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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

At Charleston

ABIGAIL SHOEMAKER, MARY SHOEMAKER, and CHRIS SHOEMAKER

***Petitioners*,**

v.

TAZEWELL COUNTY PUBLIC SCHOOLS and KIMBERLY BENSON

Respondents

From the Circuit Court of Mercer County, West Virginia Civil Action No. CC-28-2021-C-97

PETITIONERS' BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding, as a matter of law, that Defendant Benson did not act with gross negligence as there was sufficient evidence from which a jury could have reasonably found that Defendant Benson acted with gross negligence.

2. The Circuit Court erred in granting Defendant Benson's Motion for Summary Judgment because the Circuit Court's ruling was based, in part, upon a material fact that was in dispute.

3. The Circuit Court erred by finding that Defendant Benson qualifies for immunity as a matter of law because Defendant Benson only qualifies for immunity is she did not act with gross negligence.

4. The Circuit Court erred in granting Defendant Benson's Motion for Summary Judgment based upon qualified immunity.

STATEMENT OF THE CASE

1. How fifteen-year- old Abigail Shoemaker nearly died during a high school swim team practice.

In the fall of 2019, Plaintiff Abigail Shoemaker was a sophomore at Graham High School of Tazewell County, Virginia, where she was on the swim team that was coached by Defendant Kimberly Benson. *See* AP 2-3. On November 14, 2019, Abby was practicing with her high school swim team at the Bluefield State College Pool Facility in Bluefield, West Virginia. *See* AP 2-3 and AP 82 (Benson Dep. Tr. at 48). While waiting for a class to exit the pool, Coach Benson instructed the swim team to perform various "dry land" activities. *See* AP 87 (Benson Dep. Tr. At 65). One such activity was "wall-sits," which Coach Benson directed to be performed against the glass wall in the Pool Facility. *Id.* and AP 2-3. While performing the wall-sit, the glass panel that Abby was leaning against shattered, causing her to fall downward. *See* AP 88 (Benson Dep. Tr. At

70) and AP 2-3. As Abby fell, she was impaled by several large pieces of sharp glass that severed an artery in her back, punctured a lung, broke a rib, and lacerated her diaphragm. *See* AP 815-816 (Dr. Adkins[1] Dep. Tr. at 10-13). Due to the severity of her injuries, Abby began to bleed profusely and went into hemorrhagic shock. *See* AP 823 (Dr. Wides[2] Dep. Tr. at 11); *see also*, the First Responder's Body Camera Video Footage included in electronic format with the Appendix, AP 1219.

To reiterate: Coach Benson told a group of high school students to press their backs into a glass wall, to then bend their legs so that they were squatting, making them push all the harder against the glass wall, and then had the students pass a weight back and forth, causing them to press against the glass wall even more forcefully. What then happened was that a panel of the glass wall the students were pushing against broke and sharp glass impaled Abby, causing a very large laceration in her back, and she started to bleed out. *See* AP 1219 - First Responder Video including in electronic format with the Appendix.

Abby was treated by EMS and transferred by ambulance to Bluefield Regional Medical Center ("BRMC") for stabilization. *See* AP 822-823 (Dr. Wides Dep. Tr. at 8-9). During the route, the EMS workers shared with Abby's father, Plaintiff Chris Shoemaker ("Chris"), the severity of Abby's injuries and told him that Abby's injuries and prognosis did "not look very good." AP 828 (C. Shoemaker Dep. Tr. at 7). At BRMC, Chris and Abby's mother, Plaintiff Mary Shoemaker ("Mary"), were told soon after Abby's arrival that the medical staff had a great deal of difficulty accessing Abby's veins and providing transfusions because Abby had lost so much blood that her

[1] Dr. Seth Adkins is a physician who treated Abby for her injuries after she was life-flighted from Bluefield, WV, to Charleston Area Medical Center.

[2] Dr. Kathleen Wides is an emergency room physician who treated Abby for her injuries at Bluefield Regional Medical Center.

veins had collapsed. *See* AP 834 (M. Shoemaker Dep. Tr. at 69). Chris and Mary were also informed at BRMC that Abby was within minutes, if not seconds, of dying because of her loss of blood. *See* AP 839 (Croye Dep. Tr. at 42-43).

