duty to supervise employees who are acting outside the scope of their employment 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. *See Degenhart v. Knights of Columbus*, 309 S.C. 114, 420 S.E.2d 495 (1992) (adopting *Restatement (Second) of Torts* § 317 (1965)); *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); *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). Plaintiff could not show any of these requirements even if ReVille was still a camp employee when he abused Doe. If The Citadel would not be liable if ReVille abused Doe while an employee, it could not be liable for abuse years after ReVille's camp employment ended and the camp closed.

Even if a duty of care could exist, proximate cause requires that the ultimate harm be foreseeable *at the time of the alleged negligence*:

It is apodictic that a plaintiff may only recover for injuries proximately caused by the defendant's negligence. *Olson v. Faculty House*, 344 S.C. 194, 544 S.E.2d 38 (Ct. App. 2001).

To prove causation, a plaintiff must demonstrate both causation in fact and legal cause. *Id.* Causation in fact is proved by establishing the plaintiff's injury would not have occurred "but for" the defendant's negligence. *Id.* Legal cause turns on the issue of foreseeability. *Id.* An injury is foreseeable if it is the natural and probable consequence of a breach of duty. *Id.* ***Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach.*** *Id.*

See Parks v. Characters Night Club, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001) (emphasis added). It would have been wholly unforeseeable to The Citadel in 2002 or 2003 (or earlier) that their alleged acts or omissions in running the summer camp would harm Doe years later. It is not reasonable to expect Garrott to have foreseen in 2002 that her failure to document an innocent looking event (such as ReVille being in a room with a camper in an entirely non-sexual manner) would cause a child, unrelated to the camp, to be sexually abused years later off of the premises of The Citadel.

To the extent he relies on events occurring while ReVille was employed at the camp, Doe's claims are too remote from ReVille's employment. Doe's claim that more rigorous supervision of ReVille when he was a camp counselor would have altered his distant future child abuse is highly speculative. If the Court permits Doe to inject such hindsight into this case, it will open novel lines of liability that have never existed before.

Therefore, to the extent Doe's claims relate to the operation of the summer camp itself, the trial court properly granted The Citadel's motion for summary judgment.

E. Plaintiff Cannot Show Proximate Causation

In addition to the reasons set forth above, and as an alternative supporting ground, the trial court's grant of summary judgment was also proper because Plaintiff cannot show that any act of The Citadel — including the failure to report ReVille to law enforcement — was the cause of his abuse.

Proximate cause is the efficient or direct cause of the injury. *See Roof v. Kimbrough*, 297 S.C. 156, 375 S.E.2d 318 (Ct. App. 1988). Proof of proximate cause requires proof of both “causation in fact” and “legal cause.” *See Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). Causation in fact is proved by establishing that the injury would not have occurred “but for” the defendant’s negligence; on the other hand, “legal cause” focuses on foreseeability. *See id.*, 477 S.E.2d at 715. “Negligence . . . may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided.” *See Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 547, 694 S.E.2d 1, 5 (2010) (citation omitted).

“[P]roof of causation cannot rest on conjecture, and the mere possibility of such causation is not enough to sustain plaintiff’s burden of proof.” *See Todd v. United States*, 570 F. Supp. 670, 677-78 (D.S.C. 1983) (citation omitted). Speculation or conjecture is insufficient to show factual cause:

When asked if the case would have produced a different outcome had the Respondents not breached their standard of care, Scarminach hedged:

“you never know because it's conjecture.” Instead of stating that the Respondents' conduct most probably caused the outcome, Scarminach said, “had [Respondents] done these things, the percentage of success would have been greater.” Thus, Scarminach's deposition did not establish that the Respondents' actions were the “but for” cause of Harris Teeter's loss.

See Harris Teeter, Inc. v. Moore & VanAllen, P.C., 390 S.C. 275, 289-90, 701 S.E.2d 742, 749 (2010).

Initially, as the trial court properly noted, under the specific facts of this case, there can be no legal or factual causation because ReVille's abuse of Plaintiff began long before Camper Doe's 2007 report. As set forth above, ReVille started abusing Plaintiff in 2005, two years before The Citadel was ever made aware of Camper Doe's accusations. The abuse ended in August, 2007, only days after Brandenburg interviewed Camper Doe. Therefore, as the trial court held, “Plaintiff's injuries arose before — and thus were not a proximate result of — any possible breach of duty by The Citadel.” (*See Order*, at 3).

In any event, Plaintiff cannot carry his burden of showing causation because there is no evidence that, had The Citadel done any of the things Plaintiff claims it should have done, ReVille would not have abused him. For example, there is no evidence that, had The Citadel documented any of the alleged incidents of being alone with campers or reported ReVille to law enforcement, Doe would not have been abused. Instead, Plaintiff asks the Court to speculate about what might have happened under a hypothetical state of facts. This is plainly insufficient to support a finding of causation in fact. Moreover, Plaintiff cannot show legal cause because there is no evidence that it was foreseeable to The Citadel that its failure to engage in the acts complained of would cause the harm sustained by Plaintiff. *See Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001).

Therefore, the trial court properly granted The Citadel's motion for summary judgment.

III. The Trial Judge Properly Granted Summary Judgment as to Outrage

A. The SCTCA Prohibits Doe's Outrage Claim

Doe's claims exist only to the extent the SCTCA permits them. The SCTCA's provisions "establishing limitation[s] on an exemption to the liability of the state . . . *must be liberally construed in favor of limiting the liability of the state.*" S.C. Code Ann. § 15-78-20(f) (emphasis added). A "loss" under the SCTCA includes "bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but *does not include the intentional infliction of emotional harm.*" See S.C. Code § 15-78-30(f) (emphasis added). Moreover, a governmental entity may not be held liable for "employee conduct outside the scope of his official duties or which constitutes actual fraud, *actual malice, intent to harm*, or a crime involving moral turpitude." See S.C. Code § 15-78-60(17) (emphasis added). The trial court properly held that these provisions bar Doe's outrage claim.

Construing the SCTCA "liberally in favor of limiting the liability of the state," numerous courts have concluded that the SCTCA bars outrage claims. See *Newman v. South Carolina Dep't of Employment and Workforce*, 2010 WL 4791932, at *2 (D.S.C. Sept. 22, 2010) ("[A]mendment of the Complaint would not save this [outrage] cause of action, since the Department, as a state agency, has sovereign immunity with regard to this tort claim."), *report and rec. adopted*, 2010 WL 4666360 (D.S.C. Nov. 18, 2010) (see R. pp. 391-97); *Ward v. City of N. Myrtle Beach*, 457 F. Supp. 2d 625, 646-47 (D.S.C. 2006) ("[T]he South Carolina Tort Claims Act excludes the intentional infliction of emotional harm from the definition of 'loss' for which a government may be liable under the Tort Claims Act."); *Harkness v. City of Anderson*, 2005 WL 2777574, at 4 (D.S.C. Oct. 25, 2005) ("Defendants argue they are immune from suit pursuant to the South Carolina Tort Claims Act . . . on the claim of outrage, otherwise known as

intentional infliction of emotional distress. [Citation omitted.] The court agrees. The SCTCA does not waive sovereign immunity for this claim.") (*see* R. pp. 398-401); *Trask v. Beaufort Cty.*, 392 S.C. 560, 573, 709 S.E.2d 536, 543 (Ct. App. 2011) ("Under the Tort Claims Act, a coroner is immune from suit for 'the intentional infliction of emotional harm.'"); *accord Lindquist v. Tanner*, 2012 WL 3839237, at *4 (D.S.C. April 12, 2012) ("Plaintiff concedes that her claim for 'intentional' infliction of emotional distress against the County Recreation Commission is barred by the South Carolina Tort Claims Act."), *report and rec. adopted in part*, 2012 WL 3839235 (D.S.C. Sept. 4, 2012) (*see* R. pp. 402-11); *Pruitt v. County of Charleston*, 2000 WL 35535239 (June 23, 2000 Comm. Pl. Charleston Cty.) ("Accordingly, based on the clear provisions of the Tort Claims Act, Doe's outrage claim is not actionable against this Defendant."). Likewise, in this case, the SCTCA bars Doe's outrage claim.

Doe argues that these provisions do not bar his claim, because he can succeed on an outrage claim if he can prove that The Citadel acted "recklessly" (rather than with intent to harm). However, bearing in mind that the SCTCA must be construed to minimize the state's liability, this Court should construe the SCTCA's prohibition of claims for "the intentional infliction of emotional harm" to include all claims for outrage. *See* S.C. Code § 15-78-30(f). The SCTCA's use of the phrase "intentional infliction of emotional harm" — rather than "intentional infliction of emotional *distress*" — does not suggest that the legislature intended to impose outrage liability where the defendant's acts are "reckless" rather than intentional.

In support of his contention that the SCTCA does not bar his outrage claim, Plaintiff only cites *Bass v. South Carolina Dep't of Soc. Servs.*, 403 S.C. 184, 742 S.E.2d 667 (Ct. App. 2013), *cert. granted* (July 18, 2014). Specifically, Doe argues that, because this Court reversed the denial of a directed verdict on an outrage claim on *substantive grounds*, rather than the SCTCA, it impliedly rejected The Citadel's argument here. While the *Bass* defendant did make a similar argument, this Court *did not examine or rule upon that argument in its opinion*. To the contrary, this Court reversed on the separate ground that

there was no evidence of conduct sufficient to support an outrage claim. As a result, *Bass* does not support Doe's contention that this Court should ignore the plain language of the SCTCA to permit liability for outrage.

For the reasons set forth above, this Court should affirm the trial court's entry of summary judgment in favor of The Citadel.

B. Doe's Outrage Claim Fails Because There Is No Evidence That The Citadel Directed Any Conduct Toward Him

As the trial court correctly noted, Doe's outrage claim also fails because The Citadel did not direct conduct toward him. Doe's outrage claim will not succeed unless he proves that The Citadel knowingly *directed* its conduct at him *in particular*:

The law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. [Citation omitted.] 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*.

See Upchurch v. New York Times, Inc, 314 S.C. 531, 536-37, 431 S.E.2d 558, 561-62 (1993) (emphasis added); *Roberts v. Simmons*, 2014 WL 7005250, at *6 (D.S.C. Dec. 11, 2014) ("[I]t is not clear that Defendant's alleged conduct was directed at the Plaintiff.") (see R. pp. 1805-09); *Fulghum v. Wise Seats, Inc.*, 2012 WL 1032594, at *4 (D.S.C. Mar. 27, 2012) ("[T]he conduct upon which Plaintiff bases his claim . . . is not tortious conduct that was specifically directed towards Plaintiff."). In this vein, this Court has held that parents of a minor abuse victim could not sue for outrage where there was no evidence that the defendant directed actions at them. *See Doe v. Rojas*, 2007 WL 8327520, at *4 (Ct. App. April 26, 2007) ("[T]he record contains no evidence that the School District, in failing to take any preemptive action to prevent the abuse, targeted or directed any of its conduct towards the Does.") (see R. pp. 1811-14).

Doe has not proffered any evidence that The Citadel knowingly directed any actions against him. There is no evidence that The Citadel knew Doe, knew that ReVille

abused Doe or had any contact with Doe. There is no evidence that Doe was a camper at the summer camp or that he had any relationship with The Citadel. There is no evidence that The Citadel directed (or even could have directed) any conduct toward Doe, who ReVille abused *after* his employment at the summer camp. At most, Doe argues that The Citadel should have known — or, more accurately, speculated — that ReVille might abuse some unknowable person at some uncertain time in the future. He does not argue that The Citadel had any way of knowing that Doe was specifically at risk of abuse or that ReVille was, in fact, abusing him. Therefore, this Court should affirm the entry of summary judgment as to Doe's outrage claim.

C. This Claim Fails Because There Is No Evidence of Outrageous Conduct

The trial court also properly granted summary judgment to The Citadel as to Doe's outrage claim because Doe has not proffered a scintilla of evidence that The Citadel engaged in the sort of egregious conduct required for him to succeed on that claim. Doe must prove the following elements for his outrage claim:

- (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct;
- (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;"
- (3) the actions of the defendant caused plaintiff's emotional distress; and
- (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could expect to endure it."

Bass v. South Carolina Dep't of Soc. Servs., 403 S.C. 184, 193, 742 S.E.2d 667, 672 (2013) (citations omitted). "Facts which may show extreme insensitivity on the part of the defendant do not necessarily establish the tort of outrage." *Hawkins v. Greene*, 311 S.C. 88, 91, 427 S.E.2d 692, 694 (Ct. App. 1993).

South Carolina appellate courts rarely find conduct sufficient to support an outrage claim, even where defendants acted egregiously. *See e.g., Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921 (Ct. App. 1994) (supervisor threatened and ridiculed employee with cerebral palsy); *Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (homeowner's association president refused access to records); *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994) (doctor mistakenly told patient's daughter that father had died); *Holtzscheiter v. Thomson Newspapers*, 306 S.C. 297, 411 S.E.2d 664 (1991) (newspaper published unflattering statements about plaintiff's murdered daughter); *Manley v. Manley*, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987) (plaintiff was involuntarily committed to state hospital); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986) (verbally abusive accusations that plaintiff owed taxes and filed fraudulent returns); *Save Charleston Found'n v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985) (converting promissory note and maliciously bringing action).

One of the rare deviations from this trend was *McSwain v. Shei*, 304 S.C. 25, 402 S.E.2d 890 (1991), where an employer forced an employee to perform exercises that aggravated a known health condition and caused plaintiff to lose bladder control in front of others. The Court found that the jury could find this conduct "outrageous and intolerable in a civilized society." *Id.* at 29, 402 S.E.2d at 892; *accord Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981) (finding conduct sufficiently severe where home buyer subjected realtor to repeated public browbeatings, obscenities, and threats over two years and entered home without permission).

Bearing in mind that the Court must focus on The Citadel's conduct (not ReVille's), Plaintiff presents no evidence that The Citadel acted in an "extreme and outrageous" manner. There is no evidence that The Citadel acted to intentionally harm Doe or with reckless disregard for Doe's rights. Doe can point to no evidence that The Citadel intended for ReVille to abuse Doe (or anyone else) or cause emotional distress. There is no evidence that The Citadel took any act with conscious knowledge that Doe

would suffer extreme emotional distress. There is no evidence that The Citadel took pleasure in ReVille's abuse or wished him to abuse any victims. There is no evidence that anyone at The Citadel acted in such a despicable manner. Despite Plaintiff's semantic gymnastics, his claim boils down to the allegation that The Citadel was failed to prevent ReVille from abusing him. This is not the sort of conduct contemplated by the tort of outrage.

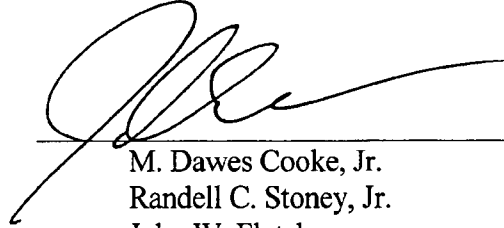
Therefore, this Court should affirm the trial court's entry of summary judgment on Doe's outrage claim.

