IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: May 30 2023
03:52PM EDT
Transaction ID 70107816

**ABIGAIL SHOEMAKER,
MARY SHOEMAKER, and
CHRIS SHOEMAKER,**

Plaintiffs-Petitioners,

v. **Appeal No.: 22-ICA-327**

**TAZEWELL COUNTY PUBLIC
SCHOOLS and KIMBERLY BENSON,**

Defendants-Respondents.

DEFENDANTS-RESPONDENTS' RESPONSE BRIEF

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COME NOW the Defendants-Respondents, Tazewell County Public Schools and Kimberly Benson, by and through counsel, and for their response brief state as follows:

I. STATEMENT OF THE CASE

According to the principle of state sovereign immunity, the United States Constitution expressly forbids a private citizen to sue one State in the courts of another unless that State consents to such suit in a foreign court. Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1496 (2019). Virginia Public School Boards are considered political subdivisions and an arm of the Commonwealth of Virginia and thus enjoy Virginia's sovereignty with respect to tort liability. Kellam v. School Bd., 202 Va. 252, 117 S.E.2d 96 (1960); B.M.H. by C.B. v. School Bd. of City of Chesapeake, Va., 833 F. Supp. 560 (E.D. Va.1993). Additionally, employees of Virginia Public School Boards are also immune from suits alleging negligence if the School Board exercises control over the employee. Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988).

Here, the Circuit Court of Mercer County granted summary judgement to Defendant Tazewell County Public Schools ("TCPS") based upon sovereign immunity and to Defendant Kim Benson ("Coach Benson") based upon a finding that Coach Benson qualified for immunity because her actions did not amount to gross negligence. AP 2-10. Plaintiffs' appeal only addresses the Circuit Court granting Coach Benson summary judgment, contending that the Circuit Court granted summary judgment based on a genuine issue of material fact that should have been presented to a jury. In response, Coach Benson contends that the Circuit Court correctly granted her summary judgment based upon a review of all facts in a light most favorable to Plaintiffs and properly applied Virginia law as it relates to Coach Benson's alleged gross negligence.

The facts the Circuit Court relied upon are as follows:

On November 14, 2019, the Graham High School swim team, coached by Defendant Kimberly Benson, held a swim practice at the Ned E. Shott Physical Education Natatorium and Swimming Pool ("BSC facility" or "BSC pool") located on the first floor of the Shott Physical Education Building on the campus of Bluefield State College ("BSC") in Bluefield, West Virginia.[1] AP 11-20. Graham High School is located in Bluefield, Tazewell County, Virginia and operates under the supervision of Defendant TCPS. AP 11-20. Kim Benson was employed as the head swim coach. AP 11-20. Plaintiff Abigail Shoemaker was part of a 16-member team that also included Coach Benson's daughter. AP 73-74, 87. Plaintiff Mary Shoemