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

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

FINAL BRIEF OF RESPONDENT

Andrea E. White (S.C. Bar # 11891)
Meredith L. Seibert (S.C. Bar # 72935)
Duff, White & Turner, LLC
P.O. Box 1486
Columbia, South Carolina 29202
Telephone: 803.790.0603
Facsimile: 803.790.0605

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. THE TRIAL COURT DID NOT ERR IN FINDING THAT MIDDLETON PRESENTED NO EVIDENCE OF A GENUINE ISSUE OF MATERIAL FACT SHOWING GROSS NEGLIGENCE BY THE DISTRICT.

2. THE TRIAL COURT DID NOT ERR IN RULING THAT THE DISTRICT, ACTING THROUGH ITS BUS DRIVER, WAS NOT GROSSLY NEGLIGENT.

3. THE TRIAL COURT DID NOT ERR IN RULING THAT THE ACTIONS OF THE DISTRICT'S BUS DRIVER WERE SUBJECT TO DISCRETIONARY IMMUNITY AND THE BUS DRIVER PROPERLY EXERCISED THAT DISCRETION.

STATEMENT OF THE CASE

This is an appeal from the trial court's grant of summary judgment on February 5, 2014, to the Respondent, Orangeburg Consolidated School District Three ("the District"). The Appellant, Jennifer Middleton, asserted a single claim against the District on behalf of her minor daughter, Jane Doe,[1] alleging that her daughter's school bus driver failed to exercise ordinary care and was "therefore grossly negligent" in his handling of an incident involving the child during a bus ride from her school to her home.

Middleton filed suit against the District on September 24, 2012. Following acceptance of service on December 21, 2012, the District filed its Answer on January 22, 2013, denying liability and asserting various affirmative defenses, including supervisory and discretionary immunity under the South Carolina Tort Claims Act. The District filed a Motion for Summary Judgment on October 4, 2013, and argued at the hearing on December 11, 2013, that the District could not be held liable because Middleton could not establish the District failed to exercise slight care in its supervision of her daughter. The District also argued that it was not liable because its employee weighed the options and, in his discretion, made a conscious choice in a manner that was not grossly negligent but in accordance with accepted standards. Additionally, the District argued the Tort Claims Act grants immunity to the District for failing to adopt or implement a policy.

---

[1] To date, the District has not filed any formal objections to the Doe designation; however, it reserves its right to do so in the future, in accordance with *In re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, Appellate Case No. 2013-002681 (S.C. Sup. Ct. filed April 4, 2014).

After hearing oral arguments, the Presiding Judge took the matter under advisement and issued an Order, filed February 5, 2014, granting summary judgment to the District. On February 19, 2014, Middleton filed a Motion for Reconsideration or for other relief from the order under Rules 59 and 60, SCRCP, or in the alternative, to reopen the hearing. At the hearing on that Motion, Middleton argued only that the District's alleged lack of a policy applicable to the situation demonstrated a lack of slight care, and the District was therefore grossly negligent. The trial court denied the motion in a Form 4 Order filed October 14, 2014.[2] Middleton filed her notice of appeal on November 5, 2014.

STATEMENT OF FACTS

During the 2011-2012 school year, the District employed Riley Simmons as a bus driver and assigned him to an elementary and middle school bus route for the Holly Hill area schools. (R. p. 39, ¶ 3). Simmons' route is in a very rural area of Orangeburg County, and there are no public restroom facilities in the area. (R. p. 43, ¶ 3; p. 52, lines 17-20). Simmons was the only adult on the bus. (R. p. 39, ¶ 3). Jane Doe, then a first grader, rode Simmons' bus. (R. p. 39, ¶ 4; p. 47, lines 9-14).

