

THE STATE OF SOUTH CAROLINA
In The State Supreme Court

 ORIGINAL

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED

The Honorable James B. Jackson, Jr.
Special Circuit Court Judge

AUG 25 2016

SO SUPREME COURT

Case No. 2012-CP-38-01314
Appellate Case No. 2014-002402
Appellate Case No. 2016-001543

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

v.

Orangeburg Consolidated School District Three.....Respondent

**RETURN BY RESPONDENT TO PETITION FOR
WRIT OF CERTIORARI**

Andrea E. White (S.C. Bar # 11891)
Meredith L. Seibert (S.C. Bar # 72935)
Laura Callaway Hart (S.C. Bar # 2766)
Duff, White & Turner, LLC
P.O. Box 1486
Columbia, South Carolina 29202
Telephone: 803.790.0603
Facsimile: 803.790.0605

Attorneys for Respondent

INDEX

Questions Presented.....1

Statement of the Case.....2

Statement of the Facts.....2

Argument

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.....6

II. The District’s policy and practice of relying on a school bus driver’s discretion in situations such as that presented to him, and the school bus driver’s actions in that situation, which protected the student from physical danger and embarrassment, establish that the District was not grossly negligent.....7

 A. The evidence in the record supports the Trial Court’s finding that the District’s lack of a written policy addressing the handling of situations on a school bus in which a child expresses an urgent need to relieve herself, and its reliance instead on a policy and practice of relying on the discretion of the bus driver, was not grossly negligent.....8

 B. The only reasonable inference from the evidence in the record supports the Trial Court’s finding that the school bus driver exercised at least slight care and was, therefore, not grossly negligent.....10

III. The District is immune from liability under S.C. Code Ann. § 15-78-60 (5) because its employee exercised his judgment and discretion in a manner that met the District’s expectations and expected standards.....13

IV. The Petitioner did not raise the issue of training of its employees by the District at the hearing on the District’s motion for summary judgment, and, even if she had, she produced no evidence to support her claim of gross negligence based on the District’s alleged lack of training of its employees.....15

V. The District is immune from liability under S.C. Code Ann. § 15-78-60 (4) for Petitioner’s claim that it was grossly negligent because it allegedly failed to adopt a policy governing situations where a student on a school bus has a sudden and urgent need for a bathroom facility.....16

Conclusion.....17

QUESTIONS PRESENTED

1. Does evidence that the Respondent school district had a policy and practice of relying on a school bus driver's discretion in handling situations where a student has a sudden and urgent need for a bathroom facility and that its bus driver acted to and did protect a student from physical danger and embarrassment in such a situation give rise to an inference of gross negligence on the part of Respondent?
2. Is the Respondent school district immune from liability under S.C. Code Ann. § 15-78-60 (5) because its employee exercised his judgment and discretion in a manner that met the Respondent's expectations and accepted standards?
3. Was the issue of training of Respondent's employee raised at the hearing on Respondent's motion for summary judgment and, if so, did Petitioner produce any evidence that would raise a genuine issue of material fact on a claim of gross negligence arising out of a lack of training of its employees?
4. Is the Respondent school district immune from liability under S.C. Code Ann. § 15-78-60 (4) for the claim that it failed to adopt a policy governing situations where a student on a school bus has a sudden and urgent need for a bathroom facility?

STATEMENT OF THE CASE

This is a tort case against a governmental entity under the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-10, et seq. The Petitioner Jennifer Middleton, as parent and GAL of her minor daughter, Jane Doe, brought this action against Orangeburg Consolidated School District Three (“Respondent” or “the District”) alleging gross negligence by the District and by her daughter’s school bus driver, an employee of the District.

The District moved for summary judgment, which was heard by Special Circuit Judge James B. Jackson, Jr. By order dated February 4, 2014, Judge Jackson granted the motion on the basis that Petitioner failed to establish a genuine issue of material fact relating to the District’s gross negligence and on the further ground that the District established that it was entitled to discretionary immunity under § 15-78-60 (5). Judge Jackson dismissed the claims against the District with prejudice. Judge Jackson subsequently denied Petitioner’s motion for reconsideration on October 16, 2014.

