THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2010-CP-10-7699

Jane Doe,

Appellant,

v.

Charles Smith, Charleston County School District
and James Island High School,

Respondents.

FINAL BRIEF OF RESPONDENTS CHARLESTON COUNTY SCHOOL DISTRICT AND JAMES ISLAND HIGH SCHOOL

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown
Wilbur E. Johnson
Brian L. Quisenberry
Russell G. Hines
25 Calhoun Street, Suite 400 (29401)
P. O. Box 993
Charleston, South Carolina 29402
(843) 720-5488
Attorneys for Respondents
Charleston County School District
and James Island High School

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INTRODUCTION

In this lawsuit, the Appellant, Jane Doe ("Doe"), is suing the Respondents, Charles Smith ("Smith"), Charleston County School District (the "School District"), and James Island High School (the "High School") (collectively, the School District and the High School will be referred to herein as the "Respondents"[1]), for causes of action arising out of Smith's alleged sexual assault of Doe on a number of occasions during the 1988-1989 school year while Doe was a freshman at the High School and Smith was Doe's teacher and softball coach. Specifically, the causes of action Doe has pleaded against the Respondents are breach of fiduciary duty, intentional infliction of emotional distress (outrage), and gross negligence. Doe commenced this action in November of 2007, claiming that she had repressed any memory of the alleged assaults until earlier that year, and therefore her suit was not barred by the applicable statute of limitations.

After sufficient discovery, and upon due notice and opportunity for Doe to be heard in opposition, the Respondents successfully moved for summary judgment, with the circuit court setting forth its decision in two extensive orders.

As an initial matter, in evaluating Doe's appellate challenge to the

[1] Smith is represented by separate counsel.

circuit court's grant of summary judgment in favor of the Respondents, it is important to note that, to upset the presumptive validity of the circuit court's ruling, as to each cause of action upon which the circuit court has granted summary judgment in favor of the Respondents, Doe has the affirmative obligation to present argument/analysis sufficient to show reversible error as to all of the independent grounds supporting the circuit court's decision. *See* McCall v. IKON, 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting an appealed order comes to the appellate court with a presumption of correctness, with the burden on the appellant to demonstrate reversible error). Respectfully, Doe has not met this burden, and has not presented argument/analysis in her principal brief sufficient to upset the circuit court's summary judgment on appeal.

Moreover, the circuit court's summary judgment should stand on its merits. The circuit court properly exercised its discretion to find that all of Doe's claims against the Respondents—both entities covered under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10 to -220 ("SCTCA")—fail substantively and because they are barred by the applicable statute of limitations.

Respectfully, the circuit court's grant of summary judgment in favor of the Respondents should be affirmed. Doe's appellate challenge is

insufficient to undermine it, and the record amply supports it.

RESPONDENTS' STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court properly grant summary judgment in favor of the High School as to all of the Appellant's causes of action against it because it did not exist as a separate legal entity during the relevant time period (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?

II. Did the circuit court properly grant summary judgment in favor of the Respondents as to the Appellant's cause of action for breach of fiduciary duty (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?

III. Did the circuit court properly grant summary judgment in favor of the Respondents as to the Appellant's cause of action for intentional infliction of emotional distress/outrage (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?

IV. Did the circuit court properly grant summary judgment in favor of the Respondents as to the Appellant's cause of action for gross negligence (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?

V. Did the circuit court properly granted summary judgment in favor of the Respondents as to all of the Appellant's causes of action because they are barred by the applicable statute of limitations (and should this ruling also be affirmed because the Appellant has not presented a proper appellate challenge sufficient to undermine it)?

RESPONDENTS' STATEMENT OF THE CASE

Doe commenced this action against Smith and the School District on

November 20, 2007, filing a summons and complaint in Charleston County Circuit Court alleging causes of action arising out of (her former teacher and softball coach) Smith's alleged sexual assault of Doe on a number of occasions during the 1988-1989 school year while she was a student at the High School. By amendment, Doe later added the High School as a defendant.

After the case was struck from the docket and thereafter restored pursuant to Rule 40(j), SCRCP, it was given the (2010) case number reflected in the above caption. Upon restoration of the case, Doe filed a second amended complaint—her operative complaint—alleging the following causes of action: breach of fiduciary duty (against all defendants), gross negligence (against the Respondents), and intentional infliction of emotional distress/outrage (against all defendants). (R. pp. 64-72.)

At all appropriate times, the Respondents pleaded or otherwise responded to Doe's complaints, denying their material allegations, and setting up a number of affirmative defenses.

