No. 22-ICA-327

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' REPLY

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Dated: June 16, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

STATEMENT OF THE CASE RELEVANT TO DEFENDANT'S RESPONSE

1. Defendant Coach Benson instructed the students to perform a wall sit against a glass wall.

Coach Benson directed students to perform walls sits against the glass wall in the Pool Facility. (*See* App. at 2-3, 87). It is not a wall that has glass windows, or for which only portions of the wall are glass panels; rather, the vast majority of the wall is glass. (*See* App. at 290; the First Responder's Body Camera Video Footage included in electronic format with the Appendix, App. at 1219). And as a result of the students being directed by Coach Benson to perform wall sits against the glass wall, Abigail Shoemaker pressed her back against the glass wall and the glass wall broke, causing her severe injuries. (*See* App. 2-3, 526, 528, 1219).

2. In granting summary judgment to Coach Benson, the Circuit Court relied upon the fact that Coach Benson had previously had students perform wall-sits against the glass wall in concluding that Coach Benson, as a matter of law, was not grossly negligent. This fact, however, was in dispute.

The Circuit Court's grant of summary judgment relied, in part, upon the following finding of fact: "Even though Benson may have previously noticed some damage to the glass wall, her students had also previously performed these same exercises against the glass without incident." (App. at 9). Whether the students under Coach Benson's supervision had previously performed wall sits against the glass, however, is disputed. Specifically, Abigail testified that the swim team had not previously performed walls sits during practice, let alone against the glass. (*See* App. at 542-543).

3. Plaintiff's expert, Dr. Gartenberg, opined that "under no circumstances" should Coach Benson have instructed students to perform exercises against a glass wall.

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. (App. at 580).

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiffs continue to content that 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. The Parties agree on the applicable legal standards relevant to this appeal.

Defendant's Response concurs with the position of the Plaintiffs as to the standard for granting summary judgment, the standard of review of an order granting summary judgment, and the legal standards under Virginia law applicable to Coach Benson and her defense of qualified immunity (i.e. whether, or not, she acted with gross negligence). (*See* Def.'s Resp. at 10-12).

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

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, 281 Va. 630, 639, 708 S.E.2d 824, 828-829 (2011) (emphasis added) (quoting *Chapman v. City of Virginia Beach*, 252 Va. 186, 190, 475 S.E.2d 798, 800-01 (1996)).

"Whether gross negligence has been established is a matter of fact to be decided by a jury." *Elliot v. Carter*, 292 Va. 618, 622, 791 S.E.2d 730, 732 (2016) (quoting *Frazier v. City of Norfolk*, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987)). 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).

In this case, Coach Benson told a group of kids to perform wall sits against a glass wall. (*See* App. at 2-3, 526, 528). That is something that a supervisor of students should never do – "under no circumstances" should Coach Benson have instructed the students to exercise against a glass wall. (App. at 580).

Why this should never be done is obvious – because the glass could break and severely hurt someone. The failure to recognize this obvious fact, and to then instruct students to exercise against a glass wall, demonstrates a complete lack of care for the safety of the students. Or, at a minimum, is sufficient evidence to warrant a jury's consideration of whether, or not, such instruction constitutes gross negligence under the circumstances of this case. *See Cmty. Motor Bus Co.*, 224 Va. at 689, 299 S.E.2d at 369.

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

Contrary to Defendant's Response (Def.'s Resp. at 19-21), 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* App. at 9). This fact, however, is in dispute. Specifically, Abigail testified that the swim team had not previously performed walls sits during practice, let alone against the glass. (*See* App. at 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* Syl. pt. 4-5, *Henderson v. Coombs*, 192 W. Va. 581, 582, 453 S.E.2d 415, 416 (1994); Syl. pt. 4-5, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W. Va. 170, 133 S.E.2d 770 (1963). To that end, the Circuit Court's granting of summary judgment should be reversed. *See Powderidge Unit Owners Ass'n v. Highland Props.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 (1996).

4. Coach Benson instructed the students to perform the specific act which caused Abigail's injury. Such an instruction should never have been given, which distinguishes this case from those relied upon by Defendant Benson and the Circuit Court.

Both the Circuit Court and Coach Benson rely upon two Virginia cases to, respectively, find and argue that, as a matter of law, Coach Benson did not act with gross negligence. Those cases are *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987) and *Elliott v. Carter*, 292 Va. 618, 791 S.E.2d 730 (2016). As detailed in Plaintiff's Brief, both of these decisions are clearly distinguishable from the instant case. The most significant distinction being that Coach Benson told Abigail to perform the very act which lead to her injuries, unlike the actions of the supervisors/employees in the Virginia cases relied upon by Coach Benson and the Court below. (*See* App. 2-3, 526, 528).

Coach Benson's instruction was one that should not have been given "under any circumstance," and it is this specific act, along with Coach Benson's prior knowledge of damage

to the glass, which results in a set of facts from which a reasonable jury could conclude that Coach Benson acted with gross negligence. "Proof of gross negligence depends upon the facts and circumstances of the particular case," *Cmty. Motor Bus Co.*, 224 Va. at 689, 299 S.E.2d at 369, and "[w]hether gross negligence has been established is a matter of fact to be decided by a jury." *Frazier*, 234 Va. at 393, 362 S.E.2d at 691.

Moreover, recent Virginia cases support Abigail's contention that a determination of whether a defendant was grossly negligent under Virginia law is a jury question. For example, in *Lemen v. Davis-Waters*, 106 Va. Cir. 445 (2020), a school bus driver employed by the county school system did not stop at a stop sign and a crash occurred causing the other vehicle to go across the median and two lanes of traffic subsequent to the crash. The circuit court found that there was a jury question regarding whether gross negligence existed because the defendant knew of the stop sign's presence and failed to stop or slow down for the same. "The deliberate action of ignoring the stop sign creates a jury question concerning gross negligence." *Lemen*, 106 Va. Cir. at 448.[1]

Similarly, Coach Benson instructed Abigail to perform wall sits against a glass wall and did so with prior knowledge of damage to the glass. (*See* App. at 2-3, 87). Reasonable minds may differ as to whether or not this deliberate action constitutes gross negligence. Therefore, it is a question of fact under the particular circumstances of the case to be decided by a jury.

CONCLUSION

The Circuit Court erred in granting summary judgment to Coach Benson. Given the unique facts and circumstances of this case, a reasonable jury could find that Coach Benson acted with gross negligence. This is because Coach Benson, under no circumstances, should have instructed

[1] *See also Amisi v. Riverside Reg'l Jail Auth.*, 555 F. Supp. 3d 244 (E.D. Va. 2021) (finding that gross negligence was as question of fact under the particular circumstances of the case); *Davis v. DeWilde*, Case No. 1:21CV00009, 2021 U.S. Dist. LEXIS 136849 (W.D. Va. July 21, 2021) (same); *Liberati v. Andress*, 2021 Va. Cir. LEXIS 120 (2021) (same).

students to perform wall sits against a glass wall and this instruction lead to Abigail's injury. Moreover, Coach Benson knew that the glass wall had been previously damaged. From these facts, a reasonable jury could conclude that Coach Benson failed to give any consideration to the safety of the students.

To put it plainly: if you order a group of students to push their bodies into a glass wall, that alone is evidence that you are not thinking about their safety. That is evidence from which a reasonable person could conclude that you acted with gross negligence.

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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CERTIFICATE OF SERVICE

I, Kevin A. Nelson, do hereby certify that the foregoing **PETITIONER'S REPLY BRIEF** was served upon all parties via File and ServeXpress on June 16, 2023 as follows:

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