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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, Petitioner,

v.

Orangeburg Consolidated School
District Three, Respondent

Amended **PETITION FOR WRIT OF CERTIORARI**

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Certificate of Counsel

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 27, 2016.

QUESTIONS PRESENTED

1. Did the Court of Appeals commit error when it ruled the Respondent was not grossly negligent by failing to have proper guidance and training for the bus driver was entitled to Summary Judgment pursuant to S.C. Code Ann. §15-78-60(4) (2005).

2. Did the Court of Appeals commit error when it ruled there no genuine issue of material fact on the issue of the gross negligence of the bus diver when the facts do support a claim that the Respondent was grossly negligent and the exercise of judgment was in fact grossly negligent.

3. Did the Court of Appeals commit error when it ruled that all issues raised by the Petitioner were not preserved for appeal as the Petitioner did raise the issue of bus driver training at the Summary Judgment hearing.

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 Respondent was grossly negligent and breached its duties to the Petitioner which resulted in damages suffered by the Petitioner. [R pp 12-17] The Respondent 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 Respondent filed a Motion for Summary Judgment together with two affidavits. [R pp 22-23]. The Petitioner 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 Petitioner 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]. The case was appealed to the Court of Appeals. After briefing, the Court issued its Unpublished Opinion granting judgment to the Respondent. The Petitioner then filed a Motion for Rehearing. The Court of Appeals issued its Order denying the Motion for a Rehearing on June 27, 2016, and the Petitioner now files this Writ of Certiorari in the Supreme Court of South Carolina.

ARGUMENTS

1. The Court of Appeals committed error when it ruled the Respondent was not grossly negligent by failing to have proper guidance and training for the bus driver was entitled to Summary Judgment pursuant to S.C. Code Ann. §15-78-60(4) (2005).

The Petitioner submits that the Court of Appeals misapprehended its argument and position. The Court ruled that the Respondent was shielded from any liability under S.C. Code Ann. §15-78-60(4) without any discussion of the law or the facts in the case. Certainly, 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, the argument advanced by the Petitioner is that the Respondent in fact did have a policy regarding situations such as this one and the policy was inadequate in that it failed to provide clear guidance to the bus driver.

The undisputed facts are there were no known public restrooms on the route. It is foreseeable that a child might have an emergency and urgent need to urinate while riding the bus on the route. The only policy the Respondent to deal with such a situation arises is to rely upon the best judgment of the driver. The Respondent admits that Petitioner stated she needed to urinate and could not hold the urge. The driver said that he considered making her wet herself. The trial court also found the other students were laughing at the Petitioner. Finally, the bus driver determined that the only course of action was to make the Petitioner pee on the side of the road. [R pp 3-10; 80-81; 39-41].

The 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 Respondent 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 Respondent admits that the situation, despite lack of 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 Respondent 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] 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 Respondent 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 Respondent 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 Petitioner 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 Petitioner submits that the Respondent was not entitled to Summary Judgment on this issue.

As stated above, the only policy Respondent had was for the driver to use his best judgment in a crisis situation. [R pp 44; 72]. While the Respondent claims this to be a good policy, it must be remembered that this situation is one where the Petitioner 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

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[1] It should also be noted when the ruling in the Hollins case is that younger children a entitled to special consideration. SC Code Ann. §63-15-30 provides that a family law judge is required to consider the child's age and experience when determining a child's preferences. See, Brown v Brown, 362 S.C. 85, 606 S.E.2d 785 (Ct. App. 2004). This principal of the law that proper deference is to be given to children illustrates why there is an genuine issue of fact whether the Respondent was grossly negligent.

4-5; 84-85]. At the very least, some kind of cover could have been erected in order that she would have privacy.

In this situation the driver at least should have access to a radio or cellular phone to inform the Respondent of an emergency in order to provide for the proper intervention by the Respondent. The Respondent should 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 Petitioner requested that the trial court take judicial notice of the Respondent'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 driver also failed to follow this policy. The Petitioner 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 Respondent admitted there was no public restroom available on this route, but made no provisions to deal with this foreseeable situation. 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 herein by the Petitioner show that there was 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 Hollins v. Richland County School Dist. One, 310 S.C. 486, 427 S.E.2d 654 (1993), 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 Respondent was one which afforded no care to the Petitioner and in fact created the dangerous and embarrassing situation. At the least, the driver could have provided some privacy for the Petitioner. 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 Petitioner inside to pee.

While the Petitioner admits this case presents a difficult situation, this is the reason that the Respondent 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 Respondent 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 Respondent exercised its discretion in a manner which afforded at least slight care to the Petitioner. The Respondent 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 Petitioner also brought to the attention of the trial court that the Respondent 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 Respondent. 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 Respondent. In Proctor, DHEC failed to make inspections of the Petitioner'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 Respondent 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 Respondent will not be entitled to plead the defense of immunity.