The Petitioner then filed an appeal to the South Carolina Court of Appeals, which issued an unpublished *per curiam* opinion on May 4, 2016, affirming the order of Judge Jackson. A subsequent petition for rehearing was denied.

STATEMENT OF THE 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. (App. 41). Simmons’ route was in a very rural section of Orangeburg County where there are no public restroom facilities. (App. 45 and 54). Simmons was the

only adult on the bus. Jane Doe, then a first grader, rode Simmons' bus. (App. 41 and 49).

On October 11, 2011, when Simmons was well into his afternoon route transporting children from school to their homes, Jane Doe informed Simmons that she "had to go to the bathroom and had to pee." Simmons initially told Jane Doe she would have to "hold it" until she got home. When Jane Doe continued to insist that she urgently needed to go to the bathroom, Simmons told her she would have to wet herself. (App. 41-42). Simmons was concerned about Jane Doe and also became aware that other students on the bus were beginning to laugh at the situation. Because of these concerns, he determined that the only reasonable option was to stop the bus in a safe location and allow the child to urinate outside the bus. (App. 42).

Simmons pulled the bus over in what he considered to be a safe location and parked it so that the door area could not be seen from the road. He then "had all the students sit all the way down in their seats so that they could not see" Jane Doe. 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. 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. From his position, Simmons could not see Jane Doe as she urinated. (App. 42). The record contains no evidence that anyone, whether on the school bus or passing by on the road, saw Jane Doe relieving herself. Shortly after being allowed off the bus to urinate behind the screen of its open door, Jane Doe returned to the bus without incident, and Simmons continued with his route.

Petitioner, who learned of the incident via a cell phone call from another student on the bus, met the bus when it stopped for Jane Doe and others to disembark and complained to Simmons about his handling of the incident. (App. 50). The next day, Petitioner complained to District administrators, who investigated her concerns. After investigation, the District determined that Simmons' actions did not violate District policy or procedures. 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. As Simmons' actions did not violate District expectations, policies, or procedures, the District determined no disciplinary action against Simmons was warranted. (App. 45).

Petitioner sued the District, claiming that it "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; (3) it failed to use ordinary and reasonable care to properly care for its students. Petitioner also claimed 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 failed to comply with the District's rules and regulations on bus transportation. (App. 18).

The trial court granted summary judgment to the District on the grounds that Petitioner 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 the particular situation, noting that the District's policy and practice was to rely on the judgment of the bus driver, which the court found to be 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. (App. 9). The court also rejected Petitioner'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 Petitioner'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 under S.C. Code Ann. § 15-78-60 (5) 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.

Petitioner filed a motion for reconsideration and, at the hearing, argued only that the District's lack of a policy specifically addressing the situation of a child on a school bus urgently needing to relieve herself was evidence of a lack of slight care. (App. 100). 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. (App. 13).

Petitioner appealed the dismissal of her case to the Court of Appeals which issued an unpublished *per curiam* opinion affirming the trial court. (App. 189-191). Petitioner filed a petition for rehearing, arguing that the Court of Appeals had misapprehended her

argument about a lack of policy, contending instead that the District's policy of relying on the discretion of bus drivers was inadequate and lacked clear guidance. (App. 192-193). The Court of Appeals denied the petition for rehearing. (App. 209).

ARGUMENT

I. The Decision of the South Carolina Court of Appeals Does Not Warrant the Issuance of a Writ of Certiorari.

The Petitioner's claim against the District is a basic tort claim by a parent on behalf of her child against a school district. The Court of Appeals affirmed the grant of summary judgment to the District in a *per curiam*, unpublished opinion. The District submits that, aside from the merits, which are addressed below, multiple factors demonstrate that a writ of certiorari is unwarranted in this case.

Rule 242(b), SCACR, lists several "special and important reasons" that would warrant the grant of a writ of certiorari. None of those reasons are present in this case:

- (1) The case presents no novel questions of law. It merely involves the application of longstanding principles of evidence and proof to a well-established cause of action. In addition, the Court of Appeals' opinion is unpublished and has no precedential value;
- (2) There was no dissent in the Court of Appeals decision. It was issued *per curiam*;
- (3) The decision of the Court of Appeals does not conflict with a decision of this Court;
- (4) No constitutional issues, substantial or otherwise, are involved; and
- (5) No federal question is included.

