

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC SUPREME COURT

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
Jel GAL for Jane Doe, Petitioner,

v.

Orangeburg Consolidated School
District Three, Respondent

APPENDIX

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Record on Appeal	1
Brief of Appellant	139
Brief of Respondent	156
Reply Brief of Appellant	183
Opinion of Court of Appeals	189
Motion for Rehearing	192
Return to Motion for Rehearing	201
Order Denying Motion for Rehearing	209

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Jennifer Middleton, as parent and
GAL for Jane Doe

Appellant,

v.

Orangeburg Consolidated School
District Three,

Respondent

RECORD ON APPEAL

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INDEX

1.	Order of Judgment dated February 4, 2014	1
2.	Order of Judgment dated October 14, 2014	11
3.	Complaint	12
4.	Answer and Affirmative Defenses	18
5.	Motion for Summary Judgment and Affidavits	22
6.	Memorandum of Law in Support of Defendant's Motion for Summary Judgment and Attachments	29
7.	Motion for Reconsideration	60
8.	Transcript of Hearing on December 11, 2013	62
9.	Transcript of Hearing on September 18, 2014	96
10.	Affidavit of Janet Greene	103
11.	Affidavit of Danny McDaniel	133
12.	Certification	136

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-38-01314

Jennifer Middleton, et al	vs	Orangeburg Consolidated School District Three
PLAINTIFF(S)		DEFENDANT(S)
Submitted by: Master-In-Equity Judge		Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(lc), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

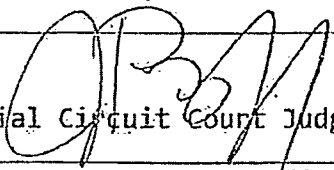
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

This order ☐ ends ☐ does not end the case.		
Additional Information for the Clerk :		
INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes ——— below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the

amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

 Special Circuit Court Judge	Judge's Code: 2097	Date: February 4, 2014
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For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)		ATTORNEY(S) FOR THE DEFENDANT(S)
		CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and GAL for
Jane Doe,

Plaintiff,

v.

Orangenburg Consolidated School District
Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

PROPOSED ORDER

ATTEST: TRUE COPY

Wingia B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

2014 FEB -5 P 3:00 PM

FILED FOR RECORD
WINGIA B. CLARK
CLERK OF COURT
ORANGEBURG, SC

This matter came before the Court on December 11, 2013, pursuant to Defendant School District's Motion for Summary Judgment. Prior to and during the hearing, the parties submitted affidavits and memoranda in support of their positions. The Court has carefully considered all of the evidence on the record in this matter, as well as the arguments of the parties. This case arose out of a difficult decision made by a school bus driver who faced an unusual and potentially embarrassing situation suffered by a minor child, Jane Doe.

While the Court empathizes with the Plaintiff's sentiments about how the incident affected her daughter, Plaintiff has failed to present any genuine issue of material fact as to whether the District was grossly negligent by failing to use slight care during the incident. Therefore, for the reasons explained below Defendant's Motion for Summary Judgment is granted.

OVERVIEW

This action was brought by Plaintiff Jennifer Middleton (hereinafter "Plaintiff") on behalf of her minor daughter, Jane Doe (hereinafter "Jane Doe") against Orangenburg

CP 301 #1

Consolidated School District Three (hereinafter "the District"), a public school district subject to the South Carolina Tort Claims Act. Plaintiff's Complaint alleges that the District was grossly negligent in its supervision of Jane Doe and in its screening, training, and supervision of the bus driver.¹ The suit arises out of an incident on October 11, 2011, when, in response to Jane Doe's pleas that she needed to use the bathroom while en route home from school, a District bus driver made an unscheduled stop to allow Jane Doe to relieve herself off of the bus. Plaintiff alleges that, as a result of the bus driver's decision, Jane Doe suffered humiliation, embarrassment, mental anguish, and other damages.

FACTS

The District is located in a rural area of eastern Orangeburg County. Riley Simmons (hereinafter "Mr. Simmons" or "the bus driver") was employed by the District as a bus driver and assigned to drive bus No. 507-0559 on Route No. 36 during the time in question. That route, which serves the Holly Hill schools, is particularly rural and there are no public restroom facilities in the area or other public places to stop and allow children to urinate. As of 2011, Mr. Simmons had over ten years experience as a school bus driver. Jane Doe, then a first grader, rode Mr. Simmons' bus.

On October 11, 2011, after the bus had left the Holly Hill schools, Jane Doe informed Mr. Simmons that she needed to use the restroom. Initially, Mr. Simmons told Jane Doe that she would have to "hold it" until she got home, as that response generally resolves such

¹ Plaintiffs did not present any argument or response to Defendant's arguments regarding the screening, training, and supervision of the bus driver. Her allegations that the District failed to properly screen, hire, and train Mr. Simmons are not based on any evidence or facts that the District knew or should have known of a problem, but on her belief that Mr. Simmons' decision to let Jane Doe use the restroom makes him a "kook" and "if you've got a kook like that driving, yeah, I assume you didn't screen them properly." Conjecture and speculation are insufficient to create any genuine issue of material fact. *McKnight v. S. Carolina Dep't of Corr.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009).

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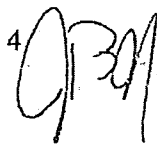
requests from students. A short while later, however, Jane Doe told Mr. Simmons again that she needed to pee. She asked several times and was jumping up and down, holding her crotch area, and crying. Mr. Simmons again told her that she would have to hold it, but Jane Doe said "no, no no!" In response, Mr. Simmons told her that she would have to wet herself. By that time, however, he believed that she was not able to refrain from using the restroom much longer. Further, the other students on the bus, which included elementary and middle school students, had started to laugh at situation.

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. In this case, Mr. Simmons decided to pull the bus over in a safe location so that Jane Doe could urinate outside of the bus. He parked the bus so that the door area was blocked from view by the road and then had all the students sit down in their seats so that they could not see Jane Doe. He then told Jane Doe she could get off the bus and urinate right behind the door by the side of the school bus. With the bus door open, this left a small corner for her to use. Mr. Simmons then sat in the driver's seat where he could make sure that the other students stayed seated and could not watch Jane Doe, as well as watch for any oncoming cars. Further, he could not see Jane Doe using the bathroom from that position. Shortly after being let off the bus to urinate, Jane Doe got back on the bus without incident and Mr. Simmons continued with his route.

3 

1. The Defendant's Motion for Summary Judgment is Granted Because Plaintiff Failed to Establish the District Was Grossly Negligent

The South Carolina 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). Because this case involves the protection of a student, Plaintiff must prove that the District was grossly negligent. 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." *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000). It is the failure to exercise even the slightest 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. Dept. of Health & Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (S.C. Ct. App. 2006). While gross negligence is ordinarily a mixed question of law and fact, where the evidence supports but one reasonable inference, as it does here, the question becomes a matter of law for the court. *Etheredge*, 534 S.E.2d at 277. In order to maintain a claim for gross negligence, Plaintiff must show that: (1) the District owed Jane Doe a duty; (2) the District breached this duty by failing to exercise slight care; (3) Jane Doe was injured, and; (4) the District's breach of duty proximately caused her injury. *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986). Here, Plaintiff has not pointed to any question of fact that would permit a reasonable jury to find that the District failed to exercise slight care.

4 

Plaintiff contends that the District was grossly negligent in its supervision of Jane Doe in a number of particulars – by failing to have a policy in place to address the situation; by allowing Jane Doe to engage in an act that constitutes criminal indecent exposure and disorderly conduct; and by not requiring Jane Doe to urinate herself on the bus. The fact that a school district could have taken additional precautions in an effort to prevent an occurrence does not establish that it failed to exercise slight care. *Etheredge*, 534 S.E.2d at 278. At best, however, 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. Moreover, I find that the responses suggested by Plaintiff are far from appropriate and that the evidence supports only one reasonable inference – that the District acted reasonably under the circumstances.

As an initial matter, Plaintiff asserts that the lack of a policy to deal with emergency situations constitutes gross negligence. Affidavit testimony submitted by the District establishes that the District relies on the judgment of the school bus driver in these sorts of emergency situations. I find that this constitutes the District's policy and practice, which, quite frankly, is the best policy for the District to adopt in emergency situations, as it would be very difficult to have hard and fast rules under varying circumstances. Moreover, Plaintiff has suggested that the proper course of action would have been for Mr. Simmons to allow Jane Doe to wet herself, which, as discussed further below, was an option that Mr. Simmons did consider. However, I find that if Mr. Simmons had allowed the child to urinate on the bus in the presences of all the other children, it would have created even more embarrassment for Jane Doe and also would have created a potentially dangerous situation where other children would be exposed to wet seats on the bus or wet floors where they could have slipped and fallen. Plaintiff also suggests that the bus driver could have located a public restroom facility in the area, although

5
JBM

both parties agree that there were no such locations available. Even if a restroom could have been located, Mr. Simmons would have been forced to leave his bus of young students without adult supervision to escort Jane Doe to the bathroom or allow a small child to go to the bathroom unattended. Neither are appropriate under the circumstances and the option chosen by the bus driver was the far better choice. Lastly, I reject Plaintiff's assertion that the bus driver's decision allowed Jane Doe to commit the crimes of indecent exposure and disorderly conduct. I find that Jane Doe, a first grader, was incapable under the law of committing the aforementioned criminal acts. A child this age cannot and did not form the requisite criminal intent to violate a criminal law. Additionally, the available evidence establishes that the bus driver took precautions to ensure Jane Doe's privacy and safety and prevent any passerby from seeing Jane Doe urinate. Although she makes several suggestions as to how she believes the District should have responded, Plaintiff cannot establish that the District's actions amount to the absence of slight care.

Rather, the evidence establishes that the District's actions demonstrated at least slight care and, in fact the manner in which this incident was handled by the bus driver was the best way to address the situation. In this case, Mr. Simmons carefully considered his options before making a difficult decision as to handle an unusual situation. Once he chose a course of action – to let Jane Doe off the bus to urinate – he proceeded with caution and safety. He parked the bus in a safe location and took steps to ensure Jane Doe's privacy and safety.

Because the evidence presented supports but one reasonable inference, I conclude that, as a matter of law, the District used more than slight care in this situation and, therefore, was not grossly negligent. I further find that Plaintiff has failed to establish even simple negligence, as she has not presented any facts from which a reasonable jury could find

6
JBM

that the District breached any duty to Jane Doe.

2. Defendant's Motion for Summary Judgment Is Granted Because the Alleged Injuries Resulted From The Exercise Of Discretion Or Judgment By District Personnel

As an additional ground for granting summary judgment, I find that, pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(5), the District is immune from liability because Plaintiff's alleged losses, damages, or injuries resulted from the exercise of discretion or judgment by a governmental employee and that discretion and judgment was not exercised in a grossly negligent manner. Discretionary immunity "is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." *Proctor v. Dept. of Health and Environmental Control*, 368 S.C. 279, 638 S.E.2d 496, 506 (Ct. App. 2006). As the party asserting this defense, the burden of proof is on the District. See *Pike v. SC Dep't of Transp.*, 343 S.C. 224, 232, 540 S.E.2s 87 (2000). However, Tort Claims Act affirmative defenses exempting government entities from liability should be liberally construed to limit liability. *Richland County v. Carolina Chloride, Inc.* (S.C.App. 2009), 382 S.C. 634, 677 S.E.2d 892, rehearing denied, certiorari granted, affirmed in part, reversed in part 394 S.C. 154, 714 S.E.2d 869, rehearing granted, rehearing dismissed 396 S.C. 311, 721 S.E.2d 441, certiorari denied 133 S.Ct. 168, 184 L.Ed.2d 36.

Here, the evidence presented by the District establishes that Mr. Simmons considered the circumstances of this situation, including the rural area, availability of public facilities, distance from school or a public facility, and supervision of the other students on the bus, before concluding that there were two possible avenues of action. Given the rural nature of the route and their current location, as well as the fact that he was the only adult on the bus, Mr.

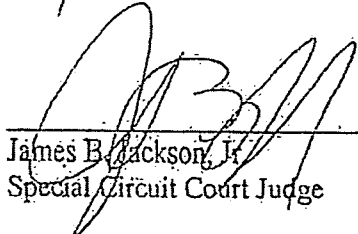
7 

Simmons weighed the only two options he believed he had – letting Jane Doe urinate on herself or letting Jane Doe use the bathroom by the side of the road. While he initially considered doing nothing so that Jane Doe would be forced to urinate on herself if it reached that point, which Mr. Simmons believed was very likely, he did not want her embarrassed or the other students to laugh or ridicule her when she did. The only other option he believed he had was to let Jane Doe urinate by the side of the road, which he believed he could do safely. Further, the District established that either one of these options met the District's expectations and accepted standards for dealing with distressed students on a school bus, further confirmed by the fact that the District took no disciplinary action against Mr. Simmons. The District is, therefore, entitled to discretionary immunity pursuant to S.C. Code §15-78-60(5).

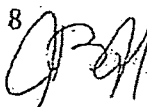
CONCLUSION

Based on the all of the evidence in this case, Plaintiff has failed to make a showing sufficient to establish that a genuine question of material fact exists as to her cause of action for gross negligence. In addition, the District conclusively established that it was entitled to discretionary immunity pursuant to S.C. Code §15-78-60(5). Defendant's Motion for Summary judgment is granted and Plaintiff's action is dismissed with prejudice.

AND IT IS SO ORDERED this 4th day of February, 2014


James B. Jackson, Jr.
Special Circuit Court Judge

Orangeburg, South Carolina

8


FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

JUDGMENT IN A CIVIL CASE

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-38-01314

Jennifer Middleton, et al	vs	Orangeburg Consolidated School District Three
PLAINTIFF(S)		DEFENDANT(S)
Submitted by: Master-In-Equity Judge		Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
- ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Plaintiff's Motion for Reconsideration is denied. The Court found in its previous Order that the School District did have a policy in this matter which allowed discretion to the bus driver to handle emergency situations. The Court further finds that the bus driver acted very reasonable under the circumstances of this case and there was certainly no gross neglect by the District.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

Sent on 10/16/2014

Ms. Shante' Zene

ATTEST: TRUE COPY
 Winnif B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

COUNTY OF ORANGEBURG

IN THE COURT OF COMMON PLEAS

Jennifer Middleton, as parent and GAL for
Jane Doe,

CIVIL ACTION COVERSHEET

Plaintiff(s)

vs.

2012- CP 38

1314

SEP 26 PM 4:43

OCSD #3,

Defendant(s)

(Please Print)

Submitted By: Glenn Walters, Sr., Esquire

Address: PO Box 1346

Orangeburg, SC 29116

SC Bar #:

13198

Telephone #:

(803) 531-8844

Fax #:

(803) 531-3628

Other:

E-mail:

glennwalterspa@gmail.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|---|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Notice/ File Med Mal (230)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☒ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
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| Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
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| Special/Complex /Other
☐ Environmental (600)
☒ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650) |
|--|--|

Submitting Party Signature:

Date:

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

ORANGEBURG COUNTY, SC

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)
)
Jennifer Middleton, as parent and)
Guardian Ad Litem for Jane Doe,)
)
Plaintiff(s))
)
v.)
)
ORANGEBURG SCHOOL)
DISTRICT THREE,)
)
Defendant.)
)
_____)

IN THE COURT OF COMMON PLEAS
Civil Action Number: 2012-CP-38-

2012 SEP 26 PM 4:43
FILED FOR RECORD
CLERK OF COURT
ORANGEBURG, SC

SUMMONS
(Jury Trial Demanded)

TO THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint upon the subscriber, at his office at 1910 Russell Street, Post Office Box 1346, Orangeburg, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid, plaintiff will apply to the Court for the relief demanded in the complaint.

LAW OFFICE OF GLENN WALTERS



Glenn Walters, Esquire
Paul W. Owen, Esquire
R. Bentz Kirby, Of Counsel
Attorneys for the Plaintiff
1910 Russell Street
Post Office Box 1346
Orangeburg, SC 29116
(803) 531.8844
(803) 531.3628 (facsimile)

Orangeburg, South Carolina

Date: 9/24/12

TEST: TRUE COPY
Walter B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS	
COUNTY OF ORANGEBURG	)	Civil Action Number: 2012-CP-38-	<u>1314</u>
Jennifer Middleton, as parent and Guardian Ad Litem for Jane Doe,	)		
Plaintiff(s)	)		
v.	)	COMPLAINT	
ORANGEBURG SCHOOL DISTRICT THREE,	)	(Jury Trial Demanded)	
Defendant.	)		

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WINNIE A. B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2012 SEP 26 PM 4:43

The Plaintiff, by and through her undersigned counsel, complaining of the acts of Defendant, alleging, and saying the following:

1. Plaintiff, Jane Doe, resides in City of Holly Hill, County of Orangeburg, State of South Carolina and at all times hereto was enrolled as a full-time student at St. James Gilyard Elementary School.
2. Defendant, Orangeburg County School District Three is a political subdivision of the State of South Carolina, and is subject to the provisions of the South Carolina Torts Claim Act; specifically, S.C. Code Ann. §15-78-10 to §15-78-190 (sup. 2000).
3. At all times relevant hereto, the Defendant, Orangeburg School District Three (hereafter OCSD# 3) and its agents and employees acting in the course and scope of their employment, undertook to provide transportation to and from school for students residing within said OCSD #3, including transportation of grade students enrolled at St. James Gilyard Elementary School therefore owed a duty to exercise reasonable care to assure that the Plaintiff was safely transported to and from school. It was the duty of agents and employees of the Defendant, acting in the course and the duty of agents and employees of their employment, to exercise ordinary and reasonable care in operating school buses and in transporting students, including the Plaintiff, safely to and from school.
4. On or about October 11, 2011, an employee of the Defendant, Mr. Riley, while acting in the course and scope of his employment, was operating a school bus owned by the Defendant OCSD#3, for the purpose of transporting students, including the Plaintiff, from St. James Gilyard Elementary School to designated bus stops on a bus route established by the Defendant, OCSD#3. In the course of doing so on said date, said employee pulled the bus over on an

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ORANGEBURG COUNTY, SC

undesignated stop and made the Plaintiff urinate on the side of the road. As a result of said event, Plaintiff is suffering from severe mental, emotional, and physical trauma.

5. The Defendant, OCSD#3, failed to exercise ordinary and reasonable care and was therefore grossly negligent in performing its duties to the Plaintiff in one or more of the following particulars:

(a) In failing to adopt or implement policies and procedures sufficient to provide for adequate screening, training, and supervision of qualified bus operators for OCSD#3.;

(b) In failing to properly screen, train, and supervise Mr. Riley so as to make certain that he was knowledgeable of district requirements for handling students in distressed situations.

(c) In failing to exercise ordinary and reasonable care in ensuring that the student was properly cared for and.

6. The Defendant's, OCSD#3, its agents and employees, acting in the course and scope of their employment, failed to exercise ordinary and reasonable care and were therefore grossly negligent in performing duties owed to the Plaintiff in one or more of the following particulars:

(a) In failing to allow the Plaintiff to use a safe public facility and maintain her safety

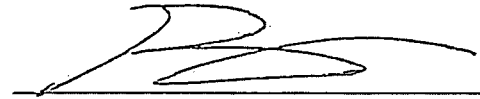
(b) In failing to assure that the Plaintiff was properly attended without any undo harm or embarrassment;

(c) In failing to comply with the rules and regulations of the Defendant, OCSD#3, for operation and procedures for bus transportation of students.

7. As a direct and proximate result of the negligence of the Defendant, or its agents and employees acting in the course and scope of their employment, Plaintiff has suffered substantial damages in the form of, but not all inclusive, humiliation, embarrassment, mental anguish, and other tangible and intangible damages. Moreover, Plaintiff was forced to retain counsel in order to pursue this claim.

WHEREFORE, Plaintiff prays for judgment against the Defendant for actual damages, together costs herein or as the Court deems just and necessary.

LAW OFFICE OF GLENN WALTERS



Glenn Walters, Esquire
Paul W. Owen, Esquire
R. Bentz Kirby, Of Counsel
Attorneys for the Plaintiff
1910 Russell Street
Post Office Box 1346
Orangeburg, SC 29116
(803) 531.8844
(803) 531.3628 (facsimile)
Email: glennwalterspaw@gmail.com

Date: _____

9/29/12

in response to Jane Doe's requests, made an unscheduled stop in order to allow Jane Doe to relieve herself. All remaining allegations of this Paragraph are denied.

5(a-c). Denied.

6(a-c). Denied.

7. Denied.

PLAINTIFF'S PRAYER FOR RELIEF

The allegations set forth in Plaintiff's prayer constitute a demand for relief to which no responsive pleading is required. To the extent a responsive pleading is required, the District denies that Plaintiff is entitled to the relief she seeks.

FIRST AFFIRMATIVE DEFENSE

The District cannot be held liable pursuant to the legal theories of *respondeat superior* or vicarious liability.

SECOND AFFIRMATIVE DEFENSE

The District is immune from liability under the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(5), because the alleged losses, damages, and injuries sustained by Plaintiff resulted from the exercise of discretion or judgment by the District and/or its employees and the District was not grossly negligent in exercising that discretion or judgment.

THIRD AFFIRMATIVE DEFENSE

The District is immune from liability under the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-60(25), because the alleged losses, damages, and injuries sustained by Plaintiff arose out of the District's responsibility or duty regarding supervision, protection, control, confinement, or custody of a student, and the District was not grossly negligent in exercising that responsibility or duty.

FOURTH AFFIRMATIVE DEFENSE

The District is not liable under S.C. Code Ann. § 15-78-60(4) for the 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.

WHEREFORE, having answered Plaintiff's Complaint, the District requests that this Court dismiss Plaintiff's Complaint with prejudice and enter judgment in the District's favor together with the costs of this action, and for such other and further relief as to the Court may deem proper.

Respectfully Submitted:

DUFF, WHITE & TURNER, LLC

By: Meredith L. Seibert
Andrea E. White
Meredith L. Seibert

P.O. Box 1486
Columbia, SC 29202
Telephone: (803) 790-0603
Facsimile: (803) 790-0605

Attorneys for Defendant Orangeburg Consolidated
School District Three

January 22, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and GAL for
Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District
Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

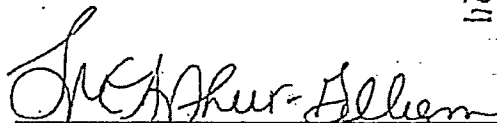
**CERTIFICATE OF SERVICE
VIA U.S. MAIL**

The undersigned of Duff, White & Turner, LLC, hereby certifies that she has served the following counsel of record with the foregoing **DEFENDANT ORANGEBURG CONSOLIDATED SCHOOL DISTRICT THREE'S ANSWER AND AFFIRMATIVE DEFENSES**, by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 22ND day of JANUARY, 2013:

Glenn Walters, Sr., Esq.
LAW OFFICE OF GLENN WALTERS
P.O. Box 1346
Orangeburg, SC 29116

FILED FOR RECORD
WINTER B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2013 JAN 23 PM 12:29



Jennifer McArthur-Gilliam, Paralegal
DUFF, WHITE & TURNER, LLC
P.O. Box 1486
Columbia, SC 29202

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and Gal for Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

NOTICE OF MOTION AND
MOTION FOR SUMMARY JUDGMENT

2013 OCT -4 PM 12:14
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ORANGEBURG COUNTY

TO: GLENN WALTERS, SR., ESQ., ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that, pursuant to Rule 56, SCRPC, Defendant Orangeburg Consolidated School District Three (hereinafter "District" or "the District"), by and through its undersigned counsel, will move before the Presiding Judge of the First Judicial Circuit, on the 10th day after service hereof, or as soon thereafter as counsel may be heard, for an Order granting the District summary judgment as to all claims and causes of action alleged against the Defendant District in Plaintiff's Complaint.

As a matter of law, the Court should grant the District summary judgment for negligence and gross negligence for the following reasons:

1. Plaintiff fails to create a genuine issue of material fact regarding liability for negligence or gross negligence on the part of the District, and the District is, therefore, entitled to summary judgment on those claims.

2. Defendant District is not liable pursuant to the South Carolina Tort Claims Act (hereinafter "the Act"), S.C. Code Ann. § 15-78-10 *et. seq.*, specifically:

a. Defendant District is a governmental entity within the provisions of the Act and is entitled to all of the protections afforded by the Act.

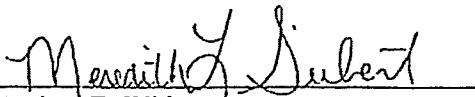
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CLERK OF COURT
ORANGEBURG COUNTY

- b. Pursuant to the Act, Defendant District is immune from liability for any damages, injuries and losses claimed by the Plaintiff pursuant to S.C. Code Ann. §15-78-60(4),(5), and (25)
- c. At all times relevant to this matter, Defendant District was not grossly negligent.

In support of this Motion, Defendant District relies upon the pleadings, the statutory and common law of the State of South Carolina, deposition excerpts, the attached affidavits of Riley Simmons and Lydia Gilliard, other evidence deemed admissible by the Court, as well as a Memorandum of Law to be filed separately with the Court once this Motion is scheduled for a hearing.

