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

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

v.

Jane Doe, Appellant.

INITIAL BRIEF OF APPELLANT

February 11, 2013

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STATEMENT OF THE CASE

Appellant Jane Doe ("Doe") filed her initial complaint on against Respondents Charles Smith ("Smith"), Charleston County School District ("CCSD") and James Island High School ("JIHS") on November 20, 2007.

The complaint arose out of alleged sexual abuse and other misconduct by Smith during the 1988-89 school year. Smith was Doe's teacher and coach and was employed by CCSD and JIHS at this time. Doe further alleged that she had repressed the memories of the abuse and did not recover them until early 2007.

Doe asserted claims against Smith, CCSD, and JIHS for breach of fiduciary duty and outrage. She further asserted a claim of gross negligence against CCSD and JIHS.

In response to the allegations made by Doe, the Respondents denied the allegations of abuse and put forth the defense that the statute of limitations had run on all of Doe's claims. CCSD and JIHS further defended by asserting the limitations of liability set forth in the South Carolina Tort Claims Act and that no duty was owed to Doe.

Respondents filed motions for summary judgment which were heard on July 23, 2012. On September 10, 2012, the court filed an order granting summary judgment in favor of CCSD and JIHS. The court found that, as a matter of law, CCSD and JIHS do not have a fiduciary relationship with its students and that no duty was owed to its student Doe. The order also incorporated the rationale and analysis regarding the statute of limitations as articulated in the order granting Smith's motion for summary judgment that would be filed two weeks later.

On September 24, 2012, the court filed an order granting Defendant Smith's motion for summary judgment. The basis of the order was that the statute of limitations had run pursuant to SC Code 15-3-555 and Doe v. Crooks, 364 SC 349, 613 S.E.2d 536 (2005). The court further found that Doe did not satisfy the requirements of objective verifiability as espoused in Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150 (Ct. App. 1999); *aff'd by* Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320 (2000), that intentional infliction of emotional harm and punitive damages are not recoverable under the South Carolina Tort Claims Act.

The court denied the Doe's motions to alter or amend the judgments without a hearing.

FACTUAL BACKGROUND

Respondent Charles Smith ("Smith") was a teacher at James Island High School during the 1988-1989 school year. In the 1988-1989 school year, Jane Doe was a freshman student at James Island High School. Respondent Smith was Jane Doe's teacher and coach at James Island High School.

During the 1988-1989 academic year, Respondent Smith began giving Jane Doe rides home from school and practice. Smith routinely gave students, including Doe rides to their homes in his own personal car from school grounds and from practice. [1] He gave students rides to overnight sports camps and even out of state. Id. He also bought students gifts, interacted socially with students, including Doe, outside of school hours. Id.

[1] *See* Respondent Smith depo tr..

All of this conduct is inappropriate conduct for teachers of James Island High School and Charleston County School District as testified to by the 30(b)(6) representative of James Island High School. *See* James Island High School 30(b)(6) depo pp. 49:1-18; 50:1-5, 16-19; 74:23-25; 75:1-2, 12-14. 25; 76:1-13. 24-25: 77:1-12. Moreover, JIHS acknowledges that it is responsible for the supervision of its students during transportation to and from school activities such as softball practice:

> Q. All right. Do you agree with the statement...Students who travel to and from the school on school buses or any trips in connection with school sponsored activities are under school supervision?
>
> A. Yes, I agree.
>
> Q. Okay. You are in charge of the teachers, are you not?
>
> A. Right.
>
> Q. Okay. And if the use of private vehicles was used by a teacher, coach, other staff member, that would be a violation without proper consent of the superintendent or the principal, that would be a violation of the policy, wouldn't it?
>
> A. It would be a violation of this policy right here, yes.

During the 1988-1989 academic year, Respondent Smith began touching Jane Doe in inappropriate and sexual ways in his classroom at James Island High School during school hours and utilized the rides he gave her in his vehicle to begin a series of sexual assaults on the minor child Jane Doe. All of these assaults occurred either on school grounds or resulting from rides given by Smith to Doe from school grounds. He further travelled with Doe from school grounds to a local horse stable and engaged in sexual contact with Doe.

The assaults caused the minor child Jane Doe such distress that she attempted to commit suicide in Smith's classroom shortly after the end of the school day in February 1989. Emergency Medical Services was called, arrived at James Island High School and paramedics rushed Doe out of the school, into the ambulance, and off to the hospital where her stomach was pumped and her life saved.