While this Court may issue a writ of certiorari in other "exceptional circumstances," *In re Breast Plant Implant Litigation*, 331 S.C. 540, 543 n. 2, 503 S.E.2d

445, 447 (1998), this case involves no such circumstances. Unlike *In re Breast Plant Implant Litigation*, no “novel questions of law concerning issues of significant public interest” are present, nor would the interest of judicial economy be served by resolving common issues raised in multiple cases. “The writ of certiorari is reserved for extraordinary situations or exceptional circumstances, and is granted sparingly.” *Rowe v. City of West Columbia*, 334 S.C. 400, 408, 513 S.E.2d 379, 383 (Ct. App. 1999), quoting 14 C.J.S. *Certiorari* § 6 (1991). This is not such an extraordinary situation.

This case does not involve any of the factors listed in Rule 242(b), SCACR, nor does it raise an issue of first impression or of great public interest or importance. This is a standard tort case brought by a private person against the local school district alleging gross negligence by a school bus driver that allegedly resulted in embarrassment to her minor child. The opinion of the Court of Appeals will have no application to other cases. There is no need for this Court to review the decision of the Court of Appeals.

II. The District’s Policy and Practice of Relying on a School Bus Driver’s Discretion in Situations such as that Presented to Him, and the School Bus Driver’s Actions in that Situation, Which Protected the Student from Physical Danger and Embarrassment, Establish that the District Was Not Grossly Negligent.

The Tort Claims Act provides that a governmental entity, such as a school district, 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. § 59-78-60 (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 Cnty 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. The Evidence in the Record Supports the Trial Court's Finding that the District's Lack of a Written Policy Addressing the Handling of Situations on a School Bus in Which a Child Expresses an Urgent Need to Relieve Herself, and Its Reliance Instead on a Policy and Practice of Relying on the Discretion of the Bus Driver, Was Not Grossly Negligent.

The Petitioner argued in her Motion for Reconsideration before the trial court that the District was grossly negligent in failing to adopt a written policy governing how a school bus driver should handle a situation when a child expresses an urgent need to relieve herself. (App. 100). In her Petition for Rehearing in the Court of Appeals, she argued that while Respondent had a policy, it was inadequate and failed to provide clear guidance to the bus driver. (App. 192-193). In support of her arguments, the Petitioner submitted an affidavit by Janet Greene, who declared herself an expert in school bus transportation. Greene opined that the District should have foreseen that a situation similar to this would arise and 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. (App. 106). Greene’s affidavit is insufficient evidence to defeat summary judgment for two 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.” The District cannot, therefore, be held liable on Petitioner’s claim that it did not adopt a particular policy. It follows that the District’s failure to adopt a particular written policy cannot be evidence of gross negligence.

Second, Greene’s affidavit is incompetent as evidence to defeat summary judgment because her opinions are legal conclusions. Expert testimony on issues of law is generally inadmissible. *Dawkins v. Fields*, 354 S.C. 58, 66, 580 S.E.2d 433, 437 (2003). However, if testimony by an expert 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*, 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.” *See* Rule 702, SCRE. Instead, Greene 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]." (App. 106). Even Greene's 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 (App. 114). 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. Greene's opinion is not supported by any facts in the record, constitutes a legal conclusion, and is, therefore, insufficient and inadmissible.

The trial court held that the District's policy and practice of relying on the judgment of the school bus driver was "the best policy . . . as it would be very difficult to have hard and fast rules under varying circumstances." (App. 9). Aside from Greene's unsupported and inadmissible legal conclusions relating to policies, there is no testimony in the record to dispute this finding. Therefore, even if the District were not immune under the Tort Claims Act for lacking a written policy designed specifically for the situation that confronted this bus driver, the record does not support a finding that the District was grossly negligent in not issuing such a written policy.

B. The Only Reasonable Inference from the Evidence in the Record Supports the Trial Court's Finding that the School Bus Driver Exercised at Least Slight Care and Was, Therefore, Not Grossly Negligent.

