THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Bentley D. Price, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2020-000804

John Doe,……..……..Appellant,

v.

Bishop of Charleston, a Corporation Sole, and
The Bishop of the Diocese of Charleston, in his
official capacity,……..…….Respondents.

INITIAL BRIEF OF RESPONDENTS

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2. **As independent sustaining grounds, the Circuit Court could properly have granted summary judgment based upon the statute of limitations or based upon the *res judicata* effect of the 2007 class action.**

3. **All of Appellant's separate causes of action likewise failed due to lack of any evidence supporting the essential elements of each claim.**

STATEMENT OF THE CASE

A. Procedural History

John Doe filed this action against the Diocese of Charleston and "the Bishop of the Diocese of Charleston, in his official capacity"[1] in August, 2018. Respondents timely filed a motion to dismiss based upon charitable immunity and the *res judicata* effect of a 2007 class action settlement.[2] The Circuit Court denied those motions on March 4, 2019. The Diocese answered the Amended Complaint on March 19, 2019, and filed a motion for partial summary judgment regarding "the Bishop of the Diocese of Charleston, in his official capacity" on March 29, 2019.[3] (Answer and Motion for Partial Summary Judgment) The Diocese filed a supplemental brief regarding the important religious liberty issues and supplemental authority in support of its motion. (Supplemental briefs) The Circuit Court denied the Diocese's motion for partial summary judgment on July 24, 2019.[4]

Pursuant to the Circuit Court's scheduling order dated June 14, 2019, discovery closed on October 15, 2019, and the deadline for filing dispositive motions was October 30, 2019. (Scheduling Order) Respondents filed individual motions for summary judgment based upon the

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[1] The only proper legal entity is Bishop of Charleston, a Corporation Sole, an entity established by the General Assembly in 1880.

[2] Appellant has taken the position that the ruling on Respondents' 12(b)(6) motion is dispositive of the issue for the remainder of the case. Respondent pointed out that the presiding judge who heard the motion to dismiss specifically recognized that Respondent could, and would, raise the issue again at the summary judgment stage of the litigation. The court below recognized that determination and overruled Appellant's argument.

[3] Both by statute and pursuant to the bylaws of the Corporation Sole, the ecclesiastical office of Bishop of Charleston operates in the secular world as the Corporation Sole. The Diocese maintains its position that the Circuit Court's refusal to give full effect to its decisions regarding how it is organized and operates in civil law violated the First Amendment's religion clauses.

[4] After the Circuit Court denied reconsideration of that order, the Diocese appealed.

absence of any genuine issue of material fact regarding: (1) the defense of common law charitable immunity; (2) the defense of the statute of limitations;[5] (3) the defense of *res judicata*; and that there was no genuine issue of material fact regarding the elements of each claim asserted by Appellant – (4) negligence, negligent retention, negligent supervision, and outrage; (5) conspiracy; (6) fraud-based and contract claims; and (7) breach of fiduciary duty. In support of the summary judgment motions, Respondent filed the affidavits of three people and filed supplemental affidavits of four expert witnesses. (Notices of Filing Affidavits).

Approximately November 15, 2019, the Circuit Court called a hearing on all pending motions for December 12, 2019. Prior to that hearing, Appellant filed nothing in opposition to Respondents' dispositive motions – he filed no deposition testimony, no discovery, no affidavits, and no briefing on the legal issues raised by Respondents' motions. Thus, Respondents' memoranda of law and evidentiary submissions constituted the only record before the Court. The Court heard oral argument on Respondents' dispositive motions based on charitable immunity, the statute of limitations, and the *res judicata* effect of the 2007 class action settlement. (Transcript of Hearing). On January 9, 2020, the Circuit Court granted Respondents' summary judgment motion based on charitable immunity. (Order granting Motion for Summary Judgment) After the Circuit Court denied Appellant's Rule 59 motion, this appeal followed.

B. Factual Background

Sacred Heart School operates as a ministry of Sacred Heart Parish and of the Roman Catholic Diocese of Charleston. The Diocese of Charleston, and its ministries and operations listed in the *Official Catholic Directory* are, and have been, recognized as charitable entities by

[5] Respondents also pointed to the lack of admissible evidence required to satisfy *Moriarty v. Garden Sanctuary Church of God* regarding claimed repressed memory syndrome. (Supplemental Brief on Inadmissibility of Testimony; Affidavits of expert witnesses Dr. Elizabeth Loftus, Dr. James Hudson, Dr. Janine Shelby, and Dr. Monica Applewhite).

the Internal Revenue Service. There was no evidence in the record before the Circuit Court calling into question the Diocese's charitable status in 1970.

Appellant was a student at the Sacred Heart. For the 1970 – 1971 school year, his 7th-Grade teacher was Chris Hartnett. Hartnett died many years ago. Another teacher at the school was Harold "Hal" Brooks. Brooks testified by affidavit that he only taught at Sacred Heart for the fall semester, 1970, before quitting to return to his father's business in Winnsboro. Thus, the only evidence before the Circuit Court established that the alleged abuse must have taken place during the fall of 1970.

Both Hartnett and Brooks had just graduated college, and teaching at Sacred Heart was the first full-time job for both men. While Brooks returned to his family business in late-1970, Hartnett became employed as a teacher at a middle school in Summerville, South Carolina, where he taught for much of the next 30 years. There is no record, nor any admissible evidence in the record, that either teacher was ever accused of sexual abuse of a minor or of any inappropriate behavior with a child before or after the alleged incidents. (Affidavit of Brooks).

ARGUMENT

An appellate court reviews the grant of summary judgment under the same standard as the Trial Court.[6]

> Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings.[7]

The Court cannot simply ignore facts that are unfavorable to the non-moving party, and must determine whether a verdict in favor of the party opposing summary judgment would be reasonably possible.[8] It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine.[9] The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine.[10] Rather, summary judgment should be granted when "plain, palpable, and indisputable facts exist on which reasonable minds cannot

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[6] *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 868 (2001).

[7] *NationsBank v. Scott Farm*, 320 S.C. 299, 302–03, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted)(emphasis added).

[8] *Stewart v. State Farm Mut. Auto Ins. Co.*, 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

[9] *Main v. Corley*, 281 S.C. 525, 316 S.E.2d 406 (1984).

[10] *Priest v. Brown*, 302 S.C. 405, 408–09, 396 S.E.2d 638, 639–40 (Ct. App. 1990).

differ."[11] The fact that a case might present a novel issue does not render summary judgment inappropriate.[12] On appeal, the Court may affirm the grant of summary judgment on any ground found in the record.[13]

I. The Circuit Court properly granted summary judgment to Respondents based upon the common law doctrine of charitable immunity applicable at the time Appellant allegedly suffered sexual abuse – Fall, 1970.