Respectfully Submitted:

DUFF, WHITE & TURNER, LLC

By: 
Andrea E. White
Meredith L. Seibert

P.O. Box 1486
Columbia, SC 29202
Telephone: (803) 790-0603
Facsimile: (803) 790-0605

Attorneys for Defendant Orangeburg Consolidated
School District Three

October 4, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and Gal for Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

AFFIDAVIT OF RILEY SIMMONS

2012 OCT - 4 PM 12:14
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ORANGEBURG COUNTY, SC

I, Riley Simmons, being duly sworn according to law, depose and say as follows:

1. I am a bus driver with Orangeburg Consolidated School District No. 3 ("the District.")
2. This is my fourth year as a bus driver with the District. I was a bus driver in New York for nine years before that.
3. During the 2011-2012 school year, I drove an elementary and middle school bus/route for the Holly Hill area. I was the only adult on the bus.
4. Jordyn Fogle rode my bus when the 2011-2012 school year started.
5. Sometime around the date of October 11, 2011, Jordyn said she had to go to the bathroom and had to pee. We were on the bus home and we had already left school. She started to ask when we were at Well's Crossing.

6. I told her she could hold it.

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Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

1 of 3

7. A little while later, she said she needed to pee again. She asked several times and was jumping up and down. She held her crotch area and seemed to be crying.

8. I told her that she would have to hold it. She said "no, no, no." I told her she would have to wet herself then.

9. By that time, I didn't think she was going to be able to hold it.

10. I considered letting her wet herself, like I told her earlier. But the other students had already started to laugh at the situation. I didn't want them to make fun of Jordyn for wetting herself. The only other option I felt I had was to let Jordyn use the bathroom by the side of the road.

11. I decided to pull the bus over in a safe location so Jordyn could pee. I parked the bus so that the door area was blocked from the road. I had all the students on the bus sit all the way down in their seats so they could not see Jordyn. I told Jordyn she could get off the bus and pee right behind the door by the side of the bus. I was sitting in the driver's seat. From there, I could make sure the other students did not watch her and watch for cars. I could not see Jordyn using the bathroom.

12. I thought I was doing the best thing for her at the time because that is what I would have wanted someone to do for my children or grandchildren.

13. Jordyn got back on the bus. We continued with the route.

FURTHER THE AFFIANT SAYETH NOT.

Riley Simmons
Riley Simmons

October 4, 2013

SWORN TO Before me this 4th day of October, 2013

R. S. Wright
Notary Public for South Carolina

My Commission Expires: June 6, 2016

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ORANGEBURG, SC

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Wingy B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and Gal for Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

AFFIDAVIT OF LYDIA GILLIARD

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I, Lydia Gilliard, being duly sworn according to law, depose and say as follows:

1. I am the Transportation Director with Orangeburg Consolidated School District No. 3 ("the District.") I have been employed in that capacity for three years.

2. I have worked for the District for a total of 25 years. Prior to becoming Transportation Director, I worked in the transportation department in various positions.

3. During the 2011-2012 school year, Mr. Riley Simmons was a bus driver employed with the District. He was assigned to drive bus No. 507-0559 on route No. 36. The route is in a rural area of the county. A copy of that route description is attached.

4. Sometime around the date of October 12, 2011, it was reported to me that a parent was upset that Mr. Simmons had let their child use the restroom by the side of the road. The matter was investigated by District officials.

ATTEST: TRUE
Wingyia R. L.
CLERK OF 1 of 2
ORANGEBURG COUNTY, SC

5. There is no specific District policy or procedure related to students temporarily leaving the bus for emergency situations, such as students who have unexpected bodily functions, such as urinating or vomiting. Those situations are left to the bus drivers to determine the best way to handle.

6. As I understand it, Mr. Simmons determined that a young student was going to urinate on herself if she could not use the bathroom quickly. He located a safe place to secure his bus so that he could let the student off to use the bathroom by the side of the bus. I also understand he took precautions so that she was not seen. Mr. Simmons' actions in this matter did not violate established District policy or procedures. He was not disciplined for his actions.

FURTHER THE AFFIANT SAYETH NOT.

Lydia Gilliard
Lydia Gilliard

October 4, 2013

SWORN TO Before me this 4th day of October, 2013

[Signature]
Notary Public for South Carolina

My Commission Expires: June 2016

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and GAL for
Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District
Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

**MEMORANDUM OF LAW IN SUPPORT
OF THE DISTRICT'S
MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This action was brought by Plaintiff Jennifer Middleton (hereinafter "Plaintiff") on behalf of her minor daughter, Jane Doe (hereinafter "Jane Doe" or "Minor Plaintiff")¹ against Orangeburg Consolidated School District Three (hereinafter "the District"). The suit arises out of an incident on or about October 11, 2011, when, in response to Jane Doe's pleas to use the bathroom while en route home from school, a District bus driver made an unscheduled stop to allow Jane Doe to relieve herself off of the bus. Plaintiff alleges that, as a result of the bus driver's decision, Jane Doe suffered humiliation, embarrassment, mental anguish, and other damages.

The District has now moved for summary judgment pursuant to Rule 56, SCRCP. This Motion is based on the grounds that there is no genuine issue of material fact regarding the District's liability and the District is entitled to judgment as a matter of law. The District offers this Memorandum of Law in Support of its Motion for Summary Judgment. Affidavits

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, thus requiring Plaintiff to meet the appropriate burdens and standards before proceeding anonymously any further.

referenced herein are attached as Exhibits A and B. The deposition excerpts referenced herein are attached as Exhibit C.

II. STATEMENT OF FACTS

During the 2011-2012 school year, Riley Simmons (hereinafter "Mr. Simmons") was a bus driver with the District assigned to an elementary and middle school bus route for the Holly Hill area schools. (Affidavit of Riley Simmons ("Simmons Aff.") at ¶ 3.) Specifically, he was assigned to drive bus No. 507-0559 on Route No. 36. That route is in a very rural area of Orangeburg County and there are no public restroom facilities in the area. (Affidavit of Lydia Gilliard ("Gilliard Aff.") at ¶ 3; Deposition of Jennifer Middleton ("Middleton Depo.") at p.103, 1.17-22.) As of 2011, Mr. Simmons had over ten years experience as a school bus driver. (Simmons Aff. at ¶ 2.) Jane Doe, then a first grader, rode Mr. Simmons' bus. (Middleton Depo. at p.24, 1.9-14; Simmons Aff. at ¶ 4.)

On or about October 11, 2011, well after the bus had left the Holly Hill schools, Jane Doe informed Mr. Simmons that she needed to use the restroom, specifically that she "had to pee." (Simmons Aff. at ¶ 5.) Initially, Mr. Simmons told Jane Doe that she would have to "hold it" until she got home. (Simmons Aff. at ¶ 6.) Generally, that response resolves any such requests from students. A short while later, however, Jane Doe told Mr. Simmons again that she needed to pee. She asked several times and was jumping up and down, holding her crotch area, and crying. (Simmons Aff. at ¶ 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. (Simmons Aff. at ¶ 8.) By that time, however, he believed that she was not able to refrain from using the restroom much longer. (Simmons Aff. at ¶ 9.) Further, the other students

on the bus, which included elementary and middle school students, had started to laugh at Jane Doe and the situation. (Simmons Aff. at ¶ 10.)

Given the extremely rural nature of the route and their current location, as well as the fact that he was the only adult on the bus, Mr. Simmons weighed the only two options that he had – letting Jane Doe urinate on herself or letting Jane Doe use the bathroom by the side of the road. (Simmons Aff. at ¶ 10.) While he initially considered doing nothing so that Jane Doe would be forced to urinate on herself if it reached that point, which Mr. Simmons believed was very likely, he did not want her embarrassed or the other students to laugh or ridicule her when she did. The only other option was to let Jane Doe urinate by the side of the road, which he believed he could do safely. (Simmons Aff. at ¶ 10.) Therefore, Mr. Simmons decided to pull the bus over in a safe location so that Jane Doe could urinate outside of the bus. (Simmons Aff. at ¶ 11.)

Mr. Simmons found a safe location and pulled the bus over. He parked the bus so that the door area was blocked from view by the road and then had all the students sit all the way down in their seats so that they could not see Jane Doe. He then told Jane Doe she could get off the bus and urinate right behind the door by the side of the school bus. With the bus door open, this left a small corner for her to use. Mr. Simmons then sat in the driver's seat where he could make sure that the other students stayed seated and could not watch Jane Doe, as well as watch for any oncoming cars. Further, he could not see Jane Doe using the bathroom from that position. (Simmons Aff. at ¶ 11.) Shortly after being let off the bus to urinate, Jane Doe got back on the bus without incident and Mr. Simmons continued with his route. (Simmons Aff. at ¶ 13.)

When Mr. Simmons arrived at Jane Doe's stop, he was met by Jane Doe's parents, including Plaintiff, who had learned of the incident via cell phone from another student on the bus. (Middleton Depo. at p.27, l.11-20.) Plaintiff was extremely upset by Mr. Simmons' decision and was vocal in letting him know that she was upset. (Middleton Depo. at p.31, l.18-23.) The next day, Plaintiff also complained to District-level administration, who investigated Plaintiff's concerns. (Gilliard Aff. at ¶ 3.)

Based on that investigation, the District determined that Mr. Simmons' actions did not violate District policy or procedures. He was not disciplined or reprimanded for his decision or actions. (Gilliard Aff. at ¶ 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. (Gilliard Aff. at ¶ 5.) The District recognized that Mr. Simmons believed that a young student would urinate on herself if she could not use the bathroom; 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. (Gilliard Aff. at ¶ 6.) As Mr. Simmons' actions did not violate District expectations, policies, or procedures, disciplinary action was not warranted. (Gilliard Aff. at ¶ 6.)

III. ARGUMENT

A. STANDARD FOR SUMMARY JUDGMENT

Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any supporting affidavits, show that there is no genuine issue as to any material fact. *Jackson v. City of Abbeville*, 366 S.C. 662, 665, 623 S.E.2d 656, 658 (Ct. App. 2005). 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, 445 S.E.2d 659 (Ct. App. 1994). Although the Court must construe the evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party, *McClanahan v. Richland County Council*, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002), 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).

Plaintiff’s sole cause of action is for gross negligence. As explained below, the District is entitled to judgment as a matter of law based on the South Carolina Tort Claims Act.

B. PLAINTIFF CANNOT ESTABLISH THAT THE DISTRICT FAILED TO EXERCISE SLIGHT CARE

The South Carolina 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). Despite Plaintiff’s attempts to define gross negligence as the failure to exercise ordinary and reasonable care (See Complaint ¶¶ 3, 5, and 6), South Carolina courts consistently have held that gross negligence is the failure to exercise even the slightest 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. Dept. of Health & Envtl. Control*, 368 S.C. 279, 628 S.E.2d 496 (S.C. Ct. App. 2006). The fact that a school district could

have taken additional precautions in an effort to prevent an occurrence does not establish that it failed to exercise slight care. *Etheredge*, 534 S.E.2d at 278. While gross negligence is ordinarily a mixed question of law and fact, where the evidence supports but one reasonable inference, as it does here, the question becomes a matter of law for the court. *Etheredge*, 534 S.E.2d at 277; *Clyburn*, 317 S.C. 50.

In order to maintain a claim for gross negligence against the District, Plaintiff must show that: (1) the District owed Jane Doe a duty; (2) the District breached this duty by failing to exercise slight care; (3) Jane Doe was injured, and; (4) the District 's breach of duty proximately caused her injury. *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1986); *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986). Assuming *arguendo*, for purposes of this Motion only, that Plaintiff is able to establish the first, third, and fourth elements of gross negligence, she is unable to show that the District breached its duty to Jane Doe by failing to exercise slight care.

Plaintiff cannot show that the District intentionally and consciously failed to do something which it was incumbent upon District employees to do, or that District employees did something intentionally that they should not have done. See *Ford v. Atlantic CoastLine Railroad*, 169 S.C. 41, 168 S.E. 143 (1932). At best, Plaintiff has demonstrated that the District did not respond to the situation in the manner that she preferred. (Middleton Depo. at p.108, l.11-12.) For instance, Plaintiff has suggested that the proper course of action would have been for Mr. Simmons to allow Jane Doe to wet herself, which, as discussed further below, was an option that Mr. Simmons did consider. (Middleton Depo. at p.102, l.3-11.) Plaintiff also suggests that, despite the absence of public facilities in the area, she wanted Mr. Simmons to turn the bus around in order to find a bathroom facility for Jane Doe to use, even if that meant backtracking

30 minutes. (Middleton Depo. at p.103, l.6-14.) Finally, Plaintiff suggests that it would have been appropriate for Mr. Simmons to leave his bus of other young students unattended so that Mr. Simmons could escort her daughter to a bathroom facility once one was located. This option would have left all of the other students on the bus without any adult supervision, even if a restroom could have been located. (Middleton Depo. at p.104, l.11-21.)

Although she makes several suggestions, some bordering on fanciful, as to how she believes the District should have responded, Plaintiff is still unable to establish that the District's chosen decision constitutes the absence of slight care. In fact, she readily admits that she has no knowledge as to any rules or regulations or District requirements that were violated as a result of this incident. (Middleton Depo. at p.107, l.12-23.) Her allegations that the District failed to properly screen, hire, and train Mr. Simmons are not based on any evidence or facts that the District knew or should have known of a problem, but on her belief that Mr. Simmons' decision to let Jane Doe use the restroom makes him a "kook" and "if you've got a kook like that driving, yeah, I assume you didn't screen them properly." (Middleton Depo. at p.97, l.14-21.) Further, her belief that Mr. Simmons allowed Jane Doe to expose herself to other students ignores the precautions Mr. Simmons took to ensure Jane Doe's privacy and safety and is pure speculation based on the type of clothing that Jane Doe was wearing that particular day. (Middleton Depo. at p.109, l.1-14.)

Conjecture and speculation are insufficient to create any genuine issue of material fact. *McKnight v. S. Carolina Dep't of Corr.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009) Rather, the evidence establishes that situations involving distressed students are matters that are left to the driver's discretion and, in this case, Mr. Simmons' handling of this matter did

not indicate a lack of slight care. As a result, Plaintiff cannot establish gross negligence as a matter of law.

C. THE DISTRICT CANNOT BE HELD LIABLE FOR ANY INJURY TO JANE DOE RESULTING FROM THE EXERCISE OF DISCRETION OR JUDGMENT BY DISTRICT PERSONNEL

Pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60(5), the District also is immune from liability because Plaintiff's alleged losses, damages, or injuries resulted from the exercise of discretion or judgment by a governmental employee and that discretion and judgment was not exercised in a grossly negligent manner. Section § 15-78-60(5) states that a governmental entity is immune from liability for any loss resulting from "the exercise of discretion or judgment by the government entity or employee or the performance of any act or service which is in the discretion or judgment of the governmental entity or employee." Discretionary immunity "is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards." *Proctor v. Dept. of Health and Environmental Control*, 368 S.C. 279, 638 S.E.2d 496, 506 (Ct. App. 2006). As the party asserting this defense, the burden of proof is on the governmental entity and is one of persuasion by a preponderance of the evidence. *Pike v. SC Dep't of Transp.*, 343 S.C. 224, 232, 540 S.E.2s 87 (2000). However, affirmative defenses set forth in the Tort Claims Act exempting government from liability should be liberally construed to limit liability. *Richland County v. Carolina Chloride, Inc.* (S.C.App. 2009) 382 S.C. 634, 677 S.E.2d 892, *rehearing denied, certiorari granted, affirmed in part, reversed in part* 394 S.C. 154, 714 S.E.2d 869, *rehearing granted, rehearing dismissed* 396 S.C. 311, 721 S.E.2d 441, *certiorari denied* 133 S.Ct. 168, 184 L.Ed.2d 36.

Here, the evidence clearly establishes that Mr. Simmons considered the

circumstances of this situation (the rural area, availability of public facilities, distance from school or public facility, and supervision of the other students on the bus) before concluding that there were two possible avenues of action – letting Jane Doe soil herself or letting Jane Doe urinate outside of the bus. He then weighed those two possibilities and the outcomes of each. For example, he considered the likelihood of Jane Doe soiling herself; the reaction of the other students on the bus; and the embarrassment Jane Doe would feel with the ability to pull the bus over in a safe location so she could urinate. Moreover, either one of these options met the District's expectations and accepted standards for dealing with distressed students, further confirmed by the fact that the District took no disciplinary action against Mr. Simmons. The District is, therefore, entitled to discretionary immunity pursuant to § 15-78-60(5).

IV. CONCLUSION

The District respectfully submits that there are no genuine issues of material fact in this case and it is entitled to judgment as a matter of law on Plaintiff's claim for gross negligence.

Respectfully Submitted:

DUFF, WHITE & TURNER, LLC

By: Meredith L. Seibert

Andrea E. White

Meredith L. Seibert

P.O. Box 1486

Columbia, SC 29202

Telephone: (803) 790-0603

Facsimile: (803) 790-0605

Attorneys for Defendant Orangeburg Consolidated
School District Three

December 6, 2013
Columbia, South Carolina

Exhibit A

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and Gal for Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

AFFIDAVIT OF RILEY SIMMONS

2012 OCT -4 PM 12:14
RECEIVED FOR
CLERK OF COURT
ORANGEBURG COUNTY SC

I, Riley Simmons, being duly sworn according to law, depose and say as follows:

1. I am a bus driver with Orangeburg Consolidated School District No. 3 ("the District.")
2. This is my fourth year as a bus driver with the District. I was a bus driver in New York for nine years before that.
3. During the 2011-2012 school year, I drove an elementary and middle school bus/route for the Holly Hill area. I was the only adult on the bus.
4. Jordyn Fogle rode my bus when the 2011-2012 school year started.
5. Sometime around the date of October 11, 2011, Jordyn said she had to go to the bathroom and had to pee. We were on the bus home and we had already left school. She started to ask when we were at Well's Crossing.
6. I told her she could hold it.

ATTEST: TRUE CL
Winnia B. Lee
CLERK OF COURT
ORANGEBURG COUNTY SC

7. A little while later, she said she needed to pee again. She asked several times and was jumping up and down. She held her crotch area and seemed to be crying.

8. I told her that she would have to hold it. She said "no, no, no." I told her she would have to wet herself then.

9. By that time, I didn't think she was going to be able to hold it.

10. I considered letting her wet herself, like I told her earlier. But the other students had already started to laugh at the situation. I didn't want them to make fun of Jordyn for wetting herself. The only other option I felt I had was to let Jordyn use the bathroom by the side of the road.

11. I decided to pull the bus over in a safe location so Jordyn could pee. I parked the bus so that the door area was blocked from the road. I had all the students on the bus sit all the way down in their seats so they could not see Jordyn. I told Jordyn she could get off the bus and pee right behind the door by the side of the bus. I was sitting in the driver's seat. From there, I could make sure the other students did not watch her and watch for cars. I could not see Jordyn using the bathroom.

12. I thought I was doing the best thing for her at the time because that is what I would have wanted someone to do for my children or grandchildren.

13. Jordyn got back on the bus. We continued with the route.

FURTHER THE AFFIANT SAYETH NOT.

Riley Simmons
Riley Simmons

October 4, 2013

SWORN TO Before me this 4th day of October, 2013

R. S. Smith
Notary Public for South Carolina

My Commission Expires: June 26, 2016

FILED FOR RECORD
VICTIM'S RIGHTS
CLERK OF COURT
ORANGEBURG, SC
2013 OCT -4 PM 12:14

ATTEST: TRUE
Wingja B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and Gal for Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District Three,

Defendant.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

AFFIDAVIT OF LYDIA GILLIARD

FILED OCT - 4 PM 12:14
CLERK OF COURT
ORANGEBURG COUNTY

I, Lydia Gilliard, being duly sworn according to law, depose and say as follows:

1. I am the Transportation Director with Orangeburg Consolidated School District No. 3 ("the District.") I have been employed in that capacity for three years.

2. I have worked for the District for a total of 25 years. Prior to becoming Transportation Director, I worked in the transportation department in various positions.

3. During the 2011-2012 school year, Mr. Riley Simmons was a bus driver employed with the District. He was assigned to drive bus No. 507-0559 on route No. 36. The route is in a rural area of the county. A copy of that route description is attached.

4. Sometime around the date of October 12, 2011, it was reported to me that a parent was upset that Mr. Simmons had let their child use the restroom by the side of the road. The matter was investigated by District officials.

ATTEST: T. R.

Wingy R.
CLERK OF COURT
1 of 2
ORANGEBURG COUNTY

5. There is no specific District policy or procedure related to students temporarily leaving the bus for emergency situations, such as students who have unexpected bodily functions, such as urinating or vomiting. Those situations are left to the bus drivers to determine the best way to handle.

6. As I understand it, Mr. Simmons determined that a young student was going to urinate on herself if she could not use the bathroom quickly. He located a safe place to secure his bus so that he could let the student off to use the bathroom by the side of the bus. I also understand he took precautions so that she was not seen. Mr. Simmons' actions in this matter did not violate established District policy or procedures. He was not disciplined for his actions.

FURTHER THE AFFIANT SAYETH NOT.

Lydia Gilliard
Lydia Gilliard

October 4, 2013

SWORN TO Before me this 4th day of October, 2013

[Signature]
Notary Public for South Carolina

My Commission Expires: June 2016

Exhibit C

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF ORANGEBURG

3

4 Jennifer Middleton, as parent and
Guardian ad Litem for Jane Doe,

5

Plaintiff(s),

6

vs.

Case No: 2012-CP-38-01314

7

Orangeburg Consolidated School
District Three

8

9

Defendant(s).

10

11

D E P O S I T I O N

12

WITNESS: JANFER MIDDLETON

13

DATE: Tuesday, August 13, 2013

14

TIME: 10:16 a.m.

15

LOCATION: Orangeburg Consolidated School
District Three
1654 Camden Road
Holly Hill, South Carolina

16

17

TAKEN BY: Attorneys for the Defendants

18

REPORTED BY: HEATHER M. CURLIN
Professional Court Reporter

19

20

21

22

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1 Hill Elementary.

2 Q. And what year was that?

3 A. When she was five.

4 Q. Would that have been 2010-2011 or 2011-2012?

5 A. It would be before that, because when the
6 incident happened, she was in the first grade.

7 Q. So 2010-2011 school year, she was at Holly
8 Hill?

9 A. She was in first grade. When the incident
10 happened --

11 Q. She was in first grade?

12 A. -- first grade.

13 Q. And that was the 2011-2012 school year?

14 A. Yes.

15 Q. Okay. So the 2010-2011 school year, she was
16 in kindergarten at Holly Hill --

17 A. Holly Hill Elementary.

18 Q. -- is that correct?

19 A. Yes.

20 Q. Okay. So for the 2011-2012 school year, what
21 school did she attend?

22 A. That's this year?

23 Q. That would have been two years ago. This --
24 this -- the 2011 year, the year that the incident
25 occurred?

- 1 A. Mr. Sims [sic], Riley Sims.
- 2 Q. Was Jordyn's brother assigned to that bus as
- 3 well?
- 4 A. Yes, he was.
- 5 Q. And what school was he attending?
- 6 A. St. James as well.
- 7 Q. And how old is --
- 8 A. Duane.
- 9 Q. -- Duane II?
- 10 A. He's 12 now.
- 11 Q. And when and how did you learn there was a
- 12 situation regarding Jordyn on the bus on October 11th,
- 13 2011?
- 14 A. A student on the bus called.
- 15 Q. Who did they call?
- 16 A. They called me and my husband.
- 17 Q. Did they call your cell phone? Did they call
- 18 the house phone?
- 19 A. They called the cell phone. And it was
- 20 placed on speakerphone, so we both heard.
- 21 Q. And what student was that?
- 22 A. His name is LeAndre.
- 23 Q. LeAndre?
- 24 A. Yes.
- 25 Q. Do you know his last name?

1 take her to the bathroom? Did you stop at a store or at
2 the district office? Where did you stop to let her go
3 to the bathroom? Every place that I asked him did he
4 go, he said no. He just was answering no, no, no. So I
5 finally got upset and I said, where did she go to the
6 bathroom? What did you do? And he said he let her off
7 the bus to use the bathroom.

8 Q. And what was your response to that?

9 A. I asked him why would he do something like
10 that, was that part of his training, were you
11 supposed -- was that how you're supposed to do things.

12 Q. And what was his response?

13 A. He didn't say anything. He was quiet.

14 Q. Did you or Mr. Fogle board the bus?

15 A. No.

16 Q. And how did your conversation with Mr. Simons
17 end?

18 A. I told him -- I did -- I got upset. I told
19 him that that was wrong that he allowed her -- I mean,
20 that he told her to get off the bus and use the bathroom
21 in front of everyone, that that wasn't right, that she's
22 a little girl and you did that with a little girl or
23 whatever in front of all these kids. And his answer, I
24 think, was that he thought he was doing us a favor. If
25 he was a grandfather, that it would be all right. And I

1 A. She had to use the bathroom one time before
2 during the commute from St. James to Holly Hill, and the
3 bus driver who drives that bus stopped at a public
4 bathroom, got off the bus with her, female driver, took
5 her to the bathroom and allowed to her to enter the
6 bathroom and use the bathroom and got back on the bus.