On October 11, 2011, when Simmons was well into his afternoon route transporting children from the Holly Hill schools to their homes, Jane Doe informed Simmons that she "had to go to the bathroom and had to pee." (R. p. 39, ¶ 5). Initially, Mr. Simmons told Jane Doe that she would have to "hold it" until she got home. (R. p. 39, ¶ 6). Jane Doe was insistent that she needed to go to the bathroom. According to Simmons, "She asked several times and was jumping up and down, holding her crotch

[2] Although the Form 4 order stated a formal order would follow, it does not appear that the court issued a formal order.

area, and crying." (R. p. 40, ¶ 7). When Mr. Simmons again told her that she would have to hold it, Jane Doe said "no, no no!" In response, Mr. Simmons told her that she would have to wet herself. (R. p. 40, ¶ 8).

Simmons believed that Jane Doe was unable to refrain from urinating much longer and continued to consider allowing her to wet herself. (R. p. 40, ¶¶ 9-10). However, he was concerned about the fact that other students were beginning to laugh at the situation, and he did not wish to give them further reason to "make fun" of Jane Doe if she wet herself. (R. p. 40, ¶ 10). He thus determined that the only reasonable option was to stop the bus in a safe location and allow the child to urinate outside the bus. (R. p. 40, ¶¶ 10-11).

Simmons pulled over in what he considered a safe location and parked the bus so that the door area could not be seen from the road. (R. p. 40, ¶ 11). He then "had all the students sit all the way down in their seats so that they could not see" Jane Doe. (R. p. 40, ¶ 11). He opened the bus door, creating a small corner on the side of the school bus behind the door and told Jane Doe she could urinate there. (R. p. 40, ¶ 11). Simmons remained in the driver's seat where he could make sure that the other students stayed seated and could not watch Jane Doe and where he could watch for any oncoming cars. (R. p. 40, ¶ 11). From his position, Simmons could not see Jane Doe as she urinated. (R. p. 40, ¶ 11). Indeed, the record contains no evidence that anyone, whether on the school bus or passing by on the road, saw Jane Doe relieving herself.

Simmons thought this was the best resolution to the problem, and it was what he would have wanted done for his own children or grandchildren had they been in the same situation. (R. p. 40, ¶ 12). Shortly after being allowed off the bus to urinate behind its

open door, Jane Doe returned to the bus without incident, and Mr. Simmons continued with his route. (R. p. 40, ¶ 13).

When Simmons arrived at Jane Doe's stop, he was met by Jane Doe's parents, including Middleton, who had learned of the incident via a cell phone call from another student on the bus. (R. p. 48, lines 11-20). Middleton was extremely upset by Simmons' handling of the matter and was vocal in letting him know that she was upset. (R. p. 49, lines 18-23). The next day, Middleton complained to District administrators, who investigated her concerns. (R. p. 43, ¶ 4).

Based on its investigation, the District determined that Simmons' actions did not violate District policy or procedures and, consequently, did not discipline or reprimand him. (R. p. 44, ¶ 6). Situations where students may temporarily leave the bus for emergency reasons, including those where students have unexpected bodily functions, such as urinating or vomiting, are left to the bus driver to handle in his or her discretion. (R. p. 44, ¶ 5). The District determined that Simmons believed that Jane Doe would have urinated on herself if she could not relieve herself otherwise; quickly located a safe place to secure his bus so he could let the student off to urinate by the bus; and then took precautions so that she was not seen or in danger. (R. p. 44, ¶ 6). As Simmons' actions did not violate District expectations, policies, or procedures, the District determined no disciplinary action was warranted. (R. p. 44, ¶ 6).

Middleton sued the District, claiming that the District "failed to exercise ordinary and reasonable care and was therefore grossly negligent" because (1) it lacked policies and procedures for screening, training, and supervising bus drivers; (2) it failed to properly screen, train, and supervise the bus driver to ensure his knowledge of how to

handle students in distress; and (3) it failed to use ordinary and reasonable care to properly care for its students. She also claimed that the District and its employees "failed to exercise ordinary and reasonable care and were therefore grossly negligent" because (1) they failed to allow Jane Doe to use a safe public facility and maintain her safety; (2) they failed to properly attend to Jane Doe without undue harm or embarrassment; and (3) they (presumably referring to Simmons) failed to comply with the District's rules and regulations on bus transportation. (R. p. 16, ¶¶ 5-6).

