THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr.
Special Circuit Court Judge for Orangeburg County

Case No. 2012-CP-38-01314
Appellate Case No. 2014-002402

Jennifer Middleton, as parent and
GAL for Jane Doe — Appellant,

v.

Orangeburg Consolidated School
District Three, — Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Court err by finding that the Plaintiff had presented no evidence of a genuine issue of fact showing gross negligence by the Defendant?

2. Were the actions and non-actions of the Defendant in fact grossly negligent when viewed in a light most favorable to the Defendant?

3. Did the Court err by ruling the actions of the bus driver were a proper exercise of discretion when there were no guidelines for him to follow during a foreseeable situation?

STATEMENT OF CASE

This case was initiated by the filing of a Summons and Complaint captioned Jennifer Middleton, as parent and GAL for Jane Doe vs Orangeburg Consolidated School District Three, in Orangeburg County on September 26, 2012. [Complaint]. The Complaint alleged the Defendant was grossly negligent and breached its duties to the Plaintiff which resulted in damages suffered by the Plaintiff. [Complaint] The Defendant filed an Answer and Affirmative Defenses on January 23, 2013. It denied a breach of duty and plead the affirmative defense the alleged claims were barred by the South Carolina Torts Claim Act. [S.C. Code Ann. §§ 15-78-10 et seq.] Discovery was undertaken by the parties and on October 11, 2013, the Defendant filed a Motion for Summary Judgment together with two affidavits. [Motion for Summary Judgment]. The Plaintiff filed two opposing affidavits [Plaintiff's Affidavits of Janet Greene and Danny McDaniel] and the matter was heard by The Honorable James B Jackson, Sr on December 11, 2013. [Transcript 12/13/13] The Court issued its Order which granted Summary Judgment filed on February 5, 2013. [Order of 2/01/13]. The Plaintiff filed a Motion for Reconsideration on February 19, 2014. [Motion for Reconsideration] This Motion was heard by Judge Jackson on September 18, 2014. [Transcript 09/18/14] The Motion was denied and an Order was filed October 14, 2014. [Order of 10/14/14]. This Appeal followed.

FACTS

On October 11, 2011, the Defendant was transporting the Plaintiff on a school bus from her home to the St James Gilyard Elementary School. The Defendant's school bus driver took an unscheduled stop because the Plaintiff had an urgent need to urinate. There were no facilities available so the school bus driver decided to make the Plaintiff urinate by the side of the road in front of the other students. [Complaint] This occurred in the ordinary course of taking the child to school and on a route which is said to have no public facilities. [Order p 2]. The driver had more than ten years experience and the Plaintiff was a student in the first grade. [Order p 2] The Plaintiff said her urge to urinate was so urgent she could not hold it until she got home. The other students, including other elementary and middle school students, began to laugh at the Plaintiff. [Order 01 p 3] The driver then made Plaintiff exit the bus and use the bathroom beside the bus. [Order 01 p 3, T#1 pp 9-10].

The Plaintiff filed a complaint on September 26, 2012, claiming that the actions of the Defendant were grossly negligent and subjected the Plaintiff to ridicule by other students. The Plaintiff alleged that she suffered humiliation, embarrassment, mental anguish and other damages. [Complaint] The Defendant filed an Answer and Affirmative Defenses on January 23, 2014, and alleged that it had not been grossly negligent and that it was immune from liability due to the South Carolina Torts Claims Act, S.C. Code Ann. §§ 15-78-10 et seq. [Answer].

Discovery was undertaken and the Defendant made a Motion for Summary Judgment which was granted after argument. [Order 1, Motion for Summary Judgment] The Plaintiff filed a Motion for Reconsideration which was denied after argument. [Order 02, Motion for Reconsideration]

ARGUMENTS

I. The facts in the case do support a claim that the Defendant was grossly negligent and the Court erred in finding that there was no genuine issue of material fact.