7 Q. Do you know who that bus driver was?

8 A. I don't know who the lady is that drives the
9 bus.

10 Q. And how do you know that?

11 A. Because Jordyn told me.

12 Q. And when did that occur?

13 A. It happened before this incident occurred.

14 Q. Okay. But that's not my question. My
15 question is, you allege that the screening provided to
16 bus drivers wasn't adequate, that we didn't screen our
17 bus drivers appropriately?

18 A. If you've got a kook like that driving, yeah,
19 I assume you didn't screen them properly.

20 Q. Do you have any evidence --

21 A. No, I don't have any evidence.

22 Q. Okay. Anything to support that allegation?

23 A. I don't personally, no.

24 Q. Other than -- separate and apart from
25 firsthand knowledge, anything to support that

1 reasonable care in ensuring that the student was
2 properly cared for and."

3 Q. Okay. What do you think was the proper thing
4 to do?

5 A. The proper thing to do was to let her wet
6 herself, which she had peed herself up one time before
7 or whatever going to school, came home fine, change --
8 washed up, changed her clothes. Either let her use the
9 bathroom and continue on home or turn around and go
10 someplace or whatever where she would be able to go in
11 and privately use the bathroom.

12 Q. Okay. Well, let's go to 6(a), and if you
13 could read that, 6(a).

14 A. "In failing to allow the Plaintiff to use a
15 safe public facility and maintain her safety."

16 Q. And I guess my question to you, Ms. Middleton,
17 is what public facility did you expect her to use on
18 that route? Where did you expect the district to stop?

19 A. I didn't know initially where the incident
20 happened. When I found out -- there is no safe place,
21 so let her pee herself up and come home. She'd done
22 that before. Let her wet herself. She was already on
23 the way home.

24 Q. So you would agree with me there was no safe
25 public facility anywhere around --

1 A. To turn the bus around on the initial
2 incident or -- I mean the thing that happened or
3 whatever with the lady bus driver, she took her to a
4 public bathroom. If you can't take her to a public
5 bathroom, let her wet herself.

6 Q. Okay. But my question to you is it says --
7 here it says we failed to allow the Plaintiff to use a
8 safe public facility.

9 A. Take her in town and let her use the
10 bathroom.

11 Q. So you wanted him to turn the bus around --

12 A. Yes.

13 Q. -- and go back 30 minutes?

14 A. Yes. That's what I wanted.

15 Q. But let me ask this question of you, too.

16 A. Yes.

17 Q. On the route, and I think you already
18 answered this question, what safe public facility was
19 there that you expected the bus driver to stop at?

20 A. I don't know. I don't know of any safe
21 public -- aside from going into town and letting her use
22 the bathroom, I don't know. There were other options
23 aside from what he did. He could have gone into the
24 town limit and used one of the gas stations or turned
25 the bus around. There were options.

1 Q. Now, let me ask you this, Ms. Middleton. If
2 he had turned the bus around, gone back into town, did
3 you expect him to send your child just into the
4 McDonald's by herself?

5 A. No.

6 Q. Who was going to stay on the bus?

7 A. He could have gotten an older student or
8 whatever on the bus. The lady who did it, she got
9 off -- well, she did improper procedure, too, then.

10 Q. I'm not asking -- I'm not asking about her.

11 A. I don't know. I expected him to let her use
12 a private bathroom. He could have gotten off the bus,
13 go stand at the door and let her go into the bathroom by
14 herself. I expected that to be done.

15 Q. And to leave a bus full of children --

16 A. Yes.

17 Q. -- unsupervised?

18 A. Yes.

19 Q. That, you think, is an appropriate option?

20 A. I think it's more appropriate than what he
21 did, yes.

22 Q. Okay. But you would agree that there's no --
23 on the route, once they're out of town, there is no
24 public facility that she could use?

25 A. No. He would have to turn around.

1 regulations of the Defendant, OCSDC Three, for operation
2 and procedures for bus transportation of the students."

3 Q. What rules and regulations do you believe
4 were not complied with? Can you identify those?

5 A. I believe that if -- the only reason why my
6 child should exit that bus, aside from not -- from her
7 stop was if there was an emergency like a fire or
8 something where all the kids would have to get off the
9 bus. But to tell my child to get off at an unknown stop
10 to go out in public to use the bathroom, I feel like
11 that was not regulation.

12 Q. Okay. Do you have any knowledge or can you
13 point to any rules or regulations that were violated?

14 A. What do you mean when you say do I have any
15 knowledge?

16 Q. Can you -- other than you think it wasn't
17 right, can you point to any rules or regulations that
18 you believe were violated?

19 A. I don't know rules and regulations. No, I
20 don't know the district's rules and regulations.

21 Q. So you can't say that Mr. Simons failed to
22 comply with those? Am I correct?

23 A. I am correct -- you are correct.

24 Q. Okay. Including your option, would you agree
25 that or do you believe that Mr. Riley had three options?

1 A. No.

2 Q. Okay. Do you agree that he could either turn
3 the bus around and leave students unattended, he could
4 let Jordyn wet herself, or he could stop the bus and let
5 her use the bathroom outside the bus?

6 A. No. I said two options.

7 Q. Those are the two options that you prefer.

8 A. And those are the two I believe he had.

9 Q. But you don't -- okay. Those are the two you
10 would have preferred he use?

11 A. Those are the two I prefer he use, and those
12 were the two I believe he had.

13 Q. Okay. But you weren't there?

14 A. No, I wasn't.

15 Q. You don't know what went through his mind?

16 A. No, I don't.

17 Q. Okay. What did Duane II say about what
18 happened when Jordyn exited the bus?

19 A. He said that she went out and used the
20 bath -- well, got off the bus and pulled down her
21 clothes to use the bathroom, and the kids were looking
22 and laughing.

23 Q. Did he say about what parts of her body were
24 exposed?

25 A. No, he didn't.

1 Q. So how do you know she was exposed?

2 A. She had a skirt on. How else do you use the
3 bathroom? You pull your skirt down, you pull your
4 panties down, you use it. It's a scooter skirt. You
5 don't lift it up. It has shorts underneath, so it had
6 to be removed.

7 Q. Okay.

8 A. It doesn't have -- it's built in with shorts.
9 Everything had to come off in order for her to use the
10 bathroom. It's not a skirt that you just flip up. It
11 has shorts underneath. It's a uniform. You pull
12 everything down.

13 Q. So she was wearing a skirt that day?

14 A. Yes.

15 Q. Okay. But your assumption that she exposed
16 herself and that children were able to see her body is
17 an assumption based on the type of clothing she was
18 wearing that day?

19 A. Based on what my son said, that the kids were
20 looking and laughing, saying look at that -- they were
21 laughing at her saying they could see her.

22 Q. They could see her? They could see exposed
23 body parts?

24 A. Yes.

25 Q. What body parts did they say they could see?

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CERTIFICATE OF REPORTER

I, Heather M. Curlin, Professional Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing deposition was taken before me on the date and at the time and location stated on page 1 of this transcript; that the deponent was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the deponent and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate, and complete record of the testimony of the deponent and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 23rd day of August, 2013, at Charleston, Charleston County, South Carolina.

Heather M. Curlin
Professional Court Reporter
Notary Public
State of South Carolina at Large
My Commission Expires:
May 27, 2021

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Jennifer Middleton, as parent and GAL for
Jane Doe,

Plaintiff,

v.

Orangeburg Consolidated School District
Three,

Defendant.

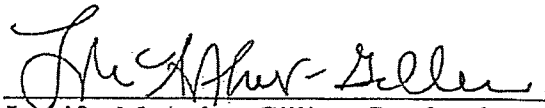
IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

C.A. No. 2012-CP-38-01314

**CERTIFICATE OF SERVICE
VIA ELECTRONIC AND U.S. MAIL**

The undersigned of Duff, White & Turner, LLC, hereby certifies that she has served the following counsel of record with the foregoing **MEMORANDUM OF LAW IN SUPPORT OF THE DISTRICT'S MOTION FOR SUMMARY JUDGMENT**, by electronically mailing and by depositing a copy of same in the U.S. Mail, postage prepaid and return address clearly indicated, to the following on this 9TH day of DECEMBER, 2013:

Glenn Walters, Sr., Esq.
LAW OFFICE OF GLENN WALTERS
P.O. Box 1346
Orangeburg, SC 29116
glennwalterspa@gmail.com


Jennifer McArthur-Gilliam, Paralegal
DUFF, WHITE & TURNER, LLC
P.O. Box 1486
Columbia, SC 29202

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Jennifer Middleton, as Parent and GAL for Jane Doe,

☒ Plaintiff

v.

Orangeburg Consolidated School District Three

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

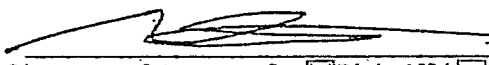
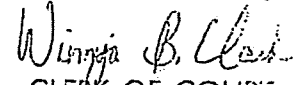
2012-CP-38-1314

MOTION AND ORDER INFORMATION

FORM AND COVER SHEET

FILED FOR RECORD
VICTORIA B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2014 FEB 19 PM 4:02

Plaintiff's Attorney: Glenn Walters, Sr., Bar No. 13198 Address: PO Box 1346, Orangeburg, SC 29116 phone: (803) 531-8844 fax: (803) 531-3628 e-mail: glennwalterspa@gmail.com other:		Defendant's Attorney: , Bar No. Address: phone: fax: e-mail: other:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Amend, Reconsider Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		February 19, 2014 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE: Date:	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: ATTEST: TRUE COPY  CLERK OF COURT ORANGEBURG COUNTY, SC	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG) FOR THE FIRST JUDICIAL CIRCUIT
))
Jennifer Middleton, as parent and) Case No. 2012-CP-38-1314
GAL for Jane Doe,))
))
Plaintiff,) NOTICE OF MOTION & MOTION
) FOR RECONSIDERATION, AND/OR
) FOR RELIEF FROM JUDGMENT OR
) ORDER TO AMEND, ALTER, OR
) MODIFY PURSUANT TO SCRPC 52
) 59, AND 60 OR IN THE ALTERNATIVE
VS.) TO REOPEN THE OCTOBER 14, 2013
) HEARING
Orangeburg Consolidated School)
District Three,)
))
Defendant,)
)

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC

2014 FEB 19 PM 4:02

TO: THE HONORABLE JAMES B. JACKSON, PRESIDING MASTER-IN-EQUITY JUDGE AND MEREDITH L. SEIBERT, ESQUIRE, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Plaintiff, Jennifer Middleton, by her attorney, will move before the Honorable James B. Jackson, Master-in-Equity for Orangeburg County, Orangeburg, South Carolina on the _____ day of _____, 2014 at _____ m. or as soon as counsel may be heard for an Order reconsidering, altering, amending, modifying or granting relief from the Order signed by Honorable James B. Jackson on February 4, 2014 and filed with the Orangeburg County Court of Common Pleas on February 19, 2014 in the foregoing matter.

Such motion is based upon the statutory and decisional law of the State of South Carolina, as may be appropriate, including but not limited to, as well as

ATTEST: TRUE COPY
Winnie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY

all applicable Law and Rules, including Rule 52, 59, and 60 of the South Carolina Rules of Civil Procedure, SC Code Ann. § 20-7-420(25)(1976, as amended) and is made on the following grounds:

1. The Plaintiff is informed and believes that the Court failed to consider the evidence present substantiating that the Defendant failed to exercise slight care.

The Defendant moves and prays that the Court reconsider and modify its Order or in the alternative, reopen the hearing to receive evidence presented by the Plaintiff and Defendant to support his claims herein.

Respectfully Submitted,



Glenn Walters, Sr., Esquire
Post Office Box 1346
Orangeburg, SC 29116
Telephone: 803 531-8844
Facsimile: 803 531-3628
Email: glennwalterspa@gmail.com
Attorneys for Plaintiff

Dated: February 19, 2014

State of South Carolina	)	
	)	In the Court of Common Pleas
County of Orangeburg	)	
	)	
Jennifer Middleton, et al	)	
	)	
Plaintiffs,	)	2012-CP-38-01314
	)	
versus	)	December 11, 2013
	)	
Orangeburg Consolidated	)	Orangeburg, South Carolina
School District Number	)	
Three,	)	
	)	
Defendant.	)	
	)	

TRANSCRIPT OF RECORD

B E F O R E:

The Honorable James B. Jackson, Sr.

A P P E A R A N C E S:

Glenn Walters, Esquire
Attorney for the Plaintiff

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I N D E X

Hearing 4

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E X H I B I T S

FOR THE PLAINTIFF:

(WHEREUPON, no exhibits were introduced during
this proceeding.)

FOR THE DEFENDANT:

(WHEREUPON, no exhibits were introduced during
this proceeding.)

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P R O C E E D I N G S

THE COURT: Whose motion is this?

MS. SEIBERT: This is the school district's, Your Honor.

THE COURT: Okay. And you're the Plaintiff; right?

MR. WALTERS: Yes, sir. And I just want to submit to you affidavits. They have been provided to counsel as required under the statute.

THE COURT: Ms. Seibert, it looks like I have something from you.

MS. SEIBERT: That's correct. You should have a motion.

THE COURT: Yes.

MS. SEIBERT: And if we're on the record, I do have an issue and I can make that now.

THE COURT: And I have the memorandum of law in support of your motion.

MS. SEIBERT: That's correct.

THE COURT: The print is sideways on mine.

MS. SEIBERT: I can give you a better copy. How is that?

(DOCUMENTS ARE HANDED TO THE COURT.)

THE COURT: That would be great. Thank you.

MS. SEIBERT: The Plaintiff's counsel was also provided a copy.

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1 THE COURT: Okay. As far as I'm concerned, we've been
2 on the record.

3 MS. SEIBERT: And I believe the Plaintiff's counsel
4 has provided you with copies of some expert affidavits. I
5 just want to make sure it's on the record before I even get
6 started that I have not -- I did receive a courtesy copy
7 via e-mail Sunday evening, but I have not received copies
8 of the attached CVs. I did let Mr. Walters know that via
9 e-mail on Monday and I still don't have copies of the CVs
10 and they have not been provided.

11 MR. WALTERS: I apologize. I thought that they were
12 both provided to ---

13 THE COURT: Yes, ma'am -- Yes, sir, the curriculum
14 vitae.

15 MS. SEIBERT: I don't know who he is. I don't know
16 him.

17 THE COURT: I guess everybody in Orangeburg knows him.

18 MR. WALTERS: This is his and I apologize if that
19 wasn't e-mailed.

20 (DOCUMENTS ARE HANDED TO OPPOSING COUNSEL.)

21 MS. SEIBERT: I said that Monday night.

22 MR. WALTERS: I apologize. And Janet Green, this is
23 her curriculum vitae. I'm sorry and I apologize.

24 (DOCUMENTS ARE HANDED TO OPPOSING COUNSEL.)

25 MS. SEIBERT: Could we please note for the record that

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1 I did not have these and have not have these?

2 THE COURT: Okay.

3 MS. SEIBERT: And before we get started, I would also
4 like to make -- to move to exclude the affidavits that have
5 been provided on another basis.

6 There are some discovery issues that are of concern.
7 Mr. McDaniel, I believe, has not been identified as an
8 expert witness despite our requests on our interrogatories
9 requesting expert witnesses, nor has the statement of Ms.
10 Green been provided, although we have requested that in
11 discovery as well. And I believe that, based on the date
12 of that statement, he's had that since November 6th. So
13 that's one issue.

14 The bigger issue really that we have is the fact that
15 everything that is in these affidavits are conclusions of
16 law. It's, you know, expert testimony ---

17 THE COURT: All right. We'll get to that.

18 MS. SEIBERT: Okay. Well, I wanted to make sure ---

19 THE COURT: You're objecting to them in general, so, I
20 mean, do you want to continue this hearing so you have time
21 to review them?

22 MS. SEIBERT: I don't need a continuance. I don't
23 think that is necessary. I don't need discovery on these.

24 THE COURT: If you need more time, that's your remedy
25 as far as I'm concerned and we'll just continue it and give

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1 you the time.

2 MS. SEIBERT: I don't need a continuance based on
3 that.

4 THE COURT: If not, we're going to go forward and I'm
5 going to consider them.

6 MS. SEIBERT: Well, I don't need that, but separate
7 and apart from the discovery issue is we don't believe that
8 it is appropriate to consider them and that's why I wanted
9 to address this before we get started ---

10 THE COURT: I understand that.

11 MS. SEIBERT: --- based on the fact that they're
12 expert opinion on a conclusion of law.

13 THE COURT: Well, that -- that will be part of your
14 argument ---

15 MS. SEIBERT: Okay.

16 THE COURT: --- on his or on your motion, I guess. I
17 mean, this is your motion; right?

18 MS. SEIBERT: Yes, sir.

19 THE COURT: And these that he's submitting are in
20 response to your motion.

21 MS. SEIBERT: That's correct.

22 THE COURT: And that will all be part of your argument
23 on the motion.

24 MS. SEIBERT: Yes.

25 THE COURT: I guess what I'm getting to is before we

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1 get to that point, if -- I mean, I want to put us in a
2 position where I can consider whatever he's going to do and
3 if you need more time to look at it, then I'm going to give
4 you a continuance.

5 MS. SEIBERT: I don't need more time.

6 THE COURT: If not, we'll go ahead and argue it and
7 I'll consider what you're saying about the content and all
8 that kind of stuff.

9 MS. SEIBERT: I do not need more time based on the
10 failure to include the CVs or to serve them.

11 THE COURT: All right. Well, let's just go -- let's
12 go forward with your motion.

13 Did you just want to present the affidavits; is that
14 correct?

15 MR. WALTERS: Yes, sir.

16 THE COURT: Okay.

17 MR. WALTERS: I just wanted to give you the affidavits
18 and I apologize for not attaching the CVs, Your Honor.

19 THE COURT: You just get used to that from Mr.
20 Walters. He never includes quite everything.

21 MS. SEIBERT: Okay.

22 THE COURT: We've known each other a long time.

23 MS. SEIBERT: Okay.

24 THE COURT: All right. Let me hear you on your
25 motion. And the rest of it is noted for the record.

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1 MS. SEIBERT: Thank you.

2 We move for summary judgement, Your Honor, on the fact
3 that there's no material issue of fact here. This case --
4 just to give a little background -- this is against
5 Orangeburg School District Three and it arrived as a result
6 of an incident back in October of 2011 where his client was
7 riding a school bus. She was a first grade student. And
8 as you are probably familiar with the area, there are some
9 long bus rides and they are in some fairly rural areas and
10 that's the case here.

11 On the particular day in question, the student,
12 Jordan, she asked the bus driver, I need to use the
13 bathroom, I need to use the bathroom. And the bus driver,
14 Mr. Simmons, told her, You'll just have to hold it.
15 Generally, that resolves the issue for most students.

16 Several minutes later she came back and said, I need
17 to use the bathroom, I need to use the bathroom -- and I
18 think she may have said, I need to pee. And he told her,
19 You're just going to have to hold it. At that point, she
20 started crying, she's holding her crotch, she's jumping up
21 and down and she's just really upset.

22 This bus has middle school and elementary school
23 students on it and there was starting to be laughter and to
24 be make fun of her. So Mr. Simmons made a decision, you
25 know, because he had told her, You need to hold it, you

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1 need to hold it, but he really realized she wasn't going to
2 be able to hold it, she's not, and she's going to urinate
3 on herself.

4 So he located a safe place to pull the bus over and
5 let Jordan out of the bus. He opened the bus door and he
6 had kind of pulled over to a corner right there and let her
7 use the bathroom right there. Before he did so, he had all
8 the students sit down in their seats and then he sat in his
9 seat so he could monitor the roadway as well as the
10 students who were still in the bus and make sure that they
11 didn't get up so they could watch her.

12 Jordan had the opportunity to use the bathroom and got
13 back on the bus and they continued on their way.

14 Just so we're clear, she didn't get hit by a bus, she
15 didn't fall over a cliff, an animal didn't jump out from
16 the side. She got off the bus and she used the restroom
17 and she got back on the bus and everyone continued on their
18 way.

19 Now, when Mr. Simmons dropped her off, her mother
20 dropped -- her mother met them at the bus stop and was
21 obviously very, very upset. She was -- had learned about
22 the incident or the stop from another student on the bus
23 who had apparently called -- called to let her know that
24 they had stopped to let Jordan use the bathroom. She was
25 very upset. Mr. Simmons said, I did what I thought was

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1 best, I stopped and let her use the restroom and then went
2 on the way.

3 The parent then complained to the school district who
4 investigated the incident and then they determined that Mr.
5 Simmons, the bus driver, made an appropriate decision.

6 For that kind of thing, there is no policy and there
7 is no procedure on what to do when a student is in that
8 kind of situation. Whether they're going to urinate or
9 vomit or whatever it may be, that's left to the discretion
10 of the particular bus driver.

11 The district investigated. They determined that Mr.
12 Simmons acted appropriately, that there was no violation of
13 district's expectations or policies or procedures and that
14 was the end of it.

15 And we're here now. That's just some factual
16 background to get you started.

17 THE COURT: Okay.

18 MS. SEIBERT: But what we would move today in asking
19 for summary judgement is, as a school district, we're
20 subject to the Torte Claims Act which means the parent has
21 to show that we were grossly negligent. There's,
22 obviously, four standards that we have to look at: whether
23 there's a duty owed, whether the district breeched the duty
24 by failing to exercise the slight care, whether the student
25 was injured, and then whether the breech of duty caused an

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1 injury.

2 For purposes of today's motion, we're not challenging
3 the first, third or fourth prongs of that and I do think
4 there's -- I don't necessarily agree that there's a lot
5 there, but I can see where there would be a question of
6 fact. However, there is no question of fact here that the
7 district did not fail to exercise slight care.

8 THE COURT: All right. Let me ask you this. I'm
9 familiar with the Tort Claims Act. Now, you're saying that
10 the negligence has to be gross negligence?

11 MS. SEIBERT: That's correct.

12 THE COURT: That's your position.

13 MS. SEIBERT: That's correct.

14 THE COURT: Under which one of those exceptions ---

15 MS. SEIBERT: And that's under 25 -- let me look it up
16 here.

17 THE COURT: It's 15-78-60, subsection 25.

18 MS. SEIBERT: And the specific rule there is that it's
19 not -- that the district is immune from liability from any
20 loss resulting from its responsibility or duty, including
21 but not limited to, supervision, protection, control,
22 confinement or custody of any student except when the
23 responsibility or duty is exercised in a grossly negligent
24 manner.

25 So the standard that they have to prove is that we

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1 were grossly negligent. And as Your Honor knows, that is
2 failure to exercise slight care. And here there's no
3 facts, there's nothing that they've been able to put forth
4 that shows that we did not exercise slight care.

5 Now, if you were to consider the affidavits that Mr.
6 Walker has produced which, again, we do not believe should
7 be considered on the issue of liability or on the issue of
8 whether the district was grossly negligent, they're expert
9 affidavits on the ultimate issue. They're expert
10 affidavits that are basically conclusions of law and legal
11 argument. That's really all that they contain.

12 And if you look at the case of Dawkins versus Fields,
13 our Supreme Court has upheld that trial courts properly
14 refuse to consider the affidavits when it primarily
15 contains legal arguments and conclusions.

16 THE COURT: You have that for me?

17 MS. SEIBERT: Yes, sir. It's 354 S.C.58, 2003.

18 And in that particular case, which is fairly similar
19 procedurally, the trial court excluded Professor John
20 Freeman's affidavit rebutting the motion for summary
21 judgement. Now, there were some facts in there and the
22 Court recognized that, but they said in general it's an
23 affidavit that contains legal arguments and legal
24 conclusions and a trial court should not consider it. And
25 that's what we have here with both affidavits.

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1 THE COURT: I probably should not accept something
2 from John Freeman as he taught me in law school.

3 MS. SEIBERT: Well, I would ---

4 THE COURT: He probably taught you, too.

5 MS. SEIBERT: I would admit that if a trial court is
6 not going to consider an affidavit of John Freeman that we
7 probably should not be considering the trial -- the
8 affidavit of these two who, in their affidavits, said that
9 they had to resort to the internet to get their research.

10 THE COURT: I haven't seen them. I haven't looked at
11 the affidavits.

12 MS. SEIBERT: And that's really -- again, what we're
13 looking at here today is there is nothing that the
14 Plaintiff can point to that shows that there was an absence
15 of slight care.

16 Now, these affidavits do show that they think that we
17 should have done things better. I believe Ms. Green in her
18 affidavit states that it would have been safer if, but
19 that's still not the absence of slight care.

20 Her affidavit also includes some reference to a CDL
21 supplement, a federal supplement, which as far as I can
22 tell is a study guide for a CDL license; that's what I'm
23 able to ascertain from the affidavit.

24 And again, at best that includes -- it's a training
25 manual with best practices that may or may not even apply

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1 to the school district. But again, best practices does not
2 establish the absence of slight care. At this point
3 there's nothing.

4 THE COURT: Have you deposed any of these parties?

5 MS. SEIBERT: No, Your Honor. And again, I didn't get
6 these affidavits with these statements until this Sunday.

7 THE COURT: I understand. I was just asking if you
8 had done that.

9 MS. SEIBERT: No, I mean ---

10 THE COURT: Well, you're making your motion at this
11 point and ---

12 MS. SEIBERT: Well, right. We made it well over a
13 year after.

14 THE COURT: Well, you've had time to depose.

15 MS. SEIBERT: That is correct. That is correct.
16 Well, Ms. Green, who is the one that we had notice of, so
17 yes, Your Honor.