The only evidence before the Circuit Court was that the Roman Catholic Diocese of Charleston was a charitable organization at the time Appellant claimed he was sexually abused by two teachers employed by Sacred Heart School in Charleston. The Diocese of Charleston has been a charitable organization since the Corporation Sole was created by the General Assembly in 1880.[14] As the South Carolina Supreme Court, this Court, and the Circuit Courts have consistently ruled, the Diocese and its employees, agents, and officers, are all part of a charitable organization, and they are entitled to immunity from suit for torts that took place prior to 1981.[15]

For nearly all of the 20th Century, the law in South Carolina was that charities were immune from suit. The Supreme Court first adopted the rule of charitable immunity in *Lindler v.*

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[11] *See Logan v. Cherokee Landscaping & Grading Co.*, 389 S.C. 611, 617, 673 S.E. 2d 801, 803.

[12] *See*, *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005); *Medical University of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004).

[13] *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) *and Rule 220(e), Rule 208(b)(2), SCACR.*

[14] Affidavit of John Barker and Act of the General Assembly, December 13, 1880.

[15] *See* i.e. *Orders of Hon. J.C. Nicholson in John Doe 193 v. Bishop of Charleston,* Civil Action 2013-CP-10-3733; *Order of Hon. Deadra Jefferson in John Doe v. The Diocese of Charleston and Jane Doe*, Civil Action 02-CP-10-0770.

Columbia Hosp. of Richmond Cnty.,[16] which held that "a charitable corporation is not liable to injuries resulting from the negligent or tortious acts of a servant, in the course of his employment, where the corporation has exercised due care in his selection."[17] Two years later, in *Vermillion v. Women's College of Due West* the Supreme Court expanded the doctrine of charitable immunity, holding that charitable immunity rendered charitable entities exempt from liability "for the torts of their superior officers, and agents as well as for those of their servants or employees whether these be selected with or without due care."[18] The Court stated that, in some instances, the rights of the individual must yield to the public good, and charities should not face ruin to compensate one or more individuals.[19]

Vermillion was a wrongful death case arising from the collapse of a wooden balcony in an auditorium on the college campus. Plaintiff's estate claimed that the school or its superior officers and agents "failed to provide a safe place for an invited guest."[20] The Court held that, while the injured person would have a remedy against the individual employee wrongdoer, she had no remedy against the charitable organization.[21]

The Supreme Court reaffirmed the defense of charitable immunity in *Eiserhardt v. State Agricultural and Mechanical Society of South Carolina*, though it refused to extend immunity to

[16] 98 S.C. 25, 81 S.E. 512 (1914).

[17] *Lindler*, 81 S.E. at 512-13.

[18] *Vermillion*, 104 S.C. 197, 201, 88 S.E. 649, 650 (S.C. 1916).

[19] *Id.*

[20] *Id.*

[21] It is worth noting that one of the alleged abusers is living and is known to Appellant's counsel.

activities outside the scope of the charitable organization's mission.[22] In 1966, the Supreme Court again reiterated the doctrine of charitable immunity from suit in *Decker v. Bishop of Charleston*.[23] In *Decker*, the Supreme Court applied charitable immunity to a tort claim against the Diocese and declared the Church to be a true charity entitled to immunity from suit altogether.[24] The Court further held that a charity's immunity from suit is unaffected by the fact that the charity procured liability insurance that would cover the loss.[25] Rather, the Diocese was immune from suit for torts committed by its employees. The *Decker* Court affirmed the dismissal of a negligence suit on the Diocese's demurrer. Importantly, the *Decker* Court was asked to overrule the doctrine of charitable immunity and declined to do so.

Prior to 1973, the law of charitable immunity was controlled by *Lindler* and *Vermillion*, which clearly held that charitable organizations could not be held liable for the torts or negligence of their officers, agents, or employees. Charitable organizations could be liable if they created a nuisance on their property that affected neighboring property owners; charitable organizations could be liable in tort if they became engaged in commercial ventures like parking lots. But, the rule itself held firm – charities were immune from suit for the torts committed by individuals affiliated with the organization.

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[22] *Eiserhardt v. State Agricultural and Mechanical Society of South Carolina*, 111 S.E.2d 568 (1959).

[23] *Decker v. Bishop of Charleston*, 247 S.C. 317, 147 S.E.2d 264, 268 (1966).

[24] *Decker v. Bishop of Charleston*, 247 S.C. at 324-25, 147 S.E.2d at 268.

[25] *Id.* at 269.

In 1973, *Jeffcoat v. Caine*[26] addressed an allegation that South Carolina Baptist Hospital could be liable for false imprisonment, an intentional tort. The Supreme Court declined to extend charitable immunity to exempt charitable organizations from liability for that intentional tort. However, the Court refused to overturn its precedents, and *Lindler, Vermillion,* and *Decker* remained the law in South Carolina.

Four years later, in *Crowley v. Bob Jones Univ.*[27] the Supreme Court clarified its holding in *Jeffcoat*. *Crowley* involved allegations that Bob Jones was grossly negligent, reckless, and willful in failing to provide timely and prudent medical treatment to a minor plaintiff who sustained a severe eye injury while performing duties required of students at an elementary school operated by the university. The Court held that, under the *Jeffcoat* decision, if the plaintiff could prove that the defendant-organization itself committed an intentional tort, then the plaintiff could recover damages, even though the defendant was a charitable organization. The Court further held that charitable immunity was an affirmative defense that the charitable organization bore the burden of proving.

Jeffcoat and *Crowley* were issued years after the alleged abuse of Appellant. At the time of the events complained of, *Lindler, Vermillion,* and *Decker* controlled, and a charitable organization was immune from suit for the negligence and torts of individuals affiliated with the organization. As *Vermillion* made clear, "the injured person has his remedy against the actual wrongdoer," as opposed to the charitable organization itself. But the Court also recognized that though the wrongdoer may be "financially irresponsible, . . . [t]he law does not undertake to provide a solvent

[26] *Jeffcoa*t, 261 S.C. 75, 198 S.E.2d 258 (1973). In relying nearly exclusively on *Jeffcoat v. Caine,* Appellant has effectively conceded that summary judgment was properly granted as to all claims except for Outrage/Intentional Infliction of Emotional Distress.