After a period of discovery, the Respondents (as well as Smith) moved for summary judgment. (R. pp. 1423-1426.) The motions for summary judgment were heard by the Honorable W. Jeffrey Young on July 23, 2012.

On September 10, 2012, Judge Young entered an order granting summary judgment in favor of the Respondents. (R. pp. 1-17.) On September 24, 2012, Judge Young entered an order granting summary judgment in favor of Smith. (R. pp. 18-29.) Judge Young expressly incorporated the reasoning and authority in his (September 24, 2012) order granting summary judgment in favor of Smith on the basis of the statute of limitations into and in support of his (September 10, 2012) order granting summary judgment to the Respondents. (R. pp. 5-6.)

By orders entered on December 13 and 27, 2012, Judge Young denied Doe's motions to reconsider with respect to the summary judgments granted Smith and the Respondents, respectively. (R. pp. 30-31.) This appeal followed.

STATEMENT OF FACTS[2]

Doe's lawsuit is based on events that allegedly occurred nearly two decades before she filed suit in 2007.[3] She alleges that her former teacher and softball coach, Smith, sexually assaulted her on a number of occasions during the 1988-1989 school year when she was a freshman at the School District's high school on James Island, i.e., the High School. (R. pp. 64-72.)

[2] Additional facts will be included, where pertinent, in the argument below.
[3] Both the superintendent of the School District and the principal of the High School at the time that the abuse allegedly occurred are now deceased.

In the 1988-1989 school year, the High School was part of the School District's system and did not exist as a separate legal entity. (R. p. 908 (Depo. p. 53, line 1 – p. 55, line 2).) The High School was created in 2003 as an entity separate from the School District. (R. p. 919 (Depo. p. 100, lines 11-24).)

Doe identifies a total of five instances of sexual assault by Smith: three instances where Smith allegedly brushed or touched her inappropriately in his classroom, and two instances occurring off school grounds when Smith took her home from softball practice. (R. p. 193 (Depo. p. 88, lines 10-23); R. p. 194 (Depo. p. 91, lines 4-6); R. p. 195 (Depo. p. 95, lines 1 – p. 97, line 22); R. p. 196 (Depo. p. 100, line 1 – p. 101, line 20).) Doe cannot specifically identify when each of the alleged instances occurred, or in what order they occurred. She alleges that the assaults took place at some point between the beginning of the school year in September of 1988 and February 12, 1989, when she alleges that she attempted to commit suicide by taking Vivarin caffeine pills. (R. p. 195 (Depo. p. 95, line 19 – p. 96, line 25); R. p. 199 (Depo p. 110, lines 4-25).) According to Doe, her suicide attempt was motivated by distress caused by Smith's sexual assaults. (App's Br. p. 4.) Doe has identified no other incidents of sexual assault after February 12, 1989.

Doe admits that she did not tell anyone about the alleged sexual assaults until 2007. (R. p. 248 (Depo. p. 35, lines 2-17).) She admits that she did not report the alleged instances to anyone at the High School and did not tell any friends or parents. (R. p. 248 (Depo. p. 35, lines 2-17).) Her mother admits that she knew that Smith gave Doe rides home from softball practice and did not complain to anyone at the High School about Smith or otherwise have a problem with it and had no suspicions of Smith prior to 2007. (R. p. 1681, lines 1-23; R. p. 1698, lines 1-16.)

At the time, it was not uncommon for coaches to give rides to students if they had no way home after practice. (R. p. 1685, lines 1-24 (Mr. Shaddrix was a football coach at the High School during the 1988-1989 school year); R. p. 1688, lines 7-25 (Dr. Dilligard served as the Deputy Superintendent for the District during the 1988-89 school year); (R. p. 1691, lines 3-24 (Dr. Shealy was the assistant principal at the High School during the 1988-89 school year).)

There are no former students, teachers, employees, or any other witnesses that testified that they suspected Smith of sexual misconduct. Indeed, no witness testified that they suspected Smith had acted inappropriate toward students.

Doe concedes that she has no evidence to show that the Respondents

should have known about the alleged danger presented by Smith prior to the alleged sexual assaults. The School District hired Smith as a teacher in 1975. (R. pp. 1693-1906.) At all times in issue, Smith held full certification credentials from the South Carolina Department of Education. (R. pp. 1693-1906.) Smith received a score of satisfactory or higher on all of his teacher evaluations, and Smith received no reports of misconduct or reprimands whatsoever prior to the alleged sexual assaults. (R. pp. 1693-1906.)