18 THE COURT: And Ms. Green is -- what is her
19 relationship to this case? Do you know?

20 MS. SEIBERT: Apparently, she has been listed as a ---

21 THE COURT: Did you depose the mother of the child?

22 MS. SEIBERT: We did. We deposed the mother and she
23 cannot point ---

24 THE COURT: Okay.

25 MS. SEIBERT: --- to any policies or procedures or

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1 expectations that she believes were violated. When we --
2 one of her allegations related to the failure to screen our
3 bus drivers and her response to any evidence or any first-
4 hand knowledge that she had of a failure on the district
5 was that the bus driver was a kook, so if he was working
6 for us, then we must have failed to screen him. So,
7 really, all it is, is speculation.

8 THE COURT: He's a what?

9 MS. SEIBERT: He's a kook.

10 THE COURT: A kook.

11 MS. SEIBERT: He let her use the bathroom, so he's a
12 kook and that because of that, we must have failed to
13 screen. That is the type of evidence that we're looking
14 at. There's no facts, there's no dispute about what
15 happened or what the district's expectations or policies or
16 procedures actually are. The Plaintiff has been unable to
17 point to that.

18 Now, looking at the curriculum vitae it looks like
19 their expert, Ms. Green, has been a bus driver in District
20 Four for nine years and that is the extent of her
21 expertise.

22 THE COURT: Okay.

23 MS. SEIBERT: Now, with that said ---

24 THE COURT: Are those CVs attached to what you handed
25 up to me?

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1 MR. WALTERS: Yes, sir.

2 THE COURT: Okay.

3 MR. WALTERS: I think -- I believe Ms. Green's is and
4 Mr. McDaniel's.

5 THE COURT: I'm not worried about Mr. McDaniel's.

6 MS. SEIBERT: That's our first issue. When we're
7 looking at the Tort Claims Act and the standard that they
8 have to meet, it's very clear that they cannot establish
9 that the district failed to exercise slight care. They've
10 been able to point to anything.

11 And again, it's almost like arguing a negative here
12 because there was -- there's nothing that we did that was
13 done incorrectly or that did not meet expectations here.

14 The other issue that I would like Your Honor to
15 consider is that under the Tort Claims Act there is a
16 separate provision for discretionary immunity, and under
17 that provision of the Tort Claims Act the district is
18 immune from liability for the alleged losses, damages or
19 injuries resulting from not exercising discretion or
20 judgement by a governmental employee. And that
21 discretionary judgement -- I'm not reading specifically
22 from that, but that ---

23 THE COURT: I'm familiar with the section you're
24 talking about.

25 MS. SEIBERT: And that's 15-78-65.

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1 THE COURT: Okay.

2 MS. SEIBERT: And here, if you look at Mr. Simmons'
3 affidavit, it is very clear that he weighed two options.
4 He looked at what his options were; he looked at them, he
5 considered them, and he chose one. And neither one of
6 those ---

7 THE COURT: Do I have his affidavit?

8 MS. SEIBERT: I'm sorry?

9 THE COURT: Do I have his affidavit?

10 MS. SEIBERT: Yes, Your Honor. That's part of the
11 motion.

12 THE COURT: Is that part of your memorandum? Part of
13 the motion.

14 MS. SEIBERT: Yes, sir.

15 THE COURT: Okay.

16 MS. SEIBERT: And just from that fact alone, it's
17 appropriate for summary judgement.

18 THE COURT: Okay. So those are your two points?

19 MS. SEIBERT: Yes, sir. And in our motion, we also --
20 for the record, in our motion we also included 15-78-64 and
21 I think it's appropriate to raise that here based on Ms.
22 Green's affidavit which says that we were -- she opines
23 that we were grossly negligent for failing to adopt a
24 policy. On her statement alone I think that establishes
25 that immunity, and that particular Tort Claims Act

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1 provision grants the district immunity for the failure to
2 adopt or implement any policy, procedure, rule, law,
3 regulation -- whatever it may be.

4 THE COURT: And which number is that?

5 MS. SEIBERT: And that is 15-78-64.

6 THE COURT: Okay. All right. Anything else?

7 MS. SEIBERT: I think that's it.

8 Again, I hope I've put it out there that there's
9 nothing that they've been able to point to that shows that
10 we didn't exercise slight care. This is a situation where
11 he let a little girl off the bus to use the bathroom rather
12 than to sit in her own urine for another half an hour. She
13 got off the bus, she used the bathroom, she got back on.
14 He made a decision and he made the best call that he
15 thought was best for this child.

16 And now the Plaintiff says that she was traumatized
17 and we recognize that she saw a -- that her mother took her
18 to a counselor after the incident, but this is not an
19 unusual incident. I think that if I was to cull everyone
20 in this courtroom, many of us have had to use the bathroom
21 outside of a public restroom facility or a private restroom
22 facility. It happens and that's what happened in this
23 incident. No one was grossly negligent. They let a little
24 girl off the bus. They let her -- they let her do it in a
25 safe environment and let her get back on the bus.

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1 THE COURT: Okay. All right. Thank you, ma'am. Mr.
2 Walters?

3 MR. WALTERS: May it please the Court?

4 Your Honor, I first want to address the factual
5 allegations that were put forth by counsel.

6 The issue is that she was ordered off the bus and she
7 exposed herself in front of the students and was told to
8 urinate, and this child is five-years old. So, under the
9 circumstances, that's why we're before the Court today.

10 Your Honor, in placing this argument before the Court,
11 I wrote some of my thoughts out and I'll first go through
12 the issue of the summary judgement motion and I'll address
13 the two arguments.

14 The school district defends it's case by basically
15 arguing it's not grossly negligent. In the affidavit from
16 the director, and you've received the affidavit they've
17 got, it appears to suggest that the child's urgent desire
18 to urinate was an emergency and that the driver's only
19 option was to allow the child to expose herself to the
20 public.

21 And by the way, this child hasn't ridden the bus since
22 then. The parents have driven her every day.

23 The school district then provided the Court with a
24 self-serving affidavit from the driver who claims he did
25 nothing wrong.

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1 The Plaintiff in this particular case has put forth
2 two affidavits: one from a former bus driver and one from
3 a former law enforcement official. Both of these
4 individuals are tendered as experts in their fields based
5 on education, training and experience.

6 What do our experts say? And, of course, in this
7 particular case, counsel alluded to the fact that you're
8 going to the internet. Well, I'd ask that the Court take
9 judicial notice of the fact that the school has no policy
10 with regards to the child urinating or using the bathroom
11 with regards to the bus.

12 I would also ask that you take judicial notice of
13 Orangeburg Consolidated School District Number Four.
14 They've got a bus driver's handbook. This is the 2012 --
15 the 2013-2014 and I'd ask that you take judicial notice of
16 it. It deals with issues with regards to the bus. It
17 simply says don't put a child off your bus unless you're
18 cleared with an administrator. If the situation is serious
19 enough and you feel you need help, either return to the
20 nearest school or stop or call for assistance, but never
21 put a child off the bus. And in this case, he put the
22 child off the bus and asked the child to remove its clothes
23 and use the bathroom.

24 In addition to that, I'd ask that you take judicial
25 notice of what another school district says in this

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1 particular case. It goes on to state that drivers should
2 not stop at non-designated stops. In other words, you
3 can't put kids on the bus and say, Oh, you've got to go to
4 the bathroom so I'll stop at McDonald's or I'll stop down
5 here at Wendy's. And what other schools have said, and you
6 can take judicial notice of it because when school boards
7 promulgate rules I believe it's law, they can't stop the
8 buses.

9 But in addition to that, our experts go on to state,
10 and I'll begin with Mr. McDaniel's affidavit and he
11 reviewed the Summons and Complaint, the Answer, and the
12 other documentation that was submitted and he went on to
13 state to a reasonable degree of professional certainty that
14 Mr. Riley Simmons in his capacity as bus driver on October
15 11 of 2011 breeched the duty of care owed to the minor
16 children, that he was grossly negligent in allowing this
17 child to urinate on the side of the road. He goes on to
18 state that he, at a minimum, allowed the child to violate
19 several laws to include disorderly conduct for the state
20 and Section 16-15-130 which prohibits indecent exposure in
21 a public place.

22 Now, counsel alludes to 15-78-60, Section 4 and 5.
23 Could I draw your attention to 15-78-60, Section 25? And
24 Section 25 simply states this, and counsel has alluded to
25 it before, but what it states is that the responsibility or

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1 duty, including but not limited to, supervision,
2 protection, control, confinement or custody of any student,
3 patient, prisoner, inmate or client of any governmental
4 entity, except when the responsibility or duty is exercised
5 in a grossly negligent manner.

6 He operated in loco parentis status. He was
7 responsible for this five-year old. He embarrassed her by
8 instructing her to get off the bus, pull your clothes down,
9 and his testimony or his affidavit says that he told her to
10 go ahead and urinate on the side of the road.

11 Counsel also alluded to the fact that students on the
12 bus called the parents. It was that bad of a situation
13 where kids were calling on their cell phone saying, She's
14 on the side of the road and she's urinating in front of all
15 of us, and the bus driver is somehow sitting in his seat
16 and he's allowed this five-year old girl to get off the
17 bus.

18 Counsel alludes to the fact in this particular case
19 that our expert driver said that this was foreseeable for
20 the district to know that an elementary student would find
21 herself in a position like our client. It's foreseeable
22 that children have to urinate, it's foreseeable that
23 children have to use the bathroom. And their position is
24 in their own affidavit that we don't have a policy. I
25 believe they've got a policy for everything under the sun,

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1 but they're saying that we don't have a policy to deal with
2 the issue of someone using the bathroom.

3 In her affidavit it goes on to state, to our end, our
4 expert says that the Defendant School District should have
5 established a policy for the driver to follow given the
6 foreseeability of children using the bathroom. The
7 district admits in their affidavit of the director that it
8 had no such policy.

9 The school district believes, and this is what is
10 really shocking, its lack of policy is a good thing. Its
11 argument goes like this: How can we be negligent because
12 we did not create a policy for us to violate? So, as long
13 as we don't make a rule, we can't violate a rule that
14 doesn't exist.

15 And counsel alludes to Section 4 and 5. Section 4 and
16 5 may deal with the adoption and promulgation of rules and
17 following procedures, but Section 25 is on the point. It
18 says that if you have control in a loco parentis status of
19 children on the bus and how they operate on that bus and
20 you do it in a grossly negligent manner -- and we've got
21 two affidavits that state that. Counsel has not produced
22 any documentation or any expert to refute this.

23 Counsel goes on to argue in this case the
24 discretionary issue, and I want to address that. That's
25 under Section 4 -- I believe it was Section 5 that she

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1 referred to the discretionary issue. What counsel didn't
2 tell the Court was that the Clark case controls that and if
3 Your Honor wants a copy of it, I can cite it for you.

4 What counsel did was she argued the Clark case and she
5 went through the ---

6 THE COURT: What's it called?

7 MR. WALTERS: I'll give you the cite for it and
8 everything, Your Honor.

9 What counsel did was they argued half the case and
10 I'll go through the whole case -- it's Clark versus South
11 Carolina Department of Public Safety -- and what counsel
12 did was counsel went through the elements in order to be
13 excused from liability when there's absolute discretionary
14 immunity, and I'll carefully go through what each step
15 requires.

16 The first thing is that in order to even argue
17 discretionary immunity the Court has to determine if there
18 is a policy that is a part of planning or is it
19 operational. And in the Clark case there was a general
20 policy that they were following and they stated that the
21 discretionary immunity was not applicable.

22 In this particular case, there is no policy. If you
23 get past that hurdle, the Court goes on to state in Clark,
24 number one, you have to face the alternatives and balance
25 the alternatives, and that's what counsel argued. You have

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1 to weigh the competing considerations and then, most
2 importantly, you have to make a conscious choice. But the
3 Court goes on to state that while you're doing this you
4 have to utilize accepted professional standards that are
5 appropriate. And their own affidavit says, We don't have a
6 policy. So, there's no way you can exercise the discretion
7 that she's referring to under the Clark versus South
8 Carolina Department of Public Safety if you don't have a
9 set of rules. If you have a set of rules and you weigh the
10 competing considerations and you sit down and you make or
11 look at the alternatives and then you make a conscious
12 choice and you're guided by those professional standards
13 that you've been given, you get out of the case. In your
14 waiver of immunity, this exception is applicable. They
15 can't cite any policy or rule that they have in this case.
16 Their position is we don't have a rule, so there's nothing
17 that we've violated and we get out of it.

18 So, essentially, the argument that they're making is,
19 to read that exception that broadly would excuse everyone
20 in the school system from any liability.

21 Your Honor, it goes on in the argument of counsel in
22 this particular case that our expert driver said that it
23 was foreseeable that this would happen. You see, Your
24 Honor, even if the school district meets its initial
25 burden, what they're doing is asserting their affirmative

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1 defenses, and their affirmative defenses are 15-78-60,
2 Section 4, Section 5 and Section 25. They fail under
3 Section 25. They fail under Section 4 -- Section 5 because
4 the discretionary test, they can't meet it.

5 Under Section 25, we've got two experts that have
6 simply stated, This is where you are and you're wrong; you
7 don't have a policy and you don't have a procedure.
8 One expert says you've even gone so far as to break the law
9 like public disorderly conduct in exposing this child and
10 in addition to that allowing this child to urinate on the
11 side of the road. The second expert says, I drive a bus --
12 and, in fact, her curriculum vitae says that she drives a
13 special needs bus -- and she goes on to say there's no
14 policy, there's no procedure.

15 And counsel belittles and makes fun of the fact that
16 they went to the internet. Well, that's the only place you
17 can go when your school system does not have a set of rules
18 that govern this activity on the bus.

19 So you simply say, Well, how do other people handle
20 it? And their position is since we don't have a set of
21 rules, Your Honor, we ask that you apply this blanket
22 exception that we can excuse anyone for exercising slight
23 care.

24 Is it slight care when you have no rules and no
25 regulations? Is it slight care when you actually break the

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1 law and ask a minor child to expose himself to the public
2 and break the law?

3 I think our affidavits create a material issue of fact
4 that a jury should decide. And, of course, looking at the
5 evidence in a light most favorable to the non-moving party
6 in this particular case, we have created a genuine issue of
7 material fact as to whether it was grossly negligent on at
8 least two independent fronts: a), for failing to
9 promulgate and to implement a policy that deals with the
10 situation as alleged in the complaint, and b), in failing
11 to handle this crisis in a reasonable and prudent manner.

12 And Your Honor asked counsel, Do you want to continue
13 this? Do you want to take their deposition? What do you
14 want to do? Their position is, No, we're moving forward.

15 I believe we've met our burden and we've created a
16 genuine issue of material fact.

17 THE COURT: Do you have anything to respond?

18 MS. SEIBERT: I do, Your Honor. The first thing I'd
19 like to point out is Mr. Walters has asked you to take
20 judicial notice of other policies, a handbook from a
21 different school district which, again, was not provided in
22 discovery and which was not a policy or a procedure adopted
23 by ---

24 THE COURT: I understand.

25 MS. SEIBERT: That's a handbook from some other school

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1 district that I've not seen before and from my experience
2 working with school districts, it's not a formal policy or
3 a procedure of a school district. I wanted to make sure
4 that was clear.

5 Now, the other thing that, again, Mr. Walters is
6 hanging his hat on is these affidavits of these experts
7 which are not admissible to prove a conclusion of law.
8 These are just legal analyses.

9 And if we're going to look at Mr. McDaniel's affidavit
10 and what he concluded, he concluded that this little girl
11 broke the law because she engaged in indecent exposure.
12 And I looked up the statute that he referenced and it
13 states that it's unlawful for a person to willfully,
14 maliciously and indecently expose his person in a public
15 place on property of others or to the view of any person on
16 a street or highway. That's not what happened here. So
17 this is a legal conclusion on top of a legal conclusion.
18 There's no weight that should be given to that, even
19 assuming that it's admissible in this particular
20 proceeding.

21 The other issue, if I could, Your Honor, address is I
22 know that Mr. Walters has addressed the Clark matter or the
23 Clark case, and we do not specifically cite that in our
24 memorandum of law; however, I would point you to Proctor
25 versus the Department of Health and Environmental Control

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1 and Pipe versus South Carolina Department of
2 Transportation, and both of those also address the
3 standards for discretionary immunity. And we addressed
4 that here. That discretionary immunity is contingent on
5 proof that the governmental entity faced with alternatives
6 actually weighed competing considerations and made a
7 conscious choice using accepted professional standards.
8 And we addressed that here in our memorandum.

9 I think it is very clear they may not agree with what
10 happened, but Mr. Simmons made a conscious decision. He
11 considered his options and he made a conscious choice and
12 the district found that acceptable and he used appropriate
13 standards to do so. I think that's clear in there.

14 Now, the other issue that I wanted to address was the
15 factual assertion that Mr. Walters has tried to put forth
16 which is that she was ordered off the bus. There are no
17 facts in the record other than the mother's perception that
18 that's what happened.

19 Also, that she exposed herself. Again, no facts in
20 the record that that's what happened. It is mother's
21 assumption based on the type of skirt she was wearing that
22 she must have exposed herself. Rather, Mr. Simmons took
23 pretty great pains to make sure that no one saw her. And
24 again, there is nothing in the record that even established
25 that she exposed herself. When asked, you know, Did your

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1 son tell you he saw her? No.

2 Again, some of these assumptions are just that:
3 assumptions. And that's not enough to make a question of
4 fact and preclude awarding summary judgement.

5 THE COURT: Mr. Walters, is there anything in the
6 record that states that the child was ordered off the bus?

7 MR. WALTERS: No, sir. What we argue is that he is in
8 a loco parentis status and the child says, Can I go to the
9 bathroom? And he says, You can go here, and he opens the
10 door. This is a five-year old girl and he's in a role
11 where he serves in a capacity just as a parent would and he
12 had the child get off the bus and use the bathroom here.

13 THE COURT: What would you have had him do?

14 MR. WALTERS: The policy should be that either you go
15 back to the nearest school or you go back to the school
16 that you came from or the child has to wet or defecate
17 itself on the bus. You can not ---

18 THE COURT: And that's better than what happened here?

19 MR. WALTERS: That may have been better instead of
20 pulling down your clothes in front of everybody on the bus
21 and being embarrassed.

22 THE COURT: Do you have any evidence that it was in
23 front of everybody on the bus?

24 MR. WALTERS: Your Honor, in this particular case,
25 yes.

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1 THE COURT: Where is that?

2 MR. WALTERS: It's alleged in the Summons and
3 Complaint. It's alleged in the affidavits that have been
4 submitted by the experts that it was humiliating and
5 embarrassing. It's in Janet Green's affidavit.

6 THE COURT: Do you have factual allegations from a
7 fact witness that anybody saw the child?

8 MR. WALTERS: Yes, sir, Your Honor.

9 THE COURT: Where?

10 MR. WALTERS: I don't believe this affidavit would be
11 timely, but we have affidavits that have alleged that.
12 They've taken no depositions of any of our witnesses.

13 THE COURT: Have you taken the depositions of any
14 witnesses?

15 MR. WALTERS: No, sir, Your Honor. My clients have
16 struggled just to pay the experts that are present before
17 the Court.

18 THE COURT: Okay.

19 MR. WALTERS: They haven't even taken the deposition
20 of the child.

21 THE COURT: The child is five?

22 MR. WALTERS: Yes, sir.

23 THE COURT: Is the child still five?

24 MR. WALTERS: No, she's older now.

25 THE COURT: When did this occur?

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1 MR. WALTERS: Your Honor, in ---

2 THE COURT: October, 11, 2011?

3 MR. WALTERS: Yes, sir, Your Honor.

4 THE COURT: Okay. All right.

5 I'll have to make a decision. Again, I haven't read
6 all the memorandums and the affidavits. I'll consider all
7 of that and look at these cases and let y'all know.

8 MR. WALTERS: Yes, sir, Your Honor.

9 THE COURT: All right. Thank you very much.

10 MS. SEIBERT: Thank you.

11 (WHEREUPON, THE HEARING IN THE ABOVE-
12 ENTITLED MATTER WAS CONCLUDED.)
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That I am not related to nor an employee of any of the parties hereto, nor a relative or employee of any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

S/DeeAnne Varnadoe
DeeAnne Varnadoe
Official Court Reporter
Notary Public for South Carolina
My commission expires 3/15/2016.

- 95 -

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF ORANGEBURG

2014-CP-38-01314

3

4 JENNIFER MIDDLETON)

TRANSCRIPT OF RECORD

5 VS.)

6

ORANGEBURG CONSOLIDATED
7 SCHOOL DISTRICT THREE)

SEPTEMBER 18, 2014
ORANGEBURG, SC

8

9 B E F O R E:

10 HONORABLE JAMES B. JACKSON

11

A P P E A R A N C E S:

12

JOSHUA KOGER, JR., ESQUIRE
13 Attorney for the Plaintiff

14

MEREDITH L. SEIBERT, ESQUIRE
15 Attorney for the Defendant

16

Ruth L. Mott, RPR, CRR
17 Official Court Reporter

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I N D E X

CERTIFICATE OF REPORTER 7

E X H I B I T S

NO.	DESCRIPTION	ID	EVD
	(NONE MARKED)		

- - -

1 THE COURT: Mr. Koger, this is your motion.

2 MR. KOGER: Yes, Your Honor.

3 THE COURT: According to Mr. Walters.

4 MR. KOGER: Yes, Your Honor.

5 THE COURT: I granted summary judgment, I think, in this
6 matter, and you've asked me to reconsider; is that correct?

7 MR. KOGER: That's correct, Your Honor.

8 THE COURT: Give me something to hang the hat on, and
9 I'll be glad to change my mind. I felt pretty comfortable
10 with my previous order, but go ahead.

11 MR. KOGER: Okay.

12 THE COURT: Let me hear from you.

13 MR. KOGER: Your Honor, may it please the Court, as the
14 Court stated, we're here for a motion for reconsideration on
15 this Middleton versus Orangeburg Consolidated District 3
16 matter right here. The ground that we would like to pursue
17 on the motion for you to reconsider is that a genuine issue
18 of material fact exists as to the District not having an
19 actual policy to handle emergency situations. I'm
20 submitting, in the original pleadings and motion for summary
21 judgment, affidavit by -- well, the affidavit by Janet Green,
22 which was an expert in bus transportation submitted by the
23 plaintiffs in this matter, stating that what happened on that
24 particular day as far as the child being -- needing to
25 urinate in that situation, that there should have been a

1 policy in place to deal with such emergency situations. She
2 also stated in her affidavit that, in a perusal of the
3 Internet, that this is a situation that is foreseeable, that
4 it happens, not frequently, but it does happen with
5 elementary children in relation to bus transportation that
6 they would have to use the restroom or bathroom, and there
7 should have been policies in place.

8 The argument from the defendants in this particular
9 case, and this is from the bus director, a Linda -- a Lydia
10 Gilliard -- is saying that discretion is what they use with
11 the bus driver in relation to these situations. It is our
12 position that not having a policy, that is grossly negligent
13 for the District to not have a policy, that discretion by the
14 bus driver is not a policy, and that this case should go
15 forward because a genuine issue of material fact exists for
16 them not having a policy; and taking all inferences in
17 relation to the plaintiff in this particular case, that a
18 jury should determine whether, by not having a policy, by not
19 promulgating a policy, that the District did not exercise
20 slight care by not having a policy, and we ask that you
21 reconsider on that particular point the granting of the
22 summary judgment to the defendant in this case.

23 THE COURT: Thank you, Mr. Koger.

24 MS. SEIBERT: Good morning, Your Honor.

25 THE COURT: Ms. Seibert?

1 MS. SEIBERT: Seibert, yes, sir.

2 THE COURT: Good to see you. Let me hear from you.

3 MS. SEIBERT: Just two points in response to that, the
4 first being that, again, they are relying on an affidavit
5 that makes a conclusion of law. They have expert testimony
6 that they have presented that basically the only basis of the
7 affidavit is to make a conclusion of law. And at our
8 previous hearing I believe I gave Your Honor two different
9 cases that address that basically affidavits -- expert
10 witness affidavits that make a conclusion of law, and that's
11 the only purpose of the affidavit, those aren't admissible;
12 and those two cases are Green versus State and Dawkins versus
13 Fields. So, again, to the extent that plaintiffs are relying
14 on this affidavit from a bus driver that says she thinks we
15 should have had a policy; and because we didn't, that's
16 negligent, that's -- again, those two cases, Green versus
17 State, Dawkins versus Fields, show that that affidavit's
18 inadmissible to begin with.

19 That said, in our answer to the original complaint, you
20 know, at the hearing, as part of the depositions, everything
21 we've gone through, the fact that we have not had a policy
22 has not been an issue. Even if it were, I would just point
23 Your Honor's attention to the Tort Claims Act 15-78-60(4),
24 and that says that the District, basically there's a
25 limitation on liability for the adoption, enforcement or

1 compliance with any law or failure to adopt or enforce any
2 law, whether valid or invalid, including, but not limited to,
3 any charter, provision, ordinance, resolution, rule,
4 regulation, or written policies. Basically, the Tort Claims
5 Act provides us a limit on liability. I mean, we can't be
6 held negligent for the failure to adopt the policy. That's
7 basically what the Tort Claims Act says. So to the extent
8 that's even an issue at this point, the Tort Claims Act
9 places a limit on liability for that.