The trial court granted summary judgment to the District on the grounds that Middleton failed to establish the District was grossly negligent in its supervision of Jane Doe. The court rejected Middleton's argument that gross negligence was shown by the alleged absence of a policy applicable to this particular situation, noting that the District's policy and practice was to rely on the judgment of the bus driver. The court further observed that reliance on the driver's judgment was the best policy because "it would be very difficult to have hard and fast rules under varying circumstances" that arise during the course of a bus route. (R. p. 7). The court also rejected Middleton's arguments that other methods of handling the situation would have been better than the method chosen by Simmons, noting that proof of other available methods does not establish that Simmons acted in a grossly negligent manner when he chose the method he did. The court also found that Middleton's assertion that Simmons caused Jane Doe to commit the crimes of indecent exposure and disorderly conduct lacked both legal and factual support. Finally, the court determined that the District was entitled to discretionary immunity because Simmons considered the circumstances and weighed the avenues available to

him and exercised his discretion in a way that met both the District's expectations and accepted standards.

Middleton filed a Motion for Reconsideration and, at the hearing, argued only that the District's lack of a policy applicable to the particular situation of a child on a school bus urgently needing to relieve herself was evidence of a lack of slight care so as to defeat the District's Motion for Summary Judgment. The trial court denied the motion, stating that the District's policy was to allow discretion to the bus driver and, in any event, there was no evidence of gross negligence on the part of the District or the bus driver.

ARGUMENT

STANDARD OF REVIEW

In considering whether an order of summary judgment by a trial court was appropriate, an appellate court applies the same standard of review as the trial court. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). The granting of summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 278, 701 S.E.2d 742, 243 (2010) "Summary judgment is proper when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Byerly v. Connor,* 307 S. C. 441, 445, 415 S.E.2d 796, 799 (1992). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the nonmoving party." *David,* 367 S.C. at 247, 626 S.E.2d at 3.

A party opposing a motion for summary judgment may not rest on the mere allegations of his pleadings, but must set forth specific facts showing that there is a genuine issue of material fact to be considered by a jury. *Thomas v. Waters*, 315 S.C. 524, 527, 445 S.E.2d 659, 661 (Ct. App. 1994). If the party opposing summary judgment "fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial," *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation,* 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999), the opposing party fails to establish the existence of a genuine issue of material fact "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991). Inadmissible testimony, including hearsay, suppositions, speculation, and bald allegations, are insufficient to create a genuine issue of fact. *Id.; see also David,* 367 S.C. at 250, 626 S.E.2d at 5 (stating "summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner"). Thus, in opposing a motion for summary judgment, an appellant is required to point to specific admissible facts showing that there is a genuine issue of material fact to be considered by a jury. *Hoard ex rel. Hoard v. Roper Hosp., Inc.* 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010); *Dawkins v. Fields*, 354 S.C. 58, 70-71, 580 S.E.2d 433, 439 (2002).

I. THE SOLE ISSUE ON APPEAL IS WHETHER THE DISTRICT'S LACK OF A WRITTEN POLICY APPLICABLE TO THE PARTICULAR SITUATION WAS EVIDENCE OF THE LACK OF SLIGHT CARE ON THE PART OF THE DISTRICT.

In her Motion for Reconsideration of the trial court's Order, Middleton did not assert grounds other than the lack of a written policy. (R. p. 98, lines 16-19). She has, therefore, failed to preserve for appeal her other arguments and grounds in opposition to summary judgment. *Brock v. Town of Mt. Pleasant*, 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014) (appellant failed to preserve issue for appeal when it did not argue it at hearing on motion to amend or alter judgment); *Doe v. Doe*, 370 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006).[3]

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT BECAUSE MIDDLETON DID NOT ESTABLISH AN ISSUE OF FACT AS TO WHETHER THE DISTRICT FAILED TO EXERCISE SLIGHT CARE.