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. The District was, therefore, entitled to summary judgment on the claim that District's employee was grossly negligent.

In opposing the District's motion for summary judgment, the Petitioner relied exclusively on her own testimony and the affidavits of two purported expert witnesses who opined that Simmons acted in a grossly negligent manner. None of this testimony is competent or sufficient to defeat summary judgment.

The Petitioner did not witness the event and offered only her belief that Simmons should have either allowed her child to wet herself or driven back 30 minutes to the town and let the child enter a public restroom alone. (App. 53-54). 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 . . . [Petitioner] has only established that the District did not respond to the situation in the manner that [Petitioner] preferred, which is not the applicable standard that the District must follow." (App. 9). *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, Petitioner submitted affidavits of Janet Greene and Danny W. McDaniel, who declared themselves as expert witnesses in school bus transportation and law enforcement, respectively. In addition to her legal conclusion regarding the lack of a District policy, discussed *supra* at pp 9-10, Greene opined that the District was grossly negligent in failing to train Simmons how to manage the "emergency situation" that occurred. (App. 106). However, the record contains no evidence whatsoever of the extent and type of training, or the lack thereof, 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 by the State). Greene's affidavit consists solely of legal conclusions unsupported by any facts in the record.

McDaniel opined that Simmons breached a duty of care owed to Jane Doe and was grossly negligent in causing Jane Doe to urinate "in public." In his unsupported legal opinion, McDaniel stated that Simmons caused, allowed, aided and abetted Jane Doe to expose herself, thus causing her to commit the crimes of disorderly conduct and indecent exposure. (App. 136). 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. The Petitioner submitted no affidavits or testimony from fact witnesses to support her claim to the contrary. This claim and McDaniel's opinion cannot, therefore, be credited.

The Petitioner presented no evidence contradicting Simmons' description of the event and of his own actions; those facts remain undisputed. The affidavits of Greene and McDaniel contain no factual evidence in opposition to the facts presented by the District, but rather constitute mere legal conclusions unsupported by the evidence. As such, their opinions are incompetent and insufficient to create a genuine issue of material fact on Simmons' alleged gross negligence. *See Dawkins*, 354 S.C. at 66-67, 580 S.E.2d at 437 (expert testimony that is not supported by facts is insufficient to defeat summary judgment); *Baughman v. American Tel. & Tel. Col.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991) (if non-moving party fails to support an essential element of his claim by competent evidence, summary judgment against him is proper).

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. The Petitioner 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 v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 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 or its employee exercised their duties 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 Petitioner's claim of gross negligence in its care of Jane Doe. The Court of Appeals correctly affirmed the trial court's grant of summary judgment to the District.

III. The District Is Immune from Liability Under S.C. Code Ann. § 15-78-60 (5) Because Its Employee Exercised His Judgment and Discretion in a Manner that Met the District's Expectations and Expected Standards.

Section 15-78-60 (5) provides that a governmental entity, including a school district, 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 it, “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, 567 S.E.2d 231, 237 (2002).

The Court of Appeals correctly affirmed the trial court’s finding 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 watch the road for safety reasons, then allow Jane Doe to exit the bus temporarily to relieve herself in privacy. (App. 42). The other alternatives—to allow her to wet herself on the bus or to turn the bus around to return to Holly Hill, a 30-minute drive, to find a public facility where 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. (App. 46). The trial court correctly

found, based on these circumstances, that Simmons' actions were entitled to discretionary immunity, and the Court of Appeals correctly affirmed that finding.

The Petitioner argues that the District "failed to comply with its manual and its instructions." (Petition for Writ of Certiorari at 7). However, the manual to which Petitioner refers was not issued or adopted by the District, Orangeburg Consolidated School District No. Three, but by a different school district, Orangeburg Consolidated School District No. Four. In any event, the manual was not introduced into the record. There is, therefore, no factual support for Petitioner's assertion that a manual adopted by the District required Simmons to contact an administrator before "putting a child off the bus" or that it prohibited Simmons from stopping the bus at non-designated stops. (App. 84-85). There is simply 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. The Court of Appeals correctly affirmed that finding.