After her initial emergency procedures, Abby was transported to Charleston Area Medical Center ("CAMC") via life-flight and was taken immediately into emergency surgery, which lasted several hours. *See* AP 815 (Dr. Adkins Dep. Tr. at 10-12). Abby was hospitalized for seven days at CAMC, including several days in the surgical trauma ICU. *See* AP 833 (M. Shoemaker Dep. Tr. at 50-52). She was released after several more days of treatment but was required to return to CAMC within 8-10 hours of her release due to medical complications arising directly from her injuries. *See Id.* She was hospitalized for an additional three days before the surgical team was able to identify the cause of her continuing distress – pooled blood around her lung which required an additional surgical procedure and a second chest tube for drainage. *See Id.*

2. A more detailed account of Coach Benson's knowledge and actions.

Coach Benson admitted, both at her deposition and in her Motion for Summary Judgment, that she instructed the swimmers to lean against the glass that broke and caused Abby's injuries. *See* AP 526 and 528 (Benson Dep. Tr. at 43, 65) and AP 46 (Benson's Memorandum of Law at 4). She also admitted at her deposition that, decades before Abby's incident in 2019, she had observed bullet holes in the glass wall on which she instructed the swimmers to lean (although admittedly she testified that she believed there were not holes in the pane of glass that caused Abby's injuries). *See* AP 526 (Benson Dep. Tr. at 41-44). Coach Benson never informed anyone at Bluefield State College ("BSC") about the presence of the bullet holes, nor expressed concern to anyone at TCPS about their presence and whether that made the BSC pool facility unsafe for practices. *See* AP 527 (Benson Dep. Tr. at 49).

TCPS admitted that the Graham High School principal recommended that Coach Benson be terminated from her position as Graham High School swim coach after the incident in which Abby was injured. *See* AP 537-538 (Dr. Stacy Dep. Tr. at 49-50). Coach Benson testified that she believed the principal wanted to remove her as swim coach because of the incident involving Abby. *See* AP 529 (Benson Dep. Tr. at 97). Indeed, Coach Benson admitted that she was told by the principal that "'In hindsight, which is 20/20, you probably shouldn't have had students perform the wall sits against a glass wall.'" AP 532 (Benson Dep. Tr. at 149). Unsurprisingly, Coach Benson's contract with TCPS was not renewed for the 2020-21 swim season. *See* AP 530 (Benson Dep. Tr. at 113-14).

Coach Benson admitted that she could have instructed the swimmers not to lean against the glass while performing wall sits. *See* AP 531 (Benson Dep. Tr. at 141). She further testified that, had the Graham High School swim team returned to BSC for swim practice, she would have made sure that the swimmers did not lean against the glass when performing wall sits. *See* AP 533 (Benson Dep. Tr. at 178).

With regard to her acts, at Coach Benson's direction, that caused her near-fatal injuries, Abby testified that the swimmers were instructed by Benson to do wall sits against the wall that had glass panels. Most significantly (in light of the Circuit Court's granting of Benson's Motion for Summary Judgment), Abby testified that the team had not done wall sits during swim practice before, nor (obviously) had leaned against the glass wall in doing so, and that she commented to the swimmer next to her (shortly before the incident): "Wouldn't it be crazy if the glass broke right now?" *See* AP 542-543 (A. Shoemaker Dep. Tr. at 13-15).

Patrolman K.N. Wright, the first officer to respond to the incident from the Bluefield Police force, testified with regard to his opinion as to the cause of the incident that led to Abby's injuries

as:

> There should be something in place as far as -- I mean, you have -- it's cold outside, there's no kind of -- that's not a safety glass or anything.· I think it's just like a regular single-pane glass. It's almost like putting your hand into a hot stove. You don't -- it's a tragedy is what it is. It's probably one of the most horrific things I've ever seen.
>
> Q. If it's not a freak accident, then how would you describe it?
>
> A. I don't think the child should have been -- or I don't think anybody should have been against the glass. I do see it as an accident. I don't know that it was a freak accident.

AP 547 (Patrolman Wright Dep. Tr. 62).

Plaintiffs' expert witness, Dr. Nancy Gartenberg, has described the following acts by Coach Benson as a breach of the standard of care as a guardian entrusted with Abby's well-being:

> Coach Benson breached her duty as a coach by failing to adjust the activity according to the availability of space, and instructed swimmers to perform conditioning/warm-up exercises in a facility without sufficient space to complete the exercise. Coach Benson failed to reasonably foresee and warn swimmers to not conduct wall-sits against glass windows. Any reasonable person would agree that doing any type of athletic activity against a window could foreseeably lead to risk of injury and harm. This is confirmed by her testimony that the School Principal told her that she should not have asked students to do wall-sits against a glass surface (which she knew had holes in it) and her subsequent non-renewal as a Head Swim Coach for the District. (Benson, pp. 16, 20, 97, 148-149).