Middleton's claim is subject to the provisions of the South Carolina Tort Claims Act, which is the exclusive remedy for all tort claims brought against governmental entities of the State, including public school districts. S.C. Code Ann. § 15-78-20(b), 30(d) & (e). The Act generally waives the sovereign immunity of the State and its governmental subdivisions for tort liability, but also maintains sovereign immunity for multiple governmental actions. S.C. Code Ann. § 15-78-60. The Act further declares that the limitations and exemptions to tort liability of the State and its political subdivisions are to be liberally construed in favor of limiting liability. S.C. Code Ann. § 15-78-20(f).

[3] Although Middleton should be limited to arguing this one issue, the District asserts, as additional sustaining grounds in this appeal, that the trial court correctly decided the District was entitled to summary judgment on the other grounds it cited in its Order. *See I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000) (respondent may assert any ground appearing in the record as an additional sustaining ground); *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 214, 758 S.E.2d 187, 194 (2014) (same).

The Tort Claims Act provides that a governmental entity is immune from liability for any loss resulting from its "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). Gross negligence is defined as "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." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000); *Clyburn v. Sumter County Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). South Carolina courts consistently have held that gross negligence is the failure to exercise even slight care. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002); *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 294, 628 S.E.2d 496, 504 (Ct. App. 2006). The fact that a school district could have taken different or additional precautions in an effort to prevent an occurrence does not establish that the district failed to exercise slight care. *Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278. The question is a matter of law for the court when the evidence supports only one reasonable inference. *Id.* at 310, 534 S.E.2d at 277; *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887-88.

A. Middleton Did Not Establish that the District's Lack of a Written Policy Applicable to the Particular Situation Was Evidence of a Lack of Slight Care on the Part of the District.

The sole issue Middleton argued at the hearing on her Motion for Reconsideration was that the District was grossly negligent in failing to adopt a written policy governing a school bus driver should handle a situation when a child expresses an urgent need to relieve herself. (R. p. 98, lines 16-19). While Middleton did not assert this as a particular

theory of negligence in her Complaint, the trial court heard arguments on this claim and rejected it.

In support of her argument, Middleton submitted the Affidavit of Janet Greene, who declared herself an expert witness in school bus transportation. Ms. Greene opined that the District should have foreseen that a situation similar to this would arise and, further, that the District was grossly negligent in failing to adopt and implement a policy and in training Simmons how to manage the "emergency situation" that confronted him. (R. p. 104, ¶¶ 6-7). Ms. Green's Affidavit is insufficient evidence to defeat summary judgment for two separate reasons.

First, the Tort Claims Act provides immunity to the District for failure to adopt a policy. S.C. Code Ann. § 15-78-60 (4). That provision states, "The governmental entity is not liable for a loss resulting from . . . 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." If the District cannot be held liable because it did not adopt a particular policy, it follows that failure to adopt a particular policy cannot be evidence of gross negligence. Middleton cannot avoid the application of § 15-78-60 (4) by claiming liability under a different provision. Therefore, the District cannot be liable as a matter of law for failing to adopt a policy.

Second, Ms. Greene's affidavit is incompetent as evidence to defeat summary judgment because her opinions are legal arguments. Expert testimony on issues of law is generally inadmissible. *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). Properly qualified experts are permitted to offer opinions if such testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702,

SCRE. If, however, such testimony is "not designed to assist the . . . court to understand certain facts, but, rather, [is] legal argument why the . . . court should rule" on the ultimate issue, it falls outside the parameters of Rule 702, SCRE. *Green v. State*, 351 S.C. 184, 198, 560 S.E.2d 318, 325 (2002). *See also U.S. v. Chapman*, 209 Fed. Appx. 253, 269 (4th Cir. 2006) (unpublished opinion) (stating that under the similar Rule 702, FRE, expert testimony is permitted if it aids the court; however, if it undertakes instead to tell the trial judge or jury what result they must reach, then rather than aiding the court, it attempts to substitute the expert's judgment for that of the court).