[27] *Crowley v. Bob Jones Univ.*, 268 S.C. 492, 234 S.E.2d 879 (1977)

defendant for every wrong done." The Court then provided many examples where an injury cannot be compensated under the law, noting that the State is "most deeply interested in the preservation of public charities." The Court's strong affirmations of charitable immunity held firm at the time Appellant alleges he was molested.[28]

On the same day in 1977 the Supreme Court issued its decision in *Crowley*, it also issued *Brown v. Anderson Cnty. Hosp. Assoc.*[29] The defendant hospital was a charitable entity, and the plaintiff's decedent was a patient at the time of his death caused by a fire in his hospital room. The plaintiff alleged that the fire and the hospital's failure to protect the patient were due to the negligent and reckless acts of the hospital's employees. The Court again summarized the state of the law of charitable immunity as it stood in 1977 as follows:

> The decisions of this Court indicate that the present state of the law in South Carolina with respect to charitable immunity is the following: It is contrary to public policy to hold a charitable institution responsible for the negligence of its servants selected with due care, *Lindler v. Columbia Hospital*, 98 S.C. 25, 81 S.E. 512 (1914), or for servants, agents, employees, or superior officers selected without due care. *Vermillion v. Woman's College of Due West*, 104 S.C. 197, 88 S.E. 649 (1916). The fact that a patient in a charitable hospital pays for a room and attendance does not render the hospital liable for injuries to the patient caused by the negligence of its servants. *Lindler v. Columbia Hospital, supra*. The relation of the injured person to the charity is of no importance so that it is immaterial whether the injured person is an employee or invitee of the institution. *Vermillion v. Woman's College of Due West, supra.* A charitable institution, however, is not exempt from liability for trespass and nuisance arising out of its activities as a lessee. *Peden v. Furman University*, 155 S.C. 1, 151 S.E. 907 (1930). Nor does immunity extend to a situation where the activity out of which the liability arises is primarily commercial in character and wholly unconnected with the charitable purpose for which the corporation was organized. *Eiserhardt v. State Ag. and Mech. Soc. of S.C.*, 235 S.C. 305, 111 S.E. (2d) 568 (1959). Churches have also been exempted from liability for negligence, *Decker v. Bishop of Charleston,* 247 S.C. 317, 147 S.E. (2d) 264 (1966), holding additionally that procurement of liability insurance by the charity does not create liability to the person injured where the charity is otherwise immune from liability. Finally,

[28] *Vermillion*, 104 S.C. at 201-2; 88 S.E. at 650.

[29] *Brown v. Anderson Cnty. Hosp. Assoc.*, 268 S.C. 479, 234 S.E.2d 873 (1977).

> where the charity commits an intentional tort, it may not interpose the defense of charitable immunity. *Jeffcoat v. Caine*, 261 S.C. 75, 198 S.E. 2d 258 (1973).[30]

The Court then engaged in a lengthy discussion of the public policy reasons behind the doctrine of charitable immunity and the gradual erosion of the doctrine in other jurisdictions. Ultimately, the Court rejected the argument that charitable immunity should be abrogated altogether.[31] The Court adopted an intermediate ground and abolished charitable immunity *only* "for a hospital's heedless or reckless disregard for the plaintiff's rights."[32] The Court then added that "[w]e do not extend it so as to abrogate or modify the defense of charitable immunity as to churches, rescue missions, orphanages, colleges, and other institutions which are charitable in nature, purpose and operation."[33]

Not until 1981 did the South Carolina Supreme Court abrogate the doctrine of charitable immunity.[34] However, the Court only did away with charitable immunity going forward. The abrogation, like any other modification to charitable immunity, could not be applied retrospectively.[35] Thus, a Court must apply charitable immunity as it existed <u>at the time of the allegedly tortious activity</u>.[36] *Jeffcoat* and *Crowley* are simply inapplicable to Appellant's claims.

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[30] *Brown v. Anderson Cty. Hosp. Asso*c., 268 S.C. 479, 483-84, 234 S.E.2d 873, 874-75 (1977)

[31] *Id.*68 S.C. at 487, 234 S.E.2d at 876-77.

[32] *Id.*

[33] *Id.*

[34] *Fitzer v. Greater Greenville South Carolina YMCA*, 277 S.C. 1, 282 S.E.2d 230 (1981).

[35] *See Hupman v. Erskine College*, 281 S.C. 43, 44, 314 S.E.2d 314, 315 (1984), *Hasell v. Medical Society of S.C.* 288 S.C. 318, 342 S.E. 594, 595 (1986) *see also Brown v. Anderson Cty. Hosp.*, 268 S.C. 479, 234 S.E.2d 873 (S.C. 1977) (modifying charitable immunity as to hospitals only to render them liable for heedless and reckless acts and prospectively only).

[36] *See Laughridge v. Parkinson*, 304 S.C. 51, 403 S.E.2d 120, 120 (1991) (holding that charitable immunity law in existence at the time of tortious conduct in 1979 must be applied).

As late as 1979, in *Douglass v. Florence Gen'l. Hosp.*, the Supreme Court reaffirmed the doctrine of charitable immunity for torts that occurred while the doctrine remained effective.[37] The plaintiff initiated that case prior to the Supreme Court's decision in *Brown v. Anderson Cty. Hosp.*, though the case was pending when the *Brown* decision was issued. The trial court dismissed the plaintiff's Complaint based upon charitable immunity and determined that *Brown* applied only prospectively and could not give life to plaintiff's claims. The Supreme Court affirmed that decision because *Brown* created liability where, before, there had been none. Thus, in that case, Florence General Hospital was immune from suit for its employees' negligence, even if heedless or reckless.[38] Clearly, therefore, changes to *Lindler*, like those in *Eiserhardt*, or *Jeffcoat* can only be applied prospectively.

In the present case, Appellant's own allegations and testimony establish that his alleged abuse could only have taken place sometime during the 1970-71 school year. One of the accused, Hal Brooks, testifies in his affidavit that he only taught at Sacred Heart School until December, 1970.[39] Therefore, the alleged abuse, which Brooks denies, would have taken place when common law charitable immunity was absolute. – As a result, the Diocese is completely immune from suit, and the Circuit Court properly granted summary judgment.[40]

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[37] 273 S.C. 716, 259 S.E.2d 117 (S.C. 1979).

[38] *Douglass*, 273 S.C. at 720, 259 S.E.2d at 118.

[39] *See* Affidavit of Hal Brooks submitted with the Diocese's motions for summary judgment.

[40] The Diocese is, and has been, a charity entitled to common law charitable immunity, which was the established law at the time of any alleged tort. It is without question that both South Carolina and federal authorities have long determined the Diocese to be a charitable institution. South Carolina law does not permit the courts of this state to substitute its judgment for the judgment of an agency. Unlike the legislatively created limitation on liability for charities, immunity from suit is *not* an issue to be applied after a jury verdict. Rather, pre-1981 charitable immunity shields charities from this suit altogether.

As previously noted, what matters for purposes of the present appeal is the law of charitable immunity as it existed in 1970-1971. At that time, *Jeffcoat* had not been decided, and prior to *Jeffcoat*, the Supreme Court had never held that charitable organizations could be liable for intentional torts such as false imprisonment. To the contrary, the Court had always granted sweeping tort immunity to charities before the erosion process started in *Jeffcoat* in 1973. Thus, Appellant's argument that *Jeffcoat* represents the state of the law when his alleged abuse occurred in clearly erroneous. Had that alleged abuse taken place on or after the date of the *Jeffcoat* opinion, Appellant's position might have merit. But as things stand, *Jeffcoat* was not the law of South Carolina in the years relevant to the present case. *Jeffcoat* altered the common law in a manner that created liability where none had previously existed. Accordingly, *Jeffcoat* only affected future claims, and it is irrelevant to this appeal.