According to Doe, "[a]s a result of the unbearable physical and emotional distress, [she] repressed the memories of the abuse at some point prior to her 18th birthday and did not recall any of these memories until her recollection in or around early 2007." (App's Br. p. 6.)

STANDARD OF REVIEW

"Summary judgment is a useful tool for ending costly and time-consuming litigation and should be granted where appropriate . . . ." State ex rel. McLeod v. Brown, 278 S.C. 281, 287, 294 S.E.2d 781, 784 (1982) (Ness, J., concurring and dissenting). "When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Pye v. Estate of

Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006).

In ruling on a motion for summary judgment, the court must view the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Rife v. Hitachi Constr. Mach. Co. Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005).

Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge this initial responsibility by pointing out to the Court the absence of evidence to support the nonmoving party's case. Id. The moving party need not support its motion with affidavits or other similar materials negating the opponent's claim. Id.

After the moving party has met this initial burden, the opposing party must, under Rule 56(e), SCRCP, "'do more than simply show that there is some metaphysical doubt as to the material facts' but 'must come forward

with 'specific facts showing that there is a genuine issue for trial.''" Baughman, 306 S.C. at 115, 410 S.E.2d at 545 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 552 (1986) (emphasis in original)). In response to a properly supported motion for summary judgment, "the non-moving party may not rest on the mere allegations or denial of the pleadings, but must set forth or point to specific facts showing there is a genuine issue of material fact. Thus the existence of a mere scintilla of evidence in support of the non-moving party's position is not sufficient to overcome a motion for summary judgment." Thomas v. Waters, 315 S.C. 524, 526, 445 S.E.2d 659, 661 (Ct. App. 1994) (citing Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1993), *rev'd in part on other grounds*, 311 S.C. 218, 428 S.E.2d 700 (1993)).

ARGUMENT[4]

I. The circuit court properly granted summary judgment in favor of the High School as to all of Doe's causes of action against it because it did not exist as a separate legal entity during the relevant time period (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

[4] Though separately set forth, the analysis/argument presented herein may contain some overlap among the issues before the Court. To the extent that the argument/analysis contained in any particular portion of this brief is relevant to any other portion, the same is hereby incorporated therein by reference

The circuit court granted summary judgment in favor of the High School as to the entirety of Doe's claims "for the additional reason that during the 1988-1989 school year [(i.e., the school year during which Doe was allegedly abused by Smith)], the High School was part of the Charleston County School District system and did not exist as a separate legal entity." (R. pp. 15-16.)

Nowhere in Doe's brief is any challenge to this ruling. The failure to present a challenge to this ruling in Doe's principal brief renders any potential challenge abandoned and incapable of being resurrected. Jinks v. Richland County, 355 S.C. 341, 344, 585 S.E.2d 281, 283, n. 3 (2003) (an issue which is not argued in the brief is deemed abandoned and precludes consideration on appeal); Cont'l Ins. Co. v. Shives, 328 S.C. 470, 474, 492 S.E.2d 808, 811, n. 2 (Ct. App. 1997) (an issue not raised in the appellant's principal brief may not be raised via a reply brief). Right or wrong, this ruling is therefore the law of the case, and requires affirmance of the circuit court's grant of summary judgment in favor of the High School as to the entirety of Doe's claims. First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct.App.1998) (holding an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

Moreover, because this (unchallenged) ruling is itself a sufficient

ground to find that all of Doe's causes of action against the High School must fail, and it is the law of the case, affirmance of the circuit court's summary judgment in favor of the High School is also called for under the two-issue rule. "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). As our Supreme Court has explained, the two-issue rule is applicable to affirm circuit court orders:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 255 n. 1 (1996).

To the extent that the Court may be inclined to address the merits of the ruling nonetheless, the Respondents contend that, factually, the High School's lack of separate existence during the 1988-1989 school year is clear

from the record,[5] and, legally, the correctness of the circuit court's ruling that no cause of action is available against an entity that had no legal existence at the time of the allegedly tortious conduct is axiomatic.

II. The circuit court properly granted summary judgment in favor of the Respondents as to Doe's cause of action for breach of fiduciary duty (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

The circuit court found that Doe's cause of action for breach of fiduciary duty fails as a matter of law because the Respondents do not have a fiduciary relationship with their students. (R. p. 6) ("Under South Carolina law, the [Respondents] do not have a fiduciary relationship with their students.")