As in *Dawkins* and *Green*, Ms. Greene's affidavit offers no "scientific, technical, or other specialized knowledge [to] assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 702, SCRE. Instead, Ms. Green inappropriately attempted to usurp the trial court's role by telling the court what, in her opinion, it should find: that the District "was grossly negligent in failing to adopt [and] implement policies governing the type of emergency conform [sic] Mr. Riley [Simmons]." (R. p. 104, ¶ 7). Even her reference to a selection from a 2004 "Federal School Bus Supplement" does not aid the trier of fact because it refers to a situation calling for a full evacuation of all the children from the bus in the event of a major crisis affecting all of them, such as fire, severe weather, hazardous spills, or downed power lines. (R. p. 112, 10.3.1). The situation in this case—a child needing to urinate who is allowed to leave the bus temporarily for that purpose—is not nearly so dire. Ms. Greene's opinion is not supported by any facts in the record, constitutes a legal conclusion, and is, therefore, insufficient and inadmissible.

Whether the facts presented to the court give rise to a reasonable inference of gross negligence is a determination to be made by the court, not by witnesses, even those properly qualified as experts. Ms. Greene's affidavit does not create a genuine issue of fact and the District is entitled to summary judgment.

B. Middleton Did Not Establish that Simmons Acted Without Slight Care in His Supervision and Protection of Jane Doe.

The evidence presented by the District to the trial court establishes that Simmons exercised at least slight care when he considered and determined which option was best among those available to him and then took steps to ensure Jane Doe's safety and privacy. Middleton presented no evidence contradicting Simmons' description of the event and of his own actions; those facts remain undisputed. In opposing the District's Motion for Summary Judgment, Middleton relies exclusively on her own testimony and the affidavits of two purported expert witnesses who opined that Simmons acted in a grossly negligent manner.

Middleton did not witness the event and offered only her belief, as the mother of Jane Doe, that Simmons should have allowed the child to wet herself or driven back 30 minutes to the town and let the child enter a public restroom alone. (R. p. 51, lines 5-11; p. 52, lines 6-14; p. 53, lines 1-18). This is not only incompetent as evidence of the facts, but is also insufficient to establish that Simmons, in choosing a different course, failed to exercise slight care. As the trial court correctly stated, "At best . . . Plaintiff has only established that the District did not respond to the situation in the manner that Plaintiff preferred, which is not the applicable standard that the District must follow." (R. p. 7). *See Etheredge*, 341 S.C. at 312, 534 S.E.2d at 278 (stating the fact that the school

district might have done more or acted differently does not negate the fact that it exercised slight care).

As for the expert testimony, Janet Greene and Danny W. McDaniel submitted Affidavits declaring themselves as expert witnesses in school bus transportation and law enforcement, respectively. In addition to her opinion regarding the lack of a District policy, discussed *supra* at p. 15-16, Ms. Greene opined that the District was grossly negligent in failing to train Simmons how to manage the "emergency situation" that occurred. (R. p. 104, ¶ 7). However, the record contains no evidence whatsoever of the extent and type of training provided to Simmons by either the District or the State Department of Education, which trains and certifies school bus drivers. *See* S.C. Code Ann. § 59-67-108 (requiring the certification of school bus drivers). Ms. Greene's testimony consists solely of legal conclusions unsupported by facts in the record.

