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 DoeAppellant,

v.

Orangeburg Consolidated School
District Three,Respondent

PETITION FOR REHEARING

The Court issued its opinion on May 4, 2016, and affirmed the lower court decision. The Opinion is 2016-UP-189. Appellant, by and through her undersigned attorneys, hereby make the following Motion for Rehearing in accord with Appellate Rule 221 and respectfully represent unto this Honorable Court as follows:

1. The School Distict was not entitled to Summary Judgment pursuant to S.C. Code Ann. §15-78-60(4) (2005).

The Appellant submits that the Court misapprehended its argument and position. Certainly, while the plain language of the statute says that a school district can not be held liable for simply not adopting a policy. S.C. Code Ann. §15-78-60(4). While perhaps not stated articularly in the most

cogent language, the argument advanced by the Appellant is that the Respondent did have a policy regarding situations such as this one and that policy was inadequate and the lack of clear guidance to the bus driver.

The undisputed facts are 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. [R pp 3-10; 80-81; 39-41].

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. [R pp 43-44] 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. [R pp 71-72; 75].

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. [R pp 103-105] 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. [R pp 106-135]. 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. [R pp 82; 133-135.][1]

The argument by the Appellant is there was in fact a policy but it did not provide proper guidance to the bus driver. Under the Court's strict reading of the statute, a School District can always avoid liability for its actions, or failure to act, no matter how flagrant or egregious the injury, simply by failing to adopt any policies or provide any training. In light of the fact the School District had a policy which was inadequate and failed to promulgate sufficient guidance to the bus driver, the Appellant submits that the Respondent was not entitled to Summary Judgment on this issue.

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[1] It should also be noted when the ruling in the Hollins case is 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.

2. There is a genuine issue of material fact on the issue of the gross negligence of the bus diver.

The Court ruled that the Respondent was entitled to Summary Judgment because there was no genuine issue of material fact raised by the Appellant. It then states that Respondent is not liable for protection of a student unless it exercises this duty and responsibility in a grossly negligent manner. The affidavits submitted by the Appellant show there was gross negligence and the issue was a genuine issue of material fact.

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. [R pp 103-105] 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. [R pp 106-135]. 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. The bus driver 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 other than "just use your discretion" 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. [R pp 82; 133-135.]

The situation here involved a young child and was foreseeable. Further, it was created by the Defendant. Thus pursuant to the holding of Hollins v. Richland County School Dist. One, 310 S.C. 486, 427 S.E.2d 654 (S.C. 1993) when a school district creates a dangerous situation the school district may be found liable. In this case 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 entitled to a directed verdict. Simply leaving the decision to a driver is no exercise of judgment at all. [R pp 79-80; 88; 98-99]. 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. [R p 82]. The Plaintiff had to suffer this indignity from an authority figure who was supposed to be providing her with safe transportation. [R p 84].

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. [R pp 75; 80-82].

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. [R p 78]. Clearly, the actions of the bus driver were grossly negligent. [R pp 83-85]. 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. [R pp 86-88].

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.

Therefore, the Court improperly ruled that no genuine issue of material fact was raised and the case should be remanded to the trial court to allow the case to be developed at trial.

3. The Appellant did raise the issue of bus driver training at the Summary Judgment hearing before the trial Cout

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. [R pp 6-9]. The second issue it ruled on was the alleged injuries resulted from the exercise of discretion or judgment by the Respondent. [R pp 9-10] Although the issue regarding the adoption of a school policy was mentioned by the Court in a footnote, there is no actual ruling by the Court on that issue. [R p 7]. 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.

The Court ruled that the issue of driver training was not preserved because it was not raised at the Summary Judgment hearing. The Record shows that it was raised at the hearing and the issue should have been considered by this Court. It was expressly stated in the Affidavit of Janet Greene. She states that in her opinion the Defendant should have forseen that a bus driver would be confronted by a situation like that raised in the Complaint. Further, she also stated that the Defendant was "grossly negligent in failing to train Mr. Riley Simmons, the bus driver, in how to manage and control the 'emergency situation' involving an elementary school child's sudden urge to urinate." [R p 104]. This issue is intertwined with the issue regarding the Defendant's policy and lack of policy. It was admitted by the Defendant that the only policy it had was the driver was to use his best judgment. [R p 44]. The argument by the Appellant is that the Defendant was grossly negligent for having only one policy, to depend on the driver's judgment. The necessary conclusion from the fact the Respondent did not provide any training to the drivers at all, nor did they give them a guidepost to deal with a reasonably foreseeable situation. [R pp 39-44, pp 20-28, pp 103-105].

CONCLUSION

The Appellant is entitled to a rehearing as the Court has overlooked the evidence that the issues were preserved for appeal and that the facts and arguments, seen in a light most favorable to the Appellant, indicate that Summary Judgment at this stage was not appropriate.

Respectfully submitted, this the 19th day of May, 2016, at Orangeburg, South Carolina.

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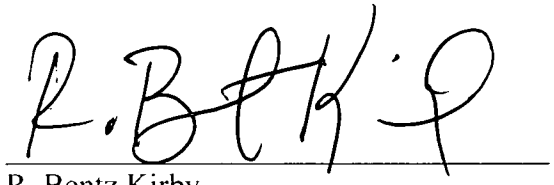
CERTIFICATE OF SERVICE

On the 19th day of May, 2016, the undersigned served a copy of the Appellants' Petition for Rehearing upon opposing counsel by placing a copy in the United States Mail, postage fully paid, to the following address:

Meredith L. Seibert
Duff, White & Turner, LLC
PO Box 1486
Columbia, SC 29204



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May 19, 2016

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 the Appellant's Petition for a Rehearing, together with six (6) copies to be filed. We are also enclosed the filing fee of $25.00. 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