In this case, as in the immediate three cases, the Respondent 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].

2. The Court of Appeals committed error when it ruled there no genuine issue of material fact on the issue of the gross negligence of the bus diver when the facts do support a claim that the Respondent was grossly negligent and the exercise of judgment was in fact grossly negligent.

The Court of Appeals ruled that the Respondent was entitled to Summary Judgment because there was no genuine issue of material fact raised by the Petitioner. 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 Petitioner show there was gross negligence and the issue was a genuine issue of material fact.

The affidavit of Janet Greene states the Respondent 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 Respondent 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 Respondent 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 Respondent. 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 Hollins 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. In this case simply leaving the decision to a driver is no exercise of

judgment at all. [R pp 79-80; 88; 98-99]. The Petitioner requested that the trial court take judicial notice of the Respondent'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 Petitioner had to suffer this indignity from an authority figure who was supposed to be providing her with safe transportation. [R p 84]. There is no evidence that the Respondent 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 Respondent exercised its discretion in a manner which afforded at least slight care to the Petitioner. The Respondent 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 Petitioner also brought to the attention of the trial court that the Respondent 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 Respondent. 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 Respondent. In Proctor, DHEC failed

to make inspections of the Petitioner's business even though its policy required the inspections 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 Respondent 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.

The general law regarding the construction of statutes is applicable to all of the arguments in this Writ. 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. Petitioner 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 Respondents 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.*
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> 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, Ethedredge at 341 S.C. at 311- 312.[2]

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

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[2] 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.

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.

The trial Court noted in its Order, there were no known public restrooms on the route and the only policy the Respondent had was to rely upon the best judgment of the driver. The Respondent admits that Petitioner 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 Petitioner. Finally, the bus driver determined that the only course of action was to make the Petitioner 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 Respondent 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 Respondent 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 Respondent 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] 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 Respondent 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 Respondent 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.][3]

Therefore, a review of the applicable cases and statues reveals that the Petitioner 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 Respondent to have a guiding policy for the

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[3] It should also be noted when the impact of the Hollins case that younger children a entitled to special consideration. SC Code Ann. §63-15-30 provides that a family law judge is required to consider the child's age and experience when determining a child's preferences. See, Brown v Brown, 362 S.C. 85, 606 S.E.2d 785 (Ct. App. 2004). This principal of the law in the proper deference to be given to children illustrates why there is an genuine issue of fact whether the Respondent was grossly negligent.

driver placed the Petitioner 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.

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 Respondent 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 Respondent caused the Petitioner to violate laws which should not happen. [R pp 98-99; 133-135].

The Petitioner submits that the Respondent 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]

3. The Court of Appeals committed error when it ruled there no genuine issue of material fact on the issue of the gross negligence of the bus diver when the facts do support a claim that the Respondent was grossly negligent and the exercise of judgment was in fact grossly negligent.

A review of the Order granting Summary Judgment shows that the Court only ruled on two of the issues raised by the Petitioner. It first ruled that the Petitioner 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 Petitioner were preserved as they were either directly ruled upon by the trial court, or were raised pursuant to a Rule 59 Motion.

The Court of Appeals stated in a footnote 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 Respondent 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 Respondent was "grossly negligent in failing to train Mr. Riley Simmons, the bus driver, 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 Respondent's policy and lack of policy. It was admitted by the Respondent that the only policy it had was the driver was to use his best judgment. [R p 44]. The argument by the Petitioner is that the Respondent 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].

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 Petitioner. It first ruled that the Petitioner 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 Petitioner were preserved as they were either directly ruled upon by the trial court, or were raised pursuant to a Rule 59 Motion.

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

59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment." Elam v. South Carlolina 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 Petitioner. It is clear that since this was a case heard on a Motion, the Judge was not going to reverse his decision. Therefore Petitioner should be allowed to pursue all three issues on Appeal.

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 lay 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.

The Petitioner submits that this issue was preserved to be considered upon appeal and it was error for the Court of Appeals to refuse to consider the argument.

CONCLUSION

The Court of Appeals failed to properly apply the law regarding damages with regard to a breach of contract. The law as applied was not supported by the actual facts and damages proved at trial. This is an error of law and the Petitioner is entitled to a Writ of Certiorari in order that this court might address these errors of law and improper application of the facts which actually are in evidence.

Respectfully submitted, this the 28th day of July, 2016, at Orangeburg, South Carolina.

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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, Petitioner,

v.

Orangeburg Consolidated School
District Three, Respondent

CERTIFICATE OF SERVICE

On the 28th day of July, 2016, the undersigned served a copy of the Petitioners Amended Petition for Writ of Certiorari upon opposing counsel and the Clerk for the Court of Appeals by placing a copy in the United States Mail, postage fully paid, or personally serving the party at the following address:

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