The general law regarding the construction of statutes is applicable to all of the arguments in this Brief. It is well settled that "[t]he cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible." Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). If the plain language of a statute gives rise to doubt or uncertainty as to legislative intent, the construing court looks to the statute's language as a whole in light of its manifest purpose. Ex parte Cannon, 385 S.C. 643, 654-55, 685 S.E.2d 814, 821 (Ct. App. 2009). Courts apply certain presumptions when divining legislative intent, including the "very strong" presumption that the legislature does not intend to overrule existing law absent an express intention to do so. *See* Hodges v. Rainey, 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000); Hoogenboom v. City of Beaufort, 315 S.C. 306, 318, 433 S.E.2d 875, 883 (Ct. App. 1992); Columbia Real Estate & Trust Co. v. Royal Exch. Assur., 132 S.C. 427, 128 S.E. 865, 866 (1925). The court may additionally look to the statute's legislative history. Cannon, 385 S.C. at 655, 685 S.E.2d at 821.

This action is one brought under S.C. Code Ann. §§ 15-78-10, et seq. which is generally known as the South Carolina Torts Claim Act. A Plaintiff may recover for a loss, which is defined as, "bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering,

mental anguish, and any other element of actual damages recoverable in actions for negligence." S.C. Code Ann. § 15-78-30 (f). To be liable, the Defendants must have acted in a "grossly negligent manner." S.C. Code Ann. § 15-78-60 (25).

In Etheredge v. Richland School District One, 341 S.C. 307, 534 S.E.2d 275 (S.C. 2000), the Supreme Court articulated the general legal standards applicable to cases such as this and stated:

> A governmental entity is not liable for a loss resulting from the "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student ... except when the responsibility or duty is exercised in a grossly negligent manner." S.C.Code Ann. § 15-78-60(25) (Supp.1999). Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Clyburn v. Sumter County District Seventeen, 317 S.C. 50, 451 S.E.2d 885 (1994); Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988). It is the failure to exercise slight care. Clyburn, *supra.* Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances. Hollins v. Richland County School District One, 310 S.C. 486, 427 S.E.2d 654 (1993). Additionally, while gross negligence ordinarily is a mixed question of law and fact, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court. Clyburn, *supra.*
>
> Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. SSI Medical Services, Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990). In ruling on a motion for summary judgment, the evidence and the inferences which can be drawn therefrom should be viewed in the light most favorable to the nonmoving party. *Id.*

As the Court of Appeals has noted in Marietta Garage, Inc. vs Department of Public Safety, 352 S.C. 95, 572 S.E.2d 306, (Ct. App. 2002), the standard of gross negligence is defined as "the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do; a relative term which means the absence of care that is necessary under the circumstances; the failure to exercise a slight degree of care; and where a person is so indifferent to the consequences of his conduct as not to give slight care to what

he is doing." Citing Staubes v. City of Folly Beach, 331 S.C. 192, 196, 500 S.E.2d 160, 163 (Ct.App. 1998).

In this instance, as in Etheredge, the trial court found there was no genuine issue of fact. A critical review of Etheredge and Hollins shows that the trial court was wrong in its conclusions. In the Etheredge case, the court took notice of the age of the two persons involved in the shooting. Both were in high school and the shooting occurred on the school campus. The school had at least four employees who monitored the halls and the teachers watched the students changing classes. There was also an intervention system to resolve disputes by students, and the school had no knowledge of the dispute between the two students. The court found that the failure to train an employee or to provide him with certain equipment did not create a genuine issue of fact when the failure to train was not the proximate cause of the injury. Supra, Ethedredge at 341 S.C. at 311- 312.[1]

The case of Hollins however, involved an elementary school student who was only an eleven year old fifth grader. The child was suspended from riding the bus. The school sent a note home with the child which was never provided to the mother. The school did not call the mother. Further, there was a factual dispute whether or not the child would have been on the bus at all due to a scheduling change. The Court ruled that there was at least a factual dispute as to whether the school had provided slight care or not and the case was to be remanded to the trier of fact. Supra, 427 S.E.2d at 655-656. Clearly, the age of the children in the two cases was relevant as it is in this case.