D. Doe's Outrage Claim Fails Because He Possessed an Alternative Claim That He Could Have Pursued

Doe's outrage claim also fails because he had other potential causes of action that he could pursue for his injuries. The law is clear that Doe may only assert an outrage claim when *no other* claim is available: "The tort of outrage was designed *not as a replacement* for the existing tort actions. Rather, it was conceived as a remedy for tortious conduct *where no remedy previously existed*." See *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 175, 321 S.E.2d 602, 613 (Ct. App. 1984), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985) (emphasis added); *Levine v. Walterboro City Police Dep't*, 2006 WL 2228993, at *2 (D.S.C. Aug. 3, 2006) ("Intentional infliction of emotional distress is a claim of last resort. . . . Since that alternative remedy was available, *Todd* suggests that a claim for intentional infliction of emotional distress cannot lie."). Doe has already asserted negligence/gross negligence claims against The Citadel. His recovery, if any, is limited to those claims. Because Doe has alternative theories available, he should not be allowed to use the tort of outrage in addition to those claims. Therefore, this Court should affirm the trial court's entry of summary judgment on Doe's outrage claim.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below granting summary judgment to The Citadel.



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Dated: November 11, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

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SC Court of Appeals

Appellate Case No. 2015-001505

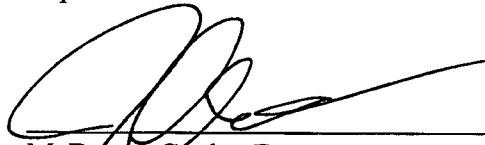
John Doe 2,..... Appellant,

v.

The Citadel Respondent.

RULE 211 CERTIFICATE

The undersigned certifies that this Respondent's Amended Final Brief complies
with Rule 211(b), SCACR.



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THE STATE OF SOUTH CAROLINA
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Honorable R. Markley Dennis, Jr., Circuit Court Judge

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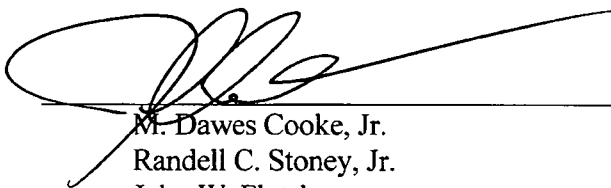
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PROOF OF SERVICE

I certify that I have served the Amended Final Brief of Respondent and Rule 211 Certificate on Appellant John Doe 2 by depositing a copy of it in the United States Mail, postage prepaid, on November 11, 2015, addressed to their attorneys of record, W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, McLeod Law Group, LLC, P.O. Box 21624, Charleston, South Carolina 29413.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe 2, Appellant,

v.

The Citadel, Respondent.

Appellate Case No. 2015-001505

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5504
Heard May 9, 2017 – Filed August 2, 2017

AFFIRMED

William Mullins McLeod, Jr., and Jacqueline LaPan
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Charleston, for Appellant.

M. Dawes Cooke, Jr., Randell Croft Stoney, Jr., and John
William Fletcher, all of Barnwell Whaley Patterson &
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WILLIAMS, J.: In this civil matter, John Doe 2 (Doe) appeals the circuit court's grant of summary judgment to The Citadel, arguing the court erred in dismissing his claims of negligence/gross negligence and outrage. We affirm.

FACTS/PROCEDURAL HISTORY

This case is one of many lawsuits stemming from a child sexual abuse scandal involving a summer camp at The Citadel, The Military College of South Carolina (The Citadel), and Louis "Skip" ReVille. On April 23, 2007, the father of a former camper at The Citadel's youth summer camp notified Mark Brandenburg, The Citadel's general counsel, that one of the camp's counselors had engaged in sexual misconduct at the camp with his son five years earlier. The former camper's father told Brandenburg a counselor named Skip invited his son into his dorm room, where the two watched pornography together and masturbated. Brandenburg subsequently spoke by telephone with the former camper, then nineteen years old, who confirmed that Skip had invited him into his room, showed him pornography, and convinced him to masturbate. After reviewing camp records, Brandenburg was able to identify the counselor as ReVille, who worked at the camp for three summers from 2001 to 2003.

On April 24, 2007, Brandenburg—along with Colonel Joseph Trez, an executive assistant to John Rosa, The Citadel's president—met with ReVille, a Citadel graduate who had also worked with college students as a part-time, temporary tutor at The Citadel's writing center from August 2006 to April 20, 2007.¹ During the meeting, ReVille emphatically denied the former camper's allegations. Brandenburg continued to investigate the allegations from April through July 2007, and by May 2007, had informed President Rosa of the allegations. On July 1, 2007, Brandenburg traveled to Texas to meet with the former camper and his parents to discuss a possible settlement of potential claims against The Citadel. At some point during that summer, however, Brandenburg fell out of touch with the former camper. Brandenburg then contacted potential witnesses who may have been present during the commission of ReVille's alleged misconduct, but he failed to find one that could corroborate the former camper's accusations. The Citadel ended its investigation without reporting the complaint to law enforcement.²

In October 2011, ReVille was arrested after confessing to abusing numerous boys while employed in various educational and athletic positions in the Charleston area

¹ In March 2007, ReVille submitted his resignation from the writing center to The Citadel, indicating an effective stop date of April 20, 2007.

² Neither the former camper nor his family reported the incident to law enforcement officials during this time.

over the span of nearly a decade. On June 13, 2012, ReVille pleaded guilty to numerous charges involving the abuse of twenty-three boys in Charleston, Berkeley, and Dorchester counties and was sentenced to fifty years in prison.

ReVille met Doe—a young male about to enter the seventh grade—and his family in the summer of 2005, through ReVille's involvement with AAU basketball at Pinewood Preparatory School (Pinewood Prep) in Summerville, South Carolina. That summer, ReVille began "grooming" Doe and later abused Doe at ReVille's residence, and he continued to abuse Doe throughout the 2005–2006 school year. At the time, ReVille was a teacher at Pinewood Prep. Doe, however, neither attended Pinewood Prep nor any summer camps or educational programs at The Citadel. In the spring of 2006, ReVille was terminated from his teaching position at Pinewood Prep and accepted Doe's parents' offer to move into the mother-in-law suite connected to their house. While living there from May 2006 to June 2007, and for a short period after moving out, ReVille continuously abused Doe, although, according to ReVille, the abuse scaled back "tremendously" after ReVille's April 2007 meeting with Brandenburg. ReVille's sexual abuse of Doe ended when Doe and his family moved to Georgia in the summer of 2007.

Doe filed the instant action against The Citadel on March 19, 2012, alleging claims of negligence/gross negligence and outrage. In his complaint, Doe claimed actions taken by The Citadel created a risk that ReVille would be placed in positions to enable him to victimize young boys, and subsequently, its failure to prevent this risk allowed ReVille to sexually abuse him. Doe asserted The Citadel was in a unique position to warn or prevent ReVille from sexually abusing young victims like Doe because The Citadel knew of the reported sexual abuse and it had a special relationship with ReVille. The Citadel filed a renewed motion for summary judgment on April 24, 2015.³ After conducting a hearing, the circuit court granted The Citadel's motion on July 6, 2015.

In its order, the circuit court dismissed Doe's negligence claims because it found The Citadel did not owe Doe a duty of care to prevent ReVille from sexually abusing Doe. Specifically, the court noted the majority of the abuse of Doe occurred before the April 2007 allegations by the former camper. Moreover, the circuit court found it was "impossible to differentiate the injury that [Doe] suffered

³ The Citadel initially filed a motion for summary judgment in this and related cases on March 6, 2014. On December 9, 2014, the circuit court denied The Citadel's motion.

after The Citadel arguably should have stopped ReVille from abusing him from the unquestionably devastating injury that [Doe] suffered from his longstanding, ongoing abuse by ReVille." Accordingly, the court concluded Doe's injuries arose before, and were not proximately caused by, any breach of duty by The Citadel. The court also dismissed the outrage claim as a matter of law because it was barred by the South Carolina Tort Claims Act⁴ (TCA) and alternatively found no evidence suggested The Citadel directed any conduct toward Doe. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). When the preponderance of the evidence standard applies, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Negligence/Gross Negligence

Doe first argues the circuit court erred in finding The Citadel did not owe a duty to Doe. We disagree.

To prove negligence, the plaintiff must show "(1) [the] defendant owes a duty of care to the plaintiff; (2) [the] defendant breached the duty by a negligent act or omission; (3) [the] defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) [the] plaintiff suffered an injury or damages." *Roe v. Bibby*, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct. App. 2014) (quoting *Doe v.*

⁴ S.C. Code Ann. §§ 15-78-10 through -220 (2005 & Supp. 2016).

Marion, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007)). 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. *Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994). "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002). Negligence is not actionable without a duty of care. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

South Carolina law does not recognize a general duty to warn a third party or potential victim of danger or to control the conduct of another. *Rogers v. S.C. Dep't of Parole & Cmty. Corr.*, 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). However, this rule has five recognized exceptions: (1) when the defendant has a special relationship to the victim; (2) when the defendant has a special relationship to the injurer; (3) when the defendant voluntarily undertakes a duty; (4) when the defendant intentionally or negligently creates the risk; and (5) when a statute imposes a duty on the defendant. *Faile*, 350 S.C. at 334, 566 S.E.2d at 546.

Doe does not argue the existence of any special relationship to qualify for the special relationship exceptions. Rather, Doe asserts The Citadel is liable to Doe "for its own failure to act with due care in voluntarily undertaking the duties to investigate, arrest, and punish ReVille; for taking actions that negligently created the risk that ReVille would sexually abuse [Doe]; and for action[s] to conceal ReVille's pedophilia in violation of Title IX."⁵ We address each argument in turn.

A. Voluntary Undertaking

Doe first asserts The Citadel established a duty of care to Doe when it voluntarily undertook the duty to investigate claims of sexual abuse on its campus, turn offenders over to its own law enforcement entity, and arrest offenders. We disagree.

Under South Carolina law, the Restatement of Torts establishes the recognition of a voluntarily assumed duty and states,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as

⁵ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

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.

Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504–05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965)).

In the instant case, The Citadel's general counsel, Brandenburg, conducted an investigation into the former camper's allegations of sexual abuse by ReVille after the former camper's father called The Citadel on April 23, 2007. Under section 323 of the Restatement of Torts, however, this undertaking cannot create a duty unless (1) Brandenburg's failure to exercise reasonable care actually *increased* the risk of harm to Doe or (2) Doe suffered harm because he relied upon Brandenburg's undertaking. *See id.* at 505, 737 S.E.2d at 514.

Upon our review of the record, we find no evidence supports a showing that Brandenburg's actions increased the risk of harm to Doe. In fact, the record demonstrates that ReVille was already abusing Doe—for nearly two years—when the April 23, 2007 allegations were made, and ReVille scaled the abuse of Doe back "tremendously" after his meeting with Brandenburg. Thus, any failure of The Citadel to exercise due care in its investigation regarding a former camper could not have reasonably increased the risk of harm to Doe when the harm was already occurring. Moreover, the record indicates Brandenburg conducted his investigation as the college's general counsel to "find out what happened" and determine possible avenues for settlement for the protection of The Citadel. It was not conducted as part of a criminal investigation. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 444–45, 494 S.E.2d 827, 833 (Ct. App. 1997) (finding an owner of an apartment complex did not undertake a duty to protect a social guest from a criminal assault occurring at the complex when providing security to the complex was taken for the protection of the tenants and not the general public). Last, because Doe had no prior relationship with The Citadel and

no evidence indicates Doe relied on Brandenburg's investigation to prevent further harm, The Citadel did not create a duty when it investigated the April 23, 2007 allegations.

Nevertheless, Doe claims the evidence presented at summary judgment⁶ established The Citadel violated its own policies⁷ from 1998 to 2005 by not investigating ReVille for sexual abuse of children. Additionally, Doe argues The Citadel's policies required action following the April 2007 allegations and its failure to adhere to the policies demonstrated a lack of due care.

We disagree with Doe's contention that The Citadel's deviations from its own policies and procedures, both prior to and following the April 23, 2007 allegations, demonstrate a lack of due care and create a triable issue as to whether The Citadel voluntarily assumed a duty to investigate and arrest ReVille for sexual abuse of children. Indeed, we find the internal policies created by The Citadel do not establish a voluntary undertaking of a duty; rather, they can only serve as evidence of the standard of care if the duty was established by law. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011) ("[I]f 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."); *id.* at 248, 711 S.E.2d at 912 (holding Wal-Mart did not voluntarily undertake a duty despite creating an internal policy that its photo technician violated by destroying photographs depicting child abuse and not informing the store manager or keeping them as evidence, and finding the policy only served as evidence of the standard of care). Therefore, any violation of an internal policy does not give rise to the

⁶ While Doe states facts in support of his argument, we note that some of the facts cited are not supported by evidence in the record. In particular, Doe asserts The Citadel was aware of ReVille's pedophilia as early as 1998, when he received services from the campus counseling center. Moreover, Doe asserts that one of ReVille's victims (Camper Doe 6), a former camper and counselor, was fired by Jennifer Garrott, the camp's deputy director, when he attempted to report ReVille's abuse to her in 2005. Because these facts do not appear in the record, we do not consider them. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

⁷ The Citadel implemented new policies in 2001 for the supervision of its camp and counselors after it learned of the sexual abuse of campers by a former senior counselor.

voluntary assumption of a duty and does not establish that The Citadel owed a duty of care as a matter of law.

B. Negligent Creation of the Risk

Doe next asserts The Citadel is liable for negligently creating the risk that ReVille would sexually abuse Doe. We disagree.

In *Edwards v. Lexington County Sheriff's Department*, our supreme court imposed a duty of care on a county and its sheriff's department because it found the entities created a risk of injury to the appellant. 386 S.C. 285, 293–94, 688 S.E.2d 125, 129–30 (2010). In that case, the appellant, a domestic violence victim, sued the respondents, the county and department, after she was attacked by her ex-boyfriend in a magistrate's court bond revocation hearing in which no security was provided. *Id.* at 287–88, 688 S.E.2d at 127. An employee of the sheriff's department, who was aware of the ex-boyfriend's multiple bond violations and threats against the appellant, requested to schedule the bond revocation hearing, where the ex-boyfriend subsequently attacked the appellant. *Id.* at 288, 688 S.E.2d at 127. Despite being aware of the appellant's fear of her ex-boyfriend, the respondents strongly encouraged the appellant to be present at the bond revocation hearing. *Id.* at 293, 688 S.E.2d at 130. Our supreme court found the respondents could not claim a lack of knowledge of the ex-boyfriend's violent tendencies towards the appellant because the respondents were seeking to revoke his bond for his failing to obey a no-contact order, which was issued in response to his violent actions. *Id.* The court found the respondents "created a situation they knew or should have known posed a substantial risk of injury to [the appellant]," and given their knowledge of the ex-boyfriend's demonstrated threats against the appellant, the respondents owed the appellant a duty of care. *Id.* at 294, 688 S.E.2d at 130. Importantly, the court noted the respondents' duty "is one of due care and whether [the respondents] acted reasonably, negligently[,] or grossly negligently is not before us." *Id.*

In the instant case, Doe argues The Citadel's duty to Doe is based upon "The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse [Doe]," and The Citadel should have foreseen its negligent actions "would probably cause injury to someone in the form of sexual abuse by ReVille." Doe again cites evidence of The Citadel's policy violations and alleged concealment of ReVille's actions. However, we again find any purported violation of the policy does not amount to the existence of a duty, but rather, focuses more

on the standards of due care establishing the extent and nature of the duty, which would help a fact-finder determine whether a duty was breached. *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006) (rejecting defendants' all or nothing approach with regard to the existence of a duty and noting that argument "confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case"). Unlike *Edwards*, Doe does not present any evidence indicating The Citadel actively created a situation that increased the risk of harm to Doe—such as placing ReVille and Doe in the same room, encouraging the two to meet, or placing Doe in ReVille's custody. In fact, no evidence suggests The Citadel was even aware of Doe's very existence before the commencement of this lawsuit because Doe had no affiliation with The Citadel's programs or camps.

