THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Carmen T. Mullen, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2017-001492
Case No. 2015-CP-07-01147

Darrell J. Alston, Jr. and Mabel L. Alston, Appellants,

v.

Beaufort County School District and South Carolina High School League, Defendants,

Of which South Carolina High School League is the Respondent.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA HIGH SCHOOL LEAGUE

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COUNTERSTATEMENT OF THE ISSUES ON APPEAL

I. Did Appellants fail to preserve their agency and vicarious liability arguments for appellate review by raising these issues for the first time in their Rule 59(e), SCRCP, motion to alter or amend judgment?

II. Did the circuit court properly grant summary judgment given that the South Carolina High School League is immune from suit pursuant to subsection 15-78-60(4) of the Tort Claims Act and Appellants failed to produce any evidence of gross negligence?

III. Did the circuit court appropriately exercise its discretion in deciding the motion for summary judgment, as well as the motion to alter or amend judgment, via Form 4 order as permitted by the South Carolina Rules of Civil Procedure?

COUNTERSTATEMENT OF THE CASE[1]

This appeal arises out of a May 2013 incident at a Beaufort High School football practice involving Appellant Darrell J. Alston, Jr. (Alston). (R. p. 13). Alston alleges he tore his ACL and meniscus in his right knee after being tackled by other players during spring practice. (Id.).

Alston and his mother, Appellant Mabel L. Alston (Mother) (collectively "Appellants"), filed a summons and complaint in the Court of Common Pleas for Beaufort County on May 11, 2015, asserting a gross negligence claim under the South Carolina Tort Claims Act[2] (the Tort Claims Act) against Beaufort County School District (the District) and South Carolina High School League (the League). (R. pp. 12–16). According to Appellants, Alston should not have been allowed on the practice field without a physical or signed parental permission form, both of which are required under the League's rules. (R. p. 128). In their complaint, Appellants requested damages for Alston's injuries as well as Mother's alleged physical, mental, and emotional injuries. (R. p. 16).

At the early stages of the case, the League and Appellants filed dispositive motions. (R. p. 1). The circuit court, however, denied those motions in an order dated October 8, 2015, finding the motions were premature because "further development of the evidence" was necessary "to conclude how it is to be applied to the law." (R. p. 5). Importantly, the circuit court made no substantive rulings on the issues raised at that time. (See id.). Over the next eighteen months, the parties engaged in extensive discovery. Alston, Mother, and their purported expert, Dr. Daniel Durbin, were deposed. Additionally, the parties exchanged written discovery in the form of

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[1] Respondent South Carolina High School League respectfully could not adopt Appellants' statement of the case as written. See Rule 208(b)(1)(C), SCACR (providing that the appellant's "statement [of the case] shall not contain contested matters"); Rule 208(b)(2), SCACR (noting "that a statement . . . of the case need not be made unless the respondent is dissatisfied with the statement . . . of the case by appellant").

[2] S.C. Code Ann. §§ 15-78-10 through -220 (2005 & Supp. 2016).

interrogatories, requests for production, and requests for admission. Following discovery, the District, the League, and Appellants filed cross-motions for summary judgment. (R. pp. 35–39, 107).

On April 11, 2017, the circuit court held a hearing on the parties' cross-motions for summary judgment. (R. pp. 343–82). All parties submitted extensive briefs and numerous exhibits in support of their motions for the court's consideration. (R. pp. 40–139). After hearing the arguments of counsel, the court decided to take the motions under advisement. (R. p. 381). The court indicated it wanted to review Dr. Durbin's deposition transcript, in particular, prior to ruling on the motions. (Id.). Subsequently, on April 17, 2017, the court granted summary judgment in favor of the League, and denied the District's and Appellants' motions for summary judgment, via Form 4 order. (R. pp. 6–8). Appellants then filed a timely Rule 59(e), SCRCP, motion to alter or amend judgment, (R. pp. 140–41), and the court denied their motion in a Form 4 order dated June 8, 2017. (R. pp. 9–11). This appeal followed.

STATEMENT OF FACTS

Although Alston was informed he needed a physical form completed before the first day of spring practice, he never obtained one prior to stepping onto the football practice field in May 2013. (R. p. 157). Alston did not have a signed parental permission form on file at Beaufort High School either. (See id.). Alston—who was sixteen years old at the time—nevertheless attended at least three practices over the next two weeks, during which he wore cleats his father had purchased for him. (R. p. 158). At some point prior to Alston's injury, he testified that Mother became upset with him for attending football practice. (R. p. 159). While Mother instructed Alston not to return to practice, she never called the school to complain to the coaches or the principal,

nor did she contact anyone at the League. (Id.). Thereafter, Alston was participating in practice when two teammates tackled him, tearing his ACL and meniscus in his right knee. (R. p. 13).

The League constitution in effect at the time of this incident required member high schools to maintain various forms to verify the eligibility of their student athletes:

> Each school shall keep on file for all student athletes, a copy of an official birth certificate, a duplicate copy of all submitted eligibility forms, transfer form (if applicable), a parent's permission record properly filled out and a physical form properly completed by a licensed medical doctor or a certified physician's assistant in a written collaboration with a licensed medical doctor.

(R. p. 73). The League constitution also required each member school to provide a roster of participating student athletes for every sport "at least seven days before the first regular season contest." (Id.). By submitting this roster to the League, the member school certified the eligibility of each student athlete and confirmed it received all necessary information outlined in article VII, section 16(C).