Nowhere in Doe's brief is any challenge to this ruling. The failure to present a challenge to this ruling Doe's principal brief renders any potential challenge abandoned and incapable of being resurrected. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2. Right or wrong, this ruling is therefore the law of the case, and requires affirmance of the circuit court's grant of summary judgment in favor of the Respondents as to Doe's cause of action for breach of fiduciary duty. Soden, 333 S.C. at 566, 511 S.E.2d at 378.

[5] (R p 908 (Depo p. 53, line 1 – p 55, line 22), R. p. 919 (Depo p. 100, lines 11-24).)

To the extent that the Court may be inclined to address the merits of the ruling nonetheless, the Respondents contend that the correctness of the circuit court's ruling that, as a matter of law, Doe has no viable cause of action against the Respondents for breach of fiduciary duty is amply supported by the authority cited by the circuit court: Doe v. Greenville County Sch. Dist., 375 S.C. 63, 651 S.E.2d 305 (2007) and Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003). (R. pp. 6-7.)

III. The circuit court properly granted summary judgment in favor of the Respondents as to Doe's cause of action for intentional infliction of emotional distress/outrage (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

The circuit court found that Doe's cause of action for intentional infliction of emotional distress (outrage) fails as a matter of law because the SCTCA "does not waive sovereign immunity for claims of intentional infliction of emotional distress." (R. p. 7.)

Nowhere in Doe's brief, however, is any challenge to this ruling. The failure to present a challenge to this ruling in Doe's principal brief renders any potential challenge abandoned and incapable of being resurrected. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2. Right or wrong, this ruling is therefore the law of the case, and requires affirmance of the circuit court's grant of summary

judgment in favor of the Respondents as to Doe's cause of action for intentional infliction of emotional distress (outrage). Soden, 333 S.C. at 566, 511 S.E.2d at 378; Jones, 387 S.C. at 346, 692 S.E.2d at 903; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1.

To the extent that the Court may be inclined to address the merits of the ruling nonetheless, the Respondents contend that the correctness of the circuit court's ruling that, as a matter of law, Doe has no viable cause of action against the Respondents for intentional infliction of emotional distress (outrage) is amply supported by the authority cited by the circuit court: § 15-78-30(f) (defining "loss" as "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**.") (emphasis added);[6] *see also* Newman v. S.C. Dep't of Empl. & Workforce, 2010 WL 4791932 (D.S.C. 2010) (holding that "the [South Carolina Department of Employment and Workforce], as a state agency, has sovereign immunity with regard to this tort claim [(i.e., intentional infliction

[6] Section 15-78-50(a) provides "Any person who may suffer a **loss** proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim as hereinafter

of emotional distress)]"); Harkness v. City of Anderson, 2005 WL 2777574 (D.S.C. 2005) (holding that "the SCTCA does not waive sovereign immunity for [an outrage] claim"). (R. p. 7.)

Further still, the circuit court found that this cause of action fails as a matter of law because "the SCTCA excludes liability for 'employee conduct outside the scope of his official duties **or** which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.'" (R. p. 7) (emphasis added) (quoting § 15-78-60(17).)

Although Doe does devote some argument in her brief to the issue of whether Smith was acting within the scope of his employment, nowhere in Doe's brief is any argument directed to the issue of whether Smith's alleged conduct "constitutes actual fraud, malice, intent to harm, or a crime of moral turpitude." Consequently, Doe has not effectively challenged this independent aspect to the circuit court's ruling, which ruling is the law of the case, and alone sufficient to require affirmance of the circuit court's grant of summary judgment in favor of the Respondents on Doe's claim for intentional infliction of emotional distress (outrage). Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511 S.E.2d at 378; Jones, 387 S.C. at 346, 692

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provided ") (emphasis added)

S.E.2d at 903; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1.

To the extent that the Court may be inclined to address the merits of the ruling regarding the application of § 15-78-60(17) nonetheless, the Respondents contend that the circuit court's ruling is correct.

Again, § 15-78-60(17) excludes liability against a government entity 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." The tortious conduct alleged here is sexual assault; such conduct cannot be within the scope of Smith's "official duties" or employment.

As an initial matter, the SCTCA expressly defines "'scope of official duty' or 'scope of employment' [to] mean[] (1) acting in and about the official business of a government entity and (2) performing official duties." Section 15-78-30(i). Doe does not address the more-restrictive nature of these defined terms under the SCTCA in her brief. S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 245, 403 S.E.2d 643, 646 (1991) (holding that the term "scope of employment" as used in an insurance policy is broader than the term "scope of official duties" as used in the SCTCA).