School and District policy requires that a student who receives such medical attention would result in an investigation by the school, records created and maintained in the student's file, accommodations provided to the student upon their return, and potentially a referral to the Department of Mental Health with a copy of such a referral kept in the student's file.[2]

However, nobody at the school or the school district investigated the matter, no accommodations were provided to Doe upon her return, no contact was made by the school or the district with Doe's family, no referral made for mental health treatment, and Respondent Smith admittedly did nothing to accommodate Doe, to inform the proper authorities of the incident, or otherwise demonstrate any care for Doe's mental or emotional well being.[3] Moreover, according to Smith, a nurse assisted him in providing emergency medical care for Doe, yet no nurse has been identified by the school, no report made of the incident in Doe's student records, no report of the incident made in Smith's personnel file, and no investigation performed by the School or the District in response to Doe's suicide attempt.

As testified to by the 30(b)(6) representative of James Island High School, the school should have provided accommodations for Doe upon her return to school

[2] *See, e.g.* the deposition testimony of the 30(b)(6) representative of James Island High School and School District policies regarding emergency care.
[3] *See, e.g.* the deposition testimony of Smith and the 30(b)(6) representative of James Island High School.

following her suicide attempt and discouraged her from dropping out of school, neither of which occurred in this case:

> Q. What would you expect the -- what actions would be taken by the school in response to a suicide attempt?
>
> A. Well, certainly if it is happening on campus, school personnel have to first act with the safety of the student in mind, notify medical authorities on the campus, notify law enforcement also for assistance, and notify the parents. And then at the same time, call for emergency help and get -- make sure the student is transported to the closest medical facility as quickly as possible.
>
> Q. Okay. And you would expect to be notified as well, wouldn't you?
>
> A. The principal would be notified right away.
>
> Q. When the student -- let's assume that the suicide attempt was unsuccessful and they lived and that student comes back, what accommodations would you make for that student?
>
> A. ...I can tell you that what we would do would be similar to any student who has had a serious medical situation and is returning to school after either a short or an extended stay from a medical situation.
>
> Q. What types of things are those?
>
> A. The student may qualify for an accommodation plan, a 504 accommodation plan.
>
> Q. What do you mean when you say that?
>
> A. A 504 is part of 94-142 concerning students with disabilities. You have to assemble and should assemble a team of educators on campus and support personnel, the parents also, the school psychologist to examine if there are any special accommodations that that student will need so that one of the basic life functions -- and education is one of them, are not impacted negatively...So it may be some accommodations in the classroom. A student may require

special seating, they may require regular visits to the guidance counselor for school related items.

James Island High School 30(b)(6) depo pp. 109:5-20; 110:18-25; 11:1-20; 112: 5-25; 113:1-13

Doe dropped out of high school without any discouragement from Smith, the school, or the school district, without any accommodations provided, and without any questions or concern exhibited for her well-being. Thereafter, Doe, like many sexual abuse victims, struggled in her adult life with sexual dysfunction, mistrust of authority figures resulting in conflict at work and in her personal life, desolation, shame, loneliness, low self esteem, and other physical and psychological manifestations of the trauma suffered at the hands of Respondent Smith and under the watch of James Island High School and the Charleston County School District.[4]

As a result of the unbearable physical and emotional distress, Doe 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.

Doe has a documented medical history of childhood sexual abuse,[5] contemporaneous written statements of the abuser (Smith),[6] and a chain of facts and circumstances, including classic grooming activities from Smith,[7] Smith's concealment of Doe's suicide attempt in his classroom,[8] and other incidents involving inappropriate

[4] *See* Deposition testimony, statement to police, and affidavit of Doe.
[5] *See, e.g.* affidavit of Heidi Zinzow, medical records of Tanya Bolton, MUSC, and others.
[6] *See* a handwritten note from Respondent Smith to Doe from her 1989 James Island High School yearbook.
[7] *See, e.g.* affidavit of Heidi Zinzow deposition testimony of the 30(b)(6) representative of James Island High school and the deposition testimony of Respondent Smith.
[8] *See* Smith's deposition testimony.

conduct on Smith's behalf[9] which have sufficient probative force to produce a reasonable inference, in the light most favorable to Doe, that the sexual abuse occurred.[10]

Additionally, the testimony of both Doe and the Respondent's expert witnesses on dissociative amnesia supports the conclusion that Doe was in fact abused, suffered from dissociative amnesia, and did not recall the abuse until 2007, despite recalling abuse by another that had been repressed. One of Doe's expert witnesses, Dr. Timothy Brewerton, testified regarding Doe's suffering and the phenomenon of dissociative amnesia as follows (due to significance of the required expert testimony in cases involving dissociative amnesia, a lengthy excerpt is appropriate for proper understanding of the phenomenon):

> Q. Can you state to a reasonable degree of medical certainty that the symptoms that [Doe] is having now as an adult are solely related to her allegation that Charlie Smith [abused her] when she was 15?
>
> A. Yes.
>
> Q. How?
>
> A. It all -- ... you know, it's something that I've been studying for literally 25 years and I've seen a number of patients with dissociative disorders who have had longer gaps in their periods of life that they don't remember. So it -- you know, the fact that she had earlier traumas actually primed her to have a later period of time of severe amnesia. I mean, she had an earlier --she had dissociation beginning as a child...
>
> Q. How could that earlier abuse affect her state of mind when she didn't have any memory of it at that time?
>
> A. Because it's imprinted in the brain. Dissociation is a survival mechanism. It's a defense mechanism. Its part of