Alston testified that he does not know anybody from the League, and he never saw any League staff present on the football field during spring practice at Beaufort High School. (R. p. 160). Nevertheless, Appellants allege the League—which was comprised of 207 member schools at the time—was grossly negligent in allowing Alston to participate without a physical or parental permission form on file. The League, of course, is not responsible for collecting forms on the practice fields for each member high school. Nor is the League responsible for making an eligibility determination before a student athlete is allowed to practice. The League merely promulgates the rules requiring each member high school to obtain the forms necessary to certify the eligibility of all student athletes. Indeed, those rules expressly state that "[e]ligibility is the responsibility of the principal and the principal must sign all eligibility forms." (R. p. 72).

In light of the foregoing, the League filed a motion for summary judgment. Because the League is immune from suit pursuant to subsection 15-78-60(4) of the Tort Claims Act and Appellants failed to produce any evidence of gross negligence, this Court should affirm the circuit court's grant of summary judgment in favor of the League.

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the [circuit] court pursuant to Rule 56(c), SCRCP." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. Ellis v. Davidson, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004); Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a factfinder." S. Glass & Plastics Co. v. Duke, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." BPS, Inc. v. Worthy, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005).

Having set forth the lens through which the Court must review the circuit court's grant of summary judgment, the League will proceed to the issues that are properly before the Court with these principles in mind. As explained in greater detail below, the circuit court correctly granted summary judgment in favor of the League, and this Court can affirm on any or all of the grounds raised in the League's motion. See Rule 220(c), SCACR (asserting that "[t]he appellate court may

affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal").

ARGUMENT

I. THE COURT SHOULD DECLINE TO ADDRESS APPELLANTS' AGENCY AND VICARIOUS LIABILITY ARGUMENTS BECAUSE THESE ISSUES ARE NOT PRESERVED FOR APPELLATE REVIEW.

As a preliminary matter, the Court should decline to address Appellants' agency theory and their argument that the League can be held vicariously liable for the District's alleged gross negligence because Appellants raised these issues for the first time in their Rule 59(e), SCRCP, motion and, therefore, they are not preserved for appellate review.

A Rule 59(e), SCRCP, motion provides a vehicle through which a party may (1) request that the circuit court reconsider matters properly encompassed in a decision on the merits or "alter or amend" its judgment, or (2) attempt to obtain a ruling on issues or arguments previously raised to the court. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21–22, 602 S.E.2d 772, 779 (2004). It is well-settled that a party cannot use a Rule 59(e) motion to raise an issue for the first time to the circuit court when the party could have raised it prior to judgment but failed to do so. See Gartside v. Gartside, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995); JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 189 (3d ed. 2016).

In their Rule 59(e) motion, Appellants sought to argue for the first time that Beaufort High School, a member school, is an agent of the League such that the League can be held vicariously liable for the member school's alleged gross negligence. (R. pp. 142–43). Appellants even appeared to concede this argument was being raised for the first time in their motion. In their supplement to the motion, Appellants accompanied this new theory with phrases like "putting

aside all the arguments made previously for denial of the . . . League's motion for summary judgment" and "this would be an independent and further ground for" denying summary judgment. (R. p. 142). A review of their complaint confirms Appellants never alleged an agency relationship between the District—or the member school for that matter—and the League, nor did they allege a theory of vicarious liability stemming from this purported relationship.[3] (See R. pp. 12–16). Appellants likewise failed to raise this issue in their cross-motion for summary judgment or memorandum in opposition to the League's and the District's motions for summary judgment. See (R. pp. 37, 127–39). Instead, they waited until filing a Rule 59(e) motion to bring this issue to the circuit court's attention. (See R. pp. 142–43).

Because Appellants raised the issue for the first time in their motion to alter or amend judgment, neither Appellants' agency theory nor their argument that the League is vicariously liable for the acts of the District are preserved for this Court's review. Appellants cannot raise a new issue whole cloth after the entry of a final judgment. See, e.g., Gartside, 383 S.C. at 43, 677 S.E.2d at 625 (asserting that "a party cannot use a Rule 59(e) motion to present to the . . . court an issue the party could have raised prior to judgment but did not"). Accordingly, the Court should decline to address this issue.[4]

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT GIVEN THAT THE LEAGUE IS IMMUNE FROM SUIT PURSUANT TO SUBSECTION 15-78-60(4) OF THE TORT CLAIMS ACT AND APPELLANTS FAILED TO PRODUCE ANY EVIDENCE OF GROSS NEGLIGENCE.

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[3] Indeed, Appellants' respondeat superior argument is wholly inconsistent with their previous position that two damages caps should apply due to two separate acts of alleged gross negligence by the District and the League. (R. p. 136).

[4] Even on the merits, Appellants' claim must fail. As explained in greater detail in Part II.B, infra, the League's enforcement of a rule does not amount to control over member schools for which vicarious liability would attach. Appellants find no refuge in suing the League for a member school's alleged gross negligence in failing to comply with the rules regarding physicals and parental permission forms because the member school is responsible for collecting these forms, not the League. Indeed, Appellants' own purported expert acknowledged the District and the League have different responsibilities. (R. p. 318).

Turning to the merits, the Court should affirm the circuit court's order granting summary judgment in favor of the League because (1) the League is entitled to immunity under the Tort Claims Act; and (2) in any event, Appellants failed to produce any evidence of gross negligence.

A. The League is Entitled to Immunity Under the Tort Claims Act.

The circuit court properly granted summary judgment in favor of the League because it is immune from liability under the Tort Claims Act for claims stemming from the League's alleged failure to enforce a rule.

"The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 280, 607 S.E.2d 711, 714 (Ct. App. 2005). "The Tort Claims Act waives immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties." Pike v. S.C. Dep't of Transp., 343 S.C. 224, 230, 540 S.E.2d 87, 90 (2000).