In any event, however, there is no question that Smith's alleged sexual

assaults of Doe were not within the scope of his employment. Our Supreme Court has explained as follows:

> The doctrine of respondeat superior rests upon the relation of master and servant. A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. These general principles govern in determining whether an employer is liable for the acts of his servant.
>
> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. **If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time.**

Armstrong v. Food Lion, Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52-53 (2006) (emphasis added) (internal citations omitted). Smith's alleged sexual assaults can only reasonably be viewed as being for his own independent purpose, wholly disconnected with his employment.

Doe notes that "South Carolina routinely holds that employers can properly be found vicariously liable for the intentional torts of their employees." (App's Br. p. 24, n. 17). Respectfully, this general notion, i.e., that it is possible for an employer to be found vicariously liable for an employee's intentional tort, is unavailing to Doe here. Indeed, the cases Doe cites are readily distinguishable from the present case, helping to illustrate the difference between those instances wherein an intentional tort, assault/battery, could be found to be within the scope of employment so as to trigger vicarious liability.[7] For instance, in Crittendon v. Thompson-Walker Co., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986), a case Doe relies upon, the employer was held vicariously liable for an employee's assault and battery, but the assault and battery was committed in connection with the employee's efforts to force the plaintiff to pay a business debt owed to the employer. In stark contrast, the alleged employee conduct in the instant case is the alleged sexual assault of a minor, which simply cannot reasonably be viewed as anything else than being for the independent purpose of the alleged abuser, wholly disconnected from his employment.[8] *Cf.*

[7] To be clear, Doe cites no authority where sexual assault has been found to be within the scope of an employee's employment.

[8]. Doe argues that Degenhart v Knights of Columbus, 309 S C 114, 420 S.E 2d 495 (1992) and its progeny are not applicable here because Smith was acting within the scope of his employment with respect to the alleged sexual abuse. (App's Br p. 25, n. 18.) Respectfully, Doe is mistaken, because, as explained herein, it is beyond reasonable

Brockington v. Pee Dee Mental Health Center, 315 S.C. 214, 218, 433 S.E.2d 16, 18 (Ct. App. 1993) ("Clearly, Davis was acting in his individual capacity and not as an agent for the defendants when he sexually assaulted Brockington."); Whittle v. S. Bell Tel. & Tel. Co., 306 S.C. 163, 410 S.E.2d 575 (Ct. App. 1991) (implying that sexual abuse is not within the scope of an employee's employment).

Also, Smith's alleged conduct, i.e., sexual assault of a minor, is a sexual battery,[9] which is a crime of moral turpitude,[10] and therefore excluded from liability under § 15-78-60(17).

IV. The circuit court properly granted summary judgment in favor the Respondents as to Doe's cause of action for gross negligence (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

As explained above, Doe is incorrect in asserting that her gross negligence claim is not controlled by Degenhart, 309 S.C. 114, 420 S.E.2d 495, and its progeny. There is no question that Smith's alleged sexual assaults of Doe were outside the scope of his employment.

In Degenhart, our Supreme Court held that an employer is under a

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dispute that Smith's alleged sexual abuse of Doe was outside the scope of his employment.

[9] Doe v. Greenville Hosp. System, 323 S.C. 33, 37, 448 S.E.2d 564, 566 (Ct. App 1994) ("As a matter of public policy, the General Assembly has determined a minor under the age of sixteen is not capable of voluntarily consenting to a sexual battery committed by an older person S C.Code Ann § 16-3-655(3) (1985) ")

[10] *Cf* State v Lee, 269 S C 421, 237 S E 2d 768 (1977) (indicating that rape is a crime of

duty in some circumstances to exercise reasonable care to control an employee acting outside the scope of employment. The Court stated that an employer may be liable for negligent supervision if the employee intentionally harms another when the employee: (1) is upon the premises of the employer, or is using a chattel of the employer, (2) the employer knows or has reason to know that he has the ability to control the employee, **and** (3) **the employer knows or should know of the necessity and opportunity for exercising such control**. 309 S.C. at 116-17, 420 S.E.2d at 496.

Here, the circuit court correctly focused on the final element, i.e., whether the Respondents knew or should have known of the necessity and opportunity for exercising control over Smith, and concluded that, viewing the evidence and reasonable inferences to be drawn therefrom in the light most favorable to Doe, it is still not possible to reasonably conclude that the Respondents knew or should have known of the alleged danger presented by Smith. (R. p. 10.)[11] Accordingly, the Respondents had no duty under Degenhart, 309 S.C. 114, 420 S.E.2d 495 and its progeny. As explained

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moral turpitude).