[9] *See* Smith's deposition testimony and the deposition testimony of the 30(b)(6) representative of James Island High School.
[10] *See* deposition testimony of Rita Avila.

how the brain reacts to overwhelming stress and it alters the course of brain development. And it's a protective mechanism. So that ability to dissociate was triggered and once it's triggered, it kind of sticks around, that propensity continues on into adulthood

The propensity to dissociate is a genetically determined quality. It's part of our personality and it's also much -- we know this from twin studies, there's kind of a bi-mobile distribution, there are high dissociators and low dissociators that run in families and then when you add overwhelming abuse or stress earlier in childhood when there is a propensity toward dissociation, that person maintains that propensity up into and through adulthood.

So the fact that she had these earlier experiences that caused her to block out these memories, which had a protective affect, which allowed her to feel okay at times, it's not gone, it's just hidden. But that propensity is still there when another serious trauma comes along. She -- you know, it worked before in terms of a protective mechanism, it's going to be relied on again as a protective mechanism...

Q. Okay. So the sexual abuse and the physical abuse and the violent home all contributed to her having a 10 to 13 years amnesic period?

A. Yes. Yes.

Q. That she didn't recover until 1996?

A. That is certainly possible, yes.

Q. Okay. And then that made her more prone to develop dissociation after the abuse she alleges at age 15? [by Smith]

A. Exactly.

Q. And that period of amnesia ended at age 18, approximately –

A. In part....She still had partial amnesia, yes, she did, for that event [Smith's abuse]...And that's the way memory recovery happens. It's just not all in one big fell swoop, it's piecemeal. It's fragmented. That's the nature of dissociation. It's the failure to integrate the experience and

when it comes back, it comes back in a fragmentary way. That's very typical.

Q. At what point after the event does the person have to dissociate from that memory in order to qualify for dissociative amnesia?

A. There's no -- there's no definitive point. It -- in some ways it a judgment call, but when you're talking about years of someone's life, big huge chunks, that's obviously abnormal. You know, people without this may not -- nobody remembers everything. Very, very few people remember everything in their lives, but they can generally know what schools they went to, who their teachers were. They can have a kind of stream, you know, a sequence of events that they can have certain -- they can point out certain facts in their life in that sequence. But with people with dissociative amnesia, they're unable to recall even some of the most neutral factual information. And so it's all kind of relative, you know. The bigger the gap, the more obvious it is.

Q. Okay. So if she had a recall of the events with Charlie Smith and we've got several of them, at least five -- up until her suicide attempt and then after the suicide attempt when she survived, is it possible that she disassociated at that point from those memories?

A. Yeah. You know, you're thinking of it as a one point in time and it's more like a process, rather than one distinct event in time.

Q. Okay.

A. You know, this was an extremely stressful overwhelming time for Michelle. You know, she -- it's not clear what exactly caused her to take the pills, you know, at the school. Something triggered her, chances are at school.

Q. And Charlie Smith was at school, correct?

A. Yes. Yes. Absolutely.

Q. Okay.

A. And then to -- and it's the whole thing, and not to disclose and have the shame of doing this in front of all of her classmates and then coming back and just being so mortified. I mean, it's the whole context –

Q. Okay.

A. -- of the situation that led to the need to disclaim it, to forget about, you know, let me out of here. And that led to her dropping out of school and it's that whole process. So no one can say, oh, it was this time, this minute on this day that dissociation began. It doesn't work that way…

You know and she didn't realize cognitively what happened to her. You have to take her psychology into consideration, her experiences before, the context. You know, she'd already had -- you know, she had very negative experiences with authority figures, father figures. She said in her testimony and told me, as well, that she really looked up to this guy. She needed a father figure. She needed someone to be a positive role model for her. She looked up to him. He betrayed her. He betrayed her trust. She was -- she thought that he was someone that she could trust and it wasn't going to be a repetition of her father experiences, but he wasn't. And you know, one of the things that happens in kids is that they freeze. They just kind of freeze. They're so frightened. She'd already had -- she'd already been primed to be scared to death of authority, particularly male authority by her family experiences. All right. And this guy comes along and he's nice to her, he gives her attention, you know, he pretends to care about her. There's an attraction, perhaps an attraction at multiple levels, okay. Just getting that attention. It's something that she wasn't used to. That, of course, you're going to like, you know. And he fooled her like a good perpetrator would. He groomed her. He led her to believe that he really cared about her, okay.