IV. The Petitioner Did Not Raise the Issue of Training of Its Employees by the District at the Hearing on the District's Motion for Summary Judgment, and, even if She Had, She Produced No Evidence to Support Her Claim of Gross Negligence Based on the District's Alleged Lack of Training of Its Employees.

The Petitioner incorrectly asserts that the issue of the District's training of its employees was raised in the trial court. The only reference to training in the record is found in her expert witness's affidavit opining on the presumed lack of training (App. 106). There are no facts in the record to support this opinion and no arguments were

presented to the trial court about training or the lack thereof.¹ The arguments in the trial court revolved solely around the District's policy and the bus driver's actions; training was not an issue. The Court of Appeals correctly noted that the Petitioner did not preserve this issue for appellate review. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004).

V. The District Is Immune from Liability Under S.C. Code Ann. § 15-78-60 (4) for Petitioner's Claim that It Was Grossly Negligent Because It Allegedly Failed to Adopt a Policy Governing Situations Where a Student on a School Bus Has a Sudden and Urgent Need for a Bathroom Facility.

The District asserts immunity under S.C. Code Ann. § 15-78-60 (4) as an additional sustaining ground. The Petitioner 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. 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 the Petitioner's claim against the District that it failed to adopt a particular policy. The trial court correctly found that the District was entitled to immunity on the

¹ Petitioner's assertions that the District's witness, Lydia Gilliard, "confirmed" in her affidavit that Simmons "was not trained to deal with this incident" and that the District admitted the situation "could have been dealt with in a better manner" are incorrect. Gilliard did not address the issue of training in any way. (App. 45-46). The District's attorney merely acknowledged that Petitioner's witnesses felt the situation could have been handled differently; neither she nor the District admitted they believed Simmons could have handled the matter differently or better. (App. 77).

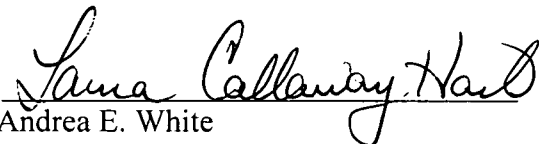
claim of lack of a policy, whether valid or invalid, whether adequate or inadequate, under S.C. Code Ann. § 15-78-60 (4). The Court of Appeals correctly affirmed this finding.

CONCLUSION

Based on the foregoing discussion, the Respondent Orangeburg Consolidated School District Three respectfully requests that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

DUFF, WHITE & TURNER, LLC

By: 

Andrea E. White
Meredith L. Seibert
Laura Callaway Hart
3700 Forest Drive, Suite 404
Post Office Box 1486
Columbia, South Carolina 29204

Attorneys for Respondent Orangeburg
Consolidated School District Three

August 25, 2016
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The State Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr.
Special Circuit Court Judge

Case No. 2012-CP-38-01314
Appellate Case No. 2014-002402
Appellate Case No. 2016-001543

RECEIVED

AUG 25 2016

SC SUPREME COURT

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

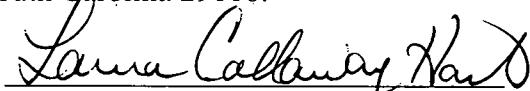
v.

Orangeburg Consolidated School District Three.....Respondent

PROOF OF SERVICE

I, Laura Callaway Hart, certify that I have served the Return by Respondent to Petition for Writ of Certiorari on Jennifer Middleton, as parent and GAL for Jane Doe, by depositing a copy in the United States Mail, postage prepaid, on August 25, 2016, addressed to her attorney of record, R. Bentz Kirby, Esq., Law Office of Glenn Walters, 1910 Russell Street, Orangeburg, South Carolina 29116.

August 25, 2016



Andrea E. White (S.C. Bar # 11891)
Meredith L. Seibert (S.C. Bar # 72935)
Laura Callaway Hart (S.C. Bar # 2766)
Duff, White & Turner, LLC
P. O. Box 1486
Columbia, South Carolina 29202
Telephone 803.790.0603
Facsimile 803.790.0605

Attorney for Respondent Orangeburg
Consolidated School District Three

(CONTINUED ON NEXT PAGE)

Other Counsel of Record:

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

Attorney for Petitioner