Section 15-78-60 of the South Carolina Code (2005) sets forth a list of numerous exceptions to the State's waiver of immunity. As our appellate courts have long recognized,[5] "[t]he provisions of the Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting [the] liability of the State." Graham v. Town of Latta, 417 S.C. 164, 183, 789 S.E.2d 71, 81 (Ct. App. 2016) (alteration in original) (quoting Hawkins v. City of Greenville, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (Ct. App. 2004)); see also S.C. Code Ann.

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[5] Appellants' assertion that "exceptions in statutes are to be construed strictly not broadly, so any doubt as to the application of an exception to the waiver of immunity will be against such an exception," App. Br. 10, is a fundamental misstatement of the law. Section 15-78-20 instructs courts to do just the opposite.

§ 15-78-20 (2005) (asserting that the provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State").

Subsection 15-78-60(4), in relevant part, provides the State is not liable for loss resulting from 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."

As noted above, the League's constitution in effect at the time of this incident required member schools to maintain various forms to verify the eligibility of their student athletes:

> Each school shall keep on file for all student athletes, a copy of an official birth certificate, a duplicate copy of all submitted eligibility forms, transfer form (if applicable), a parent's permission record properly filled out and a physical form properly completed by a licensed medical doctor or a certified physician's assistant in a written collaboration with a licensed medical doctor.

(R. p. 73). The League constitution also required each member school to provide a roster of participating student athletes for every sport "at least seven days before the first regular season contest." (Id.). By submitting this roster to the League, the member school certified the eligibility of each student athlete and confirmed it received all necessary information outlined in article VII, section 16(C). In fact, the Certificate of Eligibility form has a statement above the principal's signature line that reads, "I have on file a physical and parent's permission form for each student." (R. p. 75).

The instant case stems from an allegation that the League failed to enforce its rule requiring that each student athlete have a physical and parental permission form on file prior to participating in sports. In an effort to circumvent the effects of subsection 15-78-60(4), Appellants contend their claims center on the League's alleged failure to monitor and supervise member schools. Specifically, Appellants contend the League was grossly negligent in failing to ensure Beaufort

High School followed the League's rules regarding physical and parental permission forms. Even if the Court accepts this phrasing, Appellants' claims cannot be divorced from the fact that the only allegation against the League is that it failed to monitor and supervise Beaufort High School's compliance with the League's rules. The crux of these allegations is that the League failed to enforce or comply with its own rule. Accordingly, the circuit court properly found the League was entitled to immunity under the Tort Claims Act. See S.C. Code Ann. § 15-78-60(4) (providing the State is not liable for loss resulting from 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").

The present case is analogous to Adkins v. Varn, 312 S.C. 188, 439 S.E.2d 822 (1993). In that case, the plaintiff sued Greenville County for failing to enforce its county animal control ordinance after a thirteen-year-old bicyclist was chased into traffic by vicious dogs and killed. Id. at 189, 439 S.E.2d at 823. The circuit court granted summary judgment in favor of the county, finding it was immune from suit under subsection 15-78-60(4). Id. at 189–90, 439 S.E.2d at 823. Our supreme court affirmed the circuit court's finding of immunity, concluding that even if the county was negligent in not responding to prior complaints and picking up the dogs, the county was still immune from suit because the allegations merely stated a claim that the county failed to follow and enforce its own ordinance. Id. at 191–92, 439 S.E.2d at 824.

Similarly, in this case, the only allegation of gross negligence against the League stems from its failure to make sure that Beaufort High School followed the eligibility rules set forth in the League's constitution by checking to ensure Alston had the requisite forms prior to playing football. Because Appellants' claim falls squarely within the exception provided in subsection 15-78-60(4), the League is entitled to immunity from suit under the Tort Claims Act and summary

judgment was proper. See Adkins, 312 S.C. at 192, 430 S.E.2d at 824; S.C. Code Ann. § 15-78-20 (asserting that the provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State"); see also Citizens for Lee Cty., Inc. v. Lee Cty., 308 S.C. 23, 28, 416 S.E.2d 641, 644 (1992) (asserting that, when the terms of a statute "are clear and unambiguous," the court is "required to apply them according to their literal meaning").

B. Appellants Produced No Evidence of Gross Negligence.

In the alternative, the circuit court properly granted summary judgment in favor of the League because Appellants failed, as a matter of law, to produce any evidence of gross negligence on the part of the League.

"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) (per curiam). In other words, "gross negligence is the failure to exercise slight care." Clyburn v. Sumter Cty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). "Gross negligence is ordinarily a mixed question of law and fact." Proctor v. S.C. Dep't of Health & Envtl. Control, 368 S.C. 279, 294, 628 S.E.2d 496, 504 (Ct. App. 2006). "When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court." Clyburn, 317 S.C. at 53, 451 S.E.2d at 887–88.

To prevail on their gross negligence claim, Appellants were required to show (1) the League owed a duty to ensure Alston did not practice football without a physical or parental permission form, (2) the League breached its duty by failing to exercise slight care, (3) Alston was injured, and (4) the League's breach of its duty proximately caused his injuries. See Rice v. Sch. Dist. of Fairfield, 317 S.C. 87, 93, 452 S.E.2d 352, 355 (Ct. App. 1994) (per curiam). For the

reasons set forth below, summary judgment was proper because Appellants failed to show the League breached any duty that proximately caused their injuries.

1. The League Owes No Duty to Check Each Student Athlete's Forms.

First, Appellants failed to establish that the League owed a duty to ensure Alston had a physical and parental permission form on file prior to him stepping onto the practice field.