Q. Okay.

A. And then sex, she didn't know what sex was. It's completely new experience. Is this love, is this abuse. Kids at her age, particularly her age, she was an immature fifteen-year-old. Never had sex in her life except abusive sex by a female. So it's confusing, completely, you don't know what to think. You know, you're not thinking clearly, someone in that situation.

Q. Okay. So there's no way to say exactly when it started --

A. Correct...

Brewerton depo pp. 42:13-25; 43:1-7; 46-47:1-20; 48:18-25; 49:1-5, 18-19, 24-25; 50:1-4; 52:16-25; 53:1-4; 84:4-25: 85-86:1-7; 88:17-25; 89-90:1-13; 92:23-25; 96-97:1-14.

Respondent's expert witness on the phenomenon of dissociative amnesia, Dr. Layton McCurdy, confirmed the existence of the disorder and that he could not state that Doe had recovered the memories of the abuse prior to 2007, testifying as follows:

> Q Okay. But you are aware of some cases of sexual trauma in childhood being repressed...?
>
> A I think -- it's my opinion that there are some childhood sexual abuses that are repressed for a time until that child grows and matures a bit more.
>
> Q Okay. And that period of time is not a fixed period of time. It can be short for one, longer for another person?
>
> A That's right...
>
> Q Okay. Now, if I understand your earlier testimony, you are of the opinion that dissociative amnesia exists, that it is a diagnosable illness in certain circumstances?
>
> A I'm almost certain of that...
>
> Q Okay. Do you agree that disassociation is more common in childhood trauma victims than adult trauma victims?
>
> A Yes.
>
> Q And is that because their mental process is not as fully developed as an adult?
>
> A I think that's it. But again, I'm not completely sure.
>
> Q And the ability to cope with traumatic events at a younger age is not -- a person is not as fully equipped to deal with a traumatic event at age 4 as age 40?

A I would agree with that.

Q Okay. So then that -- would you agree that it's more likely for a child victim of trauma to disassociate those memories than it would be as an adult victim of trauma?

A Yes.

Q It's a stretch to say that a child who's had her -- had the trust violated by those with authority and control over her, it's a stretch for 19 you to say that that child going into her adolescence and adult years would have conflict with people in similar positions of authority and trust?

A I can see that, and I can also see, as I read her life history, also see that she had -- she witnessed a physical abuse by two stepfathers.

Q Right.

A She witnessed her mother being raped by one of these people.

Q. Right.

A She was abused by a child -- a baby-sitter as a younger child. Hers was not a smooth life, and those events happened to her well before she was age 15.

Q And is it your -- it's your opinion that those events did not contribute to her susceptibility to abuse?

A ..Did they contribute to her -- to her incidents of abuse is the question. Did that make her more vulnerable to someone she trusted like Charles Smith? I think that could be argued that -- that having a trusting adult might make you more vulnerable to that person.

Q All right. And then –

A Especially when you have had this background of adults that didn't seem very trustworthy, at least in reading the record.

Q Sure. And then to have that -- to get to that point and to have that person who's in a trust and authoritative position, to violate that trust in a sexual way, would then also contribute to the subsequent issues in her life?

A I would say.

Q -- are you aware or do you have an opinion on whether or not a person is predisposed to disassociate traumatic memories?

A ...I can see how that person -- one person might be more vulnerable than another, yeah.

Q And if a person is susceptible or predisposed to disassociation of traumatic events, could it then also be possible that that same person is susceptible or has a propensity -- well, is susceptible to subsequent disassociation of traumatic events? What I mean is if the person is predisposed to disassociate –

A Right.

Q -- assuming that that's the case, and the person is predisposed to disassociate --

A Yeah.

Q -- then they also would be more likely to disassociate on more than one occasion?

A Uh-huh. Yes.

Q Okay. And in reviewing the records, did you find any evidence of hypnosis or suggested memory, false memories that have been implanted in any kind of way?

A I did not.

Q. Okay. And this is just for clarification on what we have been talking about. Is there anything in her, [Doe's] records, or any of the testimony that you can point to that says she recalled these memories prior to 2007?

A No.

Q Okay. That's what I wanted to ask you about. Knowing that it happens, okay? Some people can't -- they just can't function, and they -- in order to cope, the brain on an automatic subconscious level, just kind of pushes it down somewhere in the memory bank to such a degree that it's not in their conscious awareness. Okay? You agree that that happens, and it can happen?

A I will agree that it can happen.

Q Okay. Now, assuming that that can happen, how do we know that there are not incidents of people who go their entire lives without recovering that memory?

A There just has been no case history of that.

Q But there wouldn't be one, would there?

A If they went their entire life, perhaps they would -- it would never -- they would die with that secret.

Q And nobody would –

A There are people who die with secrets. That's a fact.

Q Sure.

A And those secrets could be abuse secrets. Are they gone from -- are they amnestic for those abuse secrets? We don't know the answer to that.

Q Possibly, possibly not.

A Possibly so.