Yet, even if Appellant were correct, and *Jeffcoat*'s exception for intentional torts applies, the Circuit Court's decision is still correct because Appellant has not presented evidence sufficient to support the one and only intentional tort he alleges, *i.e.* outrage and intentional infliction of emotional distress. The record before the Circuit Court was bereft of any evidence that the Diocese intended harm toward Appellant or that the Diocese engaged in any egregious, extreme, or outrageous conduct whatsoever.[41]

[41] Respondent moved for summary judgment on Appellant's claim of Outrage/Intentional Infliction of Emotional Distress, pointing out that there was no evidence to support the essential elements of the claim. The record contains nothing in opposition to that motion.

II. As independent sustaining grounds, the Circuit Court could properly have granted summary judgment based upon the statute of limitations or based upon the *res judicata* effect of the 2007 class action.

A respondent "may raise on appeal additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled upon by the lower court."[42] In the present case, Respondent presented additional summary judgment grounds to the Circuit Court. Due to the decision on the charitable immunity issue, the court found it unnecessary to reach those additional grounds. Yet, even if this Court were to disagree with the Circuit Court on charitable immunity, Respondent's other issues serve as sufficient additional sustaining grounds to support the summary judgment granted below.

a. Respondent was also entitled to summary judgment based on the Statute of Limitations / Lack of Admissible Evidence regarding Repressed Memory Syndrome.

Respondent moved for summary judgment based upon the statute of limitations. Appellant claims to have been molested at age 14 in 1970. Appellant further claimed that "his memory was repressed" and later recovered as a result of other litigation, news reports and other circumstances. (Complaint, ¶ 16).

Both the South Carolina Supreme Court and this Court have expressed deep concerns regarding so-called "repressed memory syndrome" in their respective decisions in *Moriarty v. Garden Sanctuary Church of God*.[43] As both courts acknowledged twenty years ago, the theory of repressed memory syndrome was controversial among psychiatrists and psychologists. According to the Supreme Court, there was, even then, no consensus among the psychological,

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[42] *I'On, LLC v. Town of Mt. Pleasant*[42], 330 S.C. 406, 419, 526 S.E,2d 716, 723 (2000).
[43] *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 511 S.E.2d 699 (Ct. App. 1999); *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 534 S.E.2d 672 (S.C. 2000).

medical, and legal communities regarding the validity of the theory of repressed memory.[44] Both courts likewise acknowledged "the horrific possibility of false accusations" and acknowledged that corroborating evidence is required because of "the disagreement among the psychological and medical communities about the validity of repressed memory syndrome, the danger a plaintiff's memories could be faked or implanted during therapy, and the desire that a plaintiff not have the ability to control the running of the statute of limitations solely by allegations whose only support is contained within the plaintiff's mind."[45] Because of these concerns, the Supreme Court requires that a plaintiff claiming repression must present both at summary judgment stage and at trial: (1) objectively verifiable corroborating evidence to corroborate the fact of the abuse and (2) expert testimony to establish the both the abuse and the fact of the repressed memories.

The *Moriarty* Court held that objective verifiability may be satisfied by corroborating evidence such as: (1) an admission by the abuser; (2) a criminal conviction; (3) documented medical history of childhood sexual abuse; (4) contemporaneous records or written statements of the abuser, such as diaries or letters; (5) photographs or recordings of the abuse; (6) an objective eyewitness's account; (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

[44] *Moriarty*, 341 S.C . at 331 534 S.E.2d at 677.

[45] *Moriarty*, 534 S.E.2d at 680 *citing Roe v. Doe*, 28 F.3d at 408-09 (suggesting that corroborative evidence of abuse and repressed memory should be required) (Hall, J., concurring); *Olsen v. Hooley*, 865 P.2d 1345, 1349-50 (Utah 1993) (requiring corroborating evidence because of concerns about the reliability of memory in general and revived memories in particular, and the difficulty of defending against claims of revived memories of sexual abuse long past); *S.V. v. R.V.*, 933 S.W.2d 1, 7-15 (discovery rule applies in repressed memory case only when claim is "inherently undiscoverable" and "objectively verifiable" through corroborating evidence; court assumed plaintiff's injury was inherently undiscoverable, but rejected application of discovery rule because she offered no corroborating evidence).

probable conclusion that sexual abuse occurred.[46] This corroborating evidence is a prerequisite for application of the discovery rule to toll the statute of limitations.

There was no admissible evidence before the Circuit Court supporting the requirement of objectively verifiable evidence that Appellant was sexually abused. There was no evidence that he reported the abuse to anyone. There was no evidence that he went to a doctor or any other health care provider. There was no evidence that either accused teacher was ever convicted, nor was there any evidence that either teacher confessed to abusing Appellant. In fact, the still-living teacher adamantly denies it, and the deceased teacher taught for 30 years in the Summerville schools, apparently without any accusation of any improper sexual conduct with a minor. There were no photographs or eye witnesses. There was no evidence that either teacher has ever been accused of molesting any other child. There is a complete absence of contemporaneous circumstantial evidence that Appellant was abused in 1970.

In addition, Appellant failed to present admissible expert testimony to establish the abuse, the fact of the repressed memories, and that those memories were repressed between Appellant's 18th birthday (May 28, 1975) and sometime after August 8, 2015 (three years prior to filing the Complaint). There was no admissible expert testimony before the Circuit Court regarding repressed memory syndrome. There are no neuropsychiatric tests that would confirm Appellant ever experienced actual repression of childhood memories. There was no expert testimony that Appellant's so-called recovered memories are even accurate. There was no expert testimony establishing when Appellant began to repress any memory or when he recovered them, or that he had them at all.

[46] *Moriarty*, 341 S.C. at 336-7, 534 S.E.2d at 680, *quoting* 334, S.C. at 171, 511 S.E.2d at 710.

In short, Appellant did not come forward with a shred of admissible evidence that satisfies the heavy burden placed upon him in *Moriarty v. Garden Sanctuary Church of God*.[47] Appellant's inability to satisfy that burden places him in exactly the position that gave both this Court = and the Supreme Court such grave concern – i.e. the only evidence of repressed memory is self-reporting by Appellant. There is no objectively verifiable evidence, nor is there admissible expert testimony as the *Moriarty* Court demanded. Failing that, the discovery rule does not – and cannot – apply.

Pursuant to S.C. Code Ann. § 15-3-535, any individual plaintiff whose claim arose prior to 2001 has 3 years from the date of the tort to bring his claim.[48] The statute of limitations is tolled until a person reaches his or her majority. As the Supreme Court has explained:

> According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. *Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993). We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on *notice* that a claim

[47] Importantly, Respondent filed a motion to exclude testimony by Appellant's treating therapists, none of which was in the record before the Circuit Court at the time the Court entered summary judgment in Respondent's favor. The motion challenged the qualifications of the expert witnesses identified by Appellant and argued that their testimony should be excluded as inadmissible under Rule 702 SCRE. *See* Memorandum of Law Regarding Inadmissibility of Expert Testimony under Rule 702 *and* Supplemental / Reply Affidavits. Appellant did not file any testimony of the treating therapists in any event.