10 THE COURT: And the plaintiff has to prove gross
11 negligence in this case, don't they, Mr. Koger?

12 MS. SEIBERT: That's correct.

13 MR. KOGER: Yes, Your Honor.

14 THE COURT: Anything further, Ms. Seibert?

15 MS. SEIBERT: No, Your Honor.

16 THE COURT: I'll take the matter under advisement, Mr.
17 Koger. I appreciate it. I'll let you all know. Thank you
18 so much.

19 --- END OF TRANSCRIPT OF RECORD ---
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1 CERTIFICATE OF REPORTER

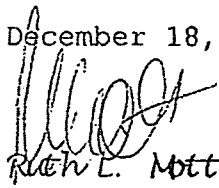
2 STATE OF SOUTH CAROLINA

3 COUNTY OF ORANGEBURG

4
5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the 1st Judicial Circuit Court for Orangeburg County,
11 South Carolina, on the 18th of September, 2014.

12 I further certify that I am neither related to nor
13 counsel for any party to the cause pending or interested in
14 the events thereof.

15 December 18, 2014

16 
17 Ruth L. Mott

18 Official Court Reporter
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25

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

JENNIFER MIDDLETON,)
as parent and GAL for Jane Doe,)

C.A. No. 2012-CP-38-01314

Plaintiff,)
)

vs.)

**AFFIDAVIT OF
JANET GREENE**

ORANGEBURG)
CONSOLIDATED SCHOOL)
DISTRICT THREE,)

Defendant.)
)
_____)

NOW COMES JANET GREENE, deposing and saying the following:

1. I am over the age of the age of eighteen and believe that I am competent to give this affidavit.
2. A. copy of my current Curriculum Vitae is attached to this Affidavit, and the contents of the same are hereby incorporated by reference in this affidavit as if fully set out. Based upon my overall education, training, and experience, I tender myself as an expert witness in the above-referenced case in the area of school bus transportation policies and procedures.
3. In anticipation of rendering the opinion in this affidavit, I review, not necessarily all inclusive, the following material: (a) the Complaint which was filed in this matter September 26, 2012; (b) the Defendant's Answer which was filed in the matter; (c) review of the laws as cited herein; (d) Defendant's Motion for Summary Judgment which was filed in this matter on October 4, 2013; (e) Affidavits of Riley Simmons and Lydia Gilliard, submitted in support of the aforementioned Motion for Summary Judgment; (f) R-16 Route Description which was prepared on September 2012 and filed in the matter in support of the Motion for Summary Judgment. Additionally, I researched issues and topics on the internet involving school bus transportation policies and procedures. I also consulted the Federal School Bus (S) Endorsement Supplement, dated 2004, from the South Carolina DMV website, located at the following link:

<http://www.scdmvonline.com/DMVNew/forms/s%20endorsement%20supplement%20study%20guide.pdf> (hereinafter referred to as the Federal School Bus Supplement).

4. For a definitional frame of reference for my opinions in this affidavit, "gross negligence" as used in this affidavit means the following: a complete failure to show care that in fact implies recklessness or a willful disregard for safety and human life. Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do. Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993). It is the failure to exercise slight care. Clyburn v. Sumter County Sch. Dist. # 17, 317 S.C. 50, 451 S.E.2d 885 (1994). Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence. Jackson v. South Carolina Dep't of Corrections, 301 S.C. 125, 390 S.E.2d 467 (Ct. App.1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990).
5. Orangeburg County School District #3 ("OCSD" or "Defendant") has admitted in the affidavit of Lydia Gilliard that no policy existed relating to students temporarily leaving the bus for emergency situations, such as students who have unexpected bodily functions, such as urinating or vomiting. See paragraph 5 of Gilliard's Affidavit. Ms. Gilliard is the Director of Transportation for the Defendant School District. Based upon her affidavit, she views a student's need to use the bathroom as an emergency situation. For the purpose of this affidavit, I adopt Ms. Gilliard's view that the situation confronting the driver, i.e., student's need to use the bathroom, was an emergency situation on date alleged in the complaint.
6. In my opinion, an elementary school student's sudden need to use the bathroom is very foreseeable and predictable. A casual search of the internet suggests that this situation occurs very often. It is my opinion, to a reasonable degree of professional certainty, the Defendant School District should have foreseen that a bus driver would eventually be confronted with the situation presented in the Complaint.
7. To a reasonable degree of professional certainty, it is my opinion that the Defendant School District was grossly negligent in failing to adopt, implement policies governing the type of emergency conform Mr. Riley, and it was also 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. The failure of the Defendant School District caused Mr. Riley to endanger the life of the minor child involved and the lives of the other children because the bus was pulled over on the side of the road. Any time a bus is pulled over on the side of the road with children seated inside, there is an add risk of exposure that it will be hit by an inattentive driver.
8. In part, the Federal School Bus Supplement says the following at Section 10.3.1:

10.3.1 - Planning for Emergencies

Determine Need to Evacuate Bus

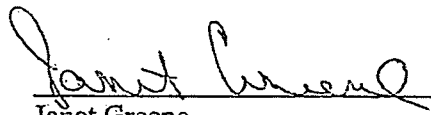
The first and most important consideration is for you to recognize the hazard. If time permits, school bus drivers should contact their dispatcher to explain the situation before making a decision to evacuate the school bus.

As a general rule, student safety and control is best maintained by keeping students on the bus during an emergency and/or impending crisis situation, if so doing does not expose them to unnecessary risk or injury (emphasis added),.....

In my opinion, it was safer for the bus driver to keep the young student on the bus, rather than stopping the bus and having the young child expose herself to the elements. By stopping the bus and allowing the young child to leave the bus, Mr. Simmons endangered the child and the other students who were inside a stopped bus on the side of the road. Mr. Simmons encouraged the child to expose herself to the children on the bus and caused humiliation and embarrassment. This action caused substantial harm to this child. To a reasonable degree of certainty, the bus driver was grossly negligent in allowing the child to exit the vehicle under the circumstances presented to him.

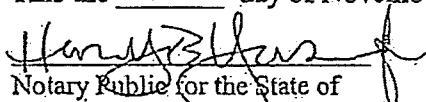
9. To a reasonable degree of professional certainty, Mr. Riley Simmons was grossly negligent and reckless in causing, allowing, aiding, or abetting the minor child to expose herself and urinate in public.

10. All opinions are presented to a reasonable degree of professional certainty.


Janet Greene

Subscribed and sworn to before me

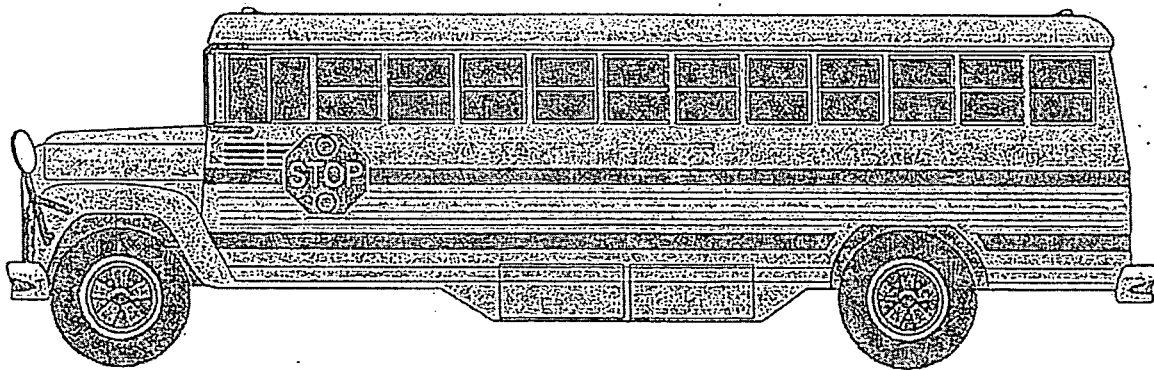
This the 6th day of November, 2013.


Notary Public for the State of
South Carolina

(Include Seal)

My Commission Expires: 9/6/2015

Federal School Bus (S) Endorsement Supplement



Material from 2004 Model Commercial Driver's License Manual

SECTION 10 SCHOOL BUSES

This Section Covers

- *Danger Zones and Use of Mirrors*
- *Loading and Unloading*
- *Emergency Exit and Evacuation*
- *Railroad-highway Grade Crossings*
- *Student Management*
- *Antilock Braking Systems*
- *Special Safety Situation*

School bus drivers must have a commercial driver's license if they drive a vehicle designed to transport (seat) 16 or more persons, including the driver.

School bus drivers must have a school bus endorsement in addition to a passenger endorsement on their commercial driver's license (CDL). To get the school bus endorsement, you must pass a knowledge test on section 10 of this manual. (If your school bus has air brakes, you must also pass a knowledge test on Section 5.) You must also pass the skills test required for the class of school bus you drive or intend to drive.

This section does NOT provide information on all the federal and state requirements needed before you drive a school bus. You should be thoroughly familiar with all specific school bus procedures, laws and regulations in your state and local school district.

10.1 - Danger Zones and Use of Mirrors

10.1.1 - Danger Zones

The danger zone is the area anywhere outside of the bus where children are in the most danger of being hit, either by another vehicle or their own bus. The danger zones extend as much as 30 feet from the front bumper, 10 feet from the left and right sides of the bus and 10 feet behind the rear bumper of the school bus. In addition, the area to the left of the bus is always considered dangerous because of passing vehicles. Figure 10.1 illustrates these danger zones.

10.1.2 - Correct Mirror Adjustment

Proper adjustment and use of all mirrors is vital to the safe operation of the school bus in order to observe the danger zone around the bus and look for students, traffic, and other objects in this area.

You should always check each mirror before operating the school bus to obtain maximum viewing area consistent with the vision requirements of Federal Motor Vehicle Safety Standard NO. 111, "Mirror Systems". If necessary, have the mirrors adjusted.

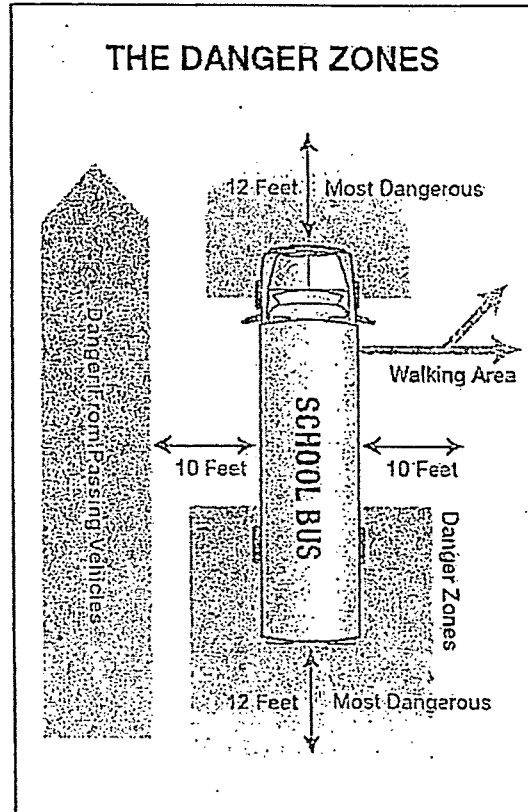


Figure 10.1

10.1.3 - Outside Left and Right Side Flat Mirrors

These mirrors are mounted at the left and right front corners of the bus at the side or front of the windshield. They are used to monitor traffic, check clearances and students on the sides and to the rear of the bus. There is a blind spot immediately below and in front of each mirror and directly in back of the rear bumper. The blind spot behind the bus could extend up to 400 feet depending on the width of the bus.

Ensure that the mirrors are properly adjusted so you can see:

- 200 feet or 4 bus lengths behind the bus.
- Along the sides of the bus.
- The rear tires touching the ground.

Figure 10.2 shows how both the outside left and right side flat mirrors should be adjusted.

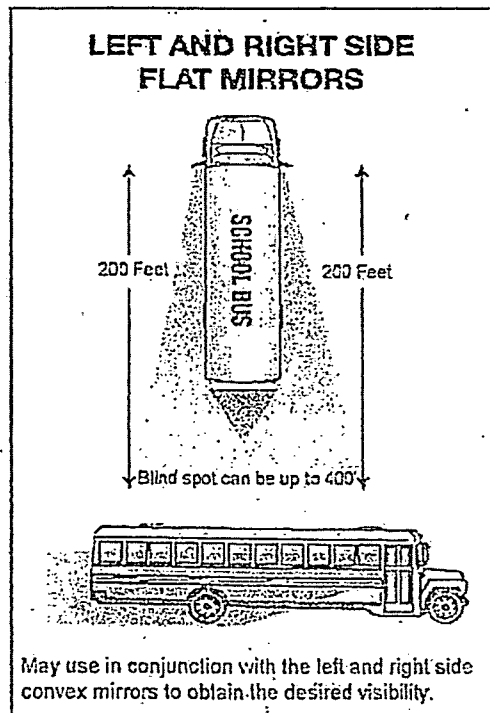


Figure 10.2

10.1.4 - Outside Left and Right Side Convex Mirrors

The convex mirrors are located below the outside flat mirrors. They are used to monitor the left and right sides at a wide angle. They provide a view of traffic, clearances, and students at the side of the bus. These mirrors present a view of people and objects that does not accurately reflect their size and distance from the bus.

Ensure that the mirrors are properly adjusted so you can see:

- The entire side of the bus up to the mirror mounts.
- Front of the rear tires touching the ground.
- At least one traffic lane on either side of the bus.

Figure 10.3 shows how both the outside left and right side convex mirrors should be adjusted.

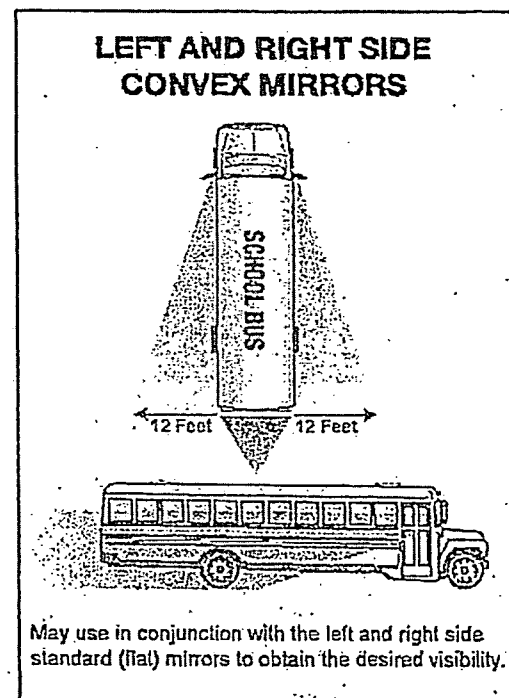


Figure 10.3

10.1.5 - Outside Left and Right Side Cross View Mirrors

These mirrors are mounted on both left and right front corners of the bus. They are used to see the "danger zone" area directly in front of the bus that is not visible by direct vision, and to view the "danger zone" areas to the left side and right side of the bus, including the service door and front wheel areas. The mirror presents a view of people and objects that does not accurately reflect their size and distance from the bus. The driver must ensure that these mirrors are properly adjusted.

Ensure that the mirrors are properly adjusted so you can see:

- The entire area in front of the bus from the front bumper at ground level to a point where direct vision is possible. Direct vision and mirror view vision should overlap.
- The right and left front tires touching the ground.
- The area from the front of the bus to the service door.
- These mirrors, along with the convex and flat mirrors, should be viewed in a logical sequence to ensure that a child or object is not in any of the danger zones.

Figures 10.4a and 10.4b illustrate how the left and right side cross view mirrors should be adjusted.

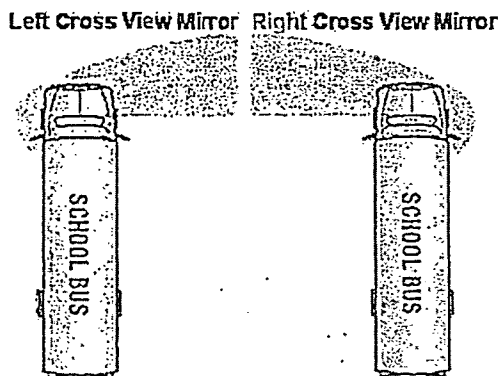


Figure 10.4a

Figure 10.4b

10.1.6 - Overhead Inside Rearview Mirror

This mirror is mounted directly above the windshield on the driver's side area of the bus. This mirror is used to monitor passenger activity inside the bus. It may provide limited visibility directly in back of the bus if the bus is equipped with a glass-bottomed rear emergency door. There is a blind spot area directly behind the driver's seat as well as a large blind spot area that begins at the rear bumper and could extend up to 400 feet or more behind the bus. You must use the exterior side mirrors to monitor traffic that approaches and enters this area.

Ensure that the mirrors are properly adjusted so you can see:

- The top of the rear window in the top of the mirror.
- All of the students, including the heads of the students right behind you.

10.2 - Loading and Unloading

More students are killed while getting on or off a school bus each year than are killed as passengers inside of a school bus. As a result, knowing what to do before, during, and after loading or unloading students is critical. This section will give you procedures to help you avoid unsafe conditions which could result in injuries and fatalities during and after loading and unloading students.

10.2.1 - Approaching the Stop

Each school district establishes official routes and official school bus stops. All stops should be approved by the school district prior to making the stop. You should never change the location of a bus stop without written approval from the appropriate school district official.

You must use extreme caution when approaching a school bus stop. You are in a very demanding situation when entering these areas. It is critical that you understand and follow all state and local laws and regulations regarding approaching a school bus stop. This would involve the proper use of mirrors, alternating flashing lamps, and when equipped, the moveable stop signal arm and crossing control arm.

When approaching the stop, you should:

- Approach cautiously at a slow rate of speed.
- Look for pedestrians, traffic, or other objects before, during, and after coming to a stop.
- Continuously check all mirrors.
- If the school bus is so equipped, activate alternating flashing amber warning lamps before the school bus stop in accordance with state law.
- Continuously check mirrors to monitor the danger zones for students, traffic, and other objects.
- Move as far as possible to the right on the traveled portion of the roadway.
- Bring school bus to a full stop with the front bumper at least 10 feet away from students at the designated stop. This forces the students to walk to the bus so you have a better view of their movements.
- Place transmission in Park, or if there is no Park shift point, in Neutral and set the parking brake at each stop.
- Open service door, if possible, enough to activate alternating red lamps when traffic is a safe distance from the school bus.
- Make a final check to see that all traffic has stopped before completely opening the door and signaling students to approach.

10.2.2 - Loading Procedures

- Perform a safe stop as described in subsection 10.2.1.
- Students should wait in a designated location for the school bus, facing the bus as it approaches.
- Students should board the bus only when signaled by the driver.
- Monitor all mirrors continuously.

- Count the number of students at the bus stop and be sure all board the bus. If possible, know names of students at each stop. If there is a student missing, ask the other students where the student is.
- Have the students board the school bus slowly, in single file, and use the handrail. The dome light should be on while loading in the dark.
- Wait until students are seated and facing forward before moving the bus.
- Check all mirrors. Make certain, no one is running to catch the bus.
- If you cannot account for a student outside, secure the bus, take the key, and check around and underneath the bus.
- When all students are accounted for, prepare to leave by:

- ☐ Closing the door.
- ☐ Engaging the transmission.
- ☐ Releasing the parking brake.
- ☐ Turning off alternating flashing red lamps.
- ☐ Turning on left turn signal.
- ☐ Allowing congested traffic to disperse.
- ☐ Checking all mirrors again.

- When it is safe, move the bus to enter traffic flow and continue the route.

The loading procedure is essentially the same wherever you load students, but there are slight differences. When students are loading at the school campus, you should:

- Turn off the ignition switch.
- Remove key if leaving driver's compartment.
- Position yourself to supervise loading as required or recommended by your state or local regulations.

10.2.3 - Unloading Procedures on the Route

- Perform a safe stop at designated unloading areas as described in subsection 10.2.1.
- Have the students remain seated until told to exit.
- Check all mirrors.
- Count the number of students while unloading to confirm the location of all students before pulling away from the stop.
- Tell students to exit the bus and walk at least 10 feet away from the side of the bus to a position where the driver can plainly see all students.

- Check all mirrors again. Make sure no students are around or returning to the bus.
- If you cannot account for a student outside the bus, secure the bus, and check around and underneath the bus.
- When all students are accounted for, prepare to leave by:
 - ☐ Closing the door.
 - ☐ Engaging transmission.
 - ☐ Releasing parking brake.
 - ☐ Turning off alternating flashing red lamps.
 - ☐ Turning on left turn signal.
 - ☐ Allowing congested traffic to disperse.
 - ☐ Checking all mirrors again.
- When it is safe, move the bus, enter the traffic flow and continue the route.

Note. If you have missed a student's unloading stop, do not back up. Be sure to follow local procedures.

Additional Procedures for Students That Must Cross the Roadway

You should understand what students should do when exiting a school bus and crossing the street in front of the bus. In addition, the school bus driver should understand that students might not always do what they are supposed to do. If a student or students must cross the roadway, they should follow these procedures:

- ☐ Walk approximately 10 feet away from the side of the school bus to a position where you can see them.
 - ☐ Walk to a location at least 10 feet in front of the right corner of the bumper, but still remaining away from the front of the school bus.
 - ☐ Stop at the right edge of the roadway. You should be able to see the student's feet.
- When students reach the edge of the roadway, they should:
 - ☐ Stop and look in all directions, making sure the roadway is clear and is safe.
 - ☐ Check to see if the red flashing lamps on the bus are still flashing.
 - ☐ Wait for your signal before crossing the roadway.
 - Upon your signal, the students should:

- ☐ Cross far enough in front of the school bus to be in your view.
- ☐ Walk to the left edge of the school bus, stop, and look again for your signal to continue to cross the roadway.
- ☐ Look for traffic in both directions, making sure roadway is clear.
- ☐ Proceed across the roadway, continuing to look in all directions.

Notes:

1. The school bus driver should enforce any state or local regulations or recommendations concerning student actions outside the school bus.
2. It is important for the driver to understand that any hand or other signal that is given to a student also could be misinterpreted by motorists that are stopped in the area.

10.2.4 - Unloading Procedures at School

State and local laws and regulations regarding unloading students at schools, particularly in situations where such activities take place in the school parking lot or other location that is off the traveled roadway, are often different than unloading along the school bus route. It is important that the school bus driver understands and obeys state and local laws and regulations. The following procedures are meant to be general guidelines.

When unloading at the school you should follow these procedures:

- Perform a safe stop at designated unloading areas as described in subsection 10.2.1.
- Secure the bus by:
 - ☐ Turning off the ignition switch.
 - ☐ Removing key if leaving driver's compartment.
- Have the students remain seated until told to exit.
- Position yourself to supervise unloading as required or recommended by your state or local regulations.
- Have students exit in orderly fashion.
- Observe students as they step from bus to see that all move promptly away from the unloading area.
- Walk through the bus and check for hiding/sleeping students and items left by students.
- Check all mirrors. Make certain no students are returning to the bus.

- If you cannot account for a student outside the bus and the bus is secure, check around and underneath the bus.
- When all students are accounted for, prepare to leave by:

- ☐ Closing the door.
- ☐ Fastening safety belt.
- ☐ Starting engine.
- ☐ Engaging the transmission.
- ☐ Releasing the parking brake.
- ☐ Turning off alternating flashing red lamps.
- ☐ Turning on left turn signal.
- ☐ Allowing congested traffic to disperse.
- ☐ Checking all mirrors again.

- When it is safe, pull away from the unloading area.

10.2.5 - Special Dangers of Loading and Unloading

Dropped or Forgotten Objects. Always focus on students as they approach the bus and watch for any who disappear from sight.

Students may drop an object near the bus during loading and unloading. Stopping to pick up the object, or returning to pick up the object, may cause the student to disappear from the driver's sight at a very dangerous moment.

Students should be told to leave any dropped object and move to a point of safety out of the danger zones and attempt to get the driver's attention to retrieve the object.

Handrail Hang-ups. Students have been injured or killed when clothing, accessories, or even parts of their body get caught in the handrail or door as they exited the bus. You should closely observe all students exiting the bus to confirm that they are in a safe location prior to moving the bus.

10.2.6 - Post-trip Inspection

When your route or school activity trip is finished, you should conduct a post-trip inspection of the bus.

You should walk through the bus and around the bus looking for the following:

- Articles left on the bus.

- Sleeping students.
- Open windows and doors.
- Mechanical/operational problems with the bus, with special attention to items that are unique to school buses – mirror systems, flashing warning lamps and stop signal arms.
- Damage or vandalism.

Any problems or special situations should be reported immediately to your supervisor or school authorities.

10.3 - Emergency Exit and Evacuation

An emergency situation can happen to anyone, anytime, anywhere. It could be a crash, a stalled school bus on a railroad-highway crossing or in a high-speed intersection, an electrical fire in the engine compartment, a medical emergency to a student on the school bus, etc. Knowing what to do in an emergency—before, during and after an evacuation—can mean the difference between life and death.

