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

RETURN BY RESPONDENT TO PETITION FOR REHEARING

Appellant has petitioned this Court for a rehearing of her appeal, which was decided *per curiam* on May 4, 2016. Respondent respectfully submits that her petition should be denied because the Court did not misapprehend her argument and position, but correctly decided her appeal.

Standard of Review

A party seeking rehearing of an appeal must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. A petition for rehearing is not an opportunity for a losing party to present the same arguments she previously presented to the Court in the hope that she might be

granted another hearing on the same points already considered by the Court. *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001); *Checker Yellow Cab Co., Inc. v. Checker Cab and Parcel Service, Inc.*, 287 S.C. 608, 612, 340 S.E.2d 549, 552 (Ct. App. 1986); *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933). In addition, a losing party may not present as grounds for a rehearing points which she overlooked or did not preserve for consideration by the Court. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011); *Kennedy*, 349 S.C. at 532-33, 564 S.E.2d at 323.

Argument

Appellant argues that the Court misapprehended her argument when it found that the Tort Claims Act provided immunity to the Respondent for its lack of a policy applicable to the situation facing the school bus driver when the first grade student insisted that she must relieve herself immediately. Specifically, Appellant now argues that Respondent had a policy, but that it was inadequate and failed to provide clear guidance to the bus driver.

Appellant's argument to the court below, in fact, was that the Respondent did not have a policy to cover the situation, which she asserted amounted to gross negligence. See R. p. 99, lines 12-22 ("It is our position that not having a policy, that is grossly negligent for the District to not have a policy, that discretion by the bus driver is not a policy, and that this case should go forward because a genuine issue of material fact exists for them not having a policy"). This Court correctly determined that Appellant's claim was that the Respondent was liable to her because it had no policy applicable to the

situation, and, further, that such a claim is foreclosed by the immunity provision of the Tort Claims Act at S.C. Code Ann.§ 15-78-60 (4).

The related argument that Appellant now makes—that the Respondent is liable to her because it failed to provide an adequate policy and clear guidance to the bus driver in supervising and protecting a student who was in urgent need of relieving herself—is an argument that the Respondent acted in a grossly negligent manner.[1] The trial court specifically held that the Respondent's policy and practice of relying on the judgment of the school bus driver was "the best policy," R. p. 7, and that the bus driver exercised at least slight care in choosing among the options available to him and in taking "precautions to ensure [the student's] privacy and safety . . . ." R. p. 8. On appeal, this Court considered and rejected Appellant's argument that the Respondent acted in a grossly negligent manner, holding instead that the Respondent exercised at least slight care, which is sufficient to shield it from liability under the Tort Claims Act, S.C. Code Ann. § 15-78-60 (25).

In her Petition for Rehearing, Appellant attempts to buttress her argument on gross negligence by repeating her earlier argument made to this Court that the affidavits of her purported experts create a genuine issue of material fact on the alleged gross negligence of the Respondent. The only admissible facts in the record, however, were supplied by the Respondent's witnesses. The affidavits submitted by Appellant's purported expert witnesses contained merely a combination of legal opinions and factual assertions not supported by the evidence in the record. They seek to create an issue by

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[1] The Tort Claims Act requires that Appellant, in order to establish liability on the part of the Respondent, a public school district, prove the Respondent was grossly negligent in its supervision of students; simple negligence is not sufficient. S.C. Code Ann. § 15-78-60 (25).

assuming the child was seen by others, but this assumption is entirely unsupported. The bus driver's affidavit establishes that neither he nor other students on the bus could view the child, and the Appellant offered no evidence either to dispute that or to establish that passersby on the road could view the child.

Moreover, while Appellant's purported expert opined that the Respondent was grossly negligent in failing to train the bus driver in how to manage this particular situation, Appellant argues in her Petition for Rehearing that the Respondent provided no training to drivers "at all." This argument is neither supported by the evidence nor argued to the trial court below.[2]

The testimony of Appellant and her purported expert witnesses was incompetent to defeat summary judgment in favor of Respondent, which supported its case with admissible evidence. Appellant testified not based on her direct knowledge or information, but on her own suppositions or hearsay supplied by unknown other people, and the expert witnesses based their opinions on unsupported assumptions. The affidavits submitted by the Respondent of the bus driver and his supervisor contain the only properly admissible facts upon which the trial court could base its ruling, and they do not support the suppositions of Appellant or her expert witnesses. Rather, they establish the existence of at least slight care on the part of the Respondent and its bus driver. "[S]ummary judgment is completely appropriate when a properly supported

[2] Appellant's assertion in this Petition that the issue of training was raised in the trial court is incorrect. The only reference to training in the record is found in her expert witness's affidavit opining on the presumed lack of training. There is no factual record to support this opinion and no arguments were presented to the trial court about training or the lack thereof. The arguments in the trial court revolved solely around the Respondent's policy and the bus driver's actions.

motion sets forth facts that remain undisputed or are contested in a deficient manner." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

More importantly for purposes of this Petition, Appellant does not raise any points in her Petition for Rehearing that this Court overlooked or misapprehended. The trial court found that, viewed in the light most favorable to Appellant, the competent evidence in the record did not create a genuine issue of material fact regarding gross negligence on the part of the bus driver, a finding that was properly affirmed by this Court. Appellant's argument for a rehearing of the issues already addressed by this Court is, in the words of the Supreme Court in the *Arnold* case, the seminal case in South Carolina on petitions for rehearing, merely a "'re-hash' of what the losing party has said before, matters which the court has already considered well and disposed of." *Arnold v. Carolina Power & Light Co.*, 167 S.E.at 238. It cannot serve as the basis for a rehearing of this appeal.

Conclusion

Appellant did not identify any points that this Court overlooked or misapprehended. This Court fully considered Appellant's evidence and arguments, and there are no grounds for a rehearing.

[SIGNATURE BLOCK ON NEXT PAGE]

May 31, 2016

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PROOF OF SERVICE

I certify that I have served the Return by Respondent to Petition for Rehearing on Jennifer Middleton, as parent and GAL for Jane Doe, by depositing a copy in the United States Mail, postage prepaid, on May 31, 2016, addressed to her attorney of record, R. Bentz Kirby, Esq., Law Office of Glenn Walters, 1910 Russell Street, Orangeburg, South Carolina 29116.

May 31, 2016

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May 31, 2016

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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

Dear Ms. Kitchings:

Enclosed herewith for filing please find an original and six copies of Respondent's Return to Appellant's Petition for Rehearing in the above-referenced case on appeal. Also enclosed are an original and six copies of a proof of service.

By copy of this letter, I am today serving the same on counsel of record for Appellant, R. Bentz Kirby, Esq.

Thank you for your assistance in this matter.

Sincerely,

Laura Callaway Hart

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/jmg
Enclosures
c: R. Bentz Kirby, Esq. (w/enclosures)(Via U.S. Mail)
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