Furthermore, the evidence does not demonstrate The Citadel was aware of ReVille's pedophilia prior to the April 2007 allegations, despite Doe's claims to the contrary. The record does not support Doe's assertions that The Citadel knew of ReVille's sexual misconduct while he was a counselor at the camp. In particular, Doe asserts The Citadel should have investigated and arrested ReVille when Garrott found ReVille alone in his room with a camper in 2002, and again in 2003 when she discovered him in his room rubbing "Icy Hot" on a junior counselor's leg following a run. However, the record does not indicate that any improper behavior was occurring at the time when Garrott "caught" ReVille to warrant termination or an investigation. Garrott stated, at the time, she did not think either incident amounted to a violation of the camp policies. Instead, she viewed the incidents as "lapse[s] in judgment." Doe's arguments again "confuse the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case." *Madison ex rel. Bryant*, 371 S.C. at 135, 638 S.E.2d at 656. Inasmuch as Doe failed to prove the existence of a duty of care, any argument involving the standards of care are not properly before this court. *See Bishop*, 331 S.C. at 86, 502 S.E.2d at 81 ("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.").

In conclusion, while ReVille's continued sexual abuse of Doe was beyond despicable, we find that, as it relates to any failure to respond after the April 2007 allegations, The Citadel's purported failure to intervene did not create a risk of harm to Doe when Doe was already exposed to ReVille's abuse. *See, e.g., DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free

world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015) ("[A]llowing continued exposure to an existing danger by failing to intervene is not the equivalent of creating or increasing the risk of that danger."), *cert. denied sub nom. John Doe 2 v. Rosa*, 136 S. Ct. 811 (2016).

C. Title IX

Doe next argues the federal statute, Title IX of the Educational Amendments of 1972, imposed a duty on The Citadel not to conceal ReVille's sexual abuse following the April 2007 allegations.⁸ We disagree.

A plaintiff will prove the first element of a negligence claim—that the defendant owes him a statutorily-created duty of care—if the plaintiff shows 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." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914–15 (Ct. App. 1988). "Title IX prohibits discrimination occurring under any educational program or activity." *Doe by Doe v. Berkeley Cty. Sch. Dist.*, 989 F. Supp. 768; 770 (D.S.C. 1997). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012).

We find Doe's claim fails because he is not a member of the class of persons the statute intends to protect. Title IX intends to protect participants and students of educational programs. *See, e.g., Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("Generally speaking, parents of a student whose rights were violated do not have standing to assert personal claims under Title IX, but do have standing to assert claims on the student's behalf. . . . On its face, the statutory language of Title IX, 20 U.S.C. § 1681 *et seq.*, applies only to students and participants in educational programs." (citations omitted)); *Doe v. Oyster River Co-*

⁸ We do not find it necessary to address any of Doe's arguments that The Citadel's alleged violations of Title IX demonstrate its failure to act with due care because, as previously mentioned, these arguments involve the standards of due care, which presuppose the existence of a duty. *See Edwards*, 386 S.C. at 294, 688 S.E.2d at 130.

op. Sch. Dist., 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs . . . have standing to bring claims under Title IX."). In the instant case, both parties agree that Doe never attended The Citadel or its summer camps. Because Doe was never a student or participant in any educational program at The Citadel, he is not a member of the class of persons Title IX intends to protect. Thus, Doe failed to prove The Citadel owed him a statutorily-created duty, and we affirm the circuit court's grant of summary judgment.⁹

II. Outrage

Last, Doe asserts the circuit court erred in granting summary judgment to The Citadel on Doe's outrage claim because more than a scintilla of evidence exists to establish that The Citadel's conduct was outrageous and directed at Doe. We disagree.

Under South Carolina law, outrage claims are limited to a defendant's egregious conduct toward a plaintiff. *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 *directed at the plaintiff*, or occur in the presence of a plaintiff of whom the defendant is aware." *Id.* (emphasis added).

In the instant case, while The Citadel's failure to notify law enforcement of ReVille's alleged abuse in 2007 is highly lamentable, Doe did not present any evidence that The Citadel directed any tortious conduct specifically toward him. Indeed, The Citadel was unaware of Doe's very existence prior to the commencement of this lawsuit. Accordingly, we uphold the circuit court's finding on this issue.¹⁰

⁹ We do not address Doe's essential purpose requirement argument because we find the resolution of this issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

¹⁰ Because our resolution of this issue is dispositive, we decline to address whether the circuit court erred in finding the TCA barred Doe's outrage claim. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

CONCLUSION

Based on the foregoing analysis, the circuit court's grant of summary judgment to The Citadel is

AFFIRMED.

KONDUROS, J., and LEE, A.J., concur.

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.

PETITION FOR REHEARING

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COMES NOW John Doe 2, pursuant to Rule 221 of the South Carolina Rules of Appellate Practice, and respectfully petitions this Honorable Court for rehearing of its Opinion filed August 2, 2017, affirming the lower court's grant of summary judgment for The Citadel by holding that The Citadel owed no duty to John Doe 2. John Doe 2 petitions for rehearing due to the errors of law and erroneous application of the standard of review of the evidence that form the basis of the Court's Opinion.

For the following reasons, Doe 2 respectfully requests that the Court of Appeals hold that whether The Citadel volunteered to investigate and respond to sexual abuse by its employee, Skip ReVille, for the protection of minor boys, to include Doe 2, is a mixed question of fact and law for the jury that was improperly decided on summary judgment. The Citadel itself admits that its actions to investigate and respond to child sexual abuse by its past and current employees was to protect children from subsequent abuse, as The Citadel's General Counsel Mark Brandenburg admits under oath:

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.

(R. p. 1298).

The Opinion ignores the evidence of The Citadel's actions taken to investigate and respond to child sexual abuse by its past and current employees that date back to 2001 up through the arrest

of Skip ReVille in 2011. In voluntarily acting, The Citadel assumed the duty to carry out its acts with due care. *E.g.*, *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985). However, rather than acting with due care to investigate and respond to ReVille’s sexual abuse of boys, The Citadel acted to conceal his abuse and conceal The Citadel’s knowledge of his abuse. The Citadel owed a duty to Doe 2 in this case, and the Opinion errs in affirming summary judgment for The Citadel.

I. The Opinion Misapprehends The Duty Owed To Doe 2 By The Citadel.

Since at least 2001, The Citadel, The Military College of South Carolina— a State institution—has voluntarily undertaken to investigate and respond to child sexual abusers in its employment (past and present). The Citadel’s voluntary actions, if carried forth with due care, seemingly align with our Legislature’s utmost priority to safeguard children through the establishment of a Children’s Policy for the State. The Legislature enacted the Children’s Policy in 2008, stating that “[i]t shall be the policy of this State to concentrate on the prevention of children’s problems as the most important strategy which can be planned and implemented on behalf of children and their families.” S.C.Code § 63-1-20(C). The law is clear that safeguarding children “shall be implemented through the cooperative efforts of state, county, and municipal legislative, judicial, and executive branches...” S.C.Code § 63-1-20(E).

However, when The Citadel, on its own accord, undertook to investigate and respond to child sexual abuse by its employees, the duty arose to then carry out those voluntary actions with due care. *E.g.*, *Crowley*, 285 S.C. at 406, 329 S.E.2d at 780 (citing *Roundtree Villas Ass’n, Inc. v 4701 Kings Corp* , 282 S.C. 415, 321 S.E.2d 46, 51 (1984) (citing Restatement [Second] of Torts, § 323); *Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co.*, 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922))). Accordingly, first

and foremost, the applicable duty in the present case is The Citadel's duty to Doe 2 to act with due care in what it undertook to do. *See Crowley*, 285 S.C. at 406, 329 S.E.2d at 780 (holding "that one who assumes to act, even though under no obligation to do so, may become subject to the duty to act with due care").

The Court's Opinion here fails to address The Citadel's duty of due care in the acts it chose to undertake, thereby mistakenly holding that The Citadel owed no duty to Doe 2. Instead, the Court's analysis goes straight to whether The Citadel owed a duty under any of the five exceptions to the general rule that one does not have a duty to warn a third party of danger or control the conduct of another.¹ *See Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002) (five recognized exceptions that will impose duty to warn or protect: (1) when defendant has a special relationship with the victim; (2) when defendant has a special relationship with the injurer, (3) when defendant voluntarily undertakes the duty; (4) when defendant intentionally or negligently creates the risk; and (5) when a statute imposes a duty on defendant). While The Citadel owed Doe 2 a duty under three of the *Faile* exceptions, The Court does not need to get to the *Faile* exceptions, because The Citadel's duty first is established by its own voluntary actions to investigate and respond to child sexual abuse.

Specifically, The Citadel's duty arose when it volunteered to investigate and respond to child sexual abuse by its past and current employees, and when it so volunteered, it assumed the duty to carry out its actions with reasonable care. Once The Citadel's performance began, the long established tenet of negligence law applied that "one who assumes to act, even though under no

¹ As argued at the trial court and in the appeal by Doe 2, while the *Faile* exceptions impose a duty on The Citadel as well, the analysis starts by assessing the direct duty owed by The Citadel for its own voluntary acts. The *Faile* exceptions are an alternative means of imposing a duty that need not be addressed, because the duty directly is established by The Citadel's volunteering to investigate and respond to sexual abuse by its past and current employees.

obligation to do so, may become subject to the duty to act with due care”, and the “common law duty to exercise reasonable care arose.” *Roundtree Villas Ass’n, Inc* , 282 S.C. at 423, 321 S.E.2d at 51 (holding that “when the Lender, in effect, took over the project and undertook to market the units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose”); *Crowley*, 285 S.C. at 406, 329 S.E.2d at 780 (holding defendants were not obligated to provide supervision over the children’s visits with their daughter, but “once their performance [to so supervise] began, a common law duty to exercise reasonable care arose”).

The common law is unwavering that one who volunteers to act for the benefit of others assumes the duty to carry forth those acts with due care. *See, e.g., Roundtree Villas Ass’n, Inc* , 282 S.C. at 423, 321 S.E.2d at 51; *Crowley*, 285 S.C. at 406, 329 S.E.2d at 78. Looking at case precedent is useful not only to illustrate how the duty arises but also to make clear that whether a defendant voluntarily undertakes an action is an issue for the fact finder, the jury in this case. *E.g., Vaughn v Town of Lyman*, 370 S.C. 436, 446-448, 635 S.E.2d 631, 637-638 (2006); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *Fickling v. City of Charleston*, 372 S.C. 597, 607-611, 643 S.E.2d 110 116-118 (Ct. App. 2007).

In *Miller v. City of Camden*, 329 S.C. at 314, 494 S.E.2d at 815, a dam was inspected and found unsafe by the Army Corps of Engineers. Defendant Kendall Company received a copy of the Corps of Engineers’ report and, thereafter, took the following two actions: (1) included one of its employees on an emergency notification form in the case of dam failure and (2) sent one of its employees to a meeting where an emergency plan was formulated for action to take if dam failure occurred. When the dam indeed did break and water from the overflow injured those in its path, our Supreme Court held that the evidence at summary judgment raised the issue of whether

Kendall voluntarily undertook to monitor the lake for the safety of others based on its two actions.

Id. at 815.

The Supreme Court reiterated, “[t]he common law ordinarily imposes no duty on a person to act. If an act is voluntarily undertaken, however, the actor assumes the duty to use due care.”

Id. at 314 (internal citation omitted). The Supreme Court also made clear:

Whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact-finder.

Id. at 314-315 (internal citations omitted). Accordingly, where there is a fact issue as to whether the defendant voluntarily undertook to act, the jury must first answer whether the defendant did in fact volunteer to act, and, if yes, the second question for the jury is whether the Defendant failed to act with due care. *Id.*

Another illustrative case of a defendant volunteering to act and, thereby, assuming the duty to act with due care is *Vaughn v. Town of Lyman*, 370 S.C. at 446-448, 635 S.E.2d at 637-638. In *Vaughn*, our Supreme Court held that a fact issue existed for the jury as to whether the Town of Lyman volunteered to maintain the sidewalks for the safety of sidewalk users. *Id.* Reviewing the appropriateness of summary judgment for the Town, the Supreme Court considered the evidence presented by the plaintiff that the Town did volunteer to maintain the sidewalks, which included (1) references to sidewalk maintenance in town minutes, (2) town ordinances regulating sidewalks, (3) the Town’s awareness of a hazardous condition on a sidewalk without reporting it on to any other authority in the past, (4) the Town’s handling of prior sidewalk complaints, and (5) the Town’s earlier removal of hazardous tree roots. *Id.* Accordingly, based on this evidence, a genuine issue of fact existed for the jury as to whether the Town volunteered to act, and the Supreme Court held the duty issue “improperly decided on summary judgment”. *Id.* at 447-448.

Likewise, this Honorable Court in 2007 held in *Fickling v. City of Charleston*, 372 S.C. at 607-611, 643 S.E.2d at 116-118, that it was an issue of fact whether the City volunteered to maintain and repair sidewalks with due care. The Court specifically held that viewing the evidence in the light most favorable to the plaintiff, summary judgment was inappropriately decided for the City as to whether the City voluntarily undertook the duty to maintain/repair the sidewalk. *Id.* at 607. The Court pointed to the evidence for the jury to consider, which included that (1) the City had fielded complaints from residents about sidewalk hazards in the past, (2) maintained a call log that included repair calls, and (3) had a policy in place and employees to handle repairs. *Id.* at 608. The Court also found that an issue of fact existed as to the City's constructive notice of the defect based on the "numerous City personnel within the area of the defect who could have seen and reported the problem; the condition had existed for a while; and the City had an established policy in place to deal with defects...and problems with sidewalks were an expected and 'recurrent' or 'continual' condition of which it had notice." *Id.* at 609.

Fickling, *Vaughn*, and *Miller* clearly establish that whether a defendant volunteered to act for the benefit of others is a mixed question of fact and law for the fact finder, the jury in this case. These cases also provide the Court with context to examine the facts, and their reasonable inferences, that establish that a defendant voluntarily undertook to act for the benefit of others. Specifically, as highlighted above, acts of attending meetings, being an emergency contact, fielding complaints, having policies in place governing how to address an issue, and having constructive notice of a problem are facts sufficient to raise the triable issue of whether a defendant volunteered to act and, thereby, assumed the duty to act with due care in carrying out the actions.