10.3.1 - Planning for Emergencies

Determine Need to Evacuate Bus

The first and most important consideration is for you to recognize the hazard. If time permits, school bus drivers should contact their dispatcher to explain the situation before making a decision to evacuate the school bus.

As a general rule, student safety and control is best maintained by keeping students on the bus during an emergency and/or impending crisis situation, if so doing does not expose them to unnecessary risk or injury. Remember, the decision to evacuate the bus must be a timely one.

A decision to evacuate should include consideration of the following conditions:

- Is there a fire or danger of fire?
- Is there a smell of leaking fuel?
- Is there a chance the bus could be hit by other vehicles?
- Is the bus in the path of a sighted tornado or rising waters?
- Are there downed power lines?
- Would removing students expose them to speeding traffic, severe weather, or a dangerous environment such as downed power lines?
- Would moving students complicate injuries such as neck and back injuries and fractures?
- Is there a hazardous spill involved? Sometimes, it may be safer to remain on the bus and not come in contact with the material.

Mandatory Evacuations. The driver must evacuate the bus when:

- The bus is on fire or there is a threat of a fire.
- The bus is stalled on or adjacent to a railroad-highway crossing.
- The position of the bus may change and increase the danger.
- There is an imminent danger of collision.
- There is a need to quickly evacuate because of a hazardous materials spill.

10.3.2 - Evacuation Procedures

Be Prepared and Plan Ahead. When possible, assign two responsible, older student assistants to each emergency exit. Teach them how to assist the other students off the bus. Assign another student assistant to lead the students to a "safe place" after evacuation. However, you must recognize that there may not be older, responsible students on the bus at the time of the emergency. Therefore, emergency evacuation procedures must be explained to all students. This includes ensuring that they know the location of and operation of the various emergency exits, and the importance of listening to and following all instructions given by you.

Some tips to determine a safe place:

- A safe place for the students will be at least 100 feet off the road in the direction of oncoming traffic. This will keep them from being hit by debris if another vehicle collides with the bus.
- Lead students upwind of the bus if fire is present.
- Lead students as far away from railroad tracks as possible and in the direction of any oncoming train.
- Lead students upwind of the bus at least 300 feet if there is a risk from spilled hazardous materials.
- If the bus is in the direct path of a sighted tornado and evacuation is ordered, escort students to a nearby ditch or culvert if shelter in a building is not readily available, and direct them to lie face down, hands covering their head. They should be far enough away so the bus cannot topple on them. Avoid areas that are subject to flash floods.

General Procedures. Determine if evacuation is in the best interest of safety.

- Determine the best type of evacuation:
 - ☐ Front, rear or side door evacuation, or some combination of doors.
 - ☐ Roof or window evacuation.
- Secure the bus by:
 - ☐ Placing transmission in Park, or if there is no shift point, in Neutral.
 - ☐ Setting parking brakes.
 - ☐ Shutting off the engine.
 - ☐ Removing ignition key.
 - ☐ Activating hazard-warning lamps.
- If time allows, notify dispatch office of evacuation location, conditions, and type of assistance needed.
- Dangle radio microphone or telephone out of driver's window for later use, if operable.
- If no radio, or radio is inoperable, dispatch a passing motorist or area resident to call for help. As a last resort, dispatch two older, responsible students to go for help.
- Order the evacuation.
- Evacuate students from the bus.
 - ☐ Do not move a student you believe may have suffered a neck or spinal injury unless his or her life is in immediate danger.
 - ☐ Special procedures must be used to move neck spinal injury victims to prevent further injury.
- Direct a student assistant to lead students to the nearest safe place.
- Walk through the bus to ensure no students remain on the bus. Retrieve emergency equipment.
- Join waiting students. Account for all students and check for their safety.
- Protect the scene. Set out emergency warning devices as necessary and appropriate.
- Prepare information for emergency responders.

10.4 - Railroad-highway Crossings

10.4.1 - Types of Crossings

Passive Crossings. This type of crossing does not have any type of traffic control device. You must stop at these crossings and follow proper procedures. However, the decision to proceed rests entirely in your hands. Passive crossings

require you to recognize the crossing, search for any train using the tracks and decide if there is sufficient clear space to cross safely. Passive crossings have yellow circular advance warning signs, pavement markings and crossbucks to assist you in recognizing a crossing.

Active Crossings. This type of crossing has a traffic control device installed at the crossing to regulate traffic. These active devices can include flashing red lights, flashing red lights with bells and flashing red lights with bells and gates.

10.4.2 - Warning Signs and Devices

Advance Warning Signs. The round, black-on-yellow warning sign is placed ahead of a public railroad-highway crossing. The advance warning sign tells you to slow down, look and listen for the train, and be prepared to stop at the tracks if a train is coming. See Figure 10.5.

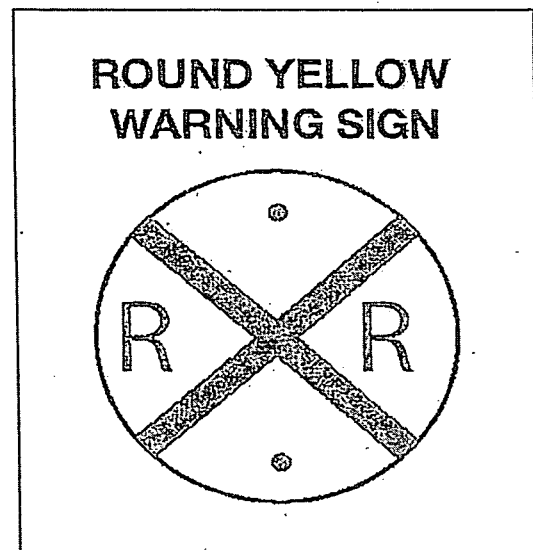


Figure 10.5

Pavement Markings. Pavement markings mean the same as the advance warning sign. They consist of an "X" with the letters "RR" and a no-passing marking on two-lane roads. See Figure 10.6.

There is also a no passing zone sign on two-lane roads. There may be a white stop line painted on the pavement before the railroad tracks. The front of the school bus must remain behind this line while stopped at the crossing.

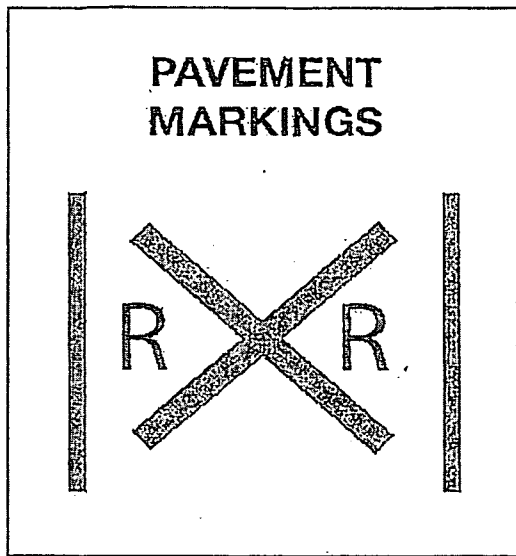


Figure 10.6

Crossbuck Signs. This sign marks a passive crossing. It requires you to yield the right-of-way to the train. When the road crosses over more than one set of tracks, a sign below the crossbuck indicates the number of tracks. See Figure 10.7.

Flashing Red Light Signals. At many active highway-rail grade crossings, the crossbuck sign has flashing red lights and bells. When the lights begin to flash, stop! A train is approaching. You are required to yield the right-of-way to the train. If there is more than one track, make sure all tracks are clear before crossing. See Figure 10.8.

Gates. Many active railroad-highway crossings have gates with flashing red lights and bells. Stop when the lights begin to flash and before the gate lowers across the road lane. Remain stopped until the gates go up and the lights have stopped flashing. Proceed when it is safe. If the gate stays down after the train passes, do not drive around the gate. Instead, contact your dispatcher. See Figure 10.8.

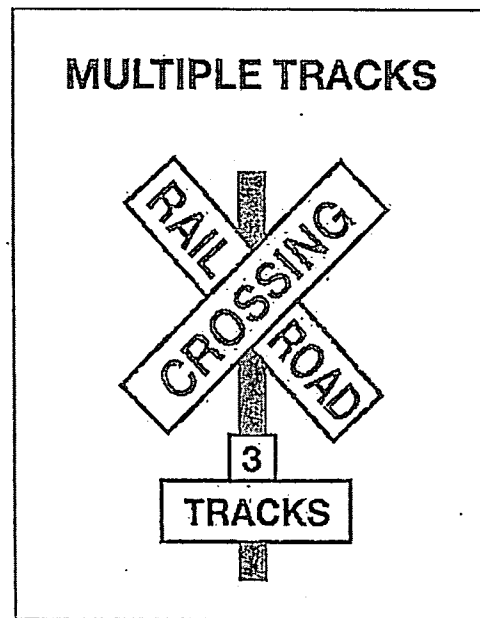


Figure 10.7

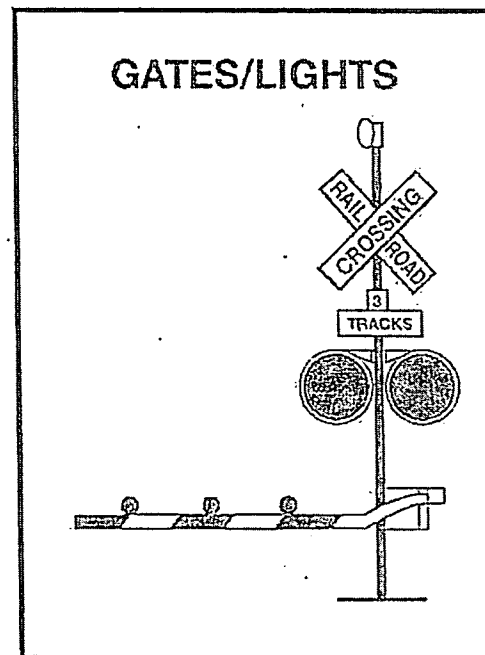


Figure 10.8

10.4.3 - Recommended Procedures

Each state has laws and regulations governing how school buses must operate at railroad-highway crossings. It is important for you to understand and obey these state laws and regulations. In general, school buses must stop at all crossings, and ensure

it is safe before proceeding across the tracks. The specific procedures required in each state vary.

A school bus is one of the safest vehicles on the highway. However, a school bus does not have the slightest edge when involved in a crash with a train. Because of a train's size and weight it cannot stop quickly. An emergency escape route does not exist for a train. You can prevent school bus/train crashes by following these recommended procedures.

- **Approaching the Crossing:**

- ☐ Slow down, including shifting to a lower gear in a manual transmission bus, and test your brakes.
- ☐ Activate hazard lamps approximately 200 feet before the crossing. Make sure your intentions are known.
- ☐ Scan your surroundings and check for traffic behind you.
- ☐ Stay to the right of the roadway if possible.
- ☐ Choose an escape route in the event of a brake failure or problems behind you.

- **At the Crossing:**

- ☐ Stop no closer than 15 feet and no farther than 50 feet from the nearest rail, where you have the best view of the tracks.
- ☐ Place the transmission in Park, or if there is no Park shift point, in Neutral and press down on the service brake or set the parking brakes.
- ☐ Turn off all radios and noisy equipment, and silence the passengers.
- ☐ Open the service door and driver's window. Look and listen for an approaching train.

- **Crossing the Track:**

- ☐ Check the crossing signals again before proceeding.
- ☐ At a multiple-track crossing, stop only before the first set of tracks. When you are sure no train is approaching on any track, proceed across all of the tracks until you have completely cleared them.
- ☐ Cross the tracks in a low gear. Do not change gears while crossing.
- ☐ If the gate comes down after you have started across, drive through it even if it means you will break the gate.

10.4.4 - Special Situations

Bus Stalls or Trapped on Tracks. If your bus stalls or is trapped on the tracks, get everyone out of the bus and off the tracks immediately. Move everyone far from the bus at an angle, which is both away from the tracks and toward the train.

Police Officer at the Crossing. If a police officer is at the crossing, obey directions. If there is no police officer, and you believe the signal is malfunctioning, contact your dispatcher to report the situation and ask for instructions on how to proceed.

Obstructed View of Tracks. Plan your route so it provides maximum sight distance at highway-rail grade crossings. Do not attempt to cross the tracks unless you can see far enough down the track to know for certain that no trains are approaching. Be especially careful at "passive" crossings. Even if there are active railroad signals that indicate the tracks are clear, you must look and listen to be sure it is safe to proceed.

Containment or Storage Areas. If it won't fit, don't commit! Know the length of your bus and the size of the containment area at highway-rail crossings on the school bus route, as well as any crossing you encounter in the course of a school activity trip. When approaching a crossing with a signal or stop sign on the opposite side, pay attention to the amount of room there. Be certain the bus has enough containment or storage area to completely clear the railroad tracks on the other side if there is a need to stop. As a general rule, add 15 feet to the length of the school bus to determine an acceptable amount of containment or storage area.

10.5 - Student Management

10.5.1 - Don't Deal With On-bus Problems When Loading and Unloading

In order to get students to and from school safely and on time, you need to be able to concentrate on the driving task.

Loading and unloading requires all your concentration. Don't take your eyes off what is happening outside the bus.

If there is a behavior problem on the bus, wait until the students unloading are safely off the bus and

have moved away. If necessary, pull the bus over to handle the problem.

10.5.2 - Handling Serious Problems

Tips on handling serious problems:

- Follow your school's procedures for discipline or refusal of rights to ride the bus.
- Stop the bus. Park in a safe location off the road, perhaps a parking lot or a driveway.
- Secure the bus. Take the ignition key with you if you leave your seat.
- Stand up and speak respectfully to the offender or offenders. Speak in a courteous manner with a firm voice. Remind the offender of the expected behavior. Do not show anger, but do show that you mean business.
- If a change of seating is needed, request that the student move to a seat near you.
- Never put a student off the bus except at school or at his or her designated school bus stop. If you feel that the offense is serious enough that you cannot safely drive the bus, calling for a school administrator or the police to come and remove the student may be appropriate. Always follow your state or local procedures for requesting assistance.

10.6 – Antilock Braking Systems

10.6.1 - Vehicles Required to have Antilock Braking Systems

The Department of Transportation requires that antilock braking systems be on:

- Air brakes vehicles, (trucks, buses, trailers and converter dollies) built on or after March 1, 1998.
- Hydraulically braked trucks and buses with a gross vehicle weight rating of 10,000 lbs or more built on or after March 1, 1999.

Many buses built before these dates have been voluntarily equipped with ABS.

Your school bus will have a yellow ABS malfunction lamp on the instrument panel if it is equipped with ABS.

10.6.2 - How ABS Helps You

When you brake hard on slippery surfaces in a vehicle without ABS, your wheels may lock up.

When your steering wheels lock up, you lose steering control. When your other wheels lock up, you may skid or even spin the vehicle.

ABS helps you avoid wheel lock up and maintain control. You may or may not be able to stop faster with ABS, but you should be able to steer around an obstacle while braking, and avoid skids caused by over braking.

10.6.3 - Braking With ABS

When you drive a vehicle with ABS, you should brake as you always have. In other words:

- Use only the braking force necessary to stop safely and stay in control.
- Brake the same way, regardless of whether you have ABS on the bus. However, in emergency braking, do not pump the brakes on a bus with ABS.
- As you slow down, monitor your bus and back off the brakes (if it is safe to do so) to stay in control.

10.6.4 - Braking if ABS is Not Working

Without ABS, you still have normal brake functions. Drive and brake as you always have.

Vehicles with ABS have yellow malfunction lamps to tell you if something is not working. The yellow ABS malfunction lamp is on the bus's instrument panel.

As a system check on newer vehicles, the malfunction lamp comes on at start-up for a bulb check and then goes out quickly. On older systems, the lamp could stay on until you are driving over five mph.

If the lamp stays on after the bulb check, or goes on once you are under way, you may have lost ABS control at one or more wheels.

Remember, if your ABS malfunctions, you still have regular brakes. Drive normally, but get the system serviced soon.

10.6.5 - Safety Reminders

- ABS does not compensate for bad driving habits, such as driving too fast, following too closely, or driving less carefully.
- ABS won't prevent power or turning skids—ABS should prevent brake-induced skids but not those caused by spinning the drive wheels or going too fast in a turn.
- ABS won't necessarily shorten stopping distance. ABS will help maintain vehicle control, but not always shorten stopping distance.
- ABS won't increase or decrease ultimate stopping power—ABS is an "add-on" to your normal brakes, not a replacement for them.
- ABS won't change the way you normally brake. Under normal brake conditions, your vehicle will stop as it always stopped. ABS only comes into play when a wheel would normally have locked up because of over braking.
- ABS won't compensate for bad brakes or poor brake maintenance.
- Remember: The best vehicle safety feature is still a safe driver.
- Remember: Drive so you never need to use your ABS.
- Remember: If you need it, ABS could help to prevent a serious crash.

10.7 - Special Safety Considerations

10.7.1 - Strobe Lights

Some school buses are equipped with roof-mounted, white strobe lights. If your bus is so equipped, the overhead strobe light should be used when you have limited visibility. This means that you cannot easily see around you – in front, behind, or beside the school bus. Your visibility could be only slightly limited or it could be so bad that you can see nothing at all. In all instances, understand and obey your state, or local regulations concerning the use of these lights.

10.7.2 - Driving in High Winds

Strong winds affect the handling of the school bus! The side of a school bus acts like a sail on a sailboat. Strong winds can push the school bus sideways. They can even move the school bus off the road or, in extreme conditions, tip it over.

If you are caught in strong winds:

- Keep a strong grip on the steering wheel. Try to anticipate gusts.
- You should slow down to lessen the effect of the wind, or pull off the roadway and wait.
- Contact your dispatcher to get more information on how to proceed.

10.7.3 - Backing

Backing a school bus is strongly discouraged. You should back your bus only when you have no other safe way to move the vehicle. You should never back a school bus when students are outside of the bus. Backing is dangerous and increases your risk of a collision.

If you have no choice and you must back your bus, follow these procedures:

- Post a lookout, preferably inside the school bus looking out the rear window. The purpose of the lookout is to warn you about obstacles, approaching persons, and other vehicles. The lookout should not give directions on how to back the bus.
- Signal for quiet on the bus.
- Constantly check all mirrors and rear windows.
- Back slowly and smoothly.
- If no lookout is available:
 - ☐ Set the parking brake.
 - ☐ Turn off the motor and take the keys with you.
 - ☐ Walk to the rear of the bus to determine whether the way is clear.
- If you must back-up at a student pick-up point, be sure to pick up students before backing and watch for late comers at all times.
- Be sure that all students are in the bus before backing.
- If you must back-up at a student drop-off point, be sure to unload students after backing.

10.7.4 - Tail Swing

A school bus can have up to a three-foot tail swing. You need to check your mirrors before and during any turning movements to monitor the tail swing.

Section 10

Test Your Knowledge

1. Define the danger zone. How far does the danger zone extend around the bus?
2. What should you be able to see if the outside flat mirrors are adjusted properly? The outside convex mirrors? The cross view mirrors?
3. You are loading students along the route. When should you activate your alternating flashing amber warning lamps?
4. You are unloading students along your route. Where should students walk to after exiting the bus?
5. After unloading at school, why should you walk through the bus?
6. What position should students be in front of the bus before they cross the roadway?
7. Under what conditions must you evacuate the bus?
8. How far from the nearest rail should you stop at a highway-rail crossing?
9. What is a passive highway-rail crossing? Why should you be extra cautious at this type of crossing?
10. How should you use your brakes if your vehicle is equipped with antilock brakes (ABS)?

If you can't answer these questions, re-read Section 10.

JANET GREENE

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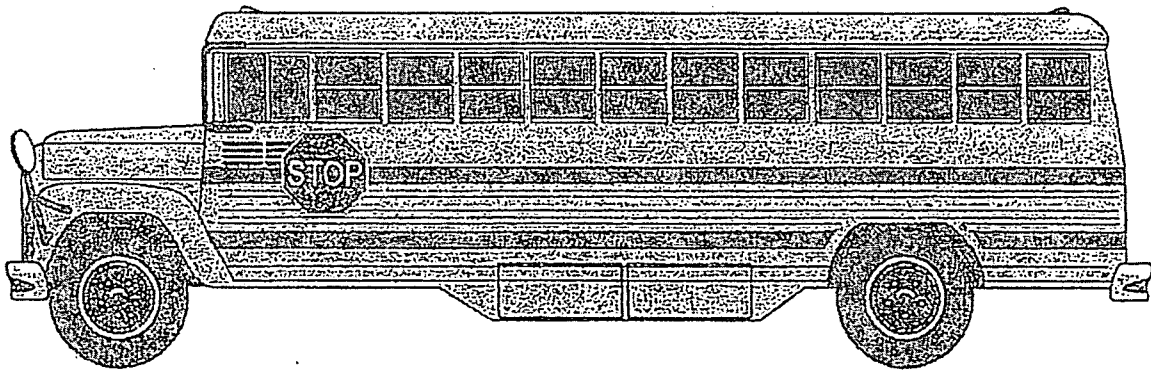
Professional Experience

American Yard Products, Orangeburg, South Carolina
1994-2004
Assembly Worker
Job responsibility included setting mower blades for assembly

Orangeburg County School District # 4
6030 Slab Landing Rd., Cope, South Carolina 29039
Bus Driver
2004-2013
Operated and maintained Special Needs Student Transport Bus

Skills	*Machine Operator skills *Clerical skills
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Federal School Bus (S) Endorsement Supplement



Material from 2004 Model Commercial Driver's License Manual

SECTION 10 SCHOOL BUSES

This Section Covers

- *Danger Zones and Use of Mirrors*
- *Loading and Unloading*
- *Emergency Exit and Evacuation*
- *Railroad-highway Grade Crossings*
- *Student Management*
- *Antilock Braking Systems*
- *Special Safety Situation*

School bus drivers must have a commercial driver's license if they drive a vehicle designed to transport (seat) 16 or more persons, including the driver.

School bus drivers must have a school bus endorsement in addition to a passenger endorsement on their commercial driver's license (CDL). To get the school bus endorsement, you must pass a knowledge test on section 10 of this manual. (If your school bus has air brakes, you must also pass a knowledge test on Section 5.) You must also pass the skills test required for the class of school bus you drive or intend to drive.

This section does NOT provide information on all the federal and state requirements needed before you drive a school bus. You should be thoroughly familiar with all specific school bus procedures, laws and regulations in your state and local school district.

10.1 - Danger Zones and Use of Mirrors

10.1.1 - Danger Zones

The danger zone is the area anywhere outside of the bus where children are in the most danger of being hit, either by another vehicle or their own bus. The danger zones extend as much as 30 feet from the front bumper, 10 feet from the left and right sides of the bus and 10 feet behind the rear bumper of the school bus. In addition, the area to the left of the bus is always considered dangerous because of passing vehicles. Figure 10.1 illustrates these danger zones.

10.1.2 - Correct Mirror Adjustment

Proper adjustment and use of all mirrors is vital to the safe operation of the school bus in order to observe the danger zone around the bus and look for students, traffic, and other objects in this area.

You should always check each mirror before operating the school bus to obtain maximum viewing area consistent with the vision requirements of Federal Motor Vehicle Safety Standard NO. 111, "Mirror Systems". If necessary, have the mirrors adjusted.

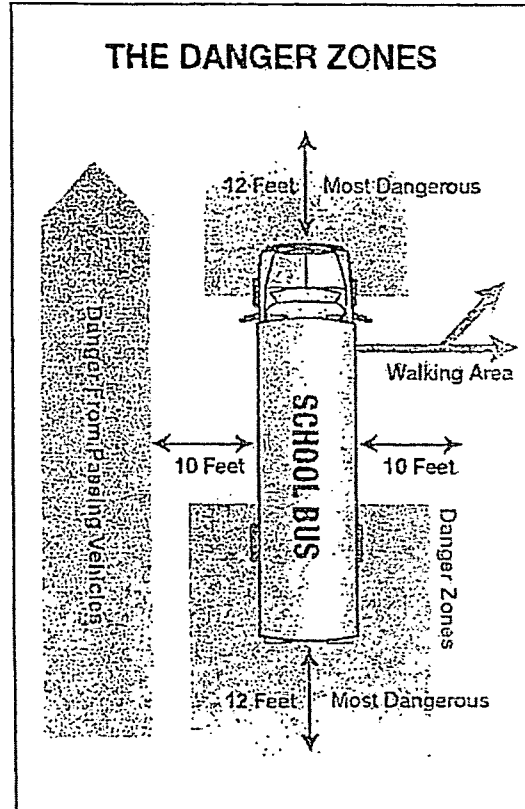


Figure 10.1

10.1.3 - Outside Left and Right Side Flat Mirrors

These mirrors are mounted at the left and right front corners of the bus at the side or front of the windshield. They are used to monitor traffic, check clearances and students on the sides and to the rear of the bus. There is a blind spot immediately below and in front of each mirror and directly in back of the rear bumper. The blind spot behind the bus could extend up to 400 feet depending on the width of the bus.

Ensure that the mirrors are properly adjusted so you can see:

- 200 feet or 4 bus lengths behind the bus.
- Along the sides of the bus.
- The rear tires touching the ground.