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[1] Clyburn the facts involved two high school students and an adult participant. Further, the school administrator attempted to diffuse the situation and the driver attempted to prevent the altercation. Supra, 451 S.E.2d at 887.

The trial Court noted in its Order, there were no known public restrooms on the route and the only policy the Defendant had was to rely upon the best judgment of the driver. The Defendant admits that Plaintiff stated she needed to urinate and could not hold the urge. The driver said that he considered making her wet herself. The court also found the other students were laughing at the Plaintiff. Finally, the bus driver determined that the only course of action was to make the Plaintiff pee on the side of the road. [Order; T#1 p 19 p 20; and Affidavit of Simmons.]

The other affidavit provided by the school said that there was "no specific policy or procedure related to students temporarily leaving the bus for emergency situations" such as the urge to urinate. The only policy was for the driver to use his best judgment. [Affidavit of Gilliard] Thus it is clear that the Defendant did not provide any guidance to the Driver other than to use his own good sense. Gilliard confirms that the driver was not trained to deal with this incident. [Gilliard aff]. See, S.C. Code Ann. §59-67-108. Additionally, the Defendant admits that the situation, despite no guidelines, could have been dealt with in a better manner. [Tr#1 p 11, p 14].

On the other hand, the affidavit of Janet Greene states the Defendant should have foreseen that a child would have the sudden urge to urinate and should have planned for this contingency. She also testified that the behavior of the bus driver endangered other children on the bus when the driver stopped on the side of the road. [Greene Affidavit.] Additionally, the affidavit of Danny McDaniel stated that the driver had a duty to operate the bus in a way which was safe for the children. [McDaniel Affidavit] This is a statutory duty pursuant to S.C. Code Ann. §59-67-180. He also points out that the behavior of the bus driver was a violation of a statute because the driver directed a first grade child to expose herself and her privates to

the outside world and to the other children on the bus. He also failed to provide any cover or privacy. This violates the statute defining indecent exposure. S.C. Code Ann. §16-15-130 provides that: "(A)(1) It is unlawful for a person to wilfully, maliciously, and indecently expose his person in a public place, on property of others, or to the view of any person on a street or highway." This event clearly was an exposure in view of the highway. Therefore, it is clear that the Defendant provided no training on how to react to a foreseeable situation. This is egregious because a first grader is involved. Rather than providing the driver with the proper tools and training, the Defendant simply relied on the driver's best judgment. This failure shows the lack of slight care, or any care at all. [T#1 p 21; McDaniel Aff.][2]

Therefore, a review of the applicable cases and statues reveals that the Plaintiff did in fact raise a material issue of fact regarding the standard of care owed to a first grader when she was forced to urinate in public on the side of the road in front of the driver and other students. The actions of the driver and the failure for the Defendant to have a guiding policy for the driver placed the Plaintiff in an untenable situation. This was the proximate cause of her emotional damage, embarrassment, and psychological damage. This case is like that of Hollins v. Richland County School Dist. One, 310 S.C. 486, 427 S.E.2d 654 (S.C. 1993) where the school district was found liable for the death of a child walking home when the district failed to give proper notice to the student's parent. The school sent a note home with the daughter. The court ruled this was not enough care for the court to rule as a matter of law that the school was

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[2] It should also be noted when the impact of the Hollins case that younger children a entitled to special consideration. SC Code Ann. §63-15-30 provides that a family law judge is required to consider the child's age and experience when determining a child's preferences. See, Brown v Brown, 362 S.C. 85, 606 S.E.2d 785 (Ct. App. 2004). This principal of the law in the proper deference to be given to children illustrates why there is an genuine issue of fact whether the Defendant was grossly negligent.

entitled to a directed verdict. Thus this case should be viewed more like Hollins than Etheredge.

II. .The Defendant's exercise of judgment was in fact grossly negligent.

As stated above, the only policy Defendant had was for the driver to use his best judgment in a crisis situation. [Affidavit of Gilliard, p 2. Tr#1 p 11]. While the Defendant claims this to be a good policy, it must be remembered that this situation is one where the Plaintiff was a first grader who was forced to expose herself in public and to urinate on the side of the road in front of her fellow students. [Order pp 2-3]. At the very least, some kind of cover could have been erected in order that she would have privacy. Perhaps the driver should have access to a radio to inform the Defendant of an emergency in order to provide for the proper intervention to occur. The Defendant could have a policy which clearly states the course of action to be undertaken by a driver in such a situation. Simply leaving the decision to a driver is no exercise of judgment at all. [T#1 p 17; T#2 pp 3-4]. The Plaintiff requested that the trial court take judicial notice of the Defendant's Bus Driver's Handbook and its requirement that the Bus Driver return to the nearest school in case of an emergency. Further, the driver is required to confirm with an administrator before he puts a child off a bus. [T#1, p 21]. The Plaintiff had to suffer this indignity from an authority figure who was supposed to be providing her with safe transportation. [T#1, p 23].

Additionally, the driver here simply decided to force the child to urinate in public. The Defendant admitted there was no public restroom available on this route, but made no provisions to deal with this foreseeable situation. Additionally, the driver did not try to find appropriate cover or shelter to afford the child some dignity; instead, he simply told her to get off the bus and pee in public. [Order #1 p 3; T#1 p 17; T#2 pp9-11].

The facts set forth above create a dispute with regard to material facts and summary judgment should not have been granted. The distinguishing factors are illustrated by reviewing the analysis of the court in the two cases which distinguish when a school does not use slight care and when slight care has been used. In the case cited above, Hollins v. Richland County School Dist. One, the Court found the case should be submitted to a jury because the school in effect created the situation which lead to the injury. In another case, Clyburn v. Sumter County School Dist. No. 17, 317 S.C. 50, 451 S.E.2d 885 (S.C. 1994), the court found that the school had used at least slight care and noted a significant difference in Etheredge and Hollins where the school had created the situation. In its discussion, the Supreme Court stated:

> The factual circumstances here are readily distinguishable from Hollins. In Hollins, the school itself created the risk by failing to give adequate notice to the parent that it was suspending the eleven-year-old child from riding the bus. The school's only action to guard against the child being injured when crossing a busy highway on her way home from school was to send a note home with the student to notify the parent of the bus suspension. Here, Clyburn was a high school senior. Upon hearing of the altercation between Assailant and Clyburn, Atkins immediately took many steps to control the situation. He called Sylvia, Assailant's younger sister, and Clyburn into his office and discussed the seriousness of the situation with them. He warned Sylvia if her sister tried to board the bus again, her sister would face criminal charges. He talked with the assistant principal at Clyburn's niece's school and asked him to tell the niece to stay away from the bus stop where the initial altercation began. Atkins also attempted to contact the parties' parents. Additionally, Atkins did not notify the police the first time he was informed Assailant boarded the bus because he had successfully dealt with similar incidents in the past without involving the police and felt he could do so in this situation. The bus driver also kept a lookout for Assailant and stated that she would not stop the bus if she saw Assailant at a bus stop.

Clyburn, 451 SE2d at 888.

In the instant case we are in fact dealing with a situation like Hollins where the school, through the lack of policies and training contributed to a driver being unprepared for a foreseeable incident. The improper behavior of the driver created the situation which caused the damages. As in Hollins, the only action taken by the Defendant was one which afforded no

care to the Plaintiff and in fact created the situation. At the least, the driver could have provided some privacy for the Plaintiff. The manual states, he was required to return to the closest school or contact a supervisor. Another reasonable and responsible course of action would be to stop at a house he knew was safe and allow a mature middle school child on the bus take the Plaintiff inside to pee.