AP 574 (Dr. Gartenberg Report at 24.).

Additionally, at her deposition Dr. Gartenberg opined that it would not have been acceptable for Coach Benson to have the swimmers do wall sits against the glass under any circumstances, agreeing that "under no circumstances" should wall sits be done against a glass wall. AP 580 (Dr. Gartenberg Dep. Tr. at 95). Dr. Gartenberg also testified that a high school coach has an obligation to conduct an inspection or overview of the premises where they're conducting their practices. *See* AP 581 (Dr. Gartenberg Dep. Tr. at 97).

3. Procedural posture of the case.

Abby and her parents sued Bluefield State College, Tazewell County Public Schools, and Coach Benson. *See* AP 11-20. All three Defendants answered the Complaint and the parties engaged in discovery. *See* AP 21-38. At the conclusion of discovery, the Defendants moved for summary judgment and Plaintiffs moved for partial summary judgment against Bluefield State College. *See* AP 39-915.

Bluefield State College moved for summary judgment based upon qualified immunity as an agency of the State of West Virginia. *Id.*

Tazewell and Coach Benson moved for summary judgment based upon sovereign immunity (Tazewell), as an agency, and qualified immunity (Coach Benson), as an employee, of the State of Virginia. *See* AP 39-69. As an employee of Tazewell, Coach Benson qualifies for immunity unless she acted with gross negligence. *Id.*

A hearing on these motions took place on November 14, 2022. *See* AP 1162-1204 (Hearing Transcript). The parties then mediated the case, which resulted in a settlement between Plaintiffs and Bluefield State College. *See* AP 1157 and 1160-1161. Subsequently, the Circuit Court granted Coach Benson and Tazewell's Motion for Summary Judgement, finding as a matter of law that Coach Benson could not be found to have acted with gross negligence and thus dismissing the claim against her as being barred by qualified immunity. *See* AP 2-10. This Appeal now seeks relief from this Court in the form of an Order reversing the Circuit Court's granting of summary judgment to Coach Benson based upon qualified immunity. Specifically, Plaintiffs contend that the Circuit Court erred by finding as a matter of law that Coach Benson was not grossly negligent, as this determination is one that should be made by a jury.

SUMMARY OF THE ARGUMENT

First, whether Coach Benson acted with gross negligence is an issue for the jury to decide. Plaintiffs submit that a reasonable juror could conclude that Coach Benson acted without any care for Abby's safety when Coach Benson instructed the swim team to press their bodies into a glass wall, particularly based upon her prior knowledge that the glass had been damaged on a prior occasion but never reporting such damage to Bluefield State College. *See* Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 191, 451 S.E.2d 755, 757 (1994) and *Frazier v. City of Norfolk*, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987) ("Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury").

As stated by both Patrolman Wright and Dr. Gartenberg, and as is understood by simple common sense, under no circumstances should Coach Benson have told students to press their bodies into a glass wall. *See* AP 547 and 580. In other words, a jury could reasonably find that Coach Benson did not think about the consequences of instructing a team of high school students to press their bodies against a glass wall; and in failing to consider what the result of her direction could be (i.e. that the glass could break), Coach Benson failed to exercise any care for the safety of the children. The key factor here which makes it possible for a reasonable jury to find that Coach Benson acted grossly negligent, as opposed to just negligent, is that Coach Benson did not merely observe the students pressing their bodies into a glass wall and fail to act – instead Coach Benson **instructed** the students to engage in the act which caused Abby's injures. *See* AP 46, 526, and 528.

Second, one of the reasons the Circuit Court found, as a matter of law, that Coach Benson's actions could not be considered grossly negligent was because, the Circuit Court concluded, Coach

Benson had previously instructed students to perform wall sits against the glass wall without incident. *See* AP 9. This fact, however (whether students had previously performed wall sits without incident), was, and continues to be, in dispute. *See* AP 542-543. Clearly, as recounted above, there was testimony that the day Abby was injured was the first time that students on the swim team had ever been instructed to perform wall sits, let alone wall sits against the glass. *See Id.* Because this fact was in dispute, the Circuit Court should not have relied upon it as a basis for granting summary judgment, which is only appropriate where there is ***no*** dispute of material fact. *See* Syl. Pt. 3, *Thomas v. Goodwin*, 164 W. Va. 770, 771, 266 S.E.2d 792, 793 (1980) ("On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue.").