It is well settled that, "[f]or negligent conduct to become actionable, it must violate some specific legal duty owed to the plaintiff. In the absence of a legal duty to prevent an injury, foreseeability of that injury is an insufficient basis on which to rest liability." Rice, 317 S.C. at 93, 452 S.E.2d at 355 (internal citation omitted). "[T]he court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff."[6] Huggins v. Citibank, N.A., 355 S.C. 329, 332, 585 S.E.2d 275, 276 (2003). If no duty exists, then "the defendant is entitled to judgment as a matter of law." Id.

The League does not have a legal duty to ensure that every single student athlete at each member high school in South Carolina has a physical and parental permission form on file before stepping onto the practice field. First, the League did not assume a duty—via its rules, bylaws, constitution, or otherwise—to collect or check forms on the practice field for every school. Rather, that responsibility rests with member schools such as Beaufort High School. Under the League's constitution, each member school is required to keep copies of physicals and parental permission forms on file at the school, and the school then certifies that it has complied with the rules by signing an eligibility form. (R. pp. 72–75).

To be sure, the League is at least two steps removed from the determination of whether a student at any given school is eligible to practice with a specific sports team. The League does not

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[6] Appellants' contention that duty "is a triable question of fact for the jury," App. Br. at 13, is a fundamental misstatement of the law. It is well settled that duty is a question of law for the court.

have employees on the field collecting forms and has no way of knowing which students will try to participate on a member school's sports team. Indeed, as the District noted, the first person at the school level with this knowledge would be the team's coach or athletic trainer. (R. p. 111). Then, depending upon how the school implements processes to collect the required eligibility forms, including the physical and parental permission forms, the chain of responsibility would go from the coach up to the athletic director and to the principal of the member school. But the League has no involvement in the process until the member school certifies it has collected the requisite forms for all student athletes on a particular team at that school. Even then, the necessary forms are not sent to the League for safekeeping or review.

Contrary to Appellants' arguments, the League does not have total authority over every aspect of interscholastic activities in South Carolina. Like many regulatory bodies in this state, the League promulgates rules and regulations through the legislative process set forth in its constitution and bylaws. The League gives discretion to members schools as to how they will comply with the various rules and regulations adopted by the members of the League. As to the collection of physicals and parental permission forms, for example, the League does not control how the requirements for participation are communicated to students and parents, when and if a member school will coordinate physicals for student athletes, how a member school internally assigns the responsibility for collecting these forms, or how a member school maintains the paperwork in its files. (R. pp. 79–80). Further, with respect to football, once a school has complied with the eligibility rules, the League does not decide who plays on the team, which equipment is used, what uniforms are purchased, how many coaches to hire, how to schedule games, or how to organize practices. (See id.). Each of these decisions rests with the coach or principal at the member school.

The League merely promulgated the rule requiring that member schools collect various forms, including physicals and parental permission forms, to verify the eligibility of each student athlete. In doing so, the League did not assume a duty to collect and analyze the eligibility requirements of each student athlete prior to participation. As a practical matter, it would have been administratively impossible for the League's staff of nine individuals to undertake this responsibility for the fall, spring, and winter sports teams for its 207 member schools during the 2012–2013 school year. (R. p. 50). Instead, under the League's constitution, that responsibility rests with the principal of each member school. (R. p. 72). And if any doubt exists as to eligibility, then "the case should be presented in written detail to the [League] Commissioner." (Id.). The League, of course, never received any complaints or questions surrounding Alston's eligibility.

In sum, the League owes no duty to ensure all required forms are present before each student athlete steps on the field. The League's rules only impose a duty on a member school's principal to certify each student athlete is eligible to participate. Therefore, Appellants' gross negligence claim fails as a matter of law because they cannot allege a cognizable duty the League owed to Alston or his Mother. See Rice, 317 S.C. at 93, 452 S.E.2d at 355 (stating that, "[f]or negligent conduct to become actionable, it must violate some specific legal duty owed to the plaintiff"); Huggins, 355 S.C. at 332, 585 S.E.2d at 276 (asserting if no duty exists, then "the defendant is entitled to judgment as a matter of law"). Further, summary judgment was not "inconsistent," as Appellants contend, because the League and the District are separate entities with different responsibilities.

2. *Appellants Failed to Demonstrate the League Breached Any Duty.*

Second, even assuming, arguendo, the Court finds Appellants demonstrated the League owed a duty to monitor its member schools' compliance with eligibility requirements, Appellants failed to show the League acted without slight care in this case.

To demonstrate a breach of duty, Appellants were required to show the League "fail[ed] to exercise slight care," Clyburn, 317 S.C. at 53, 451 S.E.2d at 887, by (1) intentionally and consciously failing "to do something which it [was] incumbent upon [the League] to do," or (2) doing something "intentionally that [the League] ought not to do," Etheredge, 341 S.C. at 310, 534 S.E.2d at 277. Appellants failed to put forth evidence that the League's conduct would fall under either category and, therefore, did not meet their burden of proving the League breached a duty.

To the extent the League owed any duty, a point which the League does not concede, the only competent evidence in the record demonstrated the League—at a minimum—acted with slight care. The League did the following to encourage its member schools to comply with article VII, section 16 of the League's constitution: (1) held two workshop meetings per year for new principals and new athletic directors in which it focused on student eligibility issues and eligibility forms, including the Certificate of Eligibility form that requires each principal to attest that the parental permission and physical forms are on file at the school; (2) held four meetings per year to certify head coaches who were not employed by the school, parts of which included discussions about safety rules, including the rule requiring a pre-participation physical exam; (3) held two meetings per year for each classification, requiring the attendance of every principal and athletic director in Class AAAA, of which Beaufort High School was a member, and discussed eligibility form requirements at these meetings; (4) held five regional meetings per year with coaches and officials to discuss football rules and rule changes, and in these meetings, the League's Football Pre-Season Practice Plan was discussed, which includes a statement that "[a]ll athletes must have

a pre-participation physical exam before athletic participation"; (5) during the 2012–2013 school year, the League's Executive Committee approved a new physical form that could be used in addition to the existing one, and member schools received information regarding the adoption of the new form; and (6) during the 2012–2013 school year and in previous years, the League staff periodically published a "League Update" newsletter that often urged attendance at the various meetings described above and encouraged member schools to confirm the accuracy of the Certificate of Eligibility forms. (R. pp. 84–86).