Q But my point is that it -- a person could go their entire life without other people knowing what happened, correct?

A Yeah.

Q And, in fact, assuming that the dissociative amnesia is real and happens so that it's not in that individual's conscious awareness, that person could actually go their entire life without knowing?

A Okay. Yes. I would agree.

McCurdy depo pp. 50:4-14; 55:21-25; 63:10-22; 64: 11-15; 73:1-6; 74:25; 75:1-2, 7-25; 76:1; 80:8-12; 83:15-20; 136:23-25; 137-38:1-14.

ARGUMENT

I. THE COURT DID NOT CONSTRUE THE FACTS IN THE LIGHT MOST FAVORABLE TO DOE.

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. Bates v. City of Columbia, 301 S.C. 320, 391 S.E.2d 733 (Ct. App. 1990). In determining whether to grant summary judgment, the pleadings and documents on file must be liberally construed in the nonmoving party's favor and the nonmoving party must be accorded the benefit of all favorable inferences that might reasonably be drawn from the record. Id; Grooms v. Marlboro County Sch. Dist., 307 S.C. 310, 312 (Ct. App. 1992). It is a matter for the jury to consider the weight to be given the testimony. Doe by Doe v. Greenville Hosp. Sys., 323 S.C. 33, 36 (Ct. App. 1994).

In its order granting summary judgment to the Respondents on the issue of the statute of limitations, the court based its analysis on many factual inferences drawn in favor of the Respondents rather than Doe.

For example, in the Order granting summary judgment for Smith, the court states that the alleged circumstances would have put a person of common knowledge and experience on notice some right of Doe's had been invaded. In support of this conclusion, the court cites deposition testimony of Doe and concludes that "this testimony is *evidence* that [Doe] knew at the time the situation was allegedly going on,

that she was being harmed." Smith Summary Judgment Order, pp. 6-7 (emphasis added). Even if this were evidence of such knowledge, this testimony is taken out of context as Doe was testifying as to what she had remembered about the abuse since her recollection first began in 2007, not what she remembered as a child. In fact, the court acknowledges that Doe could not answer any questions about her feelings at the time of the abuse because she still could not remember them. Smith Summary Judgment Order, p. 7.

The court further states that it was not reasonable for Doe to testify that she was uncomfortable and "froze" while Smith was touching her in the classroom but that she did not think it was wrong or that Smith was harming her. Smith Summary Judgment Order, pp. 7-8. Again, this testimony is taken out of context as Doe was testifying as to what she had remembered about the abuse since her recollection first began in 2007, not what she remembered as a child. She has steadfastly asserted that she had absolutely no recollection of the abuse until early 2007. In any event, the reasonableness of the reaction of a child victim to sexual abuse by a trusted adult like Smith is clearly a question to be determined by a jury. The factual inference to be drawn at the summary judgment stage is that Doe's "freezing" up illustrates that the acts were so shocking to her young psyche that she did not know how to process them, leading to the repression of the memories of the abuse.

The court goes on and concludes that a yearbook entry from Smith in Doe's yearbook shows nothing unusual and that Smith's handling of Doe's attempted suicide was proper. Smith Summary Judgment Order, pp. 9-10. These are conclusions to be made by a fact finder, not to be summarily decided by the court. A jury could reasonably conclude that the yearbook entry confirms an unusual relationship existed between Doe

and Smith that included inappropriate sexual contact and that his silence with respect to the suicide attempt demonstrates that he did not want any inquiry into their relationship.

II. THE STATUTE OF LIMITATIONS WAS TOLLED DURING DOE'S PERIOD OF REPRESSION.

Generally, a cause of action accrues at the time of the injury. Holy Loch Distributors, Inc. v. Hitchcock, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998). However, the statue of limitations is tolled during until a minor reaches the age of maturity, eighteen. S.C. Code Ann § 15-3-40. Moreover, the discovery rule tolls the statute of limitations during the period a victim psychologically represses her memory of sexual abuse. Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 167-168 (Ct. App. 1999); S.C. Code Ann. § 15-3-535.

Does such as Doe in this case do not suffer from statutory limitations on filing and action where circumstances prevent them from knowing they have been harmed. Moriarty, 334 S.C. 162 (Ct. App. 1999). Survivors of sexual abuse who repress their memories of sexual abuse and then recover them many years later -- when they are finally able to confront them – would otherwise be effectively blocked from seeking legal redress for their injuries by traditional statutes of limitations, which typically commence when the wrong is committed. These statutes, such as those relied upon by the Respondents in their motions for summary judgment, traditionally provide no legal action can be maintained unless brought within a specified period of time. However, in cases such as this one involving repressed memory, the victim is unaware of the wrongful event until well after the statute of limitations has expired.