Figures 10.4a and 10.4b illustrate how the left and right side cross view mirrors should be adjusted.

Left Cross View Mirror Right Cross View Mirror

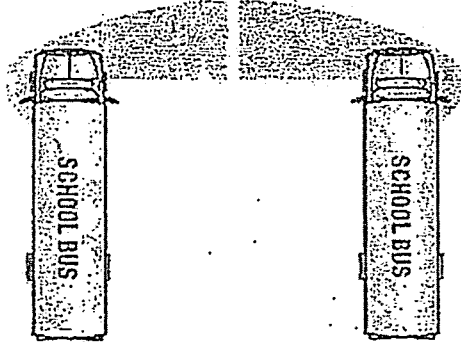


Figure 10.4a

Figure 10.4b

10.1.6 - Overhead Inside Rearview Mirror

This mirror is mounted directly above the windshield on the driver's side area of the bus. This mirror is used to monitor passenger activity inside the bus. It may provide limited visibility directly in back of the bus if the bus is equipped with a glass-bottomed rear emergency door. There is a blind spot area directly behind the driver's seat as well as a large blind spot area that begins at the rear bumper and could extend up to 400 feet or more behind the bus. You must use the exterior side mirrors to monitor traffic that approaches and enters this area.

Ensure that the mirrors are properly adjusted so you can see:

- The top of the rear window in the top of the mirror.
- All of the students, including the heads of the students right behind you.

10.2 - Loading and Unloading

More students are killed while getting on or off a school bus each year than are killed as passengers inside of a school bus. As a result, knowing what to do before, during, and after loading or unloading students is critical. This section will give you procedures to help you avoid unsafe conditions which could result in injuries and fatalities during and after loading and unloading students.

10.2.1 - Approaching the Stop

Each school district establishes official routes and official school bus stops. All stops should be approved by the school district prior to making the stop. You should never change the location of a bus stop without written approval from the appropriate school district official.

You must use extreme caution when approaching a school bus stop. You are in a very demanding situation when entering these areas. It is critical that you understand and follow all state and local laws and regulations regarding approaching a school bus stop. This would involve the proper use of mirrors, alternating flashing lamps, and when equipped, the moveable stop signal arm and crossing control arm.

When approaching the stop, you should:

- Approach cautiously at a slow rate of speed.
- Look for pedestrians, traffic, or other objects before, during, and after coming to a stop.
- Continuously check all mirrors.
- If the school bus is so equipped, activate alternating flashing amber warning lamps before the school bus stop in accordance with state law.
- Continuously check mirrors to monitor the danger zones for students, traffic, and other objects.
- Move as far as possible to the right on the traveled portion of the roadway.
- Bring school bus to a full stop with the front bumper at least 10 feet away from students at the designated stop. This forces the students to walk to the bus so you have a better view of their movements.
- Place transmission in Park, or if there is no Park shift point, in Neutral and set the parking brake at each stop.
- Open service door, if possible, enough to activate alternating red lamps when traffic is a safe distance from the school bus.
- Make a final check to see that all traffic has stopped before completely opening the door and signaling students to approach.

10.2.2 - Loading Procedures

- Perform a safe stop as described in subsection 10.2.1.
- Students should wait in a designated location for the school bus, facing the bus as it approaches.
- Students should board the bus only when signaled by the driver.
- Monitor all mirrors continuously.

- Count the number of students at the bus stop and be sure all board the bus. If possible, know names of students at each stop. If there is a student missing, ask the other students where the student is.
- Have the students board the school bus slowly, in single file, and use the handrail. The dome light should be on while loading in the dark.
- Wait until students are seated and facing forward before moving the bus.
- Check all mirrors. Make certain, no one is running to catch the bus.
- If you cannot account for a student outside, secure the bus, take the key, and check around and underneath the bus.
- When all students are accounted for, prepare to leave by:
 - ☐ Closing the door.
 - ☐ Engaging the transmission.
 - ☐ Releasing parking brake.
 - ☐ Turning off alternating flashing red lamps.
 - ☐ Turning on left turn signal.
 - ☐ Allowing congested traffic to disperse.
 - ☐ Checking all mirrors again.
- When it is safe, move the bus to enter traffic flow and continue the route.

Note: If you have missed a student's unloading stop, do not back up. Be sure to follow local procedures.

Additional Procedures for Students That Must Cross the Roadway

You should understand what students should do when exiting a school bus and crossing the street in front of the bus. In addition, the school bus driver should understand that students might not always do what they are supposed to do. If a student or students must cross the roadway, they should follow these procedures:

The loading procedure is essentially the same wherever you load students, but there are slight differences. When students are loading at the school campus, you should:

- Turn off the ignition switch.
- Remove key if leaving driver's compartment.
- Position yourself to supervise loading as required or recommended by your state or local regulations.

10.2.3 - Unloading Procedures on the Route

- Perform a safe stop at designated unloading areas as described in subsection 10.2.1.
- Have the students remain seated until told to exit.
- Check all mirrors.
- Count the number of students while unloading to confirm the location of all students before pulling away from the stop.
- Tell students to exit the bus and walk at least 10 feet away from the side of the bus to a position where the driver can plainly see all students.
- Check all mirrors again. Make sure no students are around or returning to the bus.
- If you cannot account for a student outside the bus, secure the bus, and check around and underneath the bus.
- When all students are accounted for, prepare to leave by:
 - ☐ Closing the door.
 - ☐ Engaging transmission.
 - ☐ Releasing parking brake.
 - ☐ Turning off alternating flashing red lamps.
 - ☐ Turning on left turn signal.
 - ☐ Allowing congested traffic to disperse.
 - ☐ Checking all mirrors again.
- When it is safe, move the bus, enter the traffic flow and continue the route.

- ☐ Walk approximately 10 feet away from the side of the school bus to a position where you can see them.
- ☐ Walk to a location at least 10 feet in front of the right corner of the bumper, but still remaining away from the front of the school bus.
- ☐ Stop at the right edge of the roadway. You should be able to see the student's feet.

- When students reach the edge of the roadway, they should:
 - ☐ Stop and look in all directions, making sure the roadway is clear and is safe.
 - ☐ Check to see if the red flashing lamps on the bus are still flashing.
 - ☐ Wait for your signal before crossing the roadway.
- Upon your signal, the students should:

- ☐ Cross far enough in front of the school bus to be in your view.
- ☐ Walk to the left edge of the school bus, stop, and look again for your signal to continue to cross the roadway.
- ☐ Look for traffic in both directions, making sure roadway is clear.
- ☐ Proceed across the roadway, continuing to look in all directions.

Notes:

1. The school bus driver should enforce any state or local regulations or recommendations concerning student actions outside the school bus.
2. It is important for the driver to understand that any hand or other signal that is given to a student also could be misinterpreted by motorists that are stopped in the area.

10.2.4 - Unloading Procedures at School

State and local laws and regulations regarding unloading students at schools, particularly in situations where such activities take place in the school parking lot or other location that is off the traveled roadway, are often different than unloading along the school bus route. It is important that the school bus driver understands and obeys state and local laws and regulations. The following procedures are meant to be general guidelines.

When unloading at the school you should follow these procedures:

- Perform a safe stop at designated unloading areas as described in subsection 10.2.1.
- Secure the bus by:
 - ☐ Turning off the ignition switch.
 - ☐ Removing key if leaving driver's compartment.
- Have the students remain seated until told to exit.
- Position yourself to supervise unloading as required or recommended by your state or local regulations.
- Have students exit in orderly fashion.
- Observe students as they step from bus to see that all move promptly away from the unloading area.
- Walk through the bus and check for hiding/sleeping students and items left by students.
- Check all mirrors. Make certain no students are returning to the bus.

- If you cannot account for a student outside the bus and the bus is secure, check around and underneath the bus.
- When all students are accounted for, prepare to leave by:

- ☐ Closing the door,
- ☐ Fastening safety belt
- ☐ Starting engine.
- ☐ Engaging the transmission.
- ☐ Releasing the parking brake.
- ☐ Turning off alternating flashing red lamps.
- ☐ Turning on left turn signal.
- ☐ Allowing congested traffic to disperse.
- ☐ Checking all mirrors again.

- When it is safe, pull away from the unloading area.

10.2.5 - Special Dangers of Loading and Unloading

Dropped or Forgotten Objects. Always focus on students as they approach the bus and watch for any who disappear from sight.

Students may drop an object near the bus during loading and unloading. Stopping to pick up the object, or returning to pick up the object, may cause the student to disappear from the driver's sight at a very dangerous moment.

Students should be told to leave any dropped object and move to a point of safety out of the danger zones and attempt to get the driver's attention to retrieve the object.

Handrail Hang-ups. Students have been injured or killed when clothing, accessories, or even parts of their body get caught in the handrail or door as they exited the bus. You should closely observe all students exiting the bus to confirm that they are in a safe location prior to moving the bus.

10.2.6 - Post-trip Inspection

When your route or school activity trip is finished, you should conduct a post-trip inspection of the bus.

You should walk through the bus and around the bus looking for the following:

- Articles left on the bus.

- Sleeping students.
- Open windows and doors.
- Mechanical/operational problems with the bus, with special attention to items that are unique to school buses — mirror systems, flashing warning lamps and stop signal arms.
- Damage or vandalism.

Any problems or special situations should be reported immediately to your supervisor or school authorities.

10.3 - Emergency Exit and Evacuation

An emergency situation can happen to anyone, anytime, anywhere. It could be a crash, a stalled school bus on a railroad-highway crossing or in a high-speed intersection, an electrical fire in the engine compartment, a medical emergency to a student on the school bus, etc. Knowing what to do in an emergency—before, during and after an evacuation—can mean the difference between life and death.

10.3.1 - Planning for Emergencies

Determine Need to Evacuate Bus

The first and most important consideration is for you to recognize the hazard. If time permits, school bus drivers should contact their dispatcher to explain the situation before making a decision to evacuate the school bus.

As a general rule, student safety and control is best maintained by keeping students on the bus during an emergency and/or impending crisis situation, if so doing does not expose them to unnecessary risk or injury. Remember, the decision to evacuate the bus must be a timely one.

A decision to evacuate should include consideration of the following conditions:

- Is there a fire or danger of fire?
- Is there a smell of leaking fuel?
- Is there a chance the bus could be hit by other vehicles?
- Is the bus in the path of a sighted tornado or rising waters?
- Are there downed power lines?
- Would removing students expose them to speeding traffic, severe weather, or a dangerous environment such as downed power lines?
- Would moving students complicate injuries such as neck and back injuries and fractures?
- Is there a hazardous spill involved? Sometimes, it may be safer to remain on the bus and not come in contact with the material.

Mandatory Evacuations. The driver must evacuate the bus when:

- The bus is on fire or there is a threat of a fire.
- The bus is stalled on or adjacent to a railroad-highway crossing.
- The position of the bus may change and increase the danger.
- There is an imminent danger of collision.
- There is a need to quickly evacuate because of a hazardous materials spill.

10.3.2 - Evacuation Procedures

Be Prepared and Plan Ahead. When possible, assign two responsible, older student assistants to each emergency exit. Teach them how to assist the other students off the bus. Assign another student assistant to lead the students to a "safe place" after evacuation. However, you must recognize that there may not be older, responsible students on the bus at the time of the emergency. Therefore, emergency evacuation procedures must be explained to all students. This includes ensuring that they know the location of and operation of the various emergency exits, and the importance of listening to and following all instructions given by you.

Some tips to determine a safe place:

- A safe place for the students will be at least 100 feet off the road in the direction of oncoming traffic. This will keep them from being hit by debris if another vehicle collides with the bus.
- Lead students upwind of the bus if fire is present.
- Lead students as far away from railroad tracks as possible and in the direction of any oncoming train.
- Lead students upwind of the bus at least 300 feet if there is a risk from spilled hazardous materials.
- If the bus is in the direct path of a sighted tornado and evacuation is ordered, escort students to a nearby ditch or culvert if shelter in a building is not readily available, and direct them to lie face down, hands covering their head. They should be far enough away so the bus cannot topple on them. Avoid areas that are subject to flash floods.

General Procedures. Determine if evacuation is in the best interest of safety.

- Determine the best type of evacuation:
 - ☐ Front, rear or side door evacuation, or some combination of doors.
 - ☐ Roof or window evacuation.
- Secure the bus by:
 - ☐ Placing transmission in Park, or if there is no shift point, in Neutral.
 - ☐ Setting parking brakes.
 - ☐ Shutting off the engine.
 - ☐ Removing ignition key.
 - ☐ Activating hazard-warning lamps.
- If time allows, notify dispatch office of evacuation location, conditions, and type of assistance needed.
- Dangle radio microphone or telephone out of driver's window for later use, if operable.
- If no radio, or radio is inoperable, dispatch a passing motorist or area resident to call for help. As a last resort, dispatch two older, responsible students to go for help.
- Order the evacuation.
- Evacuate students from the bus.
 - ☐ Do not move a student you believe may have suffered a neck or spinal injury unless his or her life is in immediate danger.
 - ☐ Special procedures must be used to move neck spinal injury victims to prevent further injury.
- Direct a student assistant to lead students to the nearest safe place.
- Walk through the bus to ensure no students remain on the bus. Retrieve emergency equipment.
- Join waiting students. Account for all students and check for their safety.
- Protect the scene. Set out emergency warning devices as necessary and appropriate.
- Prepare information for emergency responders.

10.4 - Railroad-highway Crossings

10.4.1 - Types of Crossings

Passive Crossings. This type of crossing does not have any type of traffic control device. You must stop at these crossings and follow proper procedures. However, the decision to proceed rests entirely in your hands. Passive crossings

require you to recognize the crossing, search for any train using the tracks and decide if there is sufficient clear space to cross safely. Passive crossings have yellow circular advance warning signs, pavement markings and crossbucks to assist you in recognizing a crossing.

Active Crossings. This type of crossing has a traffic control device installed at the crossing to regulate traffic. These active devices can include flashing red lights, flashing red lights with bells and flashing red lights with bells and gates.

10.4.2 - Warning Signs and Devices

Advance Warning Signs. The round, black-on-yellow warning sign is placed ahead of a public railroad-highway crossing. The advance warning sign tells you to slow down, look and listen for the train, and be prepared to stop at the tracks if a train is coming. See Figure 10.5.

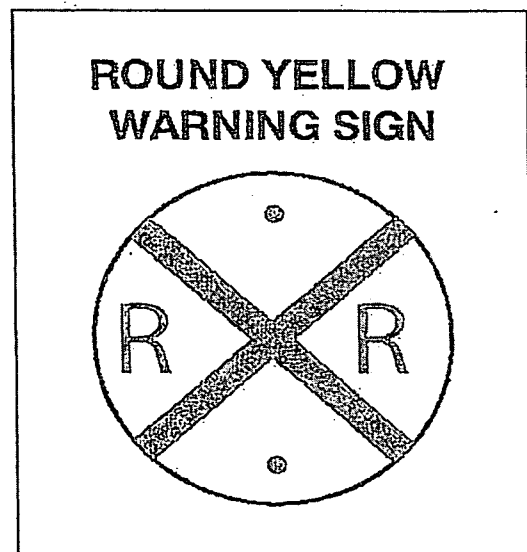


Figure 10.5

Pavement Markings. Pavement markings mean the same as the advance warning sign. They consist of an "X" with the letters "RR" and a no-passing marking on two-lane roads. See Figure 10.6.

There is also a no passing zone sign on two-lane roads. There may be a white stop line painted on the pavement before the railroad tracks. The front of the school bus must remain behind this line while stopped at the crossing.

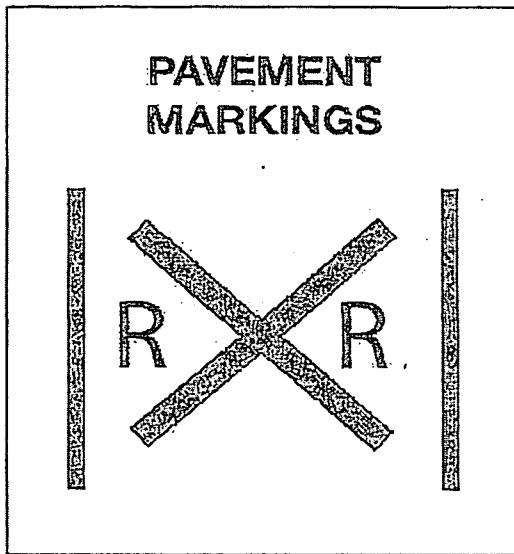


Figure 10.6

Crossbuck Signs. This sign marks a passive crossing. It requires you to yield the right-of-way to the train. When the road crosses over more than one set of tracks, a sign below the crossbuck indicates the number of tracks. See Figure 10.7.

Flashing Red Light Signals. At many active highway-rail grade crossings, the crossbuck sign has flashing red lights and bells. When the lights begin to flash, stop! A train is approaching. You are required to yield the right-of-way to the train. If there is more than one track, make sure all tracks are clear before crossing. See Figure 10.8.

Gates. Many active railroad-highway crossings have gates with flashing red lights and bells. Stop when the lights begin to flash and before the gate lowers across the road lane. Remain stopped until the gates go up and the lights have stopped flashing. Proceed when it is safe. If the gate stays down after the train passes, do not drive around the gate. Instead, contact your dispatcher. See Figure 10.8.

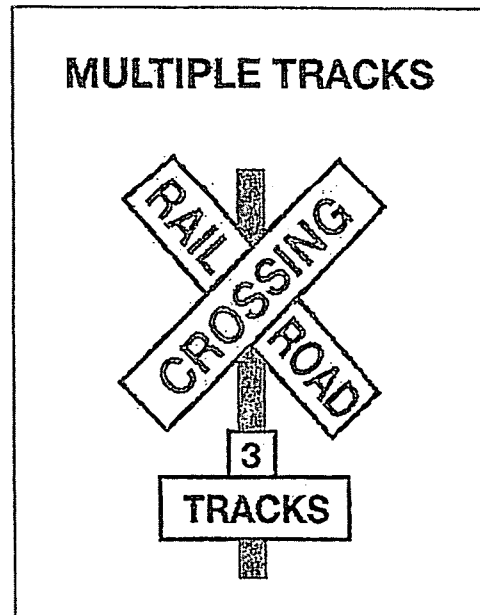


Figure 10.7

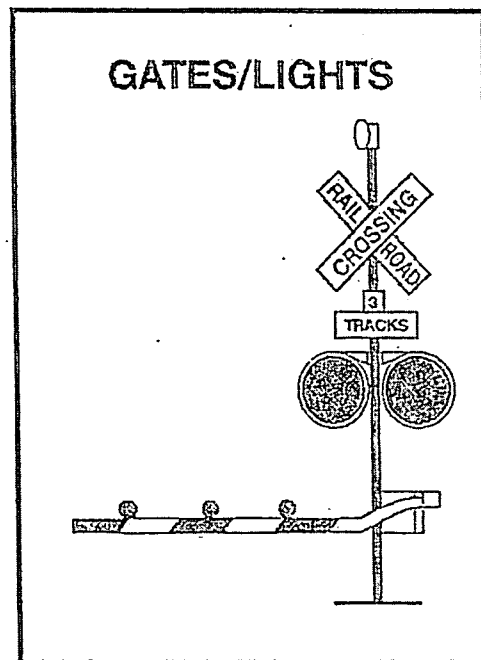


Figure 10.8

10.4.3 - Recommended Procedures

Each state has laws and regulations governing how school buses must operate at railroad-highway crossings. It is important for you to understand and obey these state laws and regulations. In general, school buses must stop at all crossings, and ensure

it is safe before proceeding across the tracks. The specific procedures required in each state vary.

A school bus is one of the safest vehicles on the highway. However, a school bus does not have the slightest edge when involved in a crash with a train. Because of a train's size and weight it cannot stop quickly. An emergency escape route does not exist for a train. You can prevent school bus/train crashes by following these recommended procedures.

- **Approaching the Crossing:**

- ☐ Slow down, including shifting to a lower gear in a manual transmission bus, and test your brakes.
- ☐ Activate hazard lamps approximately 200 feet before the crossing. Make sure your intentions are known.
- ☐ Scan your surroundings and check for traffic behind you.
- ☐ Stay to the right of the roadway if possible.
- ☐ Choose an escape route in the event of a brake failure or problems behind you.

- **At the Crossing:**

- ☐ Stop no closer than 15 feet and no farther than 50 feet from the nearest rail, where you have the best view of the tracks.
- ☐ Place the transmission in Park, or if there is no Park shift point, in Neutral and press down on the service brake or set the parking brakes.
- ☐ Turn off all radios and noisy equipment, and silence the passengers.
- ☐ Open the service door and driver's window. Look and listen for an approaching train.

- **Crossing the Track:**

- ☐ Check the crossing signals again before proceeding.
- ☐ At a multiple-track crossing, stop only before the first set of tracks. When you are sure no train is approaching on any track, proceed across all of the tracks until you have completely cleared them.
- ☐ Cross the tracks in a low gear. Do not change gears while crossing.
- ☐ If the gate comes down after you have started across, drive through it even if it means you will break the gate.

10.4.4 - Special Situations

Bus Stalls or Trapped on Tracks. If your bus stalls or is trapped on the tracks, get everyone out of the bus and off the tracks immediately. Move everyone far from the bus at an angle, which is both away from the tracks and toward the train.

Police Officer at the Crossing. If a police officer is at the crossing, obey directions. If there is no police officer, and you believe the signal is malfunctioning, contact your dispatcher to report the situation and ask for instructions on how to proceed.

Obstructed View of Tracks. Plan your route so it provides maximum sight distance at highway-rail grade crossings. Do not attempt to cross the tracks unless you can see far enough down the track to know for certain that no trains are approaching. Be especially careful at "passive" crossings. Even if there are active railroad signals that indicate the tracks are clear, you must look and listen to be sure it is safe to proceed.

Containment or Storage Areas. If it won't fit, don't commit! Know the length of your bus and the size of the containment area at highway-rail crossings on the school bus route, as well as any crossing you encounter in the course of a school activity trip. When approaching a crossing with a signal or stop sign on the opposite side, pay attention to the amount of room there. Be certain the bus has enough containment or storage area to completely clear the railroad tracks on the other side if there is a need to stop. As a general rule, add 15 feet to the length of the school bus to determine an acceptable amount of containment or storage area.

10.5 - Student Management

10.5.1 - Don't Deal With On-bus Problems When Loading and Unloading

In order to get students to and from school safely and on time, you need to be able to concentrate on the driving task.

Loading and unloading requires all your concentration. Don't take your eyes off what is happening outside the bus.

If there is a behavior problem on the bus, wait until the students unloading are safely off the bus and

have moved away. If necessary, pull the bus over to handle the problem.

10.5.2 - Handling Serious Problems

Tips on handling serious problems:

- Follow your school's procedures for discipline or refusal of rights to ride the bus.
- Stop the bus. Park in a safe location off the road, perhaps a parking lot or a driveway.
- Secure the bus. Take the ignition key with you if you leave your seat.
- Stand up and speak respectfully to the offender or offenders. Speak in a courteous manner with a firm voice. Remind the offender of the expected behavior. Do not show anger, but do show that you mean business.
- If a change of seating is needed, request that the student move to a seat near you.
- Never put a student off the bus except at school or at his or her designated school bus stop. If you feel that the offense is serious enough that you cannot safely drive the bus, calling for a school administrator or the police to come and remove the student may be appropriate. Always follow your state or local procedures for requesting assistance.

10.6 – Antilock Braking Systems

10.6.1 - Vehicles Required to have Antilock Braking Systems

The Department of Transportation requires that antilock braking systems be on:

- Air brakes vehicles, (trucks, buses, trailers and converter dollies) built on or after March 1, 1998.
- Hydraulically braked trucks and buses with a gross vehicle weight rating of 10,000 lbs or more built on or after March 1, 1999.

Many buses built before these dates have been voluntarily equipped with ABS.

Your school bus will have a yellow ABS malfunction lamp on the instrument panel if it is equipped with ABS.

10.6.2 - How ABS Helps You

When you brake hard on slippery surfaces in a vehicle without ABS, your wheels may lock up.

When your steering wheels lock up, you lose steering control. When your other wheels lock up, you may skid or even spin the vehicle.

ABS helps you avoid wheel lock up and maintain control. You may or may not be able to stop faster with ABS, but you should be able to steer around an obstacle while braking, and avoid skids caused by over braking.

10.6.3 - Braking With ABS

When you drive a vehicle with ABS, you should brake as you always have. In other words:

- Use only the braking force necessary to stop safely and stay in control.
- Brake the same way, regardless of whether you have ABS on the bus. However, in emergency braking, do not pump the brakes on a bus with ABS.
- As you slow down, monitor your bus and back off the brakes (if it is safe to do so) to stay in control.

10.6.4 - Braking if ABS is Not Working

Without ABS, you still have normal brake functions. Drive and brake as you always have.

Vehicles with ABS have yellow malfunction lamps to tell you if something is not working. The yellow ABS malfunction lamp is on the bus's instrument panel.

As a system check on newer vehicles, the malfunction lamp comes on at start-up for a bulb check and then goes out quickly. On older systems, the lamp could stay on until you are driving over five mph.

If the lamp stays on after the bulb check, or goes on once you are under way, you may have lost ABS control at one or more wheels.