Mr. McDaniel opined that Simmons was Jane Doe's "lawful supervisor" and owed a duty to her to properly supervise her and that Simmons breached the duty of care and was grossly negligent in causing her to urinate "in public." (R. p. 134, ¶ 6). In his (legal) opinion, Simmons caused, allowed, aided and abetted Jane Doe to expose herself, thus causing her to commit the crimes of disorderly conduct and indecent exposure. (R. p. 134, ¶¶ 7-8). However, there is no evidence in the record that anyone, whether Simmons or other students on the bus or passersby on the adjacent road, saw Jane Doe as she relieved herself. Therefore, this opinion is unsupported by the evidence on record. Mr. McDaniel's Affidavit contains no factual evidence in opposition to the facts presented by the District, but rather constitutes mere legal conclusions unsupported by the evidence.

For the same reasons discussed *supra* at pp. 15-16, the testimony by Ms. Greene and Mr. McDaniel on the issues of law is inadmissible. *Dawkins*, 354 S.C. at 66, 580 S.E.2d at 437. As such, it is incompetent to create a genuine issue of fact. *See Baughman*, 306 S.C. at 116, 410 S.E.2d at 546.

Middleton suggested to the trial court and continues to argue to this Court that Simmons "forced" Jane Doe to urinate "in public" and "did not try to find appropriate cover or shelter to afford the child some dignity." (Appellant's Brief at p. 8). Middleton submitted no affidavits or testimony from fact witnesses to support this claim, and the record contains no such evidence. This claim and the arguments based on it cannot, therefore, be credited.

Middleton's opposition to the District's Motion for Summary Judgment consisted solely of her own and her experts' opinions that Simmons or the District should have acted in a different manner. The evidence presented by the District established that Simmons exercised more than slight care in considering how to handle the situation and in executing his plan to ensure the safety of Jane Doe and the other students as well as the protection of Jane Doe's dignity and privacy. Middleton offered no opposing facts; the facts presented by the District regarding the incident remain undisputed and unopposed. "[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *David*, 367 S.C. at 250, 626 S.E.2d at 5; *see also Humana Hosp.-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) ("Where the plaintiff . . . makes no factual showing in opposition to a motion for summary judgment, the [trial] court is required under Rule 56,

to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law.")

The evidence in this case fails to raise an issue of material fact as to whether the District exercised its duty in a grossly negligent manner. The record supports only one reasonable inference: Simmons exercised at least slight care in his supervision and protection of Jane Doe. Therefore as a matter of law, the District is entitled to summary judgment on Middleton's claim of negligent supervision of Jane Doe.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT BECAUSE THE DISTRICT'S ACTIONS WERE SUBJECT TO DISCRETIONARY IMMUNITY, PRECLUDING LIABILITY AGAINST IT.

Section 15-78-60(5) provides that a political subdivision is immune from liability for "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." To benefit from the application of discretionary immunity, the governmental entity must prove that, "faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 428, 567 S.E.2d 231, 237 (2002).

The trial court correctly found that Simmons considered and weighed the circumstances and options available to him and made a conscious choice using accepted professional standards. Simmons stated in his Affidavit that he considered several options, but decided that the best solution to the problem was to stop the bus in a safe location, create an area for Jane Doe to utilize that was shielded from the view of the road and other students, watch the other students to ensure that they did not look at Jane Doe

and also watch the road for safety reasons, then allow Jane Doe to exit the bus temporarily to relieve herself in privacy. (R. p. 40, ¶¶ 10-11). The other alternatives—(1) allow her to wet herself on the bus or (2) turn the bus around to return to Holly Hill, a 30-minute drive, to find a public facility into which he could either allow Jane Doe to enter alone or leave the other students alone while he accompanied her—were, in his judgment, less acceptable than the method he implemented. Simmons' superior, Lydia Gilliard, the Transportation Director for the District who has years of experience in school bus transportation, submitted an Affidavit stating that Simmons' consideration of the alternatives and his safe implementation of his plan did not violate District policy or procedures and did not warrant disciplinary action. (R. p. 44, ¶ 6). The trial court correctly found, based on these circumstances, that Simmons' actions were entitled to discretionary immunity.

