

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

IN Re: Hannah J. Secka, individually and as
parent and guardian for the minor, M.Y.S.,

Plaintiff(s),

v.

Florence County School District One and
Florence County Sheriff's Department,

Defendant(s).

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

Civil Action No.: 2021-CP-21-02121

PROPOSED ORDER

This matter comes before the Court upon Plaintiffs' Rule 59(e) and Rule 60(b) Motion for Reconsideration of the Court's March 5, 2024 Order Granting Defendant Florence County School District One's Motion for Summary Judgment. A hearing was held on this matter on August 21, 2024. Darryl Caldwell of Caldwell Law Firm, LLC appeared on behalf of Plaintiffs, Hannah J. Secka, individually and as parent and guardian of MYS. Meredith L. Seibert, of Duff Freeman Seibert, L.L.C., appeared on behalf of Florence County School District One (Defendant District). After reviewing the pleadings, the prior order, the motion for reconsideration, the parties' memoranda, the arguments of counsel, and relevant case law, the Court denies Plaintiffs' Motion for Reconsideration of the order granting Defendant District summary judgment.

I. LEGAL STANDARD

Rule 59(e), SCRCF provides a mechanism for a party to request that a court review a prior order. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument

has been raised, but not ruled on, in order to preserve it for appellate review. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). The rule itself does not provide any further standards, and South Carolina case law, absent the guidance as to when to file, is also lacking in this regard. However, “Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.” *Id.* at 22, 602 S.E.2d at 779. Thus, when considering a Rule 59(e) motion to dismiss, our courts may look to the Federal Rules of Civil Procedure for guidance on the applicable standard. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) (“Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.”). The Fourth Circuit Court of Appeals has laid out three grounds that might justify amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” *Pacific Ins. Co. v. Am. Nat. Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998). “To qualify for reconsideration under the third exception, an order cannot merely be ‘maybe or probably’ wrong; it must be ‘dead wrong,’ so as to strike the Court ‘with the force of a five-week-old, unrefrigerated dead fish.’” *United States v. Mooney*, 2023 WL 3026316, at *3 (D.S.C. Apr. 20, 2023) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009)).

In their motion for reconsideration, Plaintiffs allege that they are entitled to relief pursuant to Rule 59(e) on the grounds that they believe the Court’s Order failed to recognize there was a genuine issue of material fact as to the “loss” suffered by Plaintiffs, including a loss resulting from reckless infliction of emotional harm, and failed to fully consider the expert testimony of Dr. Sterling Harris presented by Plaintiff as to violation of District policies.

II. LAW/ANALYSIS

A. Plaintiffs Are Not Entitled to Relief Pursuant to Rule 59(e), SCRCP – Motion to Alter to Amend a Judgment

1. **Plaintiffs have failed, as a matter of law, to establish a compensable loss under the Tort Claims Act regarding the actions of District employees.**

Plaintiffs assert that there is a genuine issue of fact as to whether M.Y.S. suffered a “loss” as defined by the Tort Claims Act (“TCA”). Plaintiffs focus on only two of the several incidents raised in their Complaint: the incident when M.Y.S.’s 8th grade English teacher, Ms. Luhrs, wrote on his arm with a Sharpie (the “Sharpie incident”), and the incident when M.Y.S. was in high school and alleges he was “attacked” in the locker room (the “locker room incident”).

Regarding the Sharpie incident (as well as the other instances of alleged bullying, intimidation, and harassment by other District employees), the Court correctly determined that Plaintiffs failed, as matter of law, to establish a compensable TCA “loss.” The Court correctly determined that M.Y.S. suffered no physical injury from the Sharpie incident, but rather claimed only emotional distress. The arguments in Plaintiffs’ Motion In Opposition to Summary Judgment reiterate this point, stating: “M.Y.S. testified on multiple occasions he was *made uncomfortable* when he was touched without his consent or permission by Kathy Luhrs.” Motion in Opposition, p. 3 (emphasis added). Being “made uncomfortable” does suffice for emotional harm and makes clear there was no physical injury such that Plaintiffs can establish a viable TCA loss. Moreover, as addressed in the original order and in more detail below, Plaintiffs have failed to establish a compensable Tort Claims Act “loss” under any theory related to the infliction of emotional distress.