[48] In 2001, § 15-3-555 became effective and extended the statute of limitations for cases involving alleged sexual abuse to 6 years after the victim turned 21 years of age. While statutes of limitation can generally be applied retroactively, a new statute of limitations cannot revive a claim where the prior statute has already run. *Doe v. Crooks*, 354 S.C. 349, 352, 613 S.E.2d 536, 538 (2005). Such a result would violate the defendant's rights under the Due Process Clause of the South Carolina Constitution. *See Goff v. Mills*, 279 S.C. 382, 385, 308 S.E.2d 778, 780 (S.C. 1983); *U.S. Rubber Co. v. McManus*, 45 S.E.2d 335, 338 (S.C. 1947); *Stoddard v. Owings*, 42 S.C. 88, 20 S.E. 25, 26 (S.C. 1894).

> against another party might exist. *Snell v. Columbia Gun Exchange, Inc.*, 276 S.C. 301, 278 S.E.2d 333 (1981). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *cert. granted,* 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed,* 288 S.C. 468, 343 S.E.2d 613 (1986).[49]

Statutes of limitation are not mere formalities or technicalities; rather, statutes of limitation "have long been respected as fundamental to a well-ordered judicial system."[50]

In the present case, Appellant was born in 1957, and he alleges that the sexual abuse occurred during the 1970-71 school year. He reached his majority at in 1975, when he turned 18.[51] Thus, the statute of limitations ran on Appellant's claims no later than 1978. As discussed above, the discovery rule cannot operate to save those claims from the effect of the statute of limitations. Accordingly, Appellant's claims are long since time-barred, and this serves as an additional basis for this Court to affirm the grant of summary judgment to Respondent.

b. Respondent was further entitled to summary judgment based upon the *res judicata* effect of a 2007 class action settlement.

Respondent additionally moved for summary judgment based upon the 2007 class action settlement and judgment entered in Dorchester County. The Diocese of Charleston entered into a Class Action Settlement of all potential claims that employees or agents of the Diocese

[49] *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (S.C. 1996).

[50] *Id.* (internal citations omitted).

[51] S.C. Code Ann. § 15-1-320 changed the age of majority to 18 effective February 6, 1975, just prior to Appellant's 18th birthday.

sexually abused minors.[52] The Settlement Agreement addressed the claims of two classes of individuals:

- All individuals born on or before August 30, 1980 who claim to have been sexually abused as minors by the Diocese of Charleston's personnel ("primary class"), and
- those individuals' spouses and parents ("consortium class").

A Fairness Hearing was held before the Honorable Diane S. Goodstein, on March 9, 2007, and the Court gave final approval to the Settlement Agreement by Orders dated July 30, 2007 and August 31, 2007.[53] The Circuit Court determined that the proposed class settlement was fair to both the named class representatives and to the absent class members, and that both the named plaintiffs and class counsel were adequate representatives of the class. The court entered its judgment approving the settlement classes and ordered class counsel to notify the class of the settlement. The classes were "opt-out" classes, that is, if an individual satisfied the criteria of either class, he is automatically a class member, bound to the law of the case and the terms of the Settlement Agreement. An individual must have affirmatively "opted-out" by filing a Notice of Opt Out to preserve his rights to pursue an independent claim. The Court's Order also specified the manner in which notice of the class settlement and claims procedure was to be provided to the members of the class, including publication in 10 South Carolina newspapers and the Augusta *Chronicle*, as well as the Diocese's publication the *Catholic Miscellany*.

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[52] ***See*** Settlement Agreement - *John Doe #53, John Doe 66, John Doe 66A, John Doe 67, Jane Doe 1 and Jane Doe 2, and Rachel Roe, Individually and as Representative v. The Diocese of Charleston, A Corporation Sole, and the Bishop of the Diocese of Charleston in His Official Capacity of a Class of People Similarly Situated,* Case Numbers 2006-CP-18-1310, 1311, 1636 (Dorchester County Court of Common Pleas).

[53] ***See*** Order Certifying Classes and Giving Preliminary Approval to Settlement; July 30, 2007 Order; August 31, 2007 Order.

With that judgment entered, Appellant's claims are barred under the doctrine of *res judicata*, which applies to putative class members, both absent and actual, in the same manner as it applies to ordinary litigation. The doctrine of *res judicata* is an absolute bar to a subsequent complaint or cause of action in which the merits of that complaint were previously adjudicated in a final decision, the parties to the previous litigations are identical to the subsequent case, and the merits of the successor action were included in the preceding one. "*Res judicata* requires proof of three elements: (1) that a final, valid judgment was entered on the merits of the first suit; (2) the parties to both suits are the same; and (3) the subsequent action involves matters properly included in the first action."[54] "For purposes of *res judicata*, 'cause of action' is not the form of action in which a claim is asserted, but rather the cause of action, meaning the underlying facts combined with the law giving that party a right to a remedy of one form or another based thereon."[55]

Under the doctrine of *res judicata* "a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action."[56] Because the class action judgment is binding upon all those for whom the notice program was reasonably calculated to reach, Appellant's claims are now barred by *res judicata*. All three elements of *res judicata* are present – the Appellant's claims of sexual abuse are identical to the claims asserted in the court-approved class action settlement; Appellant alleges he was a minor who suffered

[54] *Judy v. Judy*, 403 S.C. 203, 677 S.E.2d 213, 217 (Ct. App. 2009); *citing Plott v. Justin Enter.*, 374 S.C. 504, 649 S.E.2d 92, 95 (Ct. App. 2007).

[55] *Judy*, 677 S.E.2d at 218 *quoting Plum Creek Devel. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106, 109 (1999).

[56] *Treadaway v. Smith*, 325 S.C. 367, 479 S.E.2d 849, 855 (Ct. App. 1996).

sexual abuse by an employee, agent, or priest of the Diocese of Charleston; and the allegations of abuse are the same as the conduct defined in the Class Action settlement. Appellant falls squarely within the classes of claimants whose causes of action were resolved and released by the Class Action Settlement and Judgment.

A judgment in favor of the class extinguishes the claims of all members of that class, and the claims merge into the judgment granting relief.[57] The Class Action Court entered a final, valid, and enforceable judgment on the merits of the claims asserted on behalf of the class of similarly situated individuals. The Class Action Court's orders of July 30, 2007 and August 31, 2007, approved the Settlement Agreement that incorporated the claims of the class of claimants.[58] There is no dispute that Appellant's claims were encompassed by the Class Action Settlement and Order Approving Settlement. Appellant neither participated in, nor opted out of the Class Action Settlement.