In this case, at summary judgment the abundance of the evidence establishes that The Citadel volunteered to investigate and respond to child sexual abuse by its past and current

employees, to include Skip ReVille. Doe 2 incorporates in full as if fully stated herein the statement of the facts detailed in his *Petitioner's Brief*, pp. 4-14, to the Court. However to highlight, the evidence and its reasonable inferences includes:

- In 2001, The Citadel handled the report of camp counselor Michael Arpaio sexually abusing a camper at the Summer Camp and turned over the report to law enforcement;
- On August 6, 2001, in the wake of discovering Arpaio's sexual abuse at the Camp, Sergeant Middleton of the Charleston Police Department, by letter, advised The Citadel of concerning and inappropriate practices taking place at the Camp by counselors, to include counselors allowing campers to spend the night in counselors' rooms and in the same bed as counselors, sexual conversation in front of campers, and counselors taking campers off campus for non-camp activities without parental consent. (R. p. 1304; 1305-1307);
- Thereafter, The Citadel trained camp counselors to report suspected child sexual abuse or be fired;
- The Citadel required camp counselors to adhere to standard of conduct that provides zero tolerance for sexual misconduct with minors and implemented a process whereby The Citadel will respond by requiring any sexually inappropriate conduct reports to be turned over to and thoroughly investigated by The Citadel's own Department of Public Safety regardless of when sexual misconduct occurred (R. pp. 983-984);
- The Citadel required all its counselors to sign and agree to the standard of conduct and The Citadel's continuing control over them regardless of whether the counselor still works at the camp or not when a report of sexual misconduct is received by The Citadel with no time limitation (R. pp. 983-984);

- In summer 2002, Camp Deputy Director Jennifer Garrott caught ReVille alone with a minor camper in his barracks room, directly violating the rule against being behind closed doors with campers; despite the rule also requiring immediate termination for a violation, Garrott chose not to terminate ReVille or even to document his offense. (R. pp. 964-966; 1308-1312). ReVille went on to sexually abuse multiple campers numerous times in his barracks room at night during the 2002 summer sessions. (R. p. 1352, lines 4-12; p. 1353, line 18 through 1354, line 19).
- Director Garrott fired another counselor for being alone in his room with a camper in violation of the rule (R. p. 1349-1350);
- In summer 2003, Garrott, now camp Director, caught Reville engaged in inappropriate physical contact touching a camper [hereinafter referred to as Camper Doe 6] alone behind closed doors in ReVille's barracks room. Again Director Garrott chose not to terminate ReVille, despite the rule mandating his termination as a counselor. (R. pp. 983, 1308-1312). Director Garrott admits that she caught ReVille in direct violation of the rule and that she should have fired him. (R. pp. 968-969).
- Also, during the 2003 camp sessions, Director Garrott's assistant, Anna Brock, spoke to ReVille multiple times about his being alone with campers in his room, and counselor O.C. Evans made a report to Ms. Garrott's supervisor, Colonel Lackey, that ReVille had campers in his room at night, to include one of Evans's campers. In response, Colonel Lackey only told ReVille not to be alone with campers and informed Director Garrott of the complaint. Colonel Lackey and Garrott did not terminate ReVille or take any further action. (R. pp. 1308-1312).

- In 2004, The Citadel had constructive notice that ReVille was sexually abusing boys when Camper Doe 6, now The Citadel's Camp Counselor, had actual knowledge ReVille was abusing boys in the community (R. pp. 1862-1866, 1241-1243);
- In 2005, Garrott fired Camper Doe 6 when he attempted to report ReVille's sexual abuse to her;
- On April 23, 2007, The Citadel received a direct report from a former camper's (Camper Doe) father that Counselor Skip engaged in sexual abuse of boys, to include Camper Doe, while he was employed as camp counselor in the 2002 camp season (R. pp. 672-675, 687);
- On April 24, 2007, General Counsel Mark Brandenburg interviewed Camper Doe, Jennifer Garrott (who still worked at The Citadel), and ReVille (who was working for The Citadel since August 2006) (R. pp. 688-690, 958-959, 963-967);
- Specifically, Mr. Brandenburg called ReVille at his Citadel place of employment and requested ReVille come meet with him on campus; that day, Mr. Brandenburg and Executive Assistant to President Rosa, COL Trez, met with ReVille in person on campus and instructed him to "lay low" and required a quid pro quo from him to leave Citadel employment in exchange for The Citadel keeping the report close hold (R. pp. 692-697; 976-978; 980, 981);
- Mr. Brandenburg flew to Texas to meet in person with Camper Doe and his parents and take a transcribed interview, leading them to believe The Citadel was properly investigating and responding to the sexual abuse by ReVille so that no other boys would be abused (R. pp. 1015-1174); and

- Jennifer Shiel, Administrative Assistant in President Rosa's Support Office in 2007, testified that based on her personal experience, President Rosa directed the concealment of the April 2007 complaint from the get-go. (R. pp. 930-933).

Throughout the above time frames, The Citadel implemented its own policies and procedures that required The Citadel to report sex abuse of minors to its law enforcement entity, The Department of Public Safety, to fully investigate the reports and to prosecute to the fullest extent of the law. (*Petitioner's Brief*, p. 12-14 (internal citations to the Record omitted here)). The Citadel's duty to investigate and respond to child sexual abuse with due care is established by the actions it voluntarily undertook. Moreover, whether The Citadel's actions were reasonable may be assessed by looking at the standard of care The Citadel said it would adhere to, as memorialized in its own policies and procedures.

In sum, the evidence at summary judgment clearly indicates that a jury issue exists as to whether The Citadel volunteered to investigate and respond to sexual abuse by Skip ReVille, dating back to its actions taken at its Summer Camp starting in 2001 and continuing thereon until ReVille was arrested in 2011. The Court's Opinion here completely overlooks the facts establishing The Citadel volunteered to investigate and respond to sexual predators in its past and current employment and inappropriately takes the mixed question of fact and law from the jury. It is for the jury to decide whether The Citadel voluntarily undertook to investigate and respond to child sexual abuse by its past and current employees, to include ReVille. *See Miller*, 329 S.C. at 314, 494 S.E.2d at 815.

II. The Opinion Mistakenly Holds That The Citadel Owed No Duty to Doe 2 Because ReVille Regan Sexually Abusing Him in 2005 and Misapprehends The Citadel's Proximate Causation Of Doe 2's Injuries (Before April 2007 And After).

The Opinion also misapprehends The Citadel's duty owed to Doe 2 by holding that no duty was owed because Doe 2 was abused before Camper Doe's report of sexual abuse was made to The Citadel on April 23, 2007. The Opinion is wrong for three reasons: (1) The Citadel acted to investigate and respond to child sexual abuse dating back to 2001, thereby assuming the duty to act with due care **before** any sexual abuse of Doe 2 occurred; (2) the facts and reasonable inferences in Doe 2's favor establish The Citadel knew Skip ReVille, its employee, was sexually abusing children in 2002, again in 2003, in 2004, and in 2005 **before** any sexual abuse of Doe 2 occurred; and (3) Doe 2's sexual abuse from April 23, 2007 through the end of August 2007 caused new injuries for which The Citadel is separately liable for causing. The sexual abuse prior to April 2007 neither negates the damage done by the subsequent abuse nor relieves The Citadel from liability for injury its negligence proximately caused. To hold otherwise tells sex abuse victims that if you are violated once, subsequent abuse causes no harm to you and, in essence, must be tolerated. This type of rhetoric constitutes victim blaming and shaming that our State's Children's Policy advocates against.

The record here includes the affidavit of David Lisak, Ph.D. and clinical psychologist, who 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. (R. pp. 1868-1871). Dr. Lisak confirms that each and every instance of child sexual abuse harms the child and repeated acts of abuse do not eradicate or lessen the injurious effect of the abuse:

Victims of sexual abuse who suffer repeated acts of assault and/or molestation are unequivocally harmed by each act. Repeated sexual abuse reinforces extremely damaging emotional states, extremely damaging feelings and ideas about the child's self-worth, and extremely damaging feelings and ideas about the adults in the child's life who are failing to stop the repeated abuse.

Id. The sooner the abuse is disclosed, the more likely the damage caused by the abuse may be mitigated, such that “[a]ny delay in disclosure therefore increases the risk of damage, as well as the actual damage caused to the child.” *Id.* Dr. Lisak explains that most children, and in particular boys, however, do not spontaneously disclose that they have been abused, and disclosure is more likely to occur because the abuse is discovered and stopped by an adult. *Id.*

The Opinion also errs in turning to federal law to support its holding that nothing The Citadel did specifically from April 23, 2007 onward harmed Doe 2 since ReVille began abusing Doe 2 in 2005. First, the Opinion incorrectly focuses only on April 23, 2007 forward. The Citadel’s duty starts in 2001, and all of Doe 2’s abuse was proximately caused by The Citadel’s conduct. Second, in The Court’s state law negligence analysis, the Court erroneously relies on *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989) and *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015), which are cases that assessed a state actor’s liability for constitutional violations actionable under Title 42 of the United States Code Section 1983. Specifically, the issue in these federal cases was whether a state actor created the danger of injury to a victim by a third party such that the state actor was liable for the violation of the victim’s federal constitutional rights under § 1983 in what is known as state created danger liability.

Importantly, to support a claim of federal state created danger liability under § 1983, the state actor must have acted with more than negligence. *County of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 849 (1998) (holding to state a due process challenge to state action, the general rule is that the action must have been “intended to injure in some way unjustifiable by any government interest” and “negligently inflicted harm” is “categorically beneath the threshold of constitutional due process”); *see also Slaughter v. Mayor of Baltimore*, 682 F.3d 317, 321 (4th Cir. 2012) (holding state violates constitutional right when conduct is arbitrary “in a constitutional sense,

which encompasses ‘only the most egregious official conduct,’ namely that which ‘shocks the conscience’” and “refers, as a constitutional construct of substantive due process, to ‘conduct intended to injure in some way unjustifiable by any government interest.’”) (internal quotations omitted); *Waybright v. Frederick County*, 528 F.3d 199, 205 (4th Cir. 2008) (“With these principles in mind, the Supreme Court has, for half a century now, marked out executive conduct wrong enough to register on a due process scale as conduct that “shocks the conscience,” and nothing less”). Federal state created danger liability under 42 U.S.C. § 1983 has no application to assessing whether, under state common law of negligence, The Citadel voluntarily undertook to act and whether it carried out those actions with due care. The Court’s reliance on this federal body of law is misplaced.

Furthermore, under South Carolina negligence common law, The Citadel’s failure to act with due care proximately caused Doe 2’s injuries of sexual abuse by former Camp Counselor and employee, Skip ReVille. It was reasonably foreseeable and anticipated by The Citadel that ReVille would continue to sexually abuse minor boys when it failed to act with reasonable care in the actions it chose to take to investigate and respond to child sexual abuse. *See, e.g., Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968); *Green v. Atlanta & Charlotte Air line Railway Co.*, 131 S.C. 124, 133, 126 S.E. 441, 444 (1925). *Fickling, Vaughn, and Miller* make clear that when a defendant volunteers to take action, the duty to take that action with due care extends to those reasonably foreseeable individuals who would be injured by the defendant’s failure to carry out his actions with due care. The Town of Lyman and the City of Charleston’s voluntary actions to maintain sidewalks with due care extends to anyone who uses the sidewalk at any given time. *See Vaughn*, 370 S.C. at 439, 446-448, 635 S.E.2d at 633, 637 (duty to woman using sidewalk who tripped on broken part of sidewalk uprooted by trees); *Fickling v. City of Charleston*, 372

S.C. at 599, 607-611, 643 S.E.2d at 112 116-118 (duty to woman using sidewalk who stepped in hole in sidewalk and fell). The potential injured sidewalk users were not previously known to the defendants, and the defendants' duty to act with due care in what it volunteered to do extended to whomever happened to use the sidewalk and be injured by the defendants' lack of due care. Likewise, the defendant company in *Miller* who volunteered to monitor the dam for hazards did so for the benefit of those who would be injured if the company failed to act with due care to notify the appropriate officials in the event of imminent dam failure. 329 S.C. at 313-314, 494 S.E.2d at 814-815. The company's duty was owed to the reasonably foreseeable injured parties—those who happened to be in the path of water should the dam overflow because defendant failed to act with due care. *Id.* at 315. Again, these injured parties were not previously named and known but were reasonably foreseeable.

In regards to proximate causation, the Supreme Court relies continuously on “the controlling principles of law regarding intervening acts of a third party” that the Court established over the last century. *E.g., Stone*, 251 S.C. at 161, 161 S.E.2d at 173. The original tort-feasor's proximate causation of the injury remains even when an intervening act of a third party occurs if the original tort-feasor “should have reasonably foreseen and anticipated [the third party's acts] in the light of attendant circumstances. The law requires only reasonable foresight[.]” *Id.* Stated another way:

The proposition that the wrongful or illegal act of an independent third person may not be regarded as such a consequence of a tort-feasor's alleged wrong as should entail legal liability must rest, in the last analysis, upon the assumption that such a consequence is not one of which a person who assumes the discharge of the ordinary civil obligation has knowledge or the opportunity by the exercise of reasonable diligence to acquire knowledge; that it is an unnatural and abnormal intervention in the ordinary train of events and consequences not reasonably to be anticipated from the act or omission which is charged to the alleged tort-feasor as a breach of duty.

Green, 131 S.C. at 133, 126 S.E. at 444.

In sum, “[l]iability exists for the natural and probable consequences of negligent acts and omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care.” *Graham v. Whitaker*, 282 SC 393, 399, 321 S.E.2d 40, 44 (1984) (citing *Matthews v. Porter*, 239 S.C. 620, 124 S.E.2d 321 (1962)). Although foreseeability of some injury from an act or omission is a prerequisite to the plaintiff establishing proximate cause, it is not necessary for the defendant to have contemplated the particular event which occurred. *Greenville Mem’l Auditorium v. Martin*, 301 S.C. 242, 245, 391 S.E.2d 546, 547-548 (1990). Rather, it is sufficient that the defendant should have foreseen that his negligence would probably cause injury to someone. *Id*

The Citadel’s duty to act with due care in volunteering to investigate and respond to sexual abuse extends to Doe 2 as a reasonably foreseeable party injured by The Citadel’s breach of the duty. The Citadel had the knowledge of the probable consequences of its failure to act with due care in investigating and responding to ReVille’s abuse—that being, of course, that ReVille would continue to sexually abuse boys, to include Doe 2. Child sexual abuse is an area where scientific, medical, social studies and research establish that the risk of a predator continuing to abuse children is substantially certain to happen. (R. pp. 1868-1871; 1196-1197). The Citadel’s own policies it put in place and its actions to investigate and respond to child sexual abuse explicitly recognizes the certainty that child sexual abuse will continue. Moreover, the probable consequence of The Citadel’s failure to act with due care to investigate and respond to ReVille’s sexual abuse of boys was Doe 2’s abuse, which is underscored by The Citadel’s own expert, Dr. Gary Margolis, who testified that the only way to stop child sex abusers is if the abuser dies or is

incarcerated. (R. pp. 1196-1197). The Citadel's expert confirms that ReVille had a distinct preferential class of victims— boys ages 10-14— the very ages of the boys The Citadel knew ReVille was abusing at its Camp and the age range of Doe 2, and Dr. Margolis opined to the reasonable foreseeability that ReVille would continue molesting boys. (R. p. 1195).

The Citadel volunteered to investigate and respond to child sexual abuse by its past and current employees, and it did so for the benefit of those children who foreseeably would be abused should The Citadel fail to carry out its actions with due care. Simply put, the continued sexual abuse of boys by ReVille is the natural and probable consequence of The Citadel's negligence in investigating and responding to ReVille as a sexual predator. Doe 2 clearly is a reasonably foreseeable party who would be injured by The Citadel's failure to act with due care in investigating and responding to ReVille as a sexual abuser as it volunteered to do, and the Opinion errs in holding that The Citadel owed no duty to Doe 2. Moreover, The Citadel not only failed to act with due care to carry out what it voluntarily undertook to do, but The Citadel acted to do the exact opposite. The Citadel instead acted to conceal ReVille's dangerous proclivities and to conceal any evidence of The Citadel's knowledge of ReVille's abuse. (R. pp. 480-499; 1831-1833).