The other incident that Plaintiffs cite – the “tussle” in the locker room – was not decided on the basis of whether there was a TCA “loss.”¹ Rather, the Plaintiffs failed to establish a genuine issue of material fact that the District was grossly negligent as to the supervision of its employees or students under any of the various theories alleged. As noted in the original order, Plaintiffs have not created a genuine issue of fact as to whether the locker room incident actually happened. The only evidence in the record about what occurred in the locker room comes from M.Y.S. The record contains evidence showing that M.Y.S. has given conflicting statements as to whether this incident happened as he now claims. It is axiomatic that “[a] genuine issue of material fact is not created where the only issue of fact is to determine which of [several] conflicting versions of the plaintiff’s testimony is correct.” *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984). However, what was clear in the record was that Plaintiffs failed to establish a genuine issue of material fact tending to show that the District was grossly negligent as to the supervision of its employees or students, including in the locker room under several theories. Although this Court considered the testimony of Plaintiff’s expert regarding general standards and expectations, the reality is that Plaintiffs presented no evidence regarding the level of supervision in the locker room. Even if they had, MYS testified to circumstances that no one had seen the “tussle” nor could they have.

¹ Although not dispositive, to the extent a finding is warranted, this Court finds that Plaintiffs failed to establish a genuine issue of material fact as to whether MYS suffered a loss during the alleged “tussle” in the locker room. The only evidence in the record of that the incident even occurred is four conflicting statements of MYS. See *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

2. Plaintiffs have failed, as a matter of law, to establish a cause of action for emotional distress caused by the District's "extremely reckless" conduct.

The Court previously found that Plaintiffs had not established compensable instances of emotional distress, nor had they established a cause of action for negligent infliction of emotional distress. However, Plaintiffs assert that the Court erred by failing to consider Plaintiff "pled facts sufficient to establish sufficient to establish damages for emotional distress because a reasonable jury could find the conduct of District employees to be "extremely reckless," thus alleging that the Court erred by not allowing them to proceed on this claim. (Plaintiffs' Memo In Support of Motion for Reconsideration p. 5). However, the South Carolina Supreme Court case law confirms that reckless infliction of emotional distress is not a "loss" actionable under the TCA. See *Gore v. Dorchester County Sheriff's Office*, 442 S.C. 438; 900 S.E.2d 423 (2024)

In *Gore*, the Supreme Court answered the following certified question from the United States District Court: "Does the bar under the South Carolina Tort Claims Act of claims of "intentional infliction of emotional harm," S.C. Code [Ann.] § 15-7830(f), apply to claims of reckless infliction of emotional distress?" The court answered this question in the affirmative. Initially, the court held that "[r]eckless infliction of emotional distress is merely a subset of intentional infliction of emotional distress [and] there is no separate cause of action in South Carolina for the reckless infliction of emotional distress." *Id.* at 13. The court further ruled that reckless intentional infliction of emotional distress is not a loss under the TCA

Thus, the Court reaffirms its finding that Plaintiffs have failed to establish a compensable Tort Claims Act "loss" under any theory related to the infliction of emotional distress.

3. Plaintiffs have failed, as a matter of law, to establish Tort Claim Act liability based on an alleged violation of District policy.

Plaintiffs assert that the Court failed to fully consider the expert testimony provided by Plaintiff's expert witness, Dr. Harris. As a result, Plaintiffs' Motion for Reconsideration was accompanied by a "clarifying" affidavit further specifying that District personnel violated District policy JICRAA-R and GBEB based on the English teacher's actions (writing on MYS' arm).

As an initial matter, the "clarifying affidavit" is not proper and cannot be considered as part of Rule 59(e) Motion for Reconsideration. This additional evidence Plaintiff has presented as part of the Rule 59(e) motion was available and could have been presented when they filed their response in opposition to the Defendant District's Motion for Summary Judgment. However, they chose to focus on other aspects of Mr. Harris' testimony and opinions. See *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)(A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not); *Green v. Johnson*, 2024 WL 180690 (Ct. App. 2024)(master erred in considering evidence presented for the first time during a hearing on Rule 59(e) motion); *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843 (Ct. App. 2009)(court could not consider document that was submitted to the family court only as an attachment to Rule 59(e) motion).