Appellant's status as a member of the approved class of claimants under the Class Action further satisfies the requirement for identity of parties. "There is, of course, no dispute that under elementary principle of prior adjudication, a judgment in a properly entertained class action is binding on the class members in any subsequent litigation."[59] On the face of his Complaint, Appellant clearly was a similarly situated member of the settlement class approved by the Class Action Court, as he falls within the definitions of the classes, but did not participate in the claims process. Respondents likewise are identical – the Catholic Diocese of Charleston and the Bishop of Charleston. Therefore, the identity of parties cannot be disputed.

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[57] *Cooper v. Fed. Res. Bank of Richmond*, 467 U.S. 867, 874 (1984).

[58] *See* Orders of Class Action Court.

[59] *Id.*

Finally, Appellant could have raised his other claims in the approved Class Action claims process. Appellant claims to have been sexually abused as a minor by agents, employees, or priests of the Diocese. The Diocese litigated and resolved all claims of past sexual abuse in the Class Action Court, ultimately buying its peace through the Class Action Settlement Agreement. The Class Action Settlement provided a specific framework for claims to be made, and the Class Notice was clear that failure to participate in the settlement framework would result in their claims being completely and forever barred.

All issues arising out of claims of childhood sexual abuse by Diocese of Charleston personnel were previously litigated in the Class Action. Fair and adequate notice was provided for the March 9, 2007 Fairness Hearing and for participation in the Class Settlement. Due process was afforded the class members, and Appellant had a full and fair opportunity to litigate the issues raised in his Complaint.

Appellant is barred from re-litigating the issues finally determined in the Class Action. As the Class Action Court noted, the class settlement sought to "protect the interests of both the absent class members and the *Diocese's right to have the conclusive effect of a class action*." (Emphasis added). The Class Settlement is binding on absent class members if the notice procedure was in the best practicable form, and was reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to give them an opportunity to present objections.[60] The Class Action court had great flexibility in determining what was the most practical notice under the circumstances to meet the requirements of due

[60] *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985) (internal quotations omitted).

process.[61] Class counsel provided notice by publication in 10 South Carolina newspapers plus the Augusta *Chronicle* and in the Diocese's state-wide publication. The Class Action court further took specific note of the national and international publicity regarding the Class Action Settlement.

The Due Process Clause does not require inquiry into whether any individual received notice of class settlement. Rather, the Constitution merely requires that notice be reasonably calculated to reach absent parties.[62] As the Class Action Court found, the notice procedure complied with Due Process and those members of the settlement class who did not submit claims in the Class Action Settlement are now barred by the settlement and *res judicata*. Therefore, regardless of how this Court rules on the charitable immunity issue, summary judgment for Respondent was still proper and should be affirmed.

III. All of Appellant's separate causes of action likewise failed due to lack of any evidence supporting the essential elements of each claim.

Respondents also filed separate summary judgment motions highlighting the lack of any genuine issue of material fact regarding the required elements of each claim and asserting that they were entitled to judgment as a matter of law. Appellant did not submit anything in response to the Circuit Court prior to the hearing on all pending motions on December 12, 2019. As such, summary judgment was proper as to each claim and these unopposed motions stand as independent sustaining grounds. *See I'On v. Town of Mt. Pleasant*, *supra*.

a. Summary judgment was warranted as to Appellant's fraud and fraud-based claims and contract claims.

[61] Protecting the Members of the Class: Notice, 7B *Fed. Prac. & Proc. Civ.* § 1793 (3d. ed. 2014).

[62] *Newburg on Class Actions* § 8:35 (5th. Ed. 2014).

Appellant came forward with no admissible evidence regarding the essential elements of his claims for Breach of Contract, Breach of Contract Accompanied by a Fraudulent Act, or Fraudulent Concealment. Without any evidence to support the elements of these claims, Appellant's Fourth, Seventh, and Eighth causes of action failed as a matter of law.

i. Fraudulent Concealment

A claim for fraudulent concealment arises only where a party is under a duty to disclose information based upon a fiduciary relationship between the parties. As the Supreme Court has held:

> The duty to disclose may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.[63]

Appellant has never pointed to any admissible evidence that he entered into any transaction with the Diocese that would give rise to a duty to disclose. There is no evidence that Appellant and Respondent entered into any fiduciary relationship that would trigger a duty to disclose any facts known to Respondent. Likewise, there was no admissible evidence that Respondent even knew anything that it could have disclosed to Appellant or anyone else. Thus, Appellant's fraudulent concealment claim was fatally deficient.

ii. Breach of Contract and Breach of Contract Accompanied by a Fraudulent Act

[63] *See Ardis v. Cox*, 314 S.C. 512, 341 S.E.2d 267, 270 (Ct. App. 1993); *quoting Jacobson v. Yaschik* 249 S.C. 577, 155 S.E.2d 601, 605 (1967).

Appellant failed to point out any material fact to support his allegations that he entered into any contract with the Respondents; that Respondents breached that contract; or that any fraudulent act accompanied the breach.[64] Further, Appellant failed to plead fraud with the specificity required under Rule 9, SCRCP, and he failed to submit any evidence that Respondent engaged in any fraudulent intent relating to some breach of contract.

The Circuit Court could properly have entered judgment as a matter of law on Appellant's fraud and contract claims, as there is quite simply no evidence to support the essential elements of any such claim. Appellant did not establish any fraud or fraudulent intent, nor did he establish that Respondents under any duty to disclose to him information about anything. Further, Appellant failed to establish the essential elements of his claims for breach of contract or breach of contract accompanied by a fraudulent act.

b. There was no genuine issue of material fact regarding Appellant's claims for Breach of Fiduciary, and summary judgment was appropriate.

i. Breach of Fiduciary Duty

Appellant contended that, by virtue of his attendance at Sacred Heart School, as well as his status as a parishioner at Sacred Heart Church, he entered into a fiduciary relationship with Respondents in this matter. Appellant alleged that Respondents (and their agents, including the accused teachers) assumed a duty *in loco parentis*, owing students at the school a safe environment based on a relationship of confidence and trust. Appellant pleaded that Respondents' agents negligently breached this duty through their predatory actions and that the Respondents negligently breached this duty by virtue of their alleged failure to respond properly to the agents' acts.

[64] *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502, 503-504 (Ct. App. 1985).

However, South Carolina courts have routinely held that the student-school relationship does not give rise to a fiduciary duty under the theory of *in loco parentis* or any other theory.[65] Given that no such duties exist between a school and student, no such duty could be attributable to the Respondents in relation to the school either. As a result, Appellant's claim for Breach of Fiduciary Duty failed as a matter of law.

Appellant claimed a Breach of Fiduciary Duty as a result of negligent acts. In order to successfully recover for damages on a cause of action sounding in negligence, three basic elements must be met: (1) a duty of care must be legally owed by the alleged tortfeasor to the plaintiff; (2) the tortfeasor must have breached that duty; and, (3) the breach must have caused the plaintiff's damages.[66] An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.[67] The question of whether a duty exists is a matter of law for the court's determination, not an issue of fact for a jury.[68] Without a duty, there can be no actionable negligence.[69]

South Carolina courts have addressed the issue of whether a school and its agents owe a fiduciary duty to its students on multiple occasions. The most recent and oft-cited case is that of *Doe v. Greenville County Sch. Dist.*[70] In *Doe*, a substitute teacher engaged in a sexual relationship with a 14-year old student. The student's parents filed suit against the school district on a myriad

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[65] *See e.g. Hendricks v. Clemson Univ.* 353 S.C. 449, 578 S.E.2d 711 (2003); *and Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007)(affirming trial court's dismissal of breach of fiduciary duty claim).