As an aside, proving proximate causation sufficiently limits liability of one who volunteers to act and prevents the flood gates from opening up unlimited liability of volunteers. For example, the Town of Lyman in volunteering to maintain sidewalks may limit its liability by acting with due care to maintain the sidewalks. The Town controls its liability exposure. However, if the Town acts unreasonably and improperly maintains a sidewalk such that a hole is left unattended and someone falls and twists an ankle, the Town is liable for the lack of due care it exercised in the action in volunteered to do. Here, The Citadel volunteered to investigate and respond to child

sexual abuse by its past and current employees so children would not continue to be abused. If The Citadel acted with due care in carrying out what it volunteered to do, it would face no liability. However, liability attaches when The Citadel failed to act with due care in what it set out to do. Control of liability rests with The Citadel, and in this case, The Citadel failed to act with due care to carry out its investigation of and response to ReVille's child sexual abuse, thus subjecting it to liability for Doe 2's abuse. Doe 2's abuse by ReVille is "of such character that the author of the primary negligence [The Citadel] should have reasonably foreseen and anticipated [it] in the light of the attendant circumstances." *Stone*, 215 S.C. at 161, 161 S.E.2d at 173.

III. The Opinion Misapplies The Standard Of Review Of The Evidence At Summary Judgment By Misstating The Evidence And Erroneously Making Inferences In The Moving Party's Favor.

In addition, the Opinion misapplies the standard of review of the evidence by not viewing the evidence and all its reasonable inferences in the light most favorable to the nonmoving party, Doe 2. See *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). Instead, the Opinion misstates the facts, completely ignores evidence, and makes inferences in The Citadel's favor from the misstated evidence. Properly viewing the evidence at summary judgment establishes that The Citadel voluntarily acted to investigate and respond to child sexual abuse by its past and current employees, dating back to its operation of the Summer Camp in 2001; that it knew of Skip ReVille's sexual abuse of boys in 2002, 2003, 2004, 2005, and again in 2007; and along the way, The Citadel acted to conceal ReVille's sexual abuse rather than investigate and respond to his abuse with due care.

The Opinion unfortunately makes numerous errors in its review of the evidence. The Opinion overlooks the notice The Citadel had of ReVille's sexual abuse of boys in 2002, 2003, 2004, and 2005. The Opinion also errs in stating that ReVille was not working at The Citadel on

April 23, 2007, when the direct report of sex abuse by ReVille came into President Rosa's office from Camper Doe's father. ReVille attests that he was working, and his testimony is corroborated by his presence in the workplace on campus when Mr. Brandenburg called him to meet in person on April 24, 2007, as well as his application for unemployment noting his last day worked as April 30, 2007. (R. pp. 692-697; 976-978; 980, 981). The Citadel contends that ReVille resigned prior to the date and was no longer working. The Opinion improperly decides this issue for The Citadel when evidence to the contrary exists and where clearly a genuine issue of fact exists for the jury to decide. *See Pye v Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

Further misstatements of fact include stating that Camper Doe, who came forward in 2007, met Mr. Brandenburg in Texas "to discuss a possible settlement of potential claims against The Citadel." There is no such evidence, and instead the evidence is that Camper Doe met with Mr. Brandenburg after he reported the abuse to President Rosa in order to make sure that ReVille did not have the opportunity to sexually abuse any more boys. (R. pp. 672-675, 990-992, 995-997). Camper Doe had not hired an attorney or made any indication he was bringing any claims against The Citadel when they met. (R. pp. 1015-1174). The Opinion also errs in finding that ReVille's abuse of Doe 2 in the summer of 2007 was scaled back "tremendously", when Doe 2 testified that it escalated. (R. pp. 1527-1531, 1846-1849).

The Opinion also entirely omits the evidence of The Citadel's actions to conceal ReVille's sexual abuse and to conceal its knowledge of ReVille's sexual abuse. *See Petitioner's Brief*, pp. 10-12: President Rosa and Mr. Brandenburg conceal details of the April 2007 report from the Board of Visitors to such an extent Board members did not understand Mr. Brandenburg briefing them on a report of child sexual abuse (R. pp. 556-607, 1183-1192); The Citadel ensured that the General Counsel files did not indicate in any way a child sexual abuse report against ReVille by

excluding it entirely in October 2007 and then including it three years later but disguised as an Arpaio report (R. pp. 703-720); in May 2007 after the direct report of sex abuse to President Rosa's office, The Citadel appealed ReVille's eligibility for unemployment benefits after The Citadel required a quid pro quo for him to leave Citadel employment in exchange for The Citadel's silence but after Mr. Brandenburg's meeting in Texas, Citadel withdrew its appeal and accepted ReVille's eligibility for unemployment benefits. ReVille believes the Citadel withdrew the appeal in order to avoid a confrontation over the circumstances of his departure from Citadel employment. (R. p. 980).

The Opinion also overlooks the evidence after ReVille's arrest in November 2011 of The Citadel's continued concealment of ReVille's sex abuse and what The Citadel knew about it before he was arrested. For example, the Mount Pleasant Police Department spoke directly with Mr. Brandenburg in November 2011, and 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. (R. pp. 1873-1876). However, in 2007, Mr. Brandenburg unequivocally acknowledged in writing that the camper's complaint was of child sexual abuse- not "inappropriate behavior." (R. pp. 918-920; 921-922). Mr. Brandenburg further misled 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," (R. pp. 1873-1876), 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. (R. pp. 921-922).

In addition, Mr. Brandenburg 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 child sexual abuser. (R. p. 1128; 990-992). Furthermore, on August 8, 2007, Mr. Brandenburg also memorialized his assessment that the camper's report of sexual abuse by ReVille was "believable." (R. pp. 993-994). 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." (R. pp. 1873-1876). 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 acted to ensure that it did not make a report to Public Safety, and its actions maintained ReVille's anonymity as a child sexual abuser and supported ReVille's sexual abuse of Doe 2 instead.

In sum, the Opinion failed to apply the proper standard of review at summary judgment under Rule 56(c), SCRPC. The Opinion omits facts, misstates facts, and makes inferences erroneously in favor of the moving party, The Citadel. *See Pye*, 369 S.C. at 563, 633 S.E.2d at 509 (to determine "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 the nonmoving party"). Correcting the application of the standard of review of the evidence on summary judgment makes clear that genuine issues of material facts exist as to The Citadel's voluntary actions to investigate and respond to child sexual abuse and as to The Citadel's breach of its duty to undertake those actions with due care. Triable issues exist, and The Citadel is not entitled to summary judgment.

IV. The Opinion Errs In Holding That No Duty Exists Under *Faile*'s Exceptions To The General Rule That One Does Not Have A Duty To Warn A Third Party Of Danger. The Citadel Owed Doe 2 A Duty Under Statutory Creation Of A Duty, The Negligent Creation Of The Risk, And Voluntary Undertaking Of A Duty.

The Court need not address The Citadel's duty to Doe 2 under the five exceptions to the general rule that one does not have a duty to warn a third party of danger or control the conduct of another under *Faile*, 350 S.C. at 334, 566 S.E.2d at 545, because the duty of due care directly is established by The Citadel's volunteering to investigate and respond to child sexual abuse by its past and current employees. However, the Court chose to address the *Faile* exceptions in its Opinion, and its application of the law of three of the exceptions was in error as applied to this case.

First, a duty to warn a third party or control the conduct of another is established when a statute imposes a duty on defendant. *Id.* In South Carolina, the test for determining when a statute creates a duty of care and supports an action for negligence is (1) whether the statute's essential purpose is to protect from the kind of harm the plaintiff has suffered and (2) whether the plaintiff is a member of the class of persons the statute is intended to protect. *Rayfield v. S.C. Dep't of Corrections*, 297 S.C. 95, 102, 374 S.E.2d 910, 914 (Ct. App. 1988) (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)). Therefore, a statute may create a duty of care of which the violation of constitutes breach and establishes negligence per se. *Rayfield*, 297 S.C. at 103, 374 S.E. 2d at 915.

Title IX of the Education Amendments of 1972 imposed a duty on The Citadel not to conceal ReVill's sexual abuse that occurred on its campus. The essential purpose of Title IX is to eliminate, with certain exceptions, discrimination on the basis of sex against any "person" in

any education program or activity² receiving federal financial assistance. 20 U.S.C. § 1681; 34 C.F.R. § 106.1. Title IX bestows an affirmative action requirement on institutes of undergraduate higher education to take such remedial action as necessary to overcome the effects of such discrimination. 34 C.F.R. § 106.3(a). Therefore, Title IX's essential purpose to eliminate sex discrimination by definition seeks to protect other "persons" from subsequent sex discrimination. For eliminating known sexual discrimination, whether it be in the form of harassment or abuse, prevents the future sexual harassment of other individuals.

The Opinion here mistakenly holds that Title IX only intends to protect participants and students of educational programs and that Doe 2 is not a member of the protected class. The Opinion is contrary to the plain language of Title IX that states:

No **person** in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal Financial assistance.

20 U.S.C.A. § 1681(a) (emphasis added). The plain language of the federal law applies to all persons, not specifically students or participants.

Second, other courts addressing the issue of who Title IX protects have applied "person" broadly and hold that Title IX protects persons injured if the federal funding recipient [i.e. the school] exercises substantial control over the abuser or over the context in which the abuse occurs. *E.g., Simpson v. Univ. of Col. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (denying university's

² Under Title IX, an education program recipient of Federal financial assistance means "any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof." 34 C.F.R. § 106.2(i). "Institutions" include those of higher education as defined by 34 C.F.R. § 106.2(l), (m), (n), and (o), which includes The Citadel as an institute of undergraduate higher education.

motion for summary judgment as to Title IX claim where plaintiff-student sexually assaulted on campus by nonstudent-football recruit); *Crandell v N.Y. Coll. of Osteopathic Med.*, 87 F.Supp.2d 304 (S.D.N.Y. 2000) (denying summary judgment for school where off-campus sexual harassment of medical student by hospital resident, who was not under the “direct control” of the school nonetheless fell within the ambit of Title IX). Whether the victim is a student or participant of the educational program is not dispositive of whether Title IX provides protection to the injured party.

Here, The Citadel had substantial control over its employee, ReVille, dating back to 2001 when he was employed as a Camp Counselor and subject to a policy that mandated that any report of sexual misconduct be turned over by The Citadel to The Citadel’s law enforcement agency, even if the counselor was no longer employed at The Citadel at the time of the report and with no limit of application. (R. p. 983). The Citadel’s control of ReVille continued unabated under this policy from 2001 forward. Moreover, The Citadel controlled ReVille through direct employment of him again in August 2006 through April 2007, when it received Camper Doe’s report and demanded a quid pro quo from ReVille to leave employment in exchange for The Citadel’s concealment of the report. At all times relevant, The Citadel had substantial control over ReVille. Second, at all times relevant The Citadel had substantial control over the circumstances of Doe 2’s abuse by ReVille, because The Citadel undertook to investigate and respond to child sexual abuse by its past and current employees thereby controlling whether the abuse would cease or not. Title IX creates a duty for The Citadel to not conceal ReVille’s sexual abuse following April 2007, which The Citadel breached. The Opinion errs in holding that Doe 2 is not a member of the class of persons Title IX intends to protect.

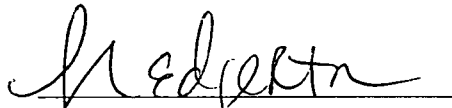
In addition, the Opinion errs in holding that The Citadel did not owe Doe 2 a duty of care under the *Faile* exceptions of negligently creating the risk of ReVille’s abuse and voluntarily

undertaking the duty to protect Doe 2 from ReVille's abuse, as fully briefed by Petitioner in his *Petitioner's Brief*. The Court need not address The Citadel's duty under these exceptions because The Citadel's own voluntary actions to investigate and respond to child sexual abuse created the duty for it to carry forth its exposure with due care. Therefore, the Opinion should apply and examine The Citadel's duty owed to Doe 2 in the actions it voluntarily undertook to do with due care as set forth herein.

V. Conclusion

In conclusion, Doe 2 respectfully requests that the Court rehear its Opinion issued August 2, 2017, due to the Opinion's misapprehensions of the duty owed by The Citadel to Doe 2 and The Citadel's proximate causation of Doe 2's injuries. Whether The Citadel volunteered to investigate and respond to Skip ReVille as a child sexual abuser for the protection of minor boys, to include Doe 2, is a mixed question of fact and law for the jury. If a jury answers yes, the subsequent jury issue is whether Doe 2's injuries were proximately caused by The Citadel's failure to carry out the actions it volunteered to do with due care. For the foregoing reasons, the court erred in affirming summary judgment for The Citadel and took these issues away from the jury. Doe 2 asks that the trial court's July 6, 2015 Order be reversed and the case remanded for trial in its entirety.

Respectfully submitted this 22 day of August 2017,


W. Mullins McLeod, Jr., SC Bar No. 14148
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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.

PROOF OF SERVICE OF PETITION FOR REHEARING

I certify that I have served Appellant's Petition for Rehearing on the above-named Respondent via hand delivery and to the South Carolina Court of Appeals via Federal Express Overnight shipping on August 22, 2017, addressed to the following:

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
PO Box 11629
Columbia, SC 29211

M. Dawes Cooke, Jr., Esquire
Randall C. Stoney, Jr., Esquire
John W. Fletcher, Esquire
Barnwell Whaley Patterson & Helms, LLC
288 Meeting Street
Charleston, SC 29401

RECEIVED

AUG 23 2017

SC Court of Appeals



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Email brooke@mcleod-lawgroup.com

August 22, 2017

Via Federal Express Overnight Mail

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
PO Box 11629
Columbia, SC 29211

Re.: John Doe 2 v. The Citadel
Appellate Case No. 2015-001505

Dear Ms. Kitchings:

Pursuant to your August 9, 2017 correspondence to the parties in the above-referenced Case, noting the updated timeline for filings, please find enclosed the original and one (7) copies of the Appellant's Petition for Rehearing. Also, enclosed, please find the Proof of Service of Appellant's Petition on Respondent and a check in the amount of \$25.00 for the filing fee. Please file the original and return a filed copy to me in the self-addressed stamped envelope.

With kind regards, I am

Sincerely,


Brooke A. DiMeo, paralegal to
Jacqueline LaPan Edgerton

/bad
Enclosures

cc: M. Dawes Cooke, Jr.
Randall C. Stoney, Jr.
John W. Fletcher

RECEIVED

AUG 23 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

RECEIVED

Appellate Case No. 2015-001505

SEP 05 2017

SC Court of Appeals

John Doe 2, ... Appellant,

v.

The Citadel..... Respondent.

RETURN TO PETITION FOR REHEARING

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AND NOW COMES Respondent The Citadel, The Military College of South Carolina ("The Citadel") and files the following Return to Petition for Rehearing:

For the reasons set forth below, this Court should deny Plaintiff John Doe 2'S ("Plaintiff") Petition for Rehearing and should retain in full force and effect its August 2, 2017 Opinion No. 5504, affirming the trial judge's entry of summary judgment in favor of The Citadel as to all of Plaintiff's claims. The Citadel incorporates by reference, as if set forth at length, its Final Respondent's Brief in this appeal.