However, even if this Court were to consider and adopt the conclusions in the clarifying affidavit, Plaintiffs' have still failed to establish a recoverable claim pursuant to the Tort Claims Act. In fact, the Tort Claims Act provides a governmental entity is not liable for a loss resulting from "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies." S.C. Code Ann. § 15-78-60(4). The affidavit of Plaintiff's

expert witness serves only to establish an additional affirmative defense for Defendant District had there been a loss associated with the English teacher's action, which there was not.

B. Plaintiffs Are Not Entitled to Relief Pursuant to Rule 60(b), SCRCP - Relief from Judgment or Order

Although the majority of Plaintiffs' memorandum and arguments were premised on Rule 59(e), SCRCP, Counsel for Plaintiffs' motion was also brought pursuant to Rule 60(b), SCRCP. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." *Perry v. Heirs at Law of Gadsden*, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct.App.2003). Rule 60(b) provides that "the court may relieve a party or his legal representative from a final judgment, order, or proceeding" for one of five listed reasons, to include: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. In their memorandum and in the course of arguments, Plaintiffs did not specify which of the five grounds entitled them to relief. In the complete absence of any facts or arguments that could reasonably support the contention that Rule 60(b)(1) and (3)-(5) are applicable, this Court considered whether Plaintiffs were entitled to relief pursuant to Rule 60(b)(2), to include consideration of the "clarifying affidavit" submitted by Plaintiffs with their Motion for Reconsideration.

Plaintiffs rely heavily on the "clarifying affidavit" submitted with their Motion for Reconsideration, asserting that if the affidavit cannot be considered as part of a Rule 59(e) Motion

for Reconsideration, Rule 60(b) permits such an affidavit to establish the grounds for relief. However, the standards for new evidence is generally the same for Rule 59(e) and Rule 60(b) motions. See *Fassett v. Evans*, 364 S.C. 42, 40, 610 S.E. 2d 841, 846 (Ct. App. 2005)(court did not abuse discretion in denying Rule 60(b) motion where new evidence included in affidavits was known to and available to movant at time of final order).

However, even after consideration of the affidavit, Plaintiffs have failed to establish a basis for relief pursuant to Rule 60(b)(2). As noted above, Rule 60(b)(2), SCRCPP, states that “On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b). The term “newly discovered evidence” is a term of art and refers to evidence which existed at the time of the final judgment, order, or proceeding but which had not been discovered by the proponent of the Rule 60(b)(2) motion. *Crawford v. Celanese Corp.*, No. 2017-CP-42-04429, 2019 WL 11276400, at *2 (S.C.Com.Pl. Nov. 25, 2019). To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.”). *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007); *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005). However, Plaintiffs have not established the existence of newly discovered evidence, through the affidavit or otherwise. Our courts are clear that evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and

(2) in the party's possession. *Lanier* at 218, 612 S.E.2d at 459. See *Fassett v. Evans* at 50 (noting the difference between newly discovered evidence and newly presented evidence). In addition, Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 272, 644 S.E.2d 755, 767 (Ct. App. 2007).

Based on the standards established by South Carolina courts, the information contained in the affidavit is not newly discovered evidence for purposes of Rule 60(b)(2). Here, though the affidavit was completed on March 13, 2024, shortly after this Court's Order granting Defendant District summary judgment, the information was known to and readily available to the Plaintiffs at the time of the original motion and Plaintiff's response. In fact, Plaintiffs' own memorandum references that Dr. Harris testified to the same conduct and alleged policy violation in both his deposition and original affidavit that is referenced in the clarifying affidavit. See Plaintiffs' Memorandum in Support of Motion for Reconsideration p. 5. The information he shared and the basis for same is merely newly presented, not newly discovered. Therefore, Plaintiffs have failed to present evidence that entitles them to relief pursuant to Rule 60(b)(2) due to newly discovered evidence.

III. CONCLUSION

Accordingly, after due deliberation, review of the pleadings, the prior order, the motion for reconsideration, the parties' memoranda, the arguments of counsel, and relevant case law, Plaintiff's Motion for Reconsideration is denied.

IT IS SO ORDERED.

Honorable Michael G. Nettles
Twelfth Judicial Circuit

September __, 2024
Florence, South Carolina



Florence Common Pleas

Case Caption: Hannah J Secka , plaintiff, et al VS Florence County School District One , defendant, et al
Case Number: 2021CP2102121
Type: Order/Other

So Ordered

s/ The Honorable Michael G. Nettles #2140