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria in Rule 18(a) and should be set for a Rule 20 argument. This is because this case involves a matter of first impression before the West Virginia Intermediate Court and the West Virginia Supreme Court: analysis and application of Virginia's standard for gross negligence and Virginia's qualified immunity law. Further, the case involves an issue of fundamental public importance: the safekeeping of student athletes.

ARGUMENT

1. Standard of review and standard for granting summary judgment.

"A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 191, 451 S.E.2d 755, 757 (1994).

"The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Id.* at Syl. Pt. 3. "The question to be decided on a motion for summary judgment is whether there

is a genuine issue of fact and not how that issue should be determined." *Henderson v. Coombs*, 192 W. Va. 581, 582, 453 S.E.2d 415, 416 (1994) (quoting Syl. pt. 5, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 170, 133 S.E.2d 770 (1963)). Indeed, "[o]n a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue." Syl. Pt. 3, *Thomas v. Goodwin*, 164 W. Va. 770, 771, 266 S.E.2d 792, 793 (1980).

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755.

"[S]ummary judgment is appropriate only if the record reveals no genuine issue of material fact and the movant demonstrates an entitlement to judgment as a matter of law. We are mindful that, in light of the jury's role in resolving questions of conflict and credibility, we have admonished that this rule should be applied with great caution. Thus, if the evidence would allow a reasonable jury to return a verdict for the nonmoving party, then summary judgment will not lie." *Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996) (citations omitted).

Finally, in evaluating a motion for summary judgment, a Circuit Court "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion." *Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758.

2. Coach Benson only qualifies for immunity if she was not grossly negligent, and whether a defendant acted with gross negligence is usually a question of fact for determination by the jury.

The Commonwealth of Virginia, including Defendant Tazewell, is immune from civil actions unless proven otherwise. *See James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980). As an employee of Defendant Tazewell, however, Coach Benson is only immune if she qualifies for immunity. "It is proper that a distinction be made between the state, whose immunity is absolute unless waived, and the employees and officials of the state, whose immunity is qualified, depending upon the function they perform and the manner of performance." *Id.*

As the Circuit Court correctly stated, Coach Benson "is only immune if she qualifies for immunity. Thus, to the extent she argues that this Court does not have jurisdiction over her because of sovereign immunity, the Court must determine whether she qualifies for immunity. *See Id. Teachout v. Larry Shermans Bakery, Inc.*, 158 W.Va. 1020, 216 S.E.2d 889 (1975)." AP 5.

Pursuant to Virginia law, Coach Benson does not qualify for immunity if she acted in a grossly negligent manner. "A state employee who acts wantonly, or in a culpable or **grossly negligent** manner, is not protected." *James v. Jane*, 282 S.E.2d 864 (emphasis supplied); *see also, Lentz v. Morris*, 372 S.E.2d 608, 610 (Va. 1988); *Messina v. Burden*, 321 S.E.2d 657 (Va. 1984); *James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980); and *Colby v. Boyden*, 400 S.E.2d 184, 186 (Va. 1991).

The Virginia Supreme Court has defined gross negligence as:

> [T]he utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. **Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety.**

Volpe v. City of Lexington, 708 S.E.2d 824, 828-829 (Va. 2011) (quoting *Chapman v. City of Virginia Beach*, 475 S.E.2d 798, 800-01 (Va. 1996) (emphasis supplied).

"Whether gross negligence has been established is usually a matter of fact to be decided by a jury." *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691 (Va. 1987) (*see also Elliot v. Carter*, 791 S.E.2d 730 (Va. 2016)). Indeed, "[p]roof of gross negligence depends upon the facts and circumstances of the particular case. If fair minded men can differ respecting the conclusion to be drawn from the evidence, a jury question is presented." *Cmty. Motor Bus Co. v. Windley*, 224 Va. 687, 689, 299 S.E.2d 367, 369 (1983).