While the Plaintiff admits this is a difficult situation, this is the reason that the Defendant should have better training for the driver, provided appropriate procedures and guidelines and have been prepared for this foreseeable situation. The court should take note of the fact that the Driver's actions caused a first grader to have to expose herself on the side of the road which is entirely inappropriate. This behavior by the driver shows that no discretion was used. There is no evidence that the Defendant used any care other than stopping the bus and having the child pee on the side of the road. [T#1 pp 14, 19-20].

Therefore, there is a material issue of fact whether the Defendant exercised its discretion in a manner which afforded at least slight care to the Plaintiff. The Defendant asserts it is entitled to protection because the statute protects it from immunity if the proper discretion is exercised. [T#1 p 17]. Clearly, it was not. [t#1 pp 23-24]. The Plaintiff also brought to the attention of the trial court that the Defendant failed to comply with its manual and the instructions. This situation is similar to the case of Clark v. Dept. of Public Safety, 353 S.C. 291, 578 S.E.2d 16, (S.C. App., 2002), aff'd 362 S.C. 377, 608 S.E.2d 573 (S.C., 2005), wherein the DPS was found to be grossly negligent when there was no supervisor involved in a high speed chase. Accordingly, this was a violation of procedure and was deemed to be grossly negligent behavior. [T#1 pp 25-27].

There are limitations on the exercise of discretion by the Defendant. An important case

in this area is Proctor v. Dept. of Health, , 368 S.C. 279, 628 S.E.2d 496 (S.C. App., 2006), wherein DHEC claimed that it was not liable for improper inspections done by its employee. The Court found that the exercise of discretion in this case was done in a grossly negligent manner. The mere fact that discretion was used does not grant immunity to the Defendant. In Proctor, DHEC failed to make inspections of the Plaintiff's business even though its policy required them to be made. Proctor has a lengthy discussion of the issue of discretionary immunity and cites two other cases which are helpful in analyzing whether the Defendant here was grossly negligent.

In Faile v. SC DJJ, 350 S.C. 315, 566 S.E.2d 536 (S.C., 2002), the court stated the requirement there be more than just an exercise of judgment, as the exercise of judgment must be based upon appropriate professional standards. In that case the DJJ worker placed the juvenile in a situation where it was found there was no proper supervision. By disregarding policy, the worker placed the child in a situation where it was in danger. Also, the court relied upon Jackson v. South Carolina Dept. of Corrections, 301 S.C. 125, 390 S.E.2d 467 (S.C. App., 1989), affd 302 S.C. 519, 397 S.E.2d 377, (S.C., 1990), where the court expressly stated that if discretion is exercised in a grossly negligent manner, the Defendant will not be entitled to plead the defense of immunity.

In this case, as in the immediate three cases, the Defendant exercised discretion, but did so in a way which was grossly negligent. To force a first grade girl to urinate by a stopped bus on the road with no privacy is an act of gross negligence was in violation of the applicable handbook procedures.. [Tr#1 pp 22-23].

III. The Defendant was grossly negligent by failing to have proper guidance and training for the bus driver to deal with this foreseeable problem.

It is clear from the entire record that the bus driver received no instruction or guidance with regard to dealing with a young child experiencing a urgent need to urinate during transportation in a rural area. [Gilliard affidavit, Simmons affidavit] The affidavit of Janet Greene states this was an emergency situation which was foreseeable. She also testifies that the Defendant was grossly negligent by not having a policy for an emergency situation where the bus driver is required to pull the bus off the road. [Greene Aff]. The affidavit of McDaniel states that the act of forcing a minor child to urinate in public was in itself gross negligence. He states that the Defendant caused the Plaintiff to violate laws which should not happen. [T#2 p3-4, McDaniel aff].

The trial court issued its order based upon the discretionary exemption discussed above. Therefore, the analysis is the same as that under Proctor, Faile, and Jackson discussed above. Both the facts and law have been reviewed in detail above and therefore the Plaintiff submits that the Defendant was grossly negligent by not having some training or guiding regulation for the bus driver to follow in an emergency situation such as this. [T #2 p3-4]

CONCLUSION

The Plaintiff asserts it was error for the court below to grant Summary Judgment. The facts are to be interpreted in a light most favorable to the Plaintiff. In that light, the Defendant was grossly negligent as set forth in the three arguments above. Therefore, the Plaintiff hereby requests this Court to reverse the Order of the trial court and to remand the case for trial by the lower court.