In light of the League's efforts to ensure compliance with the rule requiring pre-participation physicals and parental permission forms, Appellants failed to establish a genuine issue of material fact as to whether the League acted with slight care. As demonstrated in the nonexhaustive list of actions taken above, the League acted with more than slight care and, therefore, breached no duty to Appellants. At the hearing, however, Appellants countered that the testimony of their purported expert, Dr. Dan Durbin, demonstrated the League breached a duty to try to defeat summary judgment on this issue. Dr. Durbin's testimony created no genuine issue of material fact for three reasons.

First, Dr. Durbin admitted he never looked at the specifics of this case and acknowledged he could not offer an opinion as to the League. The following testimony is instructive:

> A: All I've said is are there processes in place to make sure your representatives can do that. If you can prove that, then—then there's no discussion for me. If that can't be proven, then the discussion is, after you're done with this case, what are you going to do to make sure it is?
>
> Q: All right. And then I guess my follow-up is, then, you do not have an opinion in this case as to whether or not there are appropriate processes in place?
>
> A: That's because I don't—I intentionally haven't got [sic] involved in the details of the case.

(R. pp. 254–55). Dr. Durbin repeated similar testimony several times throughout his deposition. (R. pp. 250, 271, 327 & 329).

Second, Dr. Durbin's thoughts on whether the appropriate processes were in place for collecting physical forms and parental permission forms did not constitute evidence of a standard of care for a state high school athletic association. Dr. Durbin admitted he only checked to see how one other state association handled similar situations, and it was consistent with the League's requirements in South Carolina. (R. pp. 213–14). Therefore, his testimony was insufficient to raise a question about the League's processes in place with respect to an accepted standard of care. Cf. Guinan v. Tenet Healthsystems of Hilton Head, Inc., 383 S.C. 48, 56, 677 S.E.2d 32, 37–38 (Ct. App. 2009) (holding an expert's testimony was insufficient to survive summary judgment because the testimony, at most, showed the defendant deviated from the expert's personal standard rather than the general recognized and accepted standard of care).

Additionally, given that the standard in this case is one of gross negligence, it should be noted that Dr. Durbin agreed that the League had processes in place to ensure member schools were complying with the rule regarding parental permission and pre-participation physical forms. (R. p. 271). Although he believed additional steps could have been taken, that does not negate the fact that the League exercised slight care. See Pack v. Assoc. Marine Inst., Inc., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004) (holding the fact that more could have been done does not negate a finding that the defendant exercised slight care). In their brief, Appellants point to Dr. Durbin's testimony that "[s]omeone has to get the blame[. S]omething bad happened." App. Initial Br. at 13. This actually was a statement made by Appellants' counsel during Dr. Durbin's deposition. (R. p. 340). Irrespective of who said it, this contention is without merit because our appellate courts have long refused to recognize the doctrine of res ipsa loquitur. See, e.g., King v.

J.C. Penney Co., 238 S.C. 336, 339–40, 120 S.E.2d 229, 230 (1961) ("South Carolina has consistently refused to adopt the doctrine of res ipsa loquitur . . . . In this State it is well settled that the burden rests upon the party to prove negligence. This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence."); Snow v. City of Columbia, 305 S.C. 544, 555, 409 S.E.2d 797, 803 (Ct. App. 1991) ("No inference of negligence arises from the mere fact of injury.").

Finally, as to Dr. Durbin's testimony, his main question regarding "processes" focused on whether the League communicated eligibility form requirements with school personnel. As previously noted, the League produced evidence of numerous meetings, workshops, and communications between the League staff and principals, athletic directors, and coaches that took place prior to the incident at issue in this case. See, e.g., (R. pp. 84–86); Clyburn, 317 S.C. at 53, 451 S.E.2d at 887–88 (observing that, "[w]hen the evidence supports but one reasonable inference, . . . the question [of gross negligence] becomes a matter of law for the court"). Thus, any potential concerns he raised during his deposition were more than adequately addressed. More importantly, when asked if he intended to offer opinions about gross negligence in this case, Dr. Durbin said he would have to look at additional materials before answering the question. (R. pp. 254–55, 327).

In sum, assuming without conceding the League owed a recognized legal duty to Appellants, the only evidence in the record shows the League acted with more than slight care to ensure its member schools complied with the eligibility requirements for student athletes and, therefore, Appellants failed to demonstrate the breach prong of their gross negligence claim. See Etheredge, 341 S.C. at 310, 534 S.E.2d at 277; Guinan, 383 S.C. at 56, 677 S.E.2d at 37–38; Pack,

362 S.C. at 246, 608 S.E.2d at 138. Simply put, Dr. Durbin's testimony was insufficient to establish that the League breached a duty.[7]

3. *Appellants Failed to Establish Proximate Cause.*

Third, Appellants cannot show that the failure to obtain the requisite eligibility forms proximately caused their injuries.

Gross negligence is not actionable unless it proximately causes a plaintiff's injury. See Driggers v. S. Ry. Co., 169 S.C. 157, 160, 168 S.E. 185, 186–87 (1933). "Proximate cause requires proof of both causation in fact and legal cause." Hurd v. Williamsburg Cty., 353 S.C. 596, 611, 579 S.E.2d 136, 144 (Ct. App. 2003). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Oliver v. S.C. Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992) (quoting Whitlaw v. Kroger Co., 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991)). "Legal cause . . . is proved by establishing foreseeability." Hurd, 353 S.C. at 611, 579 S.E.2d at 144. "The standard by which foreseeability is determined is that of looking to the 'natural and probable consequences' of the complained of act." Young v. Tide Craft, Inc., 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978).

In other words, "[a] negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Hurd, 353 S.C. at 612, 579 S.E.2d at 144. "An act or omission that does no more than furnish the condition or give rise to the occasion by which the injury is made possible is not the proximate cause of the injury." Shepard v. S.C. Dep't of Corr., 299 S.C. 370, 374, 385 S.E.2d 35,

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[7] In any event, the breach prong is irrelevant in the absence of a duty. As noted above, duty is a question of law for the court, and Appellants failed to demonstrate the League owed a cognizable legal duty in this case. Moreover, Dr. Durbin offered no testimony about proximate cause or the issue of immunity. In short, Dr. Durbin addressed only a small piece of the puzzle in this case, and his testimony failed to demonstrate that the League acted in a grossly negligent manner.

37 (1989). Proximate cause is the efficient or direct cause—the very thing which brings about the complained of injuries. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977).

Here, the failure to obtain physical and parental permission forms was not the very thing which brought about Appellants' injuries. See id. The lack of forms did not cause Alston to tear his ACL; instead, it merely gave rise to the occasion for Alston to be on the practice field on the day he was injured. Cf. Shepard, 299 S.C. at 374, 385 S.E.2d at 37. Stated differently, any student athlete on the football field has a risk of tearing an ACL, and the fact that Alston did not have a physical or parental permission form on file prior to entering the field did not make it more or less likely that he would suffer an acute injury while being tackled by another player.

The present case is analogous to Shepard. In that case, the South Carolina Department of Corrections (SCDC) and the South Carolina Department of Highways and Public Transportation (Highway Department) were sued after a prisoner assigned to work on a Highway Department road crew escaped and went on a crime spree, raping and murdering several individuals, including the decedent. Shepard, 299 S.C. at 372–73, 385 S.E.2d at 36. The plaintiffs alleged various acts of negligence on the part of the defendants, including violations of SCDC and Highway Department policies, which allowed the prisoners to escape. Id. at 373–74, 385 S.E.2d at 37. Following a bench trial, the circuit court granted the defendants' motion to dismiss. Id. at 372, 385 S.E.2d at 36. The court of appeals affirmed, finding the defendants' negligence did nothing more than furnish the condition or give rise to the occasion by which the prisoner was able to cause the death of the decedent. Id. at 376, 385 S.E.2d at 38. According to the court, the defendants' alleged conduct, in and of itself, did not directly bring about the injury. Id. Thus, the court affirmed the circuit court's finding that the plaintiffs failed to establish proximate causation. Id.

Like the entities in Shepard, the League's alleged failure to enforce or ensure compliance with its rule requiring physical and parental permission forms did not naturally and probably lead to the injury in this case. Alston's acute injury to the knee was caused by tackling, and Appellants failed to present any evidence to establish a causal connection between the absence of eligibility forms and the knee injury Alston sustained. In their brief, Appellants complain that Alston "never should have been allowed on the field." App. Br. at 2. This court, however, rejected the same argument in Shepard and asserted that "[a]n act or omission that does no more than furnish the condition or give rise to the occasion by which the injury is made possible is not the proximate cause of the injury." 299 S.C. at 374, 385 S.E.2d at 37. That principle is directly on point here because the alleged failure to collect forms did no more than give rise to the occasion by which Alston's tackling injury was made possible on the football field.

Therefore, summary judgment was proper because Appellants failed to establish proximate cause. See id.; Hughes, 269 S.C. at 398, 237 S.E.2d at 757; see also Barrett v. Phillips, 223 S.E.2d 918, 919–20 (N.C. Ct. App. 1976) (upholding grant of summary judgment in favor of the North Carolina High School Athletic Association following an injury to the plaintiff after a 20-year-old student who caused the injury had been allowed to participate in violation of the age rule because the rule violation was not a proximate cause of the plaintiff's injuries).

4. Appellants' Theories Are Unsupported by South Carolina Law.

Finally, the League never assumed a duty in loco parentis, and Appellants' attempt to create a new theory to establish a heightened duty owed by the League finds no support in South Carolina

law. Nor was an agency relationship created that would allow vicarious liability to attach to the League for the alleged gross negligence of a member school.[8]

Our appellate courts have not recognized Appellants' purported in loco parentis theory in this context and, thus, their heightened duty argument is without merit. In support of their argument, Appellants rely upon Stanley v. Gary, 237 S.C. 237, 116 S.E.2d 843 (1960), superseded by statute as recognized in Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861 (1996). But the Stanley case does not stand for the propositions for which it was cited. In Stanley, our supreme court held the circuit court properly dismissed the case because the appellants had failed to exhaust their administrative remedies prior to asking the court to exercise jurisdiction over the matter. 237 S.C. at 246, 116 S.E.2d at 847.