[66] *Huggins v. Citibank, N.A.*, 355 S.C. 329, 585 S.E.2d 275 (2003).

[67] *Id*.

[68] *Id*.

[69] *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998).

[70] *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 651 S.E.2d 305 (2007).

of theories, including breach of fiduciary duty and an assumed duty *in loco parentis*. In doing so, the parents alleged that the district failed to supervise the substitute teacher. Further, the parents alleged that the school district had prior warnings about the substitute teacher's interest in young girls and knew or should have known of the relationship. The trial court dismissed the claims for breach of fiduciary duty and assumed duty *in loco parentis*, and the Supreme Court certified the case directly.

On review, the Supreme Court affirmed the trial court's dismissal of the breach of fiduciary duty and breach of assumed duty *in loco parentis*. In doing so, the Court agreed with the trial court's analysis that the claims were actually based on the negligent supervision claim and that "these causes of action were alleged as an attempt to heighten any duty owed by the School District in this situation."[71] Ultimately, the Supreme Court agreed that the plaintiffs had not alleged any facts "under which this Court could find another duty owed."[72]

Appellant in the case at bar has similarly failed to establish any facts that would overcome South Carolina's explicit rejection of a fiduciary duty (*in loco parentis* or otherwise) between a student and a school.[73] Appellant essentially restated his Negligent Supervision claim and couched it in terms of an even greater duty than what he alleged in that claim. Yet, based on *Doe v.*

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[71] *Doe v. Greenville*, 375 S.C. at 72, 651 S.E.2d at 310.

[72] It should be noted that in the *Doe v. Greenville* case, the Court recognized a duty to supervise under the South Carolina Tort Claims Act, which applied to the School District given its status as a state entity. However, the Court explicitly declined to recognize any duties beyond those provided under the Tort Claims Act. Further, there is no indication that (nor any plausible reason why) a private or parochial school would be treated any differently under the common law.

[73] In John E. Rumel's *Back to the Future: The In Loco Parentis Doctrine and Its Impact on Whether K-12 Schools and Teachers Owe a Fiduciary Duty to Students*, 46 Ind. L. Rev. 711 (2013), the *Doe v. Greenville* case is listed under the section titled "Cases Categorically Refusing to Recognize the Existence of a Fiduciary Relationship Between K-12 Schools and School Supervisory Personnel and Students."

Greenville, the claim could not survive against the school itself, much less against entities even further removed from the relationship such as the Bishop and the Diocese. There is no evidence that, as Appellant alleged in his Complaint, Respondent directly or indirectly entered into any relationship that could be considered fiduciary in nature. In fact, prior to *Doe v. Greenville*, South Carolina's highest court had refused to recognize a fiduciary duty existing between a school and a student in part because of the very nature of fiduciary duties as primarily related to business and financial dealings.[74]

In *Hendricks v. Clemson Univ.*, a junior college student transferred to Clemson University in order to play Division I baseball. Upon reporting to Clemson, the student met with his academic advisor, who recommended that the student declare Speech and Communications as his major. His advisor also provided guidance as to how many hours the student should take, as well as the types of classes to be completed. Later in the semester, the advisor realized she had recommended a set of classes that would not satisfy the NCAA's eligibility requirements, and the NCAA ultimately declared the student ineligible to play baseball for Clemson. The student then filed suit on claims including negligence, breach of fiduciary duty, and breach of contract. The trial court dismissed all claims on summary judgment; however, this Court reversed and found that there were genuine issues of material fact with regard to each cause of action.

Upon review, the Supreme Court first noted that the existence of a duty between two parties is a legal determination, which rests with the court as opposed to a jury.[75] In determining no fiduciary duty exists between an academic advisor and a student, the Court explained:

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[74] *See: Hendricks v. Clemson Univ.* 353 S.C. 449, 578 S.E.2d 711 (2003)

[75] *Hendricks*, 353 S.C. at 458, 578 S.E.2d at 715 (2003).

> This Court has recognized certain relationships are by nature fiduciary, such as the attorney client relationship. [Citation omitted]. The relationship between advisor and student has not been so recognized thus far… Historically, this Court has reserved imposition of fiduciary duties to legal or business settings, often in which one person entrusts money to another, such as with lawyers, brokers, corporate directors, and corporate promoters. We decline to recognize the relationship between advisor and student as a fiduciary one.[76]

The Supreme Court is clear in its categorization of the types of relationships that qualify as fiduciary in nature as well as its preference to confine such duties to those types. In *Hendricks*, the advisor-student relationship was not considered to be of the type associated with fiduciaries, even though the advisor testified in her deposition that her job consisted of making sure the student was academically successful and remained NCAA-eligible while on a path to graduate. Those responsibilities, however, did not lead to the existence of a fiduciary duty between the student and his advisor or the student and the school.[77]

Other jurisdictions have addressed this issue under facts nearly identical to the case at bar and found no duty *in loco parentis* and no fiduciary duty existing between students and a diocese that governed the area of their parochial school.[78] In *Bernie*, a number of students filed claims against a litany of parties with regard to alleged sexual abuse at St. Paul's School, a boarding school located within the Yankton Sioux Reservation in South Dakota. Included in the suit was the Catholic Diocese of Sioux Falls, which the former students allege was a quasi-operator of the school during the time in which the alleged abuses were carried out by nuns and monks of various

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[76] *Id*.

[77] It must be noted that, although the opinion in *Hendricks* talks about the student-advisor relationship, the suit is against the University. As such, the claims that were dismissed were for breach of fiduciary duty as to Clemson University.

[78] *Bernie v. Catholic Diocese of Sioux Falls*, 2012 SD 63, 821 N.W.2d 232 (2012).

Orders teaching at the school.[79] The former students alleged that the Diocese of Sioux Falls had a duty of protection *in loco parentis* as well as a fiduciary duty of protection.

The Supreme Court of South Dakota affirmed the dismissal of the claims regarding the above-mentioned duties of protection because the former students had provided no evidence to show that the Diocese took on a custodial or protective role with regard to the students at the school.[80] Rather, the Court reasoned, any such duty would have existed between the monks, nuns, and other staffers actually working at the school.[81] There was no evidence to suggest that the Diocese had undertaken such responsibility, even though the Diocese placed the students at the school.[82]

This reasoning applies equally to the case at bar. There is no evidence to support a fiduciary relationship between the Respondent and the Appellants in this case. Therefore, there was no genuine issue of material fact, and the claim fails as a matter of law.