ARGUMENTS

A. The Opinion Correctly Determined That The Citadel Did Not Voluntarily Undertake a Duty to Plaintiff

1. There Is No Evidence That The Citadel Voluntarily Undertook a Duty Pursuant to the Restatement (Second) of Torts § 323

Plaintiff first argues that the Court should reconsider its Opinion because The Citadel "has voluntarily undertaken to investigate and respond to child sexual abusers in its employment (past and present)." (*See* Pl.'s Pet for Reh'g, at 2). However, Plaintiff's argument misses the mark, insofar as the Record on Appeal is devoid of any evidence supporting a voluntarily undertaken duty.

In accordance with the Restatement (Second) of Torts § 323, South Carolina does recognize that a party may voluntarily undertake a duty of care in limited circumstances:

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

See Johnson v. Robert E. Lee Academy, Inc., 401 S.C. 500, 504-05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting Restatement (Second) of Torts § 323 and refusing to extend duty beyond that formulation). However, the Supreme Court has declined to expand the concept of

voluntary undertaking of a duty under the broader Section 324A¹:

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

Miller v. City of Camden, 329 S.C. 310, 315, 494 S.E.2d 813, 815 (1997); *accord Johnson*, 401 S.C. at 505 n.5, 737 S.E.2d at 514 n.5 (Section 324A “has not been adopted by our courts”).

Plaintiff has not directed the Court to any evidence or testimony sufficient to create an issue of fact as to whether The Citadel undertook a duty to render services to Plaintiff for the protection of Plaintiff's person. The record evidence does not even suggest that The Citadel undertook to provide any services *to Plaintiff*.

In any event, in its Opinion, this Court correctly concluded that Plaintiff could not succeed on an action under the Restatement (Second) of Torts § 323. As the Opinion notes, (in addition to other requirements) for a voluntary undertaking of a duty of care to exist, Plaintiff must show that either: (a) The Citadel actually increased the risk of harm to him or (b) Plaintiff's injury was the result of his reliance on The Citadel's undertaking. This is consistent with this Court's prior precedent. *See Johnson*, 401 S.C. at 506, 737 S.E.2d at 514 (“Section 323(a) contemplates a party relying on the rendering of services to another for the other's protection.”); *Underwood v. Coponen*, 367 S.C. 214, 625 S.E.2d 236 (Ct. App. 2006) (“[N]either Underwood nor Coponen knew that Taylor trimmed the tree, and thus they did not rely on his doing so.”); *Staples v. Duell*, 329 S.C. 503, 510, 494 S.E.2d 639, 643 (Ct. App. 1997) (“First, Staples

¹ The Restatement (Second) of Torts § 324A states:

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

presents no evidence that Woddle's act of simply patrolling the area looking for dead trees increased her risk of harm. . . . Second, Staples made no allegation that she knew of the policy of searching for dead trees before the accident. Without previous knowledge of the policy, Staples could not have relied on the policy."). Plaintiff's Petition for Rehearing does not demonstrate the existence of either prerequisite, and the Record on Appeal is devoid of any such evidence.

First, it is beyond cavil that Plaintiff could not have relied upon anything that The Citadel did, as there was no interaction between Plaintiff and The Citadel before or during the time of ReVille's abuse of the Plaintiff. In fact, The Citadel was completely unaware of Plaintiff until the filing of this lawsuit.

Second, there is no evidence that The Citadel did anything to increase the risk of harm to Plaintiff. There is no evidence that The Citadel provided ReVille with access to Plaintiff or gave him a location to abuse Plaintiff. There is no evidence that The Citadel made it more likely that ReVille would abuse Plaintiff. At most, Plaintiff claims that The Citadel failed to prevent ReVille from abusing him.

Therefore, for the foregoing reasons, this Court should deny Plaintiff's Petition for Rehearing.

2. Plaintiff's Arguments Are Not Bolstered by the Authority He Cites

Plaintiff cites numerous cases in support of his argument that the Opinion was in error because it failed to conclude that The Citadel voluntarily undertook a duty of care to Plaintiff. However, the cases that Plaintiff cites to support that The Citadel voluntarily undertook a duty to him are distinguishable and do not support his position.

For example, Plaintiff cites *Miller v City of Camden*, 329 S.C. 310, 494 S.E.2d 813 (1997), to support his argument that The Citadel undertook a duty. In *Miller*, a plant operator constructed a dam adjacent to the plant, which it conveyed to the City. The City used the reservoir to supplement its water supply, and the plant operator was permitted to draw water for

production. The City agreed to maintain the lake at the level of the spillway. If the water level got too high, the plant operator would contact the City to open sluice gates. An Army Corps of Engineers report deemed the dam unsafe, and plant employees and the City attended a meeting with the Land Resources Commission. Although the plant operator indicated that it did not own the dam, it attended the meeting and included its employees on the Land Resources Commission's emergency notification forms as personnel monitoring the dam. A heavy rainfall caused the lake to overtop the dam, injuring plaintiffs, who sued the City and plant operator. The plant operator obtained summary judgment, arguing that no duty of care existed. The Supreme Court held that issues of fact existed as to whether the plant operator voluntarily might have undertaken a duty, since its agent was listed on an emergency notification form and it had an employee present at the meeting at which an emergency plan was formulated. *See id.*, 329 S.C. at 315, 494 S.E.2d at 815. The Court made clear that it did not recognize a duty beyond the limits described above:

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*, there is no evidence that The Citadel intended – through its operation of the summer camp or handling of Camper Doe's report – to benefit Doe, a complete stranger. The plant operator in *Miller* undertook duties that by their nature protected third-persons who might be impacted by a breach of the dam. There are no similar facts in this case. Instead, Plaintiff repeatedly tries to impose a duty to “the public” under the rubric of voluntary undertaking, an approach that no South Carolina court has ever taken.

Plaintiff additionally relies on *Fickling v. City of Charleston*, 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007). In that case, this Court held that a city might have voluntarily undertaken a duty to ensure the safe condition of sidewalks in a state right-of-way (emphasis added):

Fickling presented evidence that the City had fielded complaints from residents about hazards to the sidewalks, had maintained a log of calls from residents, including repair calls, and had a policy in place, as well as employees, to handle repairs to sidewalks within the municipal limits, including those that were City-owned and those that were non-owned. The trial court expressly found the City *admittedly* engaged in a voluntary undertaking in this instance, but noted in its order: 'Although the City in the instant case *admits that it undertakes an obligation to maintain and repair public sidewalks*, it only does so when it has notice of the dangerous condition or when the City creates the condition itself. In this case as in *Vaughan*, however, we believe there was a genuine issue of material fact as to whether the City had undertaken a duty of maintaining streets within the municipality, including Meeting Street.

See id., 372 S.C. at 609-10, 643 S.E.2d at 116-17; *accord Vaughan v. Town of Lyman*, 370 S.C. 436, 444, 635 S.E.2d 631, 637-38 (2006) (reversing grant of summary judgment where "Vaughan presented contrary evidence, including references to sidewalk maintenance in the town minutes and town ordinances regulating the sidewalks. Vaughan also presented deposition testimony showing that Lyman was aware of the hazardous condition of Lawrence Street for a substantial period of time without reporting the condition to any other authority, had previously handled complaints from town residents about the sidewalks, and removed hazardous tree roots disrupting the sidewalks.") (also cited by Plaintiff).

In *Fickling*, the City of Charleston *admitted* that it had undertaken an overarching duty to maintain certain public sidewalks, and there was evidence that this duty might encompass the subject sidewalk. Importantly, the claimed duty concerned outwardly visible property conditions at specific geographic location within the jurisdiction of a municipality that was already charged with maintaining some sidewalks. Such a duty would be precisely the type of duty that the city had undertaken as to other sidewalks. One could scarcely imagine a more fundamental municipal undertaking than the maintenance of streets and sidewalks directed to those who use those sidewalks.

Fickling (and *Vaughan*) are inapposite, as this case does not involve maintenance of property within The Citadel's boundaries. Doe was not, in any way, within the custody or control of The Citadel at the time of his abuse. Moreover, there is no evidence that a condition of The Citadel's property caused Doe's abuse. While a municipality may be liable for injury to a

previously-unknown person who was injured on a known, existing sidewalk, this does not extend the voluntary undertaking doctrine to the facts of this case. Plaintiff applies a case governing municipal maintenance of sidewalks to impose a duty to protect unknown future victims from abuse. Plaintiff stretches *Fickling* to the point of breaking. It does not support the imposition of a duty under the facts of this case.

Plaintiff cites a number of additional cases in support of his contention that there is a genuine issue of material fact as to whether The Citadel voluntarily undertook a duty of care to Plaintiff. However, *none* of those cases support his argument:

- In *Crowley v. Spivey*, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985), a duty could exist because the children's father specifically relied on representation that the defendant would supervise visitation. *See id.*, 285 S.C. at 406, 329 S.E.2d at 780 ("Timothy's testimony is unequivocal that *he allowed visitation to resume because the Spiveys undertook to provide supervision* over the children's visits with Lynette in Beaufort. The evidence also warrants the conclusion that *Timothy was swayed to permit visitation because the Spiveys undertook a search for the pistol* and were satisfied that Lynette no longer had it.") (emphasis added). There is no such reliance here, as the Plaintiff is a complete stranger to The Citadel.
- In *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984), the Court imposed a duty on a lender who undertook to repair roofs owned by regime as common elements and created a defective condition. *See id.*, 282 S.C. at 423, 321 S.E.2d at 51 ("We hold however that, when the Lender, in effect, took over the project and undertook to market the units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose."). There, the plaintiff was a known and intended beneficiary of the specific undertaking by the lender.
- In *Carolina Bank & Tr. Co. v. St. Paul Fire & Marine Co.*, 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983), the plaintiff relied upon the undertaking by the defendant. *See id.*, 279 S.C. at 580, 310 S.E.2d at 165 ("St. Paul, through its authorized agent, assumed an obligation to advise the Bank; St. Paul advised the Bank that coverage of the employee was suspended; the Bank indefinitely suspended the employee *in reliance on the advice.*") (emphasis added). On the other hand, there is no evidence that Plaintiff relied upon anything that The Citadel did in this case.

However, *none* of these cases support the imposition of a duty of care under the facts of this case, where there is no evidence that The Citadel and Plaintiff ever even knew each other, let alone that Plaintiff relied on The Citadel's alleged undertaking to him. Moreover, there is no

evidence here of anything that The Citadel did to increase the risk of danger to Plaintiff. The cases Plaintiff cites are inapposite.

B. Title IX Did Not Create a Duty of Care to Plaintiff

Plaintiff also challenges this Court's conclusion that Title IX of the Educational Amendments of 1972 did not create a duty of care flowing to Plaintiff, "because he is not a member of the class of persons the statute intends to protect." As the Opinion correctly notes, a statute may impose a duty of care if the Plaintiff can prove two elements: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *See Rayfield v South Carolina Dep't of Corr*, 297 S.C. 95, 103, 374 S.E.2d 910, 914-15 (Ct. App. 1988). Plaintiff contends that the Court disregarded the following provision of Title IX: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal Financial assistance." *See* 20 U.S.C.A. § 1681(a). For the reasons that follow, the Opinion correctly concluded that Plaintiff — who had no prior relationship with The Citadel — was not within the class of persons that Title IX is intended to protect.

There is no evidence in the Record on Appeal that Plaintiff was denied the benefit of any education program or activity. Plaintiff has not cited to any authority undermining the Opinion's position that Title IX is intended to protect "participants and students of educational programs." The law is clear that Title IX is *not* intended to protect individuals in the position of Plaintiff, *i.e.*, non-students with no educational affiliation with The Citadel. *See Dipippa v Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("On its face, the statutory language of Title IX, 20 U.S.C. § 1681 *et seq.*, applies only to students and participants in educational programs." (citations omitted)); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs . . . have standing to bring claims under Title IX."); *accord K. T. v. Culver-Stockton Coll*, No. 4:16-CV-165 CAS, 2016 WL

4243965, at *5 (E.D. Mo. Aug. 11, 2016) ("Title IX's protection against student-on-student harassment does not extend to permit a private action for damages by a non-student invited to visit the College for student-athlete recruiting purposes."), *aff'd*, No. 16-3617, 2017 WL 3254396 (8th Cir. Aug. 1, 2017); *Lopez v. San Luis Valley, Bd of Co-op. Educ. Servs.*, 977 F. Supp. 1422, 1425 (D. Colo. 1997) ("No court has held that a plaintiff who is neither a potential beneficiary of a federally funded education program nor an employee of such a program can maintain a Title IX action for sex discrimination."). As a result, the Opinion correctly holds that Title IX is not a proper basis for the imposition of a duty of care on The Citadel.

In support of his contention that he is within the class of individuals protected by Title IX, Plaintiff cites *Simpson v University of Col Boulder*, 500 F.3d 1170 (10th Cir. 2007), and *Crandell v. New York Coll of Osteopathic Med*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000). However, in both cases, the persons protected by Title IX were themselves students. *See Simpson*, 500 F.3d at 1175 ("Plaintiffs sought relief under Title IX, 20 U.S.C. § 1681(a), claiming that CU knew of the risk of sexual harassment *of female CU students* in connection with the CU football recruiting program.") (emphasis added); *Crandell*, 87 F. Supp. 2d at 306 ("[P]laintiff in this case alleges that she was subjected to sexual harassment *through much of her training* as an osteopathic physician at the New York College of Osteopathic Medicine.") (emphasis added). In fact, the *Simpson* court noted that there had been a prior sexual assault situation involving the college football team where "the victim was not a CU student protected by Title IX." *See Simpson*, 500 F.3d at 1181. In any event, these cases do *not* support Plaintiff's baseless contention that Title IX is intended to protect those who have no relationship with The Citadel and were not deprived of any "education program or activity" there.

Therefore, for the foregoing reasons, the Court should deny Plaintiff's Petition for Rehearing.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Petition for Rehearing and confirm its well-reasoned Opinion.



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Charleston, SC 29402

(843) 577-7700

Attorneys for Respondent

Dated: September 1, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2015-001505

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SC Court of Appeals

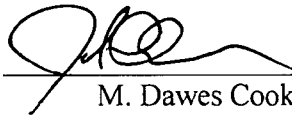
John Doe 2, ...Appellant,

v.

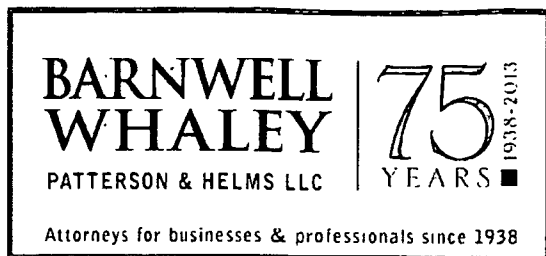
The Citadel.....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on September 1, 2017, addressed to their attorneys of record, W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, McLeod Law Group, LLC, P.O. Box 21624, Charleston, South Carolina 29413.



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September 1, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals

RE: John Doe 2 v. The Citadel
Appellate Case No. 2015-001505
Our File No.: 1.537

Dear Ms. Kitchings,

Enclosed for filing please find the original and one (1) copy of Respondent The Citadel's Return to Petition for Rehearing in the above-referenced matter. We would appreciate if you would file the original and return the filed, stamped copy to us in the self-addressed, stamped envelope provided.