The Stanley court only mentioned the phrase in loco parentis twice in its opinion. In its first reference, the court quoted a 1952 statute providing, in relevant part, that "any parent or person standing in loco parentis to any child of school age . . . aggrieved by any decision of the board of trustees of any school district in any matter or local controversy . . . may appeal the matter in controversy to the county board of education." Id. at 241, 116 S.E.2d at 845 (quoting Code of Laws of S.C. § 21-230 (1952)). The second reference was in the context of the court's conclusion that the complaint at issue in Stanley was "a matter of local controversy" and, under the statute, "the parent or person in loco parentis . . . had the right to appeal from any action of the supervising principal to the Board of Trustees" and then "to the County Board Education, and from there to the [c]ircuit [c]ourt." Id. at 245, 116 S.E.2d at 847. Nowhere in the Stanley opinion did the court mention a separate, heightened duty arising out of an in loco parentis relationship.

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[8] As noted above, Appellants' agency and vicarious liability arguments are not preserved for appellate review. Nevertheless, without waiving its preservation argument, the League will briefly address the merits.

In Doe v. Greenville County School District, however, our supreme court did address whether the circuit court properly dismissed the plaintiffs' claims for breach of fiduciary duty and breach of an assumed duty in loco parentis. 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007). The court agreed with the circuit court's analysis and concluded the plaintiffs' claims "were based solely on their claim of negligent supervision," and "these causes of action were alleged as an attempt to heighten any duty owed by the School District." Id. at 72, 651 S.E.2d at 310.

As the Doe court noted, the General Assembly had already "provided that the School District may be liable for negligent supervision of a student only if that duty was executed in a grossly negligent manner." Id. (citing S.C. Code Ann. § 15-78-60(25)). According to the court, the plaintiffs had "not alleged any facts under which [it] could find another duty owed by the School District other than the duty of supervision as outlined by the Tort Claims Act." Id. Thus, the court affirmed the circuit court's dismissal of the causes of action sounding in breach of fiduciary duty and breach of an assumed duty in loco parentis. Id.; see also id. at 75, 651 S.E.2d at 311 (Pleicones, J., concurring in part and dissenting in part) (observing that the circuit court dismissed the plaintiffs' "claims for breach of an assumed duty in loco parentis and breach of fiduciary duty" and finding "no error in the [circuit] court's conclusion that these two heightened duties do not exist" "in a school–student setting").

Like the plaintiffs in Doe, Appellants contend the League assumed a duty stemming from an alleged in loco parentis relationship with Alston. As noted above, the Doe court expressly rejected a similar attempt to impose a new heightened duty on a school district in the school–student setting. Here, the parties are even one step further removed. Appellants seek to create a heightened duty for the League, whose representatives have never interacted with Alston, by

alleging an in loco parentis relationship was created by virtue of the League promulgating rules for participation in high school football.

In loco parentis is defined as "[o]f, relating to, or acting as temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent." In loco parentis, BLACK'S LAW DICTIONARY (10th ed. 2014). Given that our supreme court rejected the invitation to recognize this theory on the school–student level, it would defy reason to extend the theory one step further to apply to the League in this context. In any event, Appellants have failed to allege—nor can they allege—any facts showing that the League took any actions to assume the responsibilities of a parent that would give rise to such a relationship. Simply put, Appellants' argument that the League assumed a heightened duty in loco parentis is without merit and was raised solely in an effort to circumvent the provisions of the Tort Claims Act. The Court should reject this argument for the same reasons our supreme court articulated in Doe.

Additionally, Bruce v. South Carolina High School League, 258 S.C. 546, 189 S.E.2d 817 (1972), does not stand for the proposition for which it was cited by Appellants. Our supreme court did not once mention the word "control" in Bruce, nor did the court espouse the theory that the League "is in complete control of high school football in the State of South Carolina." Rather, the Bruce court held that the League's enforcement of an eligibility rule did not violate two students' due process and equal protection rights, and it did not arbitrarily deprive them of the right to participate in interscholastic athletics. Id. at 551–53, 189 S.E.2d at 819–20.

Expounding on their control theory, Appellants seek to argue that the League is "responsible both for [its] own grossly negligent monitoring, supervision and training of a member school" and "as principal for the grossly negligent acts of [its] agent," the District, "a member of [the League]." App. Initial Br. at 4. As noted above, this argument is not preserved for appellate

review and the Court should decline to address it. Even when putting aside preservation concerns, this argument is without merit.

"Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf." Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct. App. 1992). "An agency relationship may be established by evidence of actual or apparent authority." Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP, 359 S.C. 635, 642, 598 S.E.2d 717, 721 (Ct. App. 2004). "While actual authority is expressly conferred upon the agent by the principal, apparent authority is when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority." Richardson v. P.V., Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009).

Appellants failed to allege, nor can they allege, any facts to demonstrate an agency relationship was created between the League and its member schools. An analogy akin to the situation at hand is very instructive. Lawyers who are members of the South Carolina Bar agree to adhere to the rules promulgated by the Supreme Court of South Carolina. Our supreme court likewise retains the authority to enforce its rules and levy penalties against members of the bar for failure to comply with the rules. Among these rules is a requirement that each lawyer obtain a certain amount of continuing legal education (CLE) requirements each year. When a lawyer fails to certify that he obtained the requisite CLE credits in a given year, the court retains the authority to administratively suspend that lawyer. Assume that, for some reason, the court failed to suspend a lawyer who did not meet the CLE requirements and that lawyer then committed legal malpractice. The supreme court, of course, would not be liable to a client for the alleged negligent acts of the member of the bar that gave rise to the legal malpractice claim.

Just as the supreme court is not liable to a third party for a member of the bar's failure to comply with all rules and regulations, the League cannot be liable to a student athlete for a member school's alleged failure to comply with its rules governing eligibility requirements. And just as lawyers do not act as agents of our supreme court, member schools do not act as agents of the League. Therefore, to the extent Appellants' arguments are preserved for this Court's review, they are without merit.