Remember, if your ABS malfunctions, you still have regular brakes. Drive normally, but get the system serviced soon.

10.6.5 - Safety Reminders

- ABS does not compensate for bad driving habits, such as driving too fast, following too closely, or driving less carefully.
- ABS won't prevent power or turning skids—ABS should prevent brake-induced skids but not those caused by spinning the drive wheels or going too fast in a turn.
- ABS won't necessarily shorten stopping distance. ABS will help maintain vehicle control, but not always shorten stopping distance.
- ABS won't increase or decrease ultimate stopping power—ABS is an "add-on" to your normal brakes, not a replacement for them.
- ABS won't change the way you normally brake. Under normal brake conditions, your vehicle will stop as it always stopped. ABS only comes into play when a wheel would normally have locked up because of over braking.
- ABS won't compensate for bad brakes or poor brake maintenance.
- Remember: The best vehicle safety feature is still a safe driver.
- Remember: Drive so you never need to use your ABS.
- Remember: If you need it, ABS could help to prevent a serious crash.

10.7 - Special Safety Considerations

10.7.1 - Strobe Lights

Some school buses are equipped with roof-mounted, white strobe lights. If your bus is so equipped, the overhead strobe light should be used when you have limited visibility. This means that you cannot easily see around you – in front, behind, or beside the school bus. Your visibility could be only slightly limited or it could be so bad that you can see nothing at all. In all instances, understand and obey your state, or local regulations concerning the use of these lights.

10.7.2 - Driving in High Winds

Strong winds affect the handling of the school bus! The side of a school bus acts like a sail on a sailboat. Strong winds can push the school bus sideways. They can even move the school bus off the road or, in extreme conditions, tip it over.

If you are caught in strong winds:

- Keep a strong grip on the steering wheel. Try to anticipate gusts.
- You should slow down to lessen the effect of the wind, or pull off the roadway and wait.
- Contact your dispatcher to get more information on how to proceed.

10.7.3 - Backing

Backing a school bus is strongly discouraged. You should back your bus only when you have no other safe way to move the vehicle. You should never back a school bus when students are outside of the bus. Backing is dangerous and increases your risk of a collision.

If you have no choice and you must back your bus, follow these procedures:

- Post a lookout, preferably inside the school bus looking out the rear window. The purpose of the lookout is to warn you about obstacles, approaching persons, and other vehicles. The lookout should not give directions on how to back the bus.
- Signal for quiet on the bus.
- Constantly check all mirrors and rear windows.
- Back slowly and smoothly.
- If no lookout is available:
 - ☐ Set the parking brake.
 - ☐ Turn off the motor and take the keys with you.
 - ☐ Walk to the rear of the bus to determine whether the way is clear.
- If you must back-up at a student pick-up point, be sure to pick up students before backing and watch for late comers at all times.
- Be sure that all students are in the bus before backing.
- If you must back-up at a student drop-off point, be sure to unload students after backing.

10.7.4 - Tail Swing

A school bus can have up to a three-foot tail swing. You need to check your mirrors before and during any turning movements to monitor the tail swing.

Section 10

Test Your Knowledge

1. Define the danger zone. How far does the danger zone extend around the bus?
2. What should you be able to see if the outside flat mirrors are adjusted properly? The outside convex mirrors? The cross view mirrors?
3. You are loading students along the route. When should you activate your alternating flashing amber warning lamps?
4. You are unloading students along your route. Where should students walk to after exiting the bus?
5. After unloading at school, why should you walk through the bus?
6. What position should students be in front of the bus before they cross the roadway?
7. Under what conditions must you evacuate the bus?
8. How far from the nearest rail should you stop at a highway-rail crossing?
9. What is a passive highway-rail crossing? Why should you be extra cautious at this type of crossing?
10. How should you use your brakes if your vehicle is equipped with antilock brakes (ABS)?

If you can't answer these questions, re-read Section 10.

JANET GREENE

151 Smiley Drive, Cordova, South Carolina 29039

Telephone: (803)378-7192

Education Holly Hill Roberts High School, Holly Hill, South Carolina
Graduated- High School Diploma- 1986

Professional Experience

American Yard Products, Orangeburg, South Carolina
1994-2004

Assembly Worker

Job responsibility included setting mower blades for assembly

Orangeburg County School District # 4
6030 Slab Landing Rd., Cope, South Carolina 29039

Bus Driver

2004-2013

Operated and maintained Special Needs Student Transport Bus

Skills •Machine Operator skills
 •Clerical skills

STATE OF SOUTH CAROLINA)
)
COUNTY OF ORANGEBURG)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

JENNIFER MIDDLETON,)
as parent and GAL for Jane Doe,)
)
Plaintiff,)

C.A. No. 2012-CP-38-01314

vs.)

AFFIDAVIT OF
DANNY W. McDANIEL

ORANGEBURG)
CONSOLIDATED SCHOOL)
DISTRICT THREE,)
)
Defendant.)
_____)

NOW COMES DANNY W. McDANIEL, deposing and saying the following:

1. I am over the age of the age of eighteen and believe that I am competent to give this affidavit.
2. A copy of my current Curriculum Vitae is attached to this Affidavit, and the contents of the same are hereby incorporated by reference in this affidavit as if fully set out. Based upon my overall education, training, and experience, I tender myself as an expert witness in the above-referenced case as in law enforcement, with special emphasis on law enforcement on the public highways within the State of South Carolina.
3. In anticipation of rendering the opinion in this affidavit, I review, not necessarily all inclusive the following material: (a) the Complaint which was filed in this matter September 26, 2012; (b) the Defendant's Answer which was filed in the matter; (c) review of the laws as cited herein; (d) Defendant's Motion for Summary Judgment which was filed in this matter on October 4, 2013; (e) Affidavits of Riley Simmons and Lydia Gilliard, submitted in support of the aforementioned Motion for Summary Judgment; (f) R-16 Route Description which was prepared on September 2012 and filed in the matter in support of the Motion for Summary Judgment. Additionally, I researched issues and topics on the internet involving urination in public and gross

DWM

negligence. I was also reviewed the legal definition for negligence and gross negligence.

4. For a definitional frame of reference for my opinion's in this affidavit, "gross negligence" as used in this affidavit means the following: a complete failure to show care that in fact implies recklessness or a willful disregard for safety and human life. Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do. Hollins v. Richland County Sch. Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993). It is the failure to exercise slight care. Clyburn v. Sumter County Sch. Dist. # 17, 317 S.C. 50, 451 S.E.2d 885 (1994). Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence. Jackson v. South Carolina Dep't of Corrections, 301 S.C. 125, 390 S.E.2d 467 (Ct. App.1989), *aff'd*, 302 S.C. 519, 397 S.E.2d 377 (1990).
5. Pursuant to Section 59-67-180, Code of Laws for South Carolina, "[t]he driver of every school bus while the bus is being operated as such shall have general supervision of it . . ." Based upon my review of this particular section of law, I conclude, to a reasonable degree of professional certainty, that Mr. Riley Simmons, the school bus driver for Defendant, owed the minor child ("Jane Doe") a duty to exercise to exercise proper supervision over her as she was a passenger on the Defendant's school bus on or about October 11, 2011. This duty of supervision included ensuring that the minor child conducted herself in a manner that would not disturb the safe operation of the bus and to ensure that the minor child was in compliance at all times with the applicable laws of this state. In my opinion, while the minor child was on the bus on the day in question, the bus driver, according to the cited statutory became her lawful supervisor.
6. To a reasonable degree of professional certainty, I conclude that Mr. Riley Simmons, in his capacity as a school bus driver for Defendant on or about October 11, 2011, breached the duty of care owed to the minor child, and he was grossly negligent in causing the minor child to urinate in public.
7. In allowing the minor child to urine in public, Mr. Riley Simmons, as a minimum, allowed the child to violate several laws to include the following: (a) disorderly conduct laws for the state; and (b) Section 16-15-130 which prohibits indecent exposure in a public place.
8. To a reasonable degree of professional certainty, Mr. Riley Simmons was grossly negligent and reckless in causing, allowing, aiding, or abetting the minor child to expose herself and urinate in public.
9. All opinions are presented to a reasonable degree of professional certainty.

[Only the signature blocks are contained below]

DW McDaniel

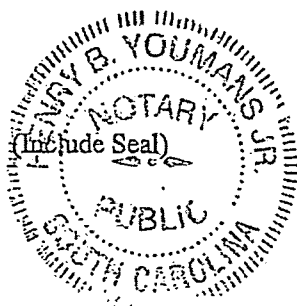
Danny W. McDaniel

Subscribed and sworn to before me

This the 5th day of ~~November~~ ^{December}, 2013.

Henry B. Youmans Jr.
Notary Public for the State of
South Carolina

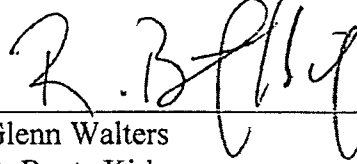
My Commission Expires: 9/6/2015



The undersigned hereby certifies the Record on Appeal contains all materials proposed to be included by any of the parties and no other material.

Respectfully submitted this the 3rd day of August, 2015 .

Glenn Walters, Attorney at Law, PA

A handwritten signature in black ink, appearing to read "R. Bentz Kirby", written over a horizontal line.

Glenn Walters

R. Bentz Kirby

PO Box 1346

Orangeburg, SC 29116

803-531-8844

Attorneys for Appellants

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities

Statement of Issues on Appeal	1
Statement of Case	1
Facts	2
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.	3
II. The Defendant's exercise of judgment was in fact grossly negligent.	8
III. The Defendant was grossly negligent by failing to have proper guidance and training for the bus driver to deal with this foreseeable problem.	12
Conclusion	12

TABLE OF AUTHORITIES

Cases

<u>Strother v. Lexington County Recreation Comm'n</u> , 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998)	3
<u>Kiriakides v. United Artists Commc'ns, Inc.</u> , 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).	3
<u>Ex parte Cannon</u> , 385 S.C. 643, 654-55, 685 S.E.2d 814, 821 (Ct. App. 2009)	3
<u>Hodges v. Rainey</u> , 341 S.C. 79, 88, 533 S.E.2d 578, 583 (2000)	3
<u>Hoogenboom v. City of Beaufort</u> , 315 S.C. 306, 318, 433 S.E.2d 875, 883 (Ct. App. 1992)	3
<u>Columbia Real Estate & Trust Co. v. Royal Exch. Assur.</u> , 132 S.C. 427, 128 S.E. 865, 866 (1925)	3
<u>Etheredge v. Richland School District One</u> , 341 S.C. 307,	

534 S.E.2d 275 (S.C. 2000)	4
<u>Clyburn v. Sumter County District Seventeen</u> , 317 S.C. 50, 451 S.E.2d 885 (1994)	4
<u>Richardson v. Hambright</u> , 296 S.C. 504, 374 S.E.2d 296 (1988)	4
<u>Hollins v. Richland County School District One</u> , 310 S.C. 486, 427 S.E.2d 654 (1993)	4
<u>SSI Medical Services, Inc. v. Cox</u> , 301 S.C. 493, 392 S.E.2d 789 (1990)	4
<u>Marietta Garage, Inc. vs Department of Public Safety</u> , 352 S.C. 95, 572 S.E.2d 306, (Ct. App. 2002)	4
<u>Staubes v. City of Folly Beach</u> , 331 S.C. 192, 196, 500 S.E.2d 160, 163 (Ct.App. 1998)	4
<u>Brown v Brown</u> , 362 S.C. 85, 606 S.E.2d 785 (Ct. App. 2004)	7
<u>Clark v. Dept. of Public Safety</u> , 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)	10
<u>Proctor v. Dept. of Health</u> , , 368 S.C. 279, 628 S.E.2d 496 (S.C. App., 2006)	10
<u>Faile v. SC DJJ</u> , 350 S.C. 315, 566 S.E.2d 536 (S.C., 2002)	10
<u>Jackson v. South Carolina Dept. of Corrections</u> , 301 S.C. 125, 390 S.E.2d 467 (S.C. App., 1989), aff'd 302 S.C. 519, 397 S.E.2d 377, (S.C., 1990)	11

Statutes

S.C. Code Ann. §§ 15-78-10 et seq.	1
S.C. Code Ann. § 15-78-30 (f)	4
S.C. Code Ann. § 15-78-60 (25).	4
S.C. Code Ann. §59-67-108	6
S.C. Code Ann. §59-67-180	6
S.C. Code Ann. §16-15-130	6
SC Code Ann. §63-15-30	7

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. [R pp 12-17]. The Complaint alleged the Defendant was grossly negligent and breached its duties to the Plaintiff which resulted in damages suffered by the Plaintiff. [R pp 12-17] 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. [R pp 22-23]. The Plaintiff filed two opposing affidavits [R pp 103-135] and the matter was heard by The Honorable James B Jackson, Sr on December 11, 2013. [R pp 62-95] The Court issued its Order which granted Summary Judgment filed on February 5, 2013. [R pp 1-10]. The Plaintiff filed a Motion for Reconsideration on February 19, 2014. [R pp 59-61] This Motion was heard by Judge Jackson on September 18, 2014. [R pp 96-102] The Motion was denied and an Order was filed October 14, 2014. [R pp 11]. 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. [R pp 12-17] This occurred in the ordinary course of taking the child to school and on a route which is said to have no public facilities. [R p 4]. The driver had more than ten years experience and the Plaintiff was a student in the first grade. [R p 4] 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. [R pp 5, 70, 84] The driver then made Plaintiff exit the bus and use the bathroom beside the bus. [R pp 5; 70-71].

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. [R pp 18-21].

Discovery was undertaken and the Defendant made a Motion for Summary Judgment which was granted after argument. [R pp 1-10; 22-23] The Plaintiff filed a Motion for Reconsideration which was denied after argument. [R pp 11, 50-61].

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, Etheredge 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.

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. [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.]²

Therefore, a review of the applicable cases and statutes 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 entitled to a directed verdict. Thus this case should be viewed more like Hollins than Etheredge.

² It should also be noted when the impact of the Hollins case that younger children are 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 a genuine issue of fact whether the Defendant was grossly negligent.

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. [R pp 44; 72]. 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. [R pp 4-5; 84-85]. 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. [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].

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. [R pp 5; 70-7; 80].

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. [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, it was not. [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.

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.. [R pp 83-84].

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. [R pp 39-41; 43-44] 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. [R pp 103-105]. 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. [R pp 98-99; 133-135].

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. [R pp 98-99]

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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 21 day of August, 2015, at Orangeburg, South Carolina.

A handwritten signature in black ink, appearing to read "R. Bentz Kirby", written over a horizontal line.

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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

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SC Court of Appeals

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 certified that this Final Brief complies with Rule 211(b), SCAR.

August 21, 2015

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

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Orangeburg Consolidated School District Three.....Respondent

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of Facts.....	3
Argument.....	7
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.....	8
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.....	9
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.....	10
B. Middleton Did Not Establish that Simmons Acted Without Slight Care in His Supervision and Protection of Jane Doe.....	13
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.....	16
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.....	18
Conclusion.....	18

TABLE OF AUTHORITIES

Cases

<i>Baughman v. American Tel. & Tel. Co.</i> , 306 S.C. 101, 410 S.E.2d 537 (1991).....	8, 15
<i>Brock v. Town of Mt. Pleasant</i> , 411 S.C. 106, 767 S.E.2d 203 (Ct. App. 2014).....	9
<i>Byerly v. Connor</i> , 307 S. C. 441, 415 S.E.2d 796 (1992).....	7
<i>Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation</i> , 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999).....	8
<i>Clyburn v. Sumter County Sch. Dist. No. 17</i> , 317 S.C. 50, 451 S.E.2d 885 (1994).....	10
<i>David v. McLeod Reg'l Med. Ctr.</i> , 367 S.C. 242, 626 S.E.2d 1 (2006).....	7, 8, 15
<i>Dawkins v. Fields</i> , 354 S.C. 58, 580 S.E.2d 433 (2002).....	8, 11, 12, 15
<i>Doe v. Doe</i> , 370 S.C. 206, 634 S.E.2d 51 (Ct. App. 2006).....	9
<i>Etheredge v. Richland Sch. Dist. One</i> , 341 S.C. 307, 534 S.E.2d 275 (2000).....	10, 13
<i>Faile v. S.C. Dep't of Juvenile Justice</i> , 350 S.C. 315, 566 S.E.2d 536 (2002).....	10
<i>Green v. State</i> , 351 S.C. 184, 560 S.E.2d 318 (2002).....	12
<i>Harris Teeter, Inc. v. Moore & Van Allen, PLLC</i> , 390 S.C. 275, 701 S.E.2d 742 (2010).....	7
<i>Hoard ex rel. Hoard v. Roper Hosp., Inc.</i> 387 S.C. 539, 694 S.E.2d 1 (2010).....	8
<i>Humana Hosp.-Bayside v. Lightle</i> , 305 S.C. 214, 407 S.E.2d 637 (1991).....	15
<i>I'On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000).....	9

<i>Proctor v. Dep’t of Health & Envtl. Control</i> , 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006)	10
<i>Sabb v. S.C. State Univ.</i> , 350 S.C. 416, 567 S.E.2d 231 (2002).....	16
<i>Sims v. Amisub of S.C., Inc.</i> , 408 S.C. 202, 758 S.E.2d 187 (2014).....	9
<i>Thomas v. Waters</i> , 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994)	8
<i>U.S. v. Chapman</i> , 209 Fed. Appx. 253 (4th Cir. 2006)	12

Statutes

S.C. Code Ann. § 15-78-20(b)	9
S.C. Code Ann. § 15-78-20(f).....	9
S.C. Code Ann. § 15-78-30(d).....	9
S.C. Code Ann. § 15-78-30(e).....	9
S.C. Code Ann. § 15-78-60.....	9
S.C. Code Ann. § 15-78-60(4)	11, 18
S.C. Code Ann. § 15-78-60(5).....	16
S.C. Code Ann. § 15-78-60(25)	10, 18
S.C. Code Ann. § 59-67-108.....	14

Rules

Rule 59, SCRCP.....	3
Rule 60, SCRCP.....	3
Rule 702, FRE.....	12
Rule 702, SCRE.....	11, 12

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, SCRCR, 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

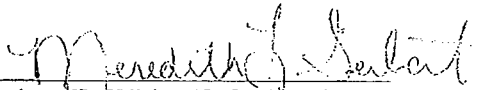
For the reasons stated above, the trial court properly found no gross negligence on the part of the District and correctly granted summary judgment. Accordingly, the District respectfully submits that the Court should affirm the trial court’s grant of summary judgment.

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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


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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AUG 24 2015

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

SC Court of Appeals

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,

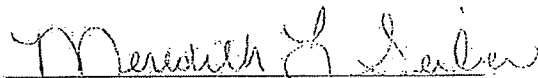
v.

Orangenburg Consolidated School District Three.....Respondent

CERTIFICATE OF COUNSEL

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

August 24, 2015



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In the Court of Appeals

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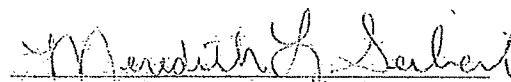
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Orangeburg Consolidated School District Three.....Respondent

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



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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
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Jennifer Middleton, as parent and
GAL for Jane Doe

Appellant,

v:

Orangeburg Consolidated School
District Three,

Respondent

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TABLE OF CONTENTS

Table of Authorities	i
Arguments	1
I. All issues raised by the Appellant were preserved for appeal	1
II. All evidence heard by the trial Court were proper pursuant to Rule 701 of the South Carolina Rules of Evidence	2
Conclusion	3

TABLE OF AUTHORITIES

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
<u>Small v. Pioneer Machinery, Inc.</u> , 329 S.C. 448, 494 S.E.2d 835 (S.C. App., 1997)	3
<u>Vespazianni v. McAlister</u> , 307 S.C. 411, 415 S.E.2d 427 (S.C. App., 1992)	2

Other Authorities

SCRE Rule 701	2
SCRE Rule 702	2

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. [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, 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.

“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.” ION, 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), SCRCP”. 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 [R pp 103-119] and McDaniel [R pp 133-135] 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.

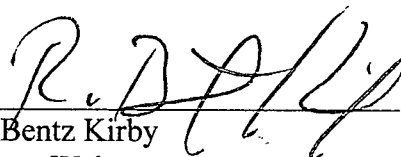
As noted in Small v. Pioneer Machinery, Inc., 329 S.C. 448, 494 S.E.2d 835 (S.C. App.,

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 21 day of August, 2015, at Orangeburg, South Carolina.


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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

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AUG 21 2015

SC Court of Appeals

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

Jennifer Middleton, as parent and
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Appellant,

v.

Orangeburg Consolidated School
District Three,

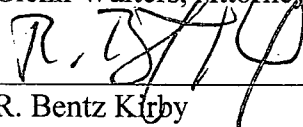
Respondent

CERTIFICATE OF COUNSEL

The undersigned certified that this Reply Brief complies with Rule 211(b), SCAR.

August 21, 2015

Glenn Walters, Attorney at Law, PA



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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

Orangeburg Consolidated School District Three,
Respondent.

Appellate Case No. 2014-002402

Appeal From Orangeburg County
James B. Jackson, Jr., Special Circuit Court Judge

Unpublished Opinion No. 2016-UP-189
Submitted March 1, 2016 – Filed May 4, 2016

AFFIRMED

Glenn Walters, Sr. and R. Bentz Kirby, both of Glenn
Walters & Associates, P.A., of Orangeburg, for
Appellant.

Andrea Eaton White and Meredith Lee Seibert, both of
Duff, White & Turner, LLC, of Columbia, for
Respondent.

PER CURIAM: Jennifer Middleton appeals the trial court's grant of summary judgment in favor of Orangeburg Consolidated School District Three (the School District). We affirm.¹

1. We find the School District was entitled to summary judgment on Middleton's claim the School District was negligent in failing to have in place a specific policy for bus drivers to follow in situations such as the one giving rise to this action. *See* S.C. Code Ann. § 15-78-60(4) (2005) (providing 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").²

2. We find the trial court did not err in finding there were no genuine issues of material fact concerning the issue of whether the bus driver was grossly negligent in his handling of the situation that gave rise to this lawsuit; therefore, summary judgment was properly granted on this issue. *See Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC."); *id.* ("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."); *id.* at 361-62, 563 S.E.2d at 333 ("In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party."); *Byerly v. Connor*, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992) ("Summary judgment can be granted when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ."); *Lord v. D & J Enters.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014) ("Once the moving party carries its initial burden, the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial."); S.C. Code Ann. § 15-78-

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² To the extent Middleton raises the School District's training of its bus drivers as a separate argument, that issue is unpreserved because Middleton did not raise the issue of bus driver training to the trial court at the summary judgment hearing. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.").

60(25) (2005) (providing that a governmental entity is not liable for any loss resulting from a "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"); *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000) ("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."); *id.* (explaining gross negligence "is the failure to exercise slight care"); *id.* ("[W]hile 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").

3. We find it unnecessary to rule on whether the trial court erred in finding the School District was entitled to discretionary immunity under section 15-78-60(5) of the South Carolina Code. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of a prior issue is dispositive).

AFFIRMED.

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

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

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 District 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 articulately in the most

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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.

¹ It should also be noted when the ruling in the Hollins case is that younger children are 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 driver.

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 Court

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

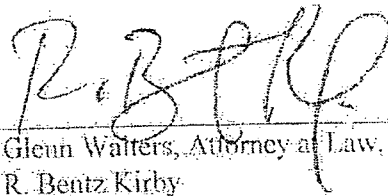
were reserved as they were either directly ruled upon by the trial court, or were raised pursuant to a Rule 59 Motion.

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 foreseen 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 Mt. 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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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.

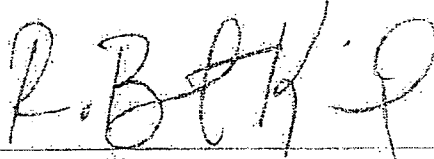
Orangeburg Consolidated School
District Three,

Respondent

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:

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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
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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

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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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
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The Honorable James B. Jackson, Jr.
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Jennifer Middleton, as parent and GAL for Jane Doe,.....Appellant,

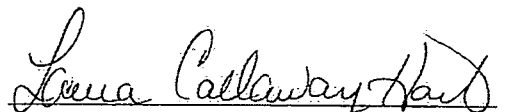
v.

Orangeburg Consolidated School District Three.....Respondent

PROOF OF SERVICE

I certify that I have served the 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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Attorney for Appellant

The South Carolina Court of Appeals

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

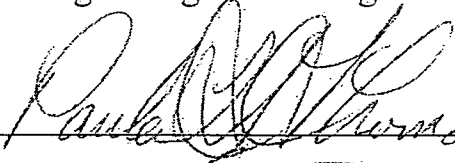
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Appellate Case No. 2014-002402

ORDER

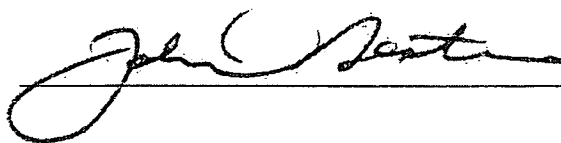
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Glenn Walters, Sr., Esquire

R. Bentz Kirby, Esquire

Merèdith Lee Seibert, Esquire

FILED

June 27, 2016