South Carolina's Supreme Court has unequivocally denied that a fiduciary duty exists between a student and a school, whether *in loco parentis* or otherwise. The common law of this State recognizes fiduciary duties as arising out of business, legal, and financial dealings among others. However, when given opportunities to expand the concept of fiduciary duties to the students of a school (or its agents), the Court has specifically declined to do so. Other jurisdictions have similarly failed to find that a Diocese would even owe such a duty with regard

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[79] The former students were apparently unable to show that the Diocese had any role in the creation of the school or in the day-to-day operation of the school. However, the former students alleged that the school could not have existed or operated without the approval and participation of the Catholic Diocese of Sioux Falls.

[80] *Bernie*, 2012 SD 63, 821 N.W.2d at 242.

[81] *Id*.

[82] *Id*.

to a school operated by those under its governance. As a result, Appellant's allegation of breach of fiduciary duty is in contravention to the law of South Carolina and must fail.

c. Appellant's claims for conspiracy also fails as a matter of law.

Appellant's Complaint contains only the barest allegations of the alleged conspiracy. Paragraph 46 contains the sum total of the conspiracy allegations– that two unnamed employees were "aware of Hartnett and Brooks' sexually deviant propensities with minors" and that these employees failed to report their knowledge of those propensities. Appellant alleges that the two unnamed employees engaged in a "conspiracy of silence." Appellant pointed to no admissible evidence of who these two alleged employees were, what they allegedly knew, or when anyone reached some agreement to harm Appellant. Further, there was absolutely no evidence that anyone took any action intended to harm Appellant, nor is there any admissible evidence that anyone took any action in furtherance of the agreement.

Appellant's allegations of damages are virtually the same throughout the Complaint:

> 47. As a direct and proximate result of the conspiratorial conduct of the Defendants, Plaintiff has been injured and suffered damages. Plaintiff is entitled to judgment against the Defendants for actual damages to be determined by the trier of fact, and punitive damages in a sufficient amount to deter such similar conduct by these Defendants or others.

Appellant does not plead special damages with any particularity, nor does he identify how he was damaged by the alleged conspiracy that was different from his general allegations of damages.

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage.[83] The difference between civil and criminal conspiracy is, in criminal conspiracy, the focus of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design.[84] Moreover, "because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Id.* "If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."[85] The primary inquiry in civil conspiracy is whether the principal purpose of the combination is to injure the Appellant.[86] The focus of a civil conspiracy claim is the manner in which the plaintiff suffers damage as a result of an overt action done pursuant to a common design.[87] A civil conspiracy claim must be supported by facts independent of the other causes of action in the complaint, and the plaintiff may not simply incorporate allegations that support other causes of action.[88]

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[83] *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009).

[84] *Id.; see also Pye v. Estate of Fox*, 369 S.C. 555, 567–68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.").

[85] *Id.*

[86] *Pye* 369 S.C. at 567–68, 633 S.E.2d at 511 (2006).

[87] *Vaught v. Waites*, 300 S.C. 201, 387 S.E.2d 91, 95 (Ct. App. 1989).

[88] *Todd v. S.C. Farm Bureau Mut. Ins. Co.* 276 S.C. 284, 278 S.E.2d 607 (1981).

Appellant failed to come forward with any evidence that there was an agreement between two or more persons to harm him. Importantly, under the intracorporate immunity doctrine, a corporate entity cannot conspire with itself; an entity cannot conspire with its employees or agents; and corporate employees cannot conspire with each other when acting in the scope of their employment.[89] Where employees are acting outside the scope of their employment, then those individuals must be named in the complaint.[90]

Quite simply, there is no admissible evidence in this case of a combination of two or more persons. There is only the allegation in the Complaint that two unnamed and unidentified employees agreed to keep quiet about the alleged perversions of Hartnett and Brooks – though there is not a shred of admissible evidence to support this allegation. Neither is there a shred of evidence that these unnamed co-conspirators intended to harm Appellant or that there was any overt act in furtherance of the agreement. Rather, the mere allegations of the Complaint are that the conspirators' silence about the alleged perversion of Hartnett and Brooks allowed the teachers to molest Appellant. There is no evidence that the conspirators intended for Appellant to suffer harm from the agreement, or that they engaged in some affirmative act in furtherance of it.

The law requires that Appellant prove special damages that were proximately caused by the civil conspiracy itself, and that go beyond the damages alleged in the other causes of action contained in the Complaint. A plaintiff cannot recover damages both for the wrongful act and for conspiracy to commit the wrongful act.[91] Where the damages alleged where the same as the

[89] *See Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 701 S.E.2d 39, 46 (Ct. App. 2010).

[90] *Id.* at 46 *citing with approval Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987).

[91] *See Todd v. S.C. Farm Bureau* and *Vaught v. Waites, supra.*

damages alleged elsewhere in the complaint, the conspiracy claim must be dismissed as a matter of law.[92] Appellant cannot carry this burden and cannot present any genuine issue of material fact in support of his claim. Therefore, the civil conspiracy cause of action must fail, and regardless of any other decisions, this Court should affirm summary judgment as to that claim.

CONCLUSION

The Circuit Court's judgment was correct in all respects and should be affirmed. The law of charitable immunity in effect at the time of the alleged abuse barred claims against charitable organizations for the torts of their employees or agents. As such, Respondents were entitled to judgment as a matter of law on all claims and the case properly was dismissed in its entirety.

In the alternative, Respondents were entitled to judgment as a matter of law on all claims based upon the absence of any admissible evidence to satisfy the heavy burden established under *Moriarty v. Garden Sanctuary Church of God* regarding assertions that the statute of limitations should be tolled where a plaintiff claims to suffer from repressed memory syndrome. Absent the required proof, Appellant's claims fail because they are barred by the applicable statute of limitations. Similarly, Appellant's claims fail because they are barred by the *res judicata* effect of the 2007 class action judgment. The record contains no evidence contradicting Respondents' assertion that Appellant was a member of the class as defined in the judgment and is thus barred from asserting any claim.

Finally, each of Appellant's separate causes of action fail as a matter of law and Respondent is entitled to judgment on each. Appellant failed to establish the requisite elements

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[92] *Todd v. S.C. Farm Bureau*, 276 S.C. at 292, 278 S.E.2d at 611; *see also Vaught*, 387 S.E.2d at 95.

of each claim and, in the absence of any specific proof, Respondent is entitled to summary judgment.

For the foregoing reasons, the Circuit Court's judgment should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR DIOCESE RESPONDENTS

September 10, 2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-000804

John Doe, ... Appellant,

v.

The Diocese of Charleston, a Corporation Sole, and
the Bishop of the Diocese of Charleston, in his official capacity, ... Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter of the Appellant certifies that I have this 10th **day of September, 2020**, served copies of the **Initial Brief of Respondents, Diocese Designation of Matter** upon all counsel for the Respondents (listed below) by causing them to be deposited in the United States mail with sufficient postage attached, addressed to:

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