The League cannot be held liable—under a theory of agency or vicarious liability—for a member school's failure to comply with a rule under the Tort Claims Act, and even if it could, Appellants failed to demonstrate the League acted with gross negligence. Moreover, the League took no actions to assume a duty in loco parentis over Alston and it does not retain the level of control over its member schools sufficient to shift liability upstream. Appellants introduced no evidence of a fiduciary or agency relationship to move forward under these theories, in part, because Appellants raised them for the first time in their Rule 59(e) motion. Accordingly, summary judgment was appropriate and the Court should affirm the circuit court's order.

III. THE CIRCUIT COURT APPROPRIATELY EXERCISED ITS DISCRETION IN DECIDING THE MOTION FOR SUMMARY JUDGMENT, AS WELL AS THE MOTION TO ALTER OR AMEND JUDGMENT, VIA FORM 4 ORDER AS PERMITTED BY THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Finally, the circuit court did not err in deciding the motions at issue in this case via Form 4 order. At the outset, the Court should decline to address this issue because it is manifestly without merit. See Rule 220(b)(2), SCACR ("The Court of Appeals need not address a point which is manifestly without merit."). Even on the merits, the Court should find the circuit court appropriately exercised its discretion in issuing Form 4 orders pursuant to the South Carolina Rules of Civil Procedure and the decisions of our appellate courts.

In support of their argument, Appellants heavily rely upon this Court's recent decision in Lollis v. Dutton, 421 S.C. 467, 807 S.E.2d 723 (Ct. App. 2017). Appellants, however, misstate the holding in that case. As this Court recognized, "findings of fact and conclusions of law are generally not required for decisions on motions." Id. at 487, 807 S.E.2d at 733. Indeed, under Rule 52(a), SCRCP, "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." In Lollis, this Court took issue with the circuit court summarily ruling upon all post-trial motions because Rule 37, SCRCP, and a statute required the court to make specific findings. 421 S.C. at 487, 807 S.E.2d at 733. Here, by contrast, the League filed a motion for summary judgment pursuant to Rule 56(c), and the rules expressly allowed the circuit court to rule upon this motion via Form 4 order without making specific findings of fact and conclusions of law. See Rule 52(a), SCRCP.

The circuit court's use of Form 4 orders was perfectly acceptable,[9] and no further explanation was required because the parties fully briefed the issues below and created an ample record for this Court to conduct meaningful appellate review in this case. See, e.g., Easterling v. Burger King Corp., 416 S.C. 437, 453, 786 S.E.2d 443, 452 (Ct. App. 2016) (finding "[t]he circuit court acted within its discretion in issuing a Form 4 order" and stating "the parties provided an ample record for th[e] court to conduct meaningful appellate review of the circuit court's grant of summary judgment and rule upon the merits of th[e] case"); Woodson v. DLI Props., LLC, 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014) (noting appellate courts apply the same standard as the

[9] The League takes issue with Appellants' contention that "clearly not much effort or attention was paid in the granting of a drastic remedy against a minor." App. Br. 14. Frankly, this unwarranted attack against a well-respected jurist is not supported by the record. The circuit court carefully considered all briefs and arguments of counsel, and the court took the motions under advisement to allow for time to review the deposition transcript of Appellants' purported expert. (R. pp. 380–81). Just because the court ruled against Appellants via Form 4 order does not mean the court did not think through or appreciate its ruling. Contrary to Appellants' assertions, the court fully considered this case. Appellants simply failed to meet their burden of proof.

circuit court under Rule 56(c), SCRCP, and finding the court of appeals had "a sufficient record before it to permit meaningful appellate review and make a decision on the merits"); Porter v. Labor Depot, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) (stating "not all situations require a detailed order, and the [circuit] court's form order may be sufficient if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal").

Our appellate courts have already addressed Appellants' meritless argument in the cases cited above, and this Court should decline Appellants' invitation to depart from the holdings in those cases. The record is complete in this matter and speaks for itself, and this Court has an ample record from which to conduct meaningful appellate review. See Easterling, 416 S.C. at 453, 786 S.E.2d at 452; Woodson, 406 S.C. at 527, 753 S.E.2d at 433; Porter, 372 S.C. at 568, 643 S.E.2d at 100; see also Rule 220(c), SCACR (asserting an "appellate court may affirm any ruling, order, decision[,] or judgment upon any ground(s) appearing in the Record on Appeal"). Accordingly, if the Court reaches the merits of this issue, it should affirm because the circuit court properly used Form 4 orders in granting summary judgment and denying Appellants' Rule 59(e) motion.

CONCLUSION

Based upon the foregoing, the Court should affirm the circuit court's order granting summary judgment. The League is immune from suit under the Tort Claims Act because Appellants' claims stem from its alleged failure to enforce a rule. Even when putting aside the issue of immunity, Appellants produced no evidence of gross negligence in this case. Indeed, to prevail on appeal, Appellants must demonstrate a genuine issue of material fact as to each element of gross negligence. As explained above, they cannot meet this burden. The Court should also find Appellants' vicarious liability and agency arguments are not preserved for appellate review.

Further, the Court should decline to address Appellants' argument regarding the use of Form 4 orders in this case because it is manifestly without merit.

Respectfully submitted,

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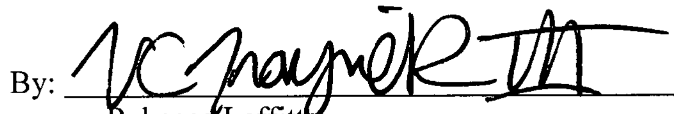
By: 

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