In response to such cases, South Carolina has applied the discovery rule to prevent the injustice which would result from the strict application of the statute of

limitations. *See* Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 167-168 (Ct. App. 1999). The Respondents acknowledge this is a case of alleged repressed memory of childhood sexual abuse and that Doe does not claim merely that she did not realize the full extent of her injuries and, as such, this case is distinguishable from Doe v. Crooks, 364 S.C. 349, 613 S.E.2d 536 (2005), which is relied upon heavily by the court in its in order granting summary judgment on the issue of the statute of limitations.

In Doe, the plaintiff was aware that as a child he had been sexually abused by his father for a number of years, however, it was not until many years later that he learned the extent of his injuries. The Supreme Court held that S.C. Code Ann. Section 15-3-40(1) (Supp. 1991) tolls the statute until Doe reaches majority, however, because Doe did not involve allegations of repressed memory, the Court held the action was barred.

Here, Doe claims that she was abused and otherwise harmed by the Respondents while she was a minor, repressed those memories before she reached the age of majority, and did not recover them until early 2007. When viewing the facts in the light most favorable to Doe, this case was filed within 1 year of recollection of the abuse from Smith - the trigger of the statute of limitations in repressed memory cases, well within the 3 year statute of limitations provided by the discovery rule. *See* S.C. Code Ann. § 15-3-535; Moriarty v. Garden Sanctuary Church of God, 334 S.C. 150, 167-168 (Ct. App. 1999). Accordingly, the Respondents motions should be denied.

a. THERE IS SUFFICIENT INDEPENDENTLY VERFIABLE EVIDENCE OF ABUSE.

"Objective verifiability" is required for the application of the discovery rule in cases of repressed memory. Moriarty, 334 S.C. 150, 171 (Ct. App. 1999).

The element of "objective verifiability" may be satisfied by corroborating evidence, for example:

> (1) admission by the abuser; or
>
> (2) a criminal conviction; or
>
> (3) documented medical history of childhood sexual abuse; or
>
> (4) contemporaneous records or written statements of the abuser, such as diaries or letters; or
>
> (5) photographs or recordings of the abuse; or
>
> (6) an objective eyewitness's account; or
>
> (7) evidence the abuser had sexually abused others; or
>
> (8) proof of a chain of facts and circumstances having sufficient probative force to produce a reasonable and probable conclusion that sexual abuse occurred.

Id.

It is important to note that these are merely examples of corroborating evidence that would satisfy the objective verifiability standard. They are not elements of objective verifiability. Here, Doe has a documented medical history of childhood sexual abuse,[11] contemporaneous written statements of the abuser (Smith),[12] and a chain of facts and circumstances - including classic grooming activities from Smith,[13] Smith's concealment of Doe's suicide attempt in his classroom,[14] and other incidents involving inappropriate

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[11] *See, e.g.* affidavit of Heidi Zinzow deposition testimony of the 30(b)(6) representative of James Island High school, and the deposition testimony of Respondent Smith.

[12] *See, e.g.* a handwritten note from Respondent Smith to Doe from her 1989 James Island High School yearbook.

[13] *See, e.g.* affidavit of Heidi Zinzow , deposition testimony of the 30(b)(6) representative of James Island High school, and the deposition testimony of Respondent Smith.

[14] *See* Smith's deposition testimony.

conduct on Smith's behalf[15] which have sufficient probative force to produce a reasonable inference, in the light most favorable to Doe, that the sexual abuse occurred.[16]

The court however, held that Doe was required to present medical records from the time she was abused to show a documented medical history of abuse. Smith Summary Judgment Order, pp. 9. Doe presented no such records because she did not recall the events of abuse until 2007. She therefore did not seek treatment until that time. All of the post 2007 medical records from her providers indicate that she was abused sexually by her teacher, Smith. Moreover, the chain of facts and circumstances regarding the grooming behavior of Smith with Doe can reasonably be inferred that the abuse did occur.

Additionally, the testimony of both Doe and the Respondent's expert witnesses on dissociative amnesia, discussed more fully above, 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. Moriarty, 334 S.C. 150 (Ct. App. 1999). Accordingly, the Respondents' motions should be denied.

III. THE RESPONDENTS OWED A DUTY OF CARE TO DOE.

a. Gross Negligence.

The Respondents in this case would be liable to Doe for her loss when their responsibility to supervise or control Smith or otherwise protect its student, Doe, is exercised in a grossly negligent manner. S.C. Code Ann. § 15-78-60(25); Grooms v.

[15] *See* Smith's deposition testimony and the deposition testimony of the 30(b)(6) representative of James Island High School.

[16] *See* deposition testimony of Rita Avila.

Marlboro County Sch. Dist., 307 S.C. 310, 313 (Ct. App. 1992). Whether in fact the loss resulted from the Respondent's alleged grossly negligent conduct is for the jury to determine. Woodell v. Marion Sch. Dist. One, 307 S.C. 297 (S.C. Ct. App. 1992); Duncan v. Hampton County Sch. Dist. 2, 335 S.C. 535, 545-546 (Ct. App. 1999).