By copy of this letter, we are serving a copy of the return to Petition for Rehearing upon counsel of record.

Sincerely,

A handwritten signature in black ink, appearing to be "JW Fletcher", is written over a horizontal line.

John W. Fletcher

JWF/jgc
Enclosures

cc: W. Mullins McLeod, Esquire
Jacqueline LaPan Edgerton, Esquire

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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



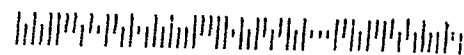
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P O. Drawer H, Charleston, SC 29402-0197

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S.C. Court of Appeals

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The Honorable Jenny Abbott Kitchings
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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

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SEP 12 2017

SC Court of Appeals

John Doe 2 Appellant,
v.
The Citadel Respondent.

REPLY TO RETURN TO PETITION FOR REHEARING

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TABLE OF AUTHORITIES

CASES

<i>Crowley v. Spivey</i> , 285 S.C. 397, 329 S.E.2d 774 (Ct.App.1985).....	1
<i>Fickling v. City of Charleston</i> , 372 S.C. 597, 643 S.E.2d 110 (Ct. App. 2007).....	1, 2
<i>Graham v. Whitaker</i> , 282 SC 393, 321 S.E.2d 40 (1984)	3
<i>Green v. Atlanta & Charlotte Air line Railway Co.</i> , 131 S.C. 124, 126 S.E. 441 (1925)	2
<i>Miller v. City of Camden</i> , 329 S.C. 310, 494 S.E.2d 813 (1997)	1, 2
<i>Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.</i> , 282 S.C. 415, 321 S.E.2d 46 (1984).....	1
<i>Stone v. Bethea</i> , 251 S.C. 157, 161 S.E.2d 171 (1968)	2
<i>Vaughn v. Town of Lyman</i> , 370 S.C. 436, 635 S.E.2d 631(2006)	1, 2

OTHER SOURCES

Restatement [Second] of Torts, § 323	1, 2, 3, 4
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COMES NOW John Doe 2 in reply to The Citadel's Return to John Doe 2's Petition for Rehearing, whereby Doe 2 requests that the Court of Appeals hold that whether The Citadel volunteered to investigate and respond to sexual abuse by its employee, Skip ReVille, for the protection of minor boys, to include Doe 2, is a mixed question of fact and law for the jury that was improperly decided on summary judgment.

The Citadel's Return advances a flawed argument from the get go, erroneously asserting that whether The Citadel volunteered to act, and with it the duty to act with due care, must be analyzed under the Restatement (Second) of Torts § 323. The Citadel's duty to Doe 2 is based on the well settled common law of negligence of our State that one who volunteers to act for the benefit of others assumes the duty to carry forth those acts with due care. *See, e.g., Vaughn v. Town of Lyman*, 370 S.C. 436, 446-448, 635 S.E.2d 631, 637-638 (2006); *Miller v. City of Camden*, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997); *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984); *Fickling v. City of Charleston*, 372 S.C. 597, 607-611, 643 S.E.2d 110, 116-118 (Ct. App. 2007); *Crowley v. Spivey*, 285 S.C. 397, 406, 329 S.E.2d 774, 780 (Ct. App. 1985). However, even directly applying the Restatement (Second) of Torts § 323 in this case makes clear that The Citadel owed a duty to Doe 2 when it volunteered to investigate and respond to child sexual abuse by its current and former employees.

First, the Restatement (Second) of Torts § 323 imposes liability on "[o]ne 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..." The references to "another" and to "the other's person or things" in § 323 establishes a volunteer relationship between a volunteer and those persons who it is reasonably foreseeable would be injured if the volunteer carries out his actions negligently. Nowhere in § 323 is the requirement that the injured person be individually

named and known prior to injury, which clearly is in line with South Carolina's common law that one who volunteers to act owes a duty of due care in those actions to those persons who it is reasonably foreseeable would be injured by the volunteer's negligence. *See, e.g., Vaughn*, 370 S.C. at 439, 446-448, 635 S.E.2d at 633, 637 (duty to unknown sidewalk user who tripped on broken part of sidewalk uprooted by trees); *Fickling v. City of Charleston*, 372 S.C. at 599, 607-611, 643 S.E.2d at 112 116-118 (duty to unknown sidewalk user who stepped in hole in sidewalk and fell); *Miller*, 329 S.C. at 313-314, 494 S.E.2d at 814-815 (defendants' duty to act with due care in monitoring dam for hazards for benefit of reasonably foreseeable injured persons- those in the path of water overflow- not previously named and known).

Accordingly, even under the Restatement (Second) of Torts § 323, a volunteer relationship was established between The Citadel and Doe 2 when The Citadel voluntarily undertook to investigate and respond to child sexual abuse by its current and past employees. It was reasonably foreseeable and anticipated by The Citadel that when it failed to act with due care in its investigation and response to child sexual abuse by Louis "Skip" ReVille that ReVille would continue to sexually abuse minor boys, to include Doe 2. *See, e.g., Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968); *Green v. Atlanta & Charlotte Air line Railway Co.*, 131 S.C. 124, 133, 126 S.E. 441, 444 (1925).

Second, The Citadel's Return only addresses whether Doe 2 relied on The Citadel's undertaking to investigate and respond to child sexual abuse by ReVille and entirely ignores that the Restatement also imposes liability for negligence when the volunteer's negligence increases the risk of harm to another. Specifically, the Restatement (Second) of Torts § 323 goes on to impose liability on the volunteer for physical harm to another resulting from the volunteer's failure to exercise reasonable care in his actions 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." (Emphasis added). It is "either or" for imposition of liability for injury; not a dual requirement. Accordingly, assessing whether The Citadel's failure to exercise reasonable care in its investigation and response to child sexual abuse by ReVille injured Doe 2 includes examining whether The Citadel's negligence "increase[d] the risk of such harm" to Doe 2. *Id.* The Citadel ignores the liability provision in § 323, because its application establishes The Citadel's negligence increased the risk of sexual abuse of Doe 2 by ReVille.

Our negligence common law is clear that "[l]iability exists for the natural and probable consequences of negligent acts and omissions, proximately flowing therefrom. The intervening negligence of a third person will not excuse the original wrongdoer if such intervention ought to have been foreseen in the exercise of due care." *Graham v. Whitaker*, 282 SC 393, 399, 321 S.E.2d 40, 44 (1984) (internal citations omitted). The Citadel's duty to act with due care in volunteering to investigate and respond to sexual abuse extends to Doe 2 as a reasonably foreseeable party injured by The Citadel's breach of the duty. The Citadel had the knowledge of the probable consequences of its failure to act with due care in investigating and responding to ReVille's abuse—that being, of course, that ReVille would continue to sexually abuse boys, to include Doe 2. Child sexual abuse is an area where scientific, medical, social studies and research establish that the risk of a predator continuing to abuse children is substantially certain to happen. (R. pp. 1868-1871; 1196-1197).

Moreover, The Citadel acted for the benefit of those children who foreseeably would be abused should The Citadel fail to carry out its actions with due care. It is reiterated that The Citadel's General Counsel, Mark Brandenburg, admitted under oath that The Citadel's actions to investigate and respond to child sexual abuse by its past and current employees was to protect

children from subsequent abuse. (R. p. 1298). The Citadel not only failed to act with due care to carry out what it voluntarily undertook to do in regards to ReVille's child sexual abuse, but The Citadel acted to do the exact opposite. The Citadel acted to conceal ReVille's dangerous proclivities and to conceal any evidence of The Citadel's knowledge of ReVille's abuse. (R. pp. 480-499; 1831-1833). The Citadel's negligence in investigating and responding to ReVille's child sexual abuse clearly increased the risk of Doe 2's subsequent sexual abuse by ReVille, rendering The Citadel liable to Doe 2 under the Restatement (Second) of Torts § 323, as well as under South Carolina common law.

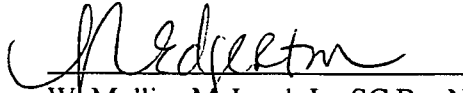
Last, The Citadel's Return entirely ignores the evidence in this case, making bald unsupported claims with no reference to any supporting evidence whatsoever. At summary judgment, the abundance of the evidence establishes that The Citadel volunteered to investigate and respond to child sexual abuse by its past and current employees, to include Skip ReVille; that The Citadel acted to conceal ReVille and its knowledge of his sexual abuse; that The Citadel knew that ReVille would continue to sexually abuse boys, to include Doe 2; and that The Citadel's negligence in doing what it volunteered to do proximately caused Doe 2's sexual abuse.¹

In conclusion, Doe 2 respectfully petitions this Honorable Court for rehearing of its Opinion filed August 2, 2017, whereby the Court affirmed summary judgment for The Citadel by holding that The Citadel owed no duty to John Doe 2. John Doe 2 petitions for rehearing due to the errors of law and erroneous application of the standard of review of the evidence that form the basis of the Court's Opinion. Whether The Citadel volunteered to investigate and respond to Skip ReVille as a child sexual abuser for the protection of minor boys, to include Doe 2, is a question

¹ Doe 2 incorporates in full as if fully stated herein all referenced evidence in his *Petitioner's Final Brief* and his *Petition for Rehearing*, as found in the Record on Appeal.

for the jury. Summary judgment for The Citadel was improper, and the case should be remanded for trial in its entirety.

Respectfully submitted this 7th day of September 2017,



W. Mullins McLeod, Jr., SC Bar No. 14148
Jacqueline LaPan Edgerton, SC Bar No. 100920

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Attorneys for Appellant

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

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SC Court of Appeals

Appellate Case No. 2015-001505

John Doe 2 Appellant,

v.

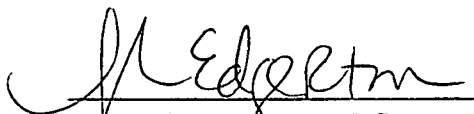
The Citadel Respondent.

PROOF OF SERVICE OF REPLY TO RETURN TO PETITION FOR REHEARING

I certify that I have served Appellant's Reply to Return to Petition for Rehearing on the above-named Respondent and to the South Carolina Court of Appeals by depositing it in the U.S. Mail, with sufficient postage, on September 7, 2017, addressed to the following:

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
PO Box 11629
Columbia, SC 29211

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Randall C. Stoney, Jr, Esquire
John W. Fletcher, Esquire
Barnwell Whaley Patterson & Helms, LLC
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Attorneys for Appellant



Direct Dial 843-277-6656

Email brooke@mcleod-lawgroup.com

September 7, 2017

Via Facsimile and US Mail

South Carolina Court of Appeals
Jenny Abbott Kitchings, Clerk
PO Box 11629
Columbia, SC 29211

Re.: John Doe 2 v. The Citadel
Appellate Case No. 2015-001505

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SEP 12 2017
SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of the Appellant's Reply to Return to Petition for Rehearing. Also, enclosed, please find the Proof of Service of Appellant's Reply to Return to Petition on Respondent. Please file the original and return a filed copy to me in the self-addressed stamped envelope.

With kind regards, I am

Sincerely,

Brooke A. DiMeo, paralegal to
Jacqueline LaPan Edgerton

/bad
Enclosures

cc: M. Dawes Cooke, Jr.
Randall C. Stoney, Jr.
John W. Fletcher

The South Carolina Court of Appeals

John Doe 2, Appellant,

v.

The Citadel, Respondent.

Appellate Case No. 2015-001505

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied; however, the attached opinion is substituted for the previous opinion, Op. No. 5504, which is withdrawn.

 J.

 J.

 A.J.

Columbia, South Carolina

FILED

cc:

William Mullins McLeod, Jr., Esquire

Jacqueline LaPan Edgerton, Esquire

M. Dawes Cooke, Jr., Esquire

September 27, 2017

Randell Croft Stoney, Jr., Esquire
John William Fletcher, Esquire
The Honorable R. Markley Dennis, Jr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

John Doe 2, Appellant,

v.

The Citadel, Respondent.

Appellate Case No. 2015-001505

Appeal From Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 5504
Heard May 9, 2017 – Filed August 2, 2017
Withdrawn, Substituted, and Refiled September 27, 2017

AFFIRMED

William Mullins McLeod, Jr., and Jacqueline LaPan
Edgerton, both of McLeod Law Group, LLC, of
Charleston, for Appellant.

M. Dawes Cooke, Jr., Randell Croft Stoney, Jr., and John
William Fletcher, all of Barnwell Whaley Patterson &
Helms, LLC, of Charleston, for Respondent.

WILLIAMS, J.: In this civil matter, John Doe 2 (Doe) appeals the circuit court's grant of summary judgment to The Citadel, arguing the court erred in dismissing his claims of negligence/gross negligence and outrage. We affirm.

FACTS/PROCEDURAL HISTORY

This case is one of many lawsuits stemming from a child sexual abuse scandal involving a summer camp at The Citadel, The Military College of South Carolina (The Citadel), and Louis "Skip" ReVille. On April 23, 2007, the father of a former camper at The Citadel's youth summer camp notified Mark Brandenburg, The Citadel's general counsel, that one of the camp's counselors had engaged in sexual misconduct at the camp with his son five years earlier. The former camper's father told Brandenburg a counselor named Skip invited his son into his dorm room, where the two watched pornography together and masturbated. Brandenburg subsequently spoke by telephone with the former camper, then nineteen years old, who confirmed that Skip had invited him into his room, showed him pornography, and convinced him to masturbate. After reviewing camp records, Brandenburg was able to identify the counselor as ReVille, who worked at the camp for three summers from 2001 to 2003.

On April 24, 2007, Brandenburg—along with Colonel Joseph Trez, an executive assistant to John Rosa, The Citadel's president—met with ReVille, a Citadel graduate who had also worked with college students as a part-time, temporary tutor at The Citadel's writing center from August 2006 to April 2007. During the meeting, ReVille emphatically denied the former camper's allegations. Brandenburg continued to investigate the allegations from April through July 2007, and by May 2007, had informed President Rosa of the allegations. On July 1, 2007, Brandenburg traveled to Texas to meet with the former camper and his parents. At some point during that summer, however, Brandenburg fell out of touch with the former camper. Brandenburg then contacted potential witnesses who may have been present during the commission of ReVille's alleged misconduct, but he failed to find one that could corroborate the former camper's accusations. The Citadel ended its investigation without reporting the complaint to law enforcement.¹

In October 2011, ReVille was arrested after confessing to abusing numerous boys while employed in various educational and athletic positions in the Charleston area over the span of nearly a decade. On June 13, 2012, ReVille pleaded guilty to numerous charges involving the abuse of twenty-three boys in Charleston, Berkeley, and Dorchester counties and was sentenced to fifty years in prison.

¹ Neither the former camper nor his family reported the incident to law enforcement officials during this time.

ReVille met Doe—a young male about to enter the seventh grade—and his family in the summer of 2005, through ReVille's involvement with AAU basketball at Pinewood Preparatory School (Pinewood Prep) in Summerville, South Carolina. That summer, ReVille began "grooming" Doe and later abused Doe at ReVille's residence, and he continued to abuse Doe throughout the 2005–2006 school year. At the time, ReVille was a teacher at Pinewood Prep. Doe, however, neither attended Pinewood Prep nor any summer camps or educational programs at The Citadel. In the spring of 2006, ReVille was terminated from his teaching position at Pinewood Prep and accepted Doe's parents' offer to move into the mother-in-law suite connected to their house. While living there from May 2006 to June 2007, and for a short period after moving out, ReVille continuously abused Doe. ReVille's sexual abuse of Doe ended when Doe and his family moved to Georgia in the summer of 2007.