3. The Circuit Court erred by concluding, as a matter of law, that Coach Benson did not act with gross negligence.

The Circuit Court compared Coach Benson's actions with those of the defendants in two Virginia cases addressing motions for summary judgment on the issue of gross negligence in finding that, as a matter of law, that Coach Benson did not act with gross negligence. *See* AP 7-9. Both cases, however, are factually distinct from this one because in this case Coach Benson instructed Abby to perform the act that caused her injury. *See* AP 46, 87-88, 526 and 528. And, as stated above, "[p]roof of gross negligence depends upon the facts and circumstances of the particular case." *Cmty. Motor Bus Co. v. Windley*, 224 Va. 687, 689, 299 S.E.2d 367, 369.

A. *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987).

In *Frazier*, Frazier (a 13–year-old child) was asked to perform the drums on an elevated stage - at the rear of the stage. *See Frazier v. City of Norfolk*, 234 Va. 388, 392-93, 362 S.E.2d 688, 690-91. The rear of the stage did not have any barrier or railing to prevent someone from falling off of it. *See Id.* During the performance Frazier dropped a drumstick, which fell behind him. *See Id.* After the performance Frazier reached to the rear blindly groping for the stick and, in the process, leaned backwards on his stool. *See Id.* The stool then tipped over and Frazier fell off of the rear end of the stage. *See Id.*

Frazier alleged that the City was grossly negligent for failing to install a barrier or railing

at the rear of the stage platform as required by City building code and because the City was aware that someone had fallen off the rear of the stage in the past. *See Id.* In finding that the City acted negligently, but not grossly negligent, the Virginia Court noted that while the City failed to install protective devices at a platform edge, the edge of the platform was open and obvious. *See Id.*

In this case, unlike *Frazier*, the issue is not whether Coach Benson failed to take some action that could have prevented Abby's injuries. Rather, the issue is that Coach Benson instructed Abby to perform the specific act that caused her injuries. *See* AP 46, 87-88, 526 and 528. In *Frazier*, had the City instructed Frazier to try to retrieve his dropped drumstick and Frazier then fell as a result of following that instruction, then the situation would be comparable to the one in this case. But that is not what happened in *Frazier*, which is why *Frazier's* holding is not applicable to this case. Again, "[p]roof of gross negligence depends upon the facts and circumstances of the particular case." *Cmty. Motor Bus Co. v. Windley*, 224 Va. 687, 689, 299 S.E.2d 367, 369.

B. *Elliott v. Carter*, 292 Va. 618, 791 S.E.2d 730 (2016).

In *Elliott*, a 13-year-old Boy Scout, Caleb, walked out into a river along a partially submerged sand bar, following a group of Scouts and their Scout peer leader, Carter, who was 16 years old. Carter decided to swim back to the shore but instructed Caleb to walk back to shore, as Caleb did not know how to swim. While walking back to the shore, Caleb fell into deeper water and drowned.

In finding that Carter did not act with gross negligence, the Virginia Court wrote:

> First, it is not alleged that Caleb had any difficulty walking out along the sandbar with Carter. Second, there is no allegation that Carter was aware of any hidden danger posed by the sandbar, the river or its current. Third, Carter instructed Caleb to walk back to shore along the same route he had taken out into the river, and there was no evidence that conditions changed such that doing so would have been different or more dangerous than initially walking out, which was done without difficulty. Finally, Carter tried to swim back and assist Caleb once Caleb slipped off the sandbar, which is indicative that Carter was close enough to attempt to

render assistance when Caleb fell into the water, and that Carter did attempt to render such assistance.

Elliott v. Carter, 292 Va. 618, 623, 791 S.E.2d 730, 733 (2016).

Like *Frazier*, the key distinction between *Elliott* and this case is the fact that here Coach Benson specifically instructed Abby to perform the act that caused her injury. *See* AP 46, 87-88, 526 and 528. Had Carter instructed Caleb to swim back to shore, then *Elliott*'s fact pattern would mirror this case. But that is not what happened in *Elliott*, which is why *Elliott*'s holding is not applicable to this case.[3] Once again, "[p]roof of gross negligence depends upon the facts and circumstances of the particular case." *Cmty. Motor Bus Co. v. Windley*, 224 Va. 687, 689, 299 S.E.2d 367, 369.