[11] With regard to the "light most favorable" to Doe, the Respondents note that it is only with respect to the circuit court's summary judgment on the basis of the statute of limitations that Doe argues the circuit court did not construe facts in the light most favorable to her. (App's Br pp. 15-17.) Doe does not argue that any aspect of the circuit court's September 10, 2012 order granting summary judgment to the Respondents is tainted by this alleged error. Of course, in any event, the Respondents contend that Doe is mistaken in asserting any error with respect to the circuit court's view of the evidence

therein, the circuit court's ruling is amply supported by cases following Degenhart in the context of alleged sexual assault: Brockington, 315 S.C. 214, 433 S.E.2d 16 (reversing the trial court's denial of the defendants' motions for JNOV where, when viewing the evidence in the light most favorable to the nonmoving party, the evidence and its reasonable inferences did not support a finding that the defendants knew or should have known of the necessity of controlling the subject employee) and Moore v. Berkeley County School District, 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1997) (affirming the trial court's grant of the defendant's motion for summary judgment where there was no evidence that the defendant knew or should have known of subject employee's inappropriate sexual proclivities). (R. pp. 7 - 13.)[12]

The circuit court's application of the Degenhart analysis to the indisputable facts of this case is also above reproach. Doe herself testified that she has no evidence to show that the Respondents should have known about the alleged danger presented by Smith prior to the alleged sexual

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underlying the grant of summary judgment on the basis of the statue of limitations.

[12] The circuit court also noted, for the sake of comparison, Greenville Hospital System, 323 S C 33, 448 S.E.2d 564. (R. p. 9, n. 20.) Although, in that case, a judgment in favor of the plaintiff was affirmed, the analytical framework, which examined whether the evidence would permit a reasonable inference that the defendant hospital knew or should have known of the necessity of controlling the subject employee, is the same as applies to determine this case Unlike the Greenville Hospital case, here there is simply no evidence allowing for such an inference to be reasonably made

assaults. (R. pp. 251-52 (Depo. p. 49, line 14 – p. 50, line 4).) As noted in the above factual recitation, the School District hired Smith as a teacher in 1975. (R. pp. 1693-1906.) At all times in issue, Smith held full certification credentials from the South Carolina Department of Education. (R. pp. 1693-1906.) Prior to the alleged instances sexual abuse at issue, Smith received a score of satisfactory or higher on all of his teacher evaluations, and Smith received no reports of misconduct or reprimands. (R. pp. 1693-1906.)

There is no question that Doe did not report or otherwise tell anyone about the alleged sexual assaults until 2007. (R. p. 248 (Depo. p. 35, lines 1-17).) There are no former students, teachers, employees, or any other witnesses that testified they suspected Smith of sexual misconduct or any inappropriate actions towards students. And the mere allegation that Smith gave Doe rides home after softball practice could not reasonably put the Respondents on notice of any danger presented by Smith. Indeed, during the relevant school year (i.e., 1988-1989), it was not uncommon for coaches to give rides to students after practice, and it did not violate any school policy. (R. p. 1685, lines 1-24; R. p. 1688, lines 7-25; R. p. 1691, lines 3-24.)

Doe's mother knew that Smith gave Doe rides home from softball practice and did not have a problem with it. Doe's mother did not complain to anyone at the High School about Smith. (R. p. 1681, lines 6-24; R. p.

1682, lines 1 - 16.)[13]

Moreover, besides being correct on the merits, the circuit court's ruling with respect to the Degenhart analysis is also the law of the case. Nowhere in Doe's brief does she cite to any evidence from which a reasonable inference can be drawn that the Respondents knew or should have known that Smith had any inappropriate sexual proclivities. *See* Moore, 326 S.C. at 591-92, 486 S.E.2d at 13. In her brief, Doe acknowledges the circuit court's ruling that "no duty existed" on behalf of the Respondents under Degenhart, 309 S.C. 114, 420 S.E.2d 495, and its progeny. (App's Br. p. 22) ("Respondent CCDS and JIHS assert, and the trial court found, that no duty existed between the school and its student, Doe, because the school was not aware of Smith's activities with [Doe].") But Doe does not thereafter actually argue against the ruling (again, the