The South Carolina Supreme Court has defined gross negligence as "the failure to exercise slight care" and "the absence of care that is necessary under the circumstances." Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 490 (1993). South Carolina law is clear that the Respondents are liable to its students for a loss when their responsibility to supervise, protect, or otherwise control one of its teachers was exercised in a grossly negligent manner under S.C. Code Ann. § 15-78-60(25); Woodell v. Marion Sch. Dist. One, 307 S.C. 297 (Ct. App. 1992). Whether in fact the loss resulted from the Respondent's alleged grossly negligent conduct is for the jury to determine. Woodell v. Marion Sch. Dist. One, 307 S.C. 297 (S.C. Ct. App. 1992); Duncan v. Hampton County Sch. Dist. 2, 335 S.C. 535, 545-546 (Ct. App. 1999).

Moreover, "the burden of establishing this limitation upon liability is upon the governmental entity asserting it as an affirmative defense." Doe by Roe v. Orangeburg County Sch. Dist. No. 2, 329 S.C. 221, 223-224 (Ct. App. 1997) *citing* Rakestraw v. South Carolina Dep't of Hwys. & Pub. Trans., 323 S.C. 227, 230-31, 473 S.E.2d 890, 892 (Ct. App. 1996); Strange v. S.C. Dep't of Highways & Pub. Transp., 314 S.C. 427, 430 (S.C. 1994)("The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense.").

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 Redden. CCSD/JIHS Order pp. 7-14.

Here, the reasonable inference drawn from the testimony and evidence at this stage is that Respondent Smith routinely and repeatedly violated school policy in the discharge of his duties as a teacher and that both James Island High School and the Charleston County School District did absolutely nothing to enforce these policies, nothing to ensure that they were being followed, and nothing to document Smith's violations of policy in his personnel file so that appropriate action could be taken. Doe claims focus on the Respondent's alleged gross negligence in supervising its teacher, Smith, and protecting its student, Doe.

Under these factual circumstances, whether School District exercised "slight care" in never once noticing that Smith was giving student's rides in his car and utilizing that vehicle to sexually abuse Doe, never once making no effort to offer guidance, accommodation, or other support to Doe when she attempted suicide on school grounds, and otherwise completely failing to ensure its teacher, Smith, adhered to policies designed to protect the students, including Doe, is a question for the jury. Furthermore, it is for the jury to determine whether these failures constituted gross negligence and whether Doe's injuries were proximately caused by such gross negligence. Accordingly, the Respondents' motions should be denied.

b. <u>Scope of Employment.</u>

Respondent CCDS and JIHS also assert, and the trial court found, that no duty existed between the school and its student, Doe, because acts of abuse are outside the scope of employment as a matter of law. CCSD/JIHS Order pp. 14-15.

"The terms 'course of employment' and 'scope of authority' are not susceptible of accurate definition. What acts are within the scope of employment can be determined by no fixed rule. The authority from the master is generally to be gathered from all the surrounding and attendant circumstances." Adams v. South Carolina Power Co., 200 S.C. 438, 441 (S.C. 1942).

Under South Carolina law, it is not necessary to find the particular act creating liability was within the servant's authority. Nor is it necessary that the assault should have been made as a means or for the purpose of performing the work the servant was employed to do. Crittenden v. Thompson-Walker Co., Inc., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986); Carr v. William C. Crowell Co., 28 Cal.2d 652, 171 P.2d 5 (1946); Fields v. Sanders, 29 Cal.2d 834, 180 P.2d 684 (1947).

The proper inquiry is "if the servant is doing ***some*** act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." Crittenden v. Thompson-Walker Co., 288 S.C. 112, 115-116 (S.C. Ct. App. 1986) (emphasis added); Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d at 798-799, (S.C. 1945) *quoting* Cantrell v. Claussen's Bakery, 172 S.C. 490, 494, 174 S.E. 438, 440 (1934). 288 S.C. at 115-116, 341 S.E.2d at 387 (citations omitted); *accord* S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 246 (S.C. 1991).

"The reason which has supported the principle of respondeat superior, based upon the judicial interpretation and declaration of public policy, is that the principal, selecting his agent and directing the manner in which he shall execute the agency, should in justice to third persons with whom the agent may deal, and who are not responsible either for his selection or conduct, be held liable for his torts." Jones v. Elbert, 211 S.C. 553, 558 (S.C. 1945) *citing* Sams v. Arthur, 135 S.C. 123, 133 S.E. 205, 208.