Middleton argues in her brief that the District "failed to comply with its manual and the instructions." (Appellant's Brief at p. 10). There is no factual support for this assertion. Middleton attempted to argue at the summary judgment hearing that a bus driver manual for Orangeburg Consolidated School District Number Four required Simmons to contact an administrator before "putting a child off the bus" and, further, prohibited Simmons from stopping the bus at non-designated stops. (R. p. 82, line 12-p. 83, line 8). However, the manual from District Four was not issued or adopted by District Three, the Respondent in this case. In any event, the manual was not introduced into the record. Therefore, there is no evidence that Simmons, in exercising his discretion, did not adhere to accepted standards, rules, or instructions.

The trial court correctly found that the District is entitled to discretionary immunity based on the factual record. Accordingly, this decision should be affirmed.

IV. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THE DISTRICT BECAUSE THE DISTRICT IS IMMUNE FROM CLAIMS THAT IT FAILED TO ADOPT AND ENFORCE POLICIES.

Middleton claims that the District was grossly negligent by failing to adopt and enforce policies applicable to the "emergency situation" of a student needing to go to the bathroom in a rural area where there are no public bathroom facilities.[4] However, the Tort Claims Act provides that 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) (emphasis added). This provision is straight-forward and clearly applies to Middleton's claim against the District. The District is entitled to summary judgment on this claim because it is immune from it under S.C. Code Ann. § 15-78-60(4).

CONCLUSION

For the reasons stated above, the trial court properly found no gross negligence on the part of the District and correctly granted summary judgment. Accordingly, the District respectfully submits that the Court should affirm the trial court's grant of summary judgment.

(SIGNATURE BLOCK ON NEXT PAGE)

---

[4] Middleton appears to assert this argument as a means to void the supervisory immunity available to the District under S.C. Code Ann. § 15-78-60(25), which is discussed *supra* at p. 13. The District argues in this section that even if supervisory immunity is not available to it, it is nevertheless immune under the provision of the Tort Claims Act relating to the adoption or non-adoption of policies in S.C. Code Ann. § 15-78-60(4).

Respectfully submitted,

August 24, 2015

Andrea E. White (S.C. Bar # 11891)
Meredith L. Seibert (S.C. Bar # 72935)
Duff, White & Turner, LLC
P.O. Box 1486
Columbia, South Carolina 29202
Telephone: 803.790.0603
Facsimile: 803.790.0605

Attorneys for Respondent

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

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent Orangeburg Consolidated School District Three complies with Rule 211(b), SCACR.

August 24, 2015

Andrea E. White (S.C. Bar # 11891)
Meredith L. Seibert (S.C. Bar # 72935)
Duff, White & Turner, LLC
P. O. Box 1486
Columbia, South Carolina 29202
Telephone 803.790.0603
Facsimile 803.790.0605

Attorney for Respondent Orangeburg
Consolidated School District Three

(CONTINUED ON NEXT PAGE)

Other Counsel of Record:

R. Bentz Kirby, Esq.
Law Office of Glenn Walters
1910 Russell Street
Orangeburg, SC 29116

Attorney for Appellant

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

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

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent Orangeburg Consolidated School District Three on Jennifer Middleton, as parent and GAL for Jane Doe, by depositing a copy in the United States Mail, postage prepaid, on August 24, 2015, addressed to her attorney of record, R. Bentz Kirby, Esq., Law Office of Glenn Walters, 1910 Russell Street, Orangeburg, South Carolina 29116.

August 24, 2015

Andrea E. White (S.C. Bar # 11891)
Meredith L. Seibert (S.C. Bar # 72935)
Duff, White & Turner, LLC
P. O. Box 1486
Columbia, South Carolina 29202
Telephone 803.790.0603
Facsimile 803.790.0605

Attorney for Respondent Orangeburg
Consolidated School District Three

(CONTINUED ON NEXT PAGE)

Other Counsel of Record:

R. Bentz Kirby, Esq.
Law Office of Glenn Walters
1910 Russell Street
Orangeburg, SC 29116

Attorney for Appellant