[13] Any argument by Doe that Smith giving her rides home provides evidence in and of itself from which the Respondents knew or should have known of any of Smith's alleged inappropriate sexual proclivities is patently specious. The gap between the evidence of Smith giving Doe rides and any contention that the Respondents knew or should have known of any danger presented by Smith cannot be bridged without resort to impermissible speculation. Hanahan v. Simpson, 326 S.C. 140, 149, 485 S E 2d 903, 908 (1997) ("[V]erdicts may not be permitted to rest upon surmise, conjecture or speculation."); *see also* Todd v S C Farm Bureau Mut. Ins Co., 283 S.C. 155, 321 S.E.2d 602, 613 (Ct App 1984), *rev'd on other ground by* 287 S C 190, 336 S E.2d 472 (1985) ("Although we are required at this point to view the evidence in the light most favorable to Todd, we are not allowed to embellish it by frequent flights into the fanciful.") Also, any argument by Doe regarding the Respondents' response to her alleged suicide attempt is patently irrelevant with respect to the critical question of whether the Respondents knew or should have known about any of Smith's alleged inappropriate sexual proclivities, because the record is clear that no alleged acts of sexual

ruling being that no duty existed); rather, Doe argues that the record contains evidence creating a jury question as to whether a duty (which Doe seems to simply presume exists) was breached. In other words, Doe puts the cart before the horse, arguing about the alleged breach of a duty before (indeed, without) arguing that the duty exists in the first place. Respectfully, a plain reading of Doe's argument reveals that the she has not, in fact, challenged the circuit court's actual ruling regarding the threshold question of the existence of a duty based upon the Degenhart analysis. (App's Br. p. 22.) Having failed to challenge this ruling, it is the law of the case and requires affirmance of the circuit court's grant of summary judgment in favor of the Respondents as to Doe's gross negligence cause of action. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511 S.E.2d at 378.

Further still, with regard to policies that Doe claims to have been violated/not enforced, the circuit court expressly ruled as follows: "Doe submits current 2012 policies and attempts to apply those to the allegations from the 1988-89 school year. The policies Doe cites are irrelevant to the present case because none were issued earlier than 2005." (R. p. 4, n. 13.) Doe has not challenged this ruling in her principal brief, and it is therefore

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assault occurred after Doe's alleged suicide attempt.

the law of the case. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511 S.E.2d at 378. Consequently, Doe's argument regarding the violation/failure to enforce policy is—in addition to being misplaced, as explained in the preceding paragraph—necessarily unavailing because it pertains to policies that the circuit court has ruled to be irrelevant, which ruling is conclusive because Doe has not properly challenged it on appeal.

Even further, with regard to policies, the circuit court ruled as follows:

> In *Brockington v. Pee Dee Mental Health Center*, 315 S.C. at 218, the Court of Appeals held there was no duty to adopt or enforce certain rules against employees acting outside the scope of their employment. The plaintiff in *Brockington* alleged his negligence claim should survive because the employer owed him a duty to supervise its employees under the employer's internal rules and directives. *Id.* The Court rejected the plaintiff's claim and held an employer can only be held liable for failing to enforce its rules and policies with respect to actions within the scope of employment. *Id.* The Court held "we conclude the defendants possessed no duty arising out of the internal directives to protect [the plaintiff] from unreasonable risks resulting from his relationship with [the employee] in [his] individual capacity." *Id.* (emphasis added). *See also, Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47 (1996) ("Whether the law recognizes a particular duty is an issue of law to be determined by the court. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict.").

> Even if there was such a duty to adopt or enforce rules or polices, the District and High School are immune from such a claim in this case under the Tort Claims Act. The SCTCA states in relevant part "The governmental entity is not liable for a loss resulting from. . . ***adoption, enforcement, or compliance*** with any law ***or failure to adopt or enforce*** any law, whether valid or invalid, ***including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.***" S.C. Code Ann. § 15-78-60(4) (emphasis added).

(R. pp. 13-14) (emphasis in original.) Here, again, the Respondents are unable to discern that where Doe has presented an argument challenging the circuit court's ruling in this regard, and it is therefore the law of the case. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2; Soden, 333 S.C. at 566, 511.[14]

V. The circuit court properly granted summary judgment in favor of the Respondents as to all of Doe's causes of action because they are barred by the applicable statute of limitations (and this ruling should also be affirmed because Doe has not presented a proper appellate challenge sufficient to undermine it).