Respectfully submitted, this the 24th day of March, 2015, at Orangeburg, South Carolina.

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District Three, Respondent

CERTIFICATE OF SERVICE

On the 24 day of March, 2015, the undersigned served a copy of the Appellants' Initial Brief and Designation of Matter to be Included in the Record upon opposing counsel by placing a copy in the United States Mail, postage fully paid, to the following address:

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March 24, 2015

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Re: Jennifer Middleton, et al vs Orangeburg Consolidated School District Three
Appellate Case No. 2014-002402

Dear Ms Kitchings:

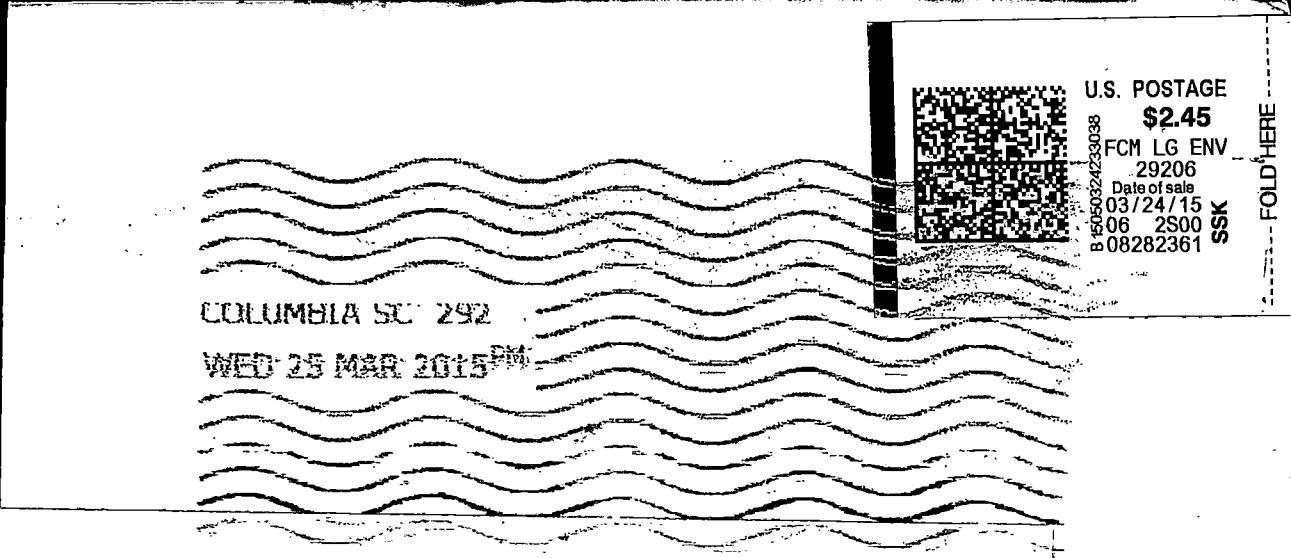
Enclosed you will please find an original and copy of both the Initial Brief and the Designation of Matter to be included in the Record on Appeal. By copy of this letter, we are serving the attorney for the Respondent at the address on the Certificate of Service. Please call me at 803-413-5676 with any questions.

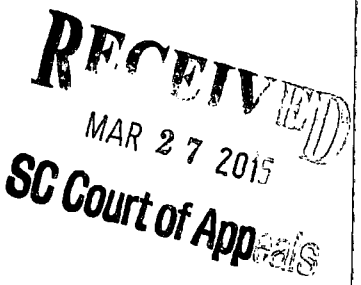
With kind regards, I am

Yours very truly,

R. Bentz Kirby

cc: Meredith L. Seibert





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