Under South Carolina law - which takes a decidedly broad view of acts in furtherance of the master's business[17] - it is irrelevant if Smith may have taken actions that were outside of the technical scope of his authority as a teacher. If Smith is doing ***some*** act in furtherance of James Island High School or the Charleston County School District with Doe, he must be regarded as acting within the scope of his employment, even if he exceeds his technical authority in doing so. *See* Crittenden, Jones *supra.*

The Respondents claim that Smith was not acting within the scope of his employment while assaulting Doe. However, Smith clearly was acting within the scope of his employment when he taught and coached Doe, both on school grounds and during extracurricular activities. Smith routinely would take Doe in his car from school to practice and to her home. According to the Respondents, this conduct was not only within the scope of his employment but common place at the time. The Respondents' knew or should have known of Smith's trips with Doe and others, yet did not to prevent

[17] South Carolina routinely holds that employers can properly be found vicariously liable for the intentional torts of their employees. *See* Berkeley - Dorchester Counties Econ. Dev. Corp. v. United States HHS, 395 F. Supp. 2d 317, 323 (D.S.C. 2005) (civil conspiracy and slander within scope of employment); Polatty v. Char, 67 S.C. 391, 395 (S.C. 1903) (assault and battery within scope despite lack of express authorization by principal); Jamison v. Howard, 271 S.C. 385, 388 (S.C. 1978) (assault within the scope of employment even when the employee exceeded his authority and acted contrary to the express orders of the employer); Crittenden v. Thompson-Walker Co., 288 S.C. 112, 116 (S.C. Ct. App. 1986) (assault and battery); Murphy v. Jefferson Pilot Communs. Co., 364 S.C. 453, 462 (S.C. Ct. App. 2005) (defamation); Murray v. Holnam, Inc., 344 S.C. 129, 139, 542 S.E.2d 743, 748 (Ct. App. 2001) (defamation); S.C. State Budget & Control Bd. v. Prince, 304 S.C. 241, 247 (S.C. 1991) (defamation).

this from happening, did nothing to warn Smith or Doe that this was inappropriate conduct, and did nothing to otherwise take any reasonable measure to protect Doe. While the assaults themselves may or may not have been technically outside the scope of his employment, the conduct of transporting Doe to and from school to practice and to her home apparently fell squarely within his employment duties. Accordingly, Smith was performing at least *some* act in furtherance of the school and the district's business, and whether or not the Respondent's are responsible for the resulting harm is a proximate causation question to be determined by the jury.

Moreover, Smith's conduct with respect to Doe's attempted suicide was clearly within the scope of his duties as a teacher. The emergency medical care of a student and the following actions to be undertaken by the teacher, the school, and the school district are all actions, independent of any acts sexual abuse, which are within Smith's scope of employment.[18] The question of whether or not Doe's resulting drop out was a proximate cause of the failure of Smith, the school, and/or the district failure to exercise even slight care owed to Doe arising out of her suicide attempt is a question for the jury to determine.

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[18] For these reasons, the analysis set forth in Degenhart v. Knights of Columbus, 309 S.C. 114 (1992), Moore v. Berkeley County School District, 326 S.C. 584 (1997), and Brockington v. Pee Dee Mental Health Center, 315 S.C. 214 (1993), all of which apply to an employer's duty with respect to employee conduct that is outside the scope of employment, is not applicable. To the extent Smith was taking any action in furtherance of the school's business by giving rides and tending to Doe after her suicide attempt, the question becomes one for the jury.

To the extent Smith was acting outside the scope of his employment by taking Doe for rides in his car and tending to Doe after her suicide attempt, the ruling by the trial court barring the claims of outrage and for punitive damages against Smith are in error because those limitations on liability apply only to employees acting within the scope of their employment.

The record and evidence supports the inference be drawn in Doe's favor insofar as genuine issues of material fact exist as to what the actual scope of Smith's employment, how exactly Smith exceeded the scope of his employment, and whether Smith's conduct within the scope of his employment contributed in whole or in part to her injuries.

At this stage of the proceedings, all reasonable inferences must be drawn in the light most favorable to Doe.

Clearly, Smith was doing at least *some* act in furtherance of the school and the districts business during his travels with Doe. Even if Smith was acting without the express authorization of the school or the district, which is most properly reserved for determination by a jury, his activities with Doe were not so wholly disconnected from the business of the school and the district such that he was acting outside the scope of his employment as a matter of law. This question remains a fact question to be determined by the jury. Accordingly, the Respondents' motions must be denied.

CONCLUSION

For the foregoing reasons, the orders granting summary judgment in favor of the Respondents should be reversed and the case set for a jury trial.

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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

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

v.

Jane Doe, — Appellant.

Proof of Service

I certify that I have served the Appellant's Initial Brief and the Designation of Matter to be Included on the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on February 11, 2013, addressed to the attorneys of record, Robin Jackson at Senn Legal LLC, P. O. Box 12279, Charleston, SC 29422 and Brian Quisenberry at Young Clement Rivers, LLP, 25 Calhoun Street, Suite 400, P.O. Box 993, Charleston, SC 29402.

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