In its order granting summary judgment in favor of the Respondents,

[14] In fairness, Doe does argue that the evidence presents a jury question as to whether Smith was acting in the scope of his employment with respect to the alleged sexual abuse (App's Br pp 22-26) As explained, *supra*, this argument is without merit; the evidence simply does not allow for a reasonable conclusion that Smith's alleged sexual abuse of Doe was within the scope of his employment Armstrong, 371 S.C at 276, 639 S.E 2d at 52-53; Brockington, 315 S C. at 218, 433 S.E.2d at 18, Whittle, 306 S C. 163, 410 S E 2d 575. That said, Doe's brief does not at all address the circuit court's above-quoted analysis of Brockington, 315 S.C. 214, 433 S.E.2d 16 (regarding enforcement of policies within the scope as opposed to outside the scope of employment) or of § 15-78-60(4) of

the circuit court expressly found that the reasoning and authorities cited in its order granting summary judgment in favor of Smith on the basis of the statute of limitations applied equally to Doe's claims against the Respondents and incorporated that reasoning and authority into its order granting summary judgment in favor of the Respondents. (R. pp. 5-6; R. pp. 18-29.) Pursuant to Rule 208(b)(6), SCACR, to the extent not inconsistent herewith, the Respondents hereby adopt by reference all of the argument/analysis in Smith's brief in support of affirmance of the circuit court's summary judgment in favor of the Respondents on the basis of the statute of limitations.

Additionally, the Respondents contend that Doe has not properly presented a challenge to the circuit court's ruling that all of her claims are barred by the statute of limitations. The only way that Doe's 2007 lawsuit arising out of alleged assaults upon her as a 15-year-old in 1988-1989 is not time barred is if she can carry her burden of showing repressed memory under South Carolina law. One of the independent bases for the circuit court's rejection of Doe's repressed-memory theory was that Doe had not presented sufficient expert testimony: "Though [Doe's] expert witnesses have testified that she appears to meet the qualifications for repressed

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the SCTCA.

memory, **neither of her experts can say to a reasonable degree of medical certainty when the memories were repressed or when she recovered them**." (R. p. 27) (emphasis added.)[15] Accordingly, the circuit court found that, to present a potentially meritorious claim of repressed memory, Doe had to present expert medical testimony establishing, to a reasonable degree of medical certainty, both (1) when the memories were repressed and (2) when she recovered them, and that Doe had not presented such evidence.

Nowhere in Doe's brief is any challenge to this ruling. Doe argues only as follows: "[T]he testimony of both Doe and the Respondent's expert witnesses on dissociative amnesia . . . supports the conclusion that Doe was in fact abused and in fact suffered from dissociative amnesia. Ultimately the issue of whether and when Doe repressed her memories and when she recovered them are questions of fact to be determined by the jury." (App's Br. p. 20.) Doe never actually challenges the circuit court's clear ruling that, to present a case sufficient to get to a jury, she must first put forth an expert that "can say to a reasonable degree of medical certainty when the memories

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[15] (*See also* R. pp. 5-6) ("Defendants further argue that [Doe's] allegation of repressed memory fails to save her claims because she presented no 'objectively verifiable' evidence of the alleged abuse, **and the expert testimony she submitted did not identify the specific date when [Doe] allegedly recovered her memories**. Based on the reasoning and authorities cited in this Court's Order granting Defendant Smith's Motion for Summary Judgment, **the Court agrees** and finds that the same reasoning and authorities, which are incorporated by reference herein, apply equally to [Doe's] claims asserted against the [Respondents] ") (emphasis added.)

were repressed or when she recovered them." (R. p. 27.) The failure to present any challenge to this ruling in Doe's principal brief renders it abandoned and incapable of being resurrected. Jinks, 355 S.C. at 344, 585 S.E.2d at 283, n. 3; Shives, 328 S.C. at 474, 492 S.E.2d at 811, n. 2. Right or wrong, this ruling is therefore the law of the case. Soden, 333 S.C. at 566, 511 S.E.2d at 378. Because this (unchallenged) ruling is itself a sufficient ground to find that all of Doe's causes of action against Respondents (and, for that matter, Smith) must fail, and it is the law of the case, affirmance of the circuit court's summary judgment in favor of the Respondents as to all of Doe's causes of action is called for under the two issue rule. Jones, 387 S.C. at 346, 692 S.E.2d at 903; Anderson, 322 S.C. at 420, 472 S.E.2d at 255 n. 1.

CONCLUSION

For the foregoing reasons, and any other reason that may be apparent from the record (to include especially the reasoning set forth in the circuit court's orders), the Respondents ask that this Honorable Court affirm the circuit court's summary judgment in their favor.

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: ______________________

Stephen L. Brown
Wilbur E. Johnson
Brian L. Quisenberry
Russell G. Hines
P.O. Box 993 (29402)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
(843) 720-5488
Attorneys for Respondents
Charleston County School District
and James Island High School

Charleston, South Carolina

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