Doe filed the instant action against The Citadel on March 19, 2012, alleging claims of negligence/gross negligence and outrage. In his complaint, Doe claimed actions taken by The Citadel created a risk that ReVille would be placed in positions to enable him to victimize young boys, and subsequently, its failure to prevent this risk allowed ReVille to sexually abuse him. Doe asserted The Citadel was in a unique position to warn or prevent ReVille from sexually abusing young victims like Doe because The Citadel knew of the reported sexual abuse and it had a special relationship with ReVille. The Citadel filed a renewed motion for summary judgment on April 24, 2015.² After conducting a hearing, the circuit court granted The Citadel's motion on July 6, 2015.

In its order, the circuit court dismissed Doe's negligence claims because it found The Citadel did not owe Doe a duty of care to prevent ReVille from sexually abusing Doe. Specifically, the court noted the majority of the abuse of Doe occurred before the April 2007 allegations by the former camper. Moreover, the circuit court found it was "impossible to differentiate the injury that [Doe] suffered after The Citadel arguably should have stopped ReVille from abusing him from the unquestionably devastating injury that [Doe] suffered from his longstanding, ongoing abuse by ReVille." Accordingly, the court concluded Doe's injuries arose before, and were not proximately caused by, any breach of duty by The Citadel.

² The Citadel initially filed a motion for summary judgment in this and related cases on March 6, 2014. On December 9, 2014, the circuit court denied The Citadel's motion.

The court also dismissed the outrage claim as a matter of law because it was barred by the South Carolina Tort Claims Act³ (TCA) and alternatively found no evidence suggested The Citadel directed any conduct toward Doe. This appeal followed.

STANDARD OF REVIEW

"An appellate court reviews a grant of summary judgment under the same standard applied by the [circuit] court pursuant to Rule 56, SCRPC." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002).

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC. When determining whether triable issues of material fact exist, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). When the preponderance of the evidence standard applies, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LAW/ANALYSIS

I. Negligence/Gross Negligence

Doe first argues the circuit court erred in finding The Citadel did not owe a duty to Doe. We disagree.

To prove negligence, the plaintiff must show "(1) [the] defendant owes a duty of care to the plaintiff; (2) [the] defendant breached the duty by a negligent act or omission; (3) [the] defendant's breach was the actual or proximate cause of the plaintiff's injury; and (4) [the] plaintiff suffered an injury or damages." *Roe v. Bibby*, 410 S.C. 287, 293, 763 S.E.2d 645, 648 (Ct. App. 2014) (quoting *Doe v. Marion*, 373 S.C. 390, 400, 645 S.E.2d 245, 250 (2007)). 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. *Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1994). "In a negligence action, the

³ S.C. Code Ann. §§ 15-78-10 through -220 (2005 & Supp. 2016).

court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002). Negligence is not actionable without a duty of care. *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

South Carolina law does not recognize a general duty to warn a third party or potential victim of danger or to control the conduct of another. *Rogers v. S.C. Dep't of Parole & Cmt. Corr.*, 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). However, this rule has five recognized exceptions: (1) when the defendant has a special relationship to the victim; (2) when the defendant has a special relationship to the injurer; (3) when the defendant voluntarily undertakes a duty; (4) when the defendant intentionally or negligently creates the risk; and (5) when a statute imposes a duty on the defendant. *Faile*, 350 S.C. at 334, 566 S.E.2d at 546.

Doe does not argue the existence of any special relationship to qualify for the special relationship exceptions. Rather, Doe asserts The Citadel is liable to Doe "for its own failure to act with due care in voluntarily undertaking the duties to investigate, arrest, and punish ReVille; for taking actions that negligently created the risk that ReVille would sexually abuse [Doe]; and for action[s] to conceal ReVille's pedophilia in violation of Title IX."⁴ We address each argument in turn.

A. Voluntary Undertaking

Doe first asserts The Citadel established a duty of care to Doe when it voluntarily undertook the duty to investigate claims of sexual abuse on its campus, turn offenders over to its own law enforcement entity, and arrest offenders. We disagree.

Under South Carolina law, the Restatement of Torts establishes the recognition of a voluntarily assumed duty and states,

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012).

(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.

Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504–05, 737 S.E.2d 512, 514 (Ct. App. 2012) (quoting RESTATEMENT (SECOND) OF TORTS § 323 (AM. LAW INST. 1965)).

In the instant case, The Citadel's general counsel, Brandenburg, conducted an investigation into the former camper's allegations of sexual abuse by ReVille after the former camper's father called The Citadel on April 23, 2007. Under section 323 of the Restatement of Torts, however, this undertaking cannot create a duty unless (1) Brandenburg's failure to exercise reasonable care actually *increased* the risk of harm to Doe or (2) Doe suffered harm because he relied upon Brandenburg's undertaking. *See id.* at 505, 737 S.E.2d at 514.

Upon our review of the record, we find no evidence supports a showing that Brandenburg's actions increased the risk of harm to Doe. In fact, the record demonstrates that ReVille was already abusing Doe—for nearly two years—when the April 23, 2007 allegations were made. Thus, any failure of The Citadel to exercise due care in its investigation regarding a former camper could not have reasonably increased the risk of harm to Doe when the harm was already occurring. Moreover, the record indicates Brandenburg conducted his investigation as the college's general counsel to "find out what happened" and determine possible avenues for settlement for the protection of The Citadel. It was not conducted as part of a criminal investigation. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 444–45, 494 S.E.2d 827, 833 (Ct. App. 1997) (finding an owner of an apartment complex did not undertake a duty to protect a social guest from a criminal assault occurring at the complex when providing security to the complex was taken for the protection of the tenants and not the general public). Last, because Doe had no prior relationship with The Citadel and no evidence indicates Doe relied on Brandenburg's investigation to prevent further harm, The Citadel did not create a duty when it investigated the April 23, 2007 allegations.

Nevertheless, Doe claims the evidence presented at summary judgment⁵ established The Citadel violated its own policies⁶ from 1998 to 2005 by not investigating ReVille for sexual abuse of children. Additionally, Doe argues The Citadel's policies required action following the April 2007 allegations and its failure to adhere to the policies demonstrated a lack of due care.

We disagree with Doe's contention that The Citadel's deviations from its own policies and procedures, both prior to and following the April 23, 2007 allegations, demonstrate a lack of due care and create a triable issue as to whether The Citadel voluntarily assumed a duty to investigate and arrest ReVille for sexual abuse of children. Indeed, we find the internal policies created by The Citadel do not establish a voluntary undertaking of a duty; rather, they can only serve as evidence of the standard of care if the duty was established by law. *See Doe ex rel. Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 247, 711 S.E.2d 908, 912 (2011) ("[I]f 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."); *id.* at 248, 711 S.E.2d at 912 (holding Wal-Mart did not voluntarily undertake a duty despite creating an internal policy that its photo technician violated by destroying photographs depicting child abuse and not informing the store manager or keeping them as evidence, and finding the policy only served as evidence of the standard of care). Therefore, any violation of an internal policy does not give rise to the voluntary assumption of a duty and does not establish that The Citadel owed a duty of care as a matter of law.

B. Negligent Creation of the Risk

⁵ While Doe states facts in support of his argument, we note that some of the facts cited are not supported by evidence in the record. In particular, Doe asserts The Citadel was aware of ReVille's pedophilia as early as 1998, when he received services from the campus counseling center. Moreover, Doe asserts that one of ReVille's victims (Camper Doe 6), a former camper and counselor, was fired by Jennifer Garrott, the camp's deputy director, when he attempted to report ReVille's abuse to her in 2005. Because these facts do not appear in the record, we do not consider them. *See* Rule 210(h), SCACR ("[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.").

⁶ The Citadel implemented new policies in 2001 for the supervision of its camp and counselors after it learned of the sexual abuse of campers by a former senior counselor.

Doe next asserts The Citadel is liable for negligently creating the risk that ReVille would sexually abuse Doe. We disagree.

In *Edwards v. Lexington County Sheriff's Department*, our supreme court imposed a duty of care on a county and its sheriff's department because it found the entities created a risk of injury to the appellant. 386 S.C. 285, 293–94, 688 S.E.2d 125, 129–30 (2010). In that case, the appellant, a domestic violence victim, sued the respondents, the county and department, after she was attacked by her ex-boyfriend in a magistrate's court bond revocation hearing in which no security was provided. *Id.* at 287–88, 688 S.E.2d at 127. An employee of the sheriff's department, who was aware of the ex-boyfriend's multiple bond violations and threats against the appellant, requested to schedule the bond revocation hearing, where the ex-boyfriend subsequently attacked the appellant. *Id.* at 288, 688 S.E.2d at 127. Despite being aware of the appellant's fear of her ex-boyfriend, the respondents strongly encouraged the appellant to be present at the bond revocation hearing. *Id.* at 293, 688 S.E.2d at 130. Our supreme court found the respondents could not claim a lack of knowledge of the ex-boyfriend's violent tendencies towards the appellant because the respondents were seeking to revoke his bond for his failing to obey a no-contact order, which was issued in response to his violent actions. *Id.* The court found the respondents "created a situation they knew or should have known posed a substantial risk of injury to [the appellant]," and given their knowledge of the ex-boyfriend's demonstrated threats against the appellant, the respondents owed the appellant a duty of care. *Id.* at 294, 688 S.E.2d at 130. Importantly, the court noted the respondents' duty "is one of due care and whether [the respondents] acted reasonably, negligently[,] or grossly negligently is not before us." *Id.*

In the instant case, Doe argues The Citadel's duty to Doe is based upon "The Citadel's own affirmative actions that created the circumstances for ReVille to sexually abuse [Doe]," and The Citadel should have foreseen its negligent actions "would probably cause injury to someone in the form of sexual abuse by ReVille." Doe again cites evidence of The Citadel's policy violations and alleged concealment of ReVille's actions. However, we again find any purported violation of the policy does not amount to the existence of a duty, but rather, focuses more on the standards of due care establishing the extent and nature of the duty, which would help a fact-finder determine whether a duty was breached. *See Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 135, 638 S.E.2d 650, 656 (2006) (rejecting defendants' all or nothing approach with regard to the existence of a duty

and noting that argument "confuses the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case"). Unlike *Edwards*, Doe does not present any evidence indicating The Citadel actively created a situation that increased the risk of harm to Doe—such as placing ReVille and Doe in the same room, encouraging the two to meet, or placing Doe in ReVille's custody. In fact, no evidence suggests The Citadel was even aware of Doe's very existence before the commencement of this lawsuit because Doe had no affiliation with The Citadel's programs or camps.

Furthermore, the evidence does not demonstrate The Citadel was aware of ReVille's pedophilia prior to the April 2007 allegations, despite Doe's claims to the contrary. The record does not support Doe's assertions that The Citadel knew of ReVille's sexual misconduct while he was a counselor at the camp. In particular, Doe asserts The Citadel should have investigated and arrested ReVille when Garrott found ReVille alone in his room with a camper in 2002, and again in 2003 when she discovered him in his room rubbing "Icy Hot" on a junior counselor's leg following a run. However, the record does not indicate that any improper behavior was occurring at the time when Garrott "caught" ReVille to warrant termination or an investigation. Garrott stated, at the time, she did not think either incident amounted to a violation of the camp policies. Instead, she viewed the incidents as "lapse[s] in judgment." Doe's arguments again "confuse the existence of a duty with standards of care establishing the extent and nature of the duty in a particular case." *Madison ex rel. Bryant*, 371 S.C. at 135, 638 S.E.2d at 656. Inasmuch as Doe failed to prove the existence of a duty of care, any argument involving the standards of care are not properly before this court. *See Bishop*, 331 S.C. at 86, 502 S.E.2d at 81 ("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.").

In conclusion, while ReVille's continued sexual abuse of Doe was beyond despicable, we find that, as it relates to any failure to respond after the April 2007 allegations, The Citadel's purported failure to intervene did not create a risk of harm to Doe when Doe was already exposed to ReVille's abuse. *See, e.g., DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 201 (1989) ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."); *Doe v. Rosa*, 795 F.3d 429, 439 (4th Cir. 2015) ("[A]llowing continued exposure to an existing danger by failing to intervene is not

the equivalent of creating or increasing the risk of that danger."), *cert. denied sub nom. John Doe 2 v. Rosa*, 136 S. Ct. 811 (2016).

C. Title IX

Doe next argues the federal statute, Title IX of the Educational Amendments of 1972, imposed a duty on The Citadel not to conceal ReVille's sexual abuse following the April 2007 allegations.⁷ We disagree.

A plaintiff will prove the first element of a negligence claim—that the defendant owes him a statutorily-created duty of care—if the plaintiff shows 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." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914–15 (Ct. App. 1988). "Title IX prohibits discrimination occurring under any educational program or activity." *Doe by Doe v. Berkeley Cty. Sch. Dist.*, 989 F. Supp. 768, 770 (D.S.C. 1997). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012).

We find Doe's claim fails because he is not a member of the class of persons the statute intends to protect. Title IX intends to protect participants and students of educational programs. *See, e.g., Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("Generally speaking, parents of a student whose rights were violated do not have standing to assert personal claims under Title IX, but do have standing to assert claims on the student's behalf. . . . On its face, the statutory language of Title IX, 20 U.S.C. § 1681 *et seq.*, applies only to students and participants in educational programs." (citations omitted)); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs . . . have standing to bring claims under Title IX."). In the instant case, both parties agree that Doe never attended The Citadel or its

⁷ We do not find it necessary to address any of Doe's arguments that The Citadel's alleged violations of Title IX demonstrate its failure to act with due care because, as previously mentioned, these arguments involve the standards of due care, which presuppose the existence of a duty. *See Edwards*, 386 S.C. at 294, 688 S.E.2d at 130.

summer camps. Because Doe was never a student or participant in any educational program at The Citadel, he is not a member of the class of persons Title IX intends to protect. Thus, Doe failed to prove The Citadel owed him a statutorily-created duty, and we affirm the circuit court's grant of summary judgment.⁸

II. Outrage

Last, Doe asserts the circuit court erred in granting summary judgment to The Citadel on Doe's outrage claim because more than a scintilla of evidence exists to establish that The Citadel's conduct was outrageous and directed at Doe. We disagree.

Under South Carolina law, outrage claims are limited to a defendant's egregious conduct toward a plaintiff. *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 *directed at the plaintiff*, or occur in the presence of a plaintiff of whom the defendant is aware." *Id.* (emphasis added).

In the instant case, while The Citadel's failure to notify law enforcement of ReVille's alleged abuse in 2007 is highly lamentable, Doe did not present any evidence that The Citadel directed any tortious conduct specifically toward him. Indeed, The Citadel was unaware of Doe's very existence prior to the commencement of this lawsuit. Accordingly, we uphold the circuit court's finding on this issue.⁹

CONCLUSION

⁸ We do not address Doe's essential purpose requirement argument because we find the resolution of this issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

⁹ Because our resolution of this issue is dispositive, we decline to address whether the circuit court erred in finding the TCA barred Doe's outrage claim. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (ruling an appellate court need not address remaining issues when its resolution of a prior issue is dispositive).

Based on the foregoing analysis, the circuit court's grant of summary judgment to The Citadel is

AFFIRMED.

KONDUROS, J., and LEE, A.J., concur.