

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JUN 15 2015

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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 REPLY BRIEF OF APPELLANT

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Cases

<u>Elam v. SOUTH CAROLINA DEPT. OF TRANSP.</u> , 361 S.C. 9, 602 S.E.2d 772 (S.C., 2004)	2
<u>ION, LLC v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (S.C., 2000)	1
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ARGUMENTS

I. All issues raised by the Appellant were preserved for appeal

In its brief the Respondent argues that only the issue related to the adoption of a written policy is preserved for appeal as it is the only issue raised pursuant to the Rule 59 Motion. The applicable case law states in general that issues must be ruled upon by the Court, or raised in a Rule 59 Motion. If an issue is raised for the first time on appeal it is not properly before the court. And, if the Rule 59 Motion is merely a restatement on other issues ruled upon by the Court, the issues are not preserved.

A review of the Order granting Summary Judgment shows that the Court only ruled on two of the issues raised by the Appellant. It first ruled that the Appellant failed to establish that the Respondent was grossly negligent. [Order pp 4-7]. The second issue it ruled on was the alleged injuries resulted from the exercise of discretion or judgment by the Respondent. [Order pp 7-8] Although the issue regarding the adoption of a school policy was mentioned by the Court, there is no actual ruling by the Court on that issue. [Order p 5]. Thus all three issues raised by the Appellant were reserved as they were either directly ruled upon by the trial court, or were raised pursuant to a Rule 59 Motion.

“If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.” I'ON, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (S.C., 2000). “Accordingly, we reaffirm the rationale and principles expressed in *Coward Hund*; *Quality Trailer*, and *Collins Music*. An appeal may be barred due to untimely service of the notice of appeal when a party — instead of serving a notice of appeal — files a successive Rule 59(e) motion, where the

trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment.” Elam v. SOUTH CAROLINA DEPT. OF TRANSP., 361 S.C. 9, 602 S.E.2d 772 (S.C., 2004). “Where a matter is not ruled on by the Circuit Court, the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e), SCRCF”. Vespazianni v. McAlister, 307 S.C. 411, 415 S.E.2d 427 (S.C. App., 1992). The Court had already ruled on two of the issues raised on appeal by the Appellant. It is clear that since this was a case heard on a Motion, the Judge was not going to reverse his decision. Therefore Appellant should be allowed to pursue all three issues on Appeal.

II. All evidence heard by the trial Court were proper pursuant to Rule 701 of the South Carolina Rules of Evidence

The Respondent argues that the evidence submitted consisted solely of legal conclusions by expert witnesses who were commenting on issues of law and did not assist the trier of fact to understand the evidence of determine a fact in issue. [SCRE Rule 702]. However, Rule 701 of the SCRE allows testimony by a lay witness if

“If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.”

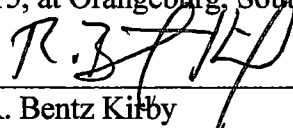
[SCRE Rule 701]. The crux of all the issues in the case are easily understood by the testimony of Greene [Greene Affidavit] and McDaniel [McDaniel Affidavit] as any law person knows that it is not appropriate to force a child to urinate in public by the side of the road. McDaniel also points out what the public in general knows, which is that a person may be arrested and charged with a crime for urinating in public. Likewise, Greene's testimony stating that the training and lack of regulation were not only proper, but were admissible pursuant to Rule 701.

As noted in Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (S.C. App., 1997), the court can consider and admit the opinion of a lay person who has experience and knowledge of the field in which they are testifying. In this case both Greene and McDaniel were testifying from their special and experience in the matters regarding the operation of a bus, the proper training, the need for proper regulations and policies, and the application of laws to specific duties and responsibilities of bus drivers.

CONCLUSION

Therefore, in light of the fact that all three issues presented by the Appellant were appropriately before the Court and there is at least a scintilla of evidence to support the claims of the Appellant, it was improper for the lower court to grant Summary Judgment and the case should be returned to the lower court for adjudication on the full merits.

Respectfully submitted, this the 17th day of June, 2015, at Orangeburg, South Carolina.



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CERTIFICATE OF SERVICE

On the 12th day of June, 2015, the undersigned served a copy of the Appellants' Initial Reply Brief upon opposing counsel by placing a copy in the United States Mail, postage fully paid, to the following address:

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Glenn Walters, Sr.
R. Bentz Kirby, Retired and Of Counsel

June 12, 2015

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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

Dear Ms Kitchings:

Please find enclosed a copy of the Appellant's Initial Reply Brief to be filed. We are enclosing a copy and a self addressed stamped envelope and request that you return a stamped copy indicating the date and time of filing. By copy of this letter we are serving a copy on the Attorney for the Respondent. 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
Laura C. Hart



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