C. There is sufficient evidence for a reasonable jury to find that Coach Benson acted with gross negligence.

Coach Benson knew that at least a portion of the glass wall had been damaged for years and that she had never brought this fact to the attention of BSC or Tazewell, and Coach Benson instructed a group of students to press their bodies into the glass wall. *See* AP 46, 87-88, and 526-528. Simply put, instructing students to push their bodies into a glass wall is something that should never be done, and it is something that Coach Benson should have known not to do. *See* AP 547 and 580. And because Abby and the other students, following Coach Benson's instructions, pressed their bodies into the glass wall, the glass broke and Abby was severely injured. *See* AP 46, 87-88, 526-528, and AP 1219 - First Responder Video.

[3] Plaintiffs suggest that it is also appropriate, when comparing the circumstances in *Elliot* to those of the instant case, to consider the relative ages and roles of Coach Benson and the 16-year-old Defendant peer-leader Carter. As coach and essentially guardian of Abby and all the other swimmers under her direct supervision, Coach Benson was certainly more qualified and obligated to make decisions about what the swimmers would do and when, as opposed to a teenaged peer leader. If in this case a fellow swimmer had instructed the team to perform wall sits against a glass wall and Coach Benson had not stopped the activity, resulting in Abby's injuries, perhaps would be an absence of facts that would support jury consideration of whether Coach Benson was grossly negligent. But that is not the factual scenario before this Court (or, indeed, the Circuit Court).

Drawing any permissible inference from these facts in the light most favorable to Abby, a reasonably jury could find that Coach Benson acted without any care for Abby's safety in instructing the students to perform a wall sit against the glass wall. *See Painter v. Peavy*, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 and *Powderidge*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878. As such, the Circuit Court erred in granting Coach Benson summary judgment by finding as a matter of law that Coach Benson could not have acted with gross negligence. *See Id.*; *Volpe v. City of Lexington*, 708 S.E.2d 824, 828-829; and *Frazier v. City of Norfolk*, 362 S.E.2d 688, 691.

4. The Circuit Court relied upon a material fact that was genuinely in dispute, making its granting of summary judgment improper.

The Circuit Court's grant of summary judgment relied, in part, upon the following fact: that Coach Benson had previously instructed students to perform wall sits against the glass without incident. *See* AP 9. This fact, however, is in dispute. Specifically, Abby testified that the swim team had not previously performed walls sits during practice, let alone against the glass. *See* AP 542-543.

The Circuit Court, therefore, erred in relying upon this fact. *See* Syl. Pt. 3, *Thomas v. Goodwin*, 164 W. Va. 770, 771, 266 S.E.2d 792, 793 (1980) ("On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises no substantial factual issue."). As such, the Circuit Court, contrary to the dictates of Rule 56, assessed the merits of a disputed issue of material fact in concluding that Coach Benson had previously instructed students to perform wall sits against the glass without incident. *See Henderson v. Coombs*, 192 W. Va. 581, 582, 453 S.E.2d 415, 416; Syl. pt. 5, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 170, 133 S.E.2d 770; and Syl. Pt. 4. To that end, the Circuit Court's granting of summary judgment should be reversed. *See Powderidge*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878.

CONCLUSION

The Circuit Court erred in granting summary judgment to Coach Benson. Whether Coach Benson acted with gross negligence is an issue that must be resolved by the jury because a reasonable jury could conclude that Coach Benson didn't consider the consequences of having a group of high school students press their backs into a glass wall could be, and as a result did not exercise any care in connection with giving such an instruction. As such, a reasonable jury could find that Coach Benson acted with gross negligence. Further, the Circuit Court erred in granting summary judgment to Coach Benson because it relied upon a material fact that was in dispute in order to conclude as a matter of law that Coach Benson's actions could not be found to be grossly negligent.

The Shoemakers, therefore, request the following relief from this Court: (1) a finding that the Circuit Court committed reversible error; (2) a reversal of the Circuit Court's Order granting Coach Benson summary judgment; (3) a directive to the Circuit Court to deny Coach Benson's motion for summary judgment and to set the case for trial; and (4) any additional relief this Court finds just.

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VERIFICATION

I, the undersigned counsel for the Petitioners, hereby certify that the facts and allegations contained in **Petitioner's Brief** and **Appendix** are true and correct to the best of my belief and knowledge.

Dated: April 13, 2023

Kevin A. Nelson (WVSB #2715)

CERTIFICATE OF SERVICE

I, Kevin A. Nelson, do hereby certify that the foregoing **PETITIONER'S BRIEF** was served upon all parties via File and ServeXpress on April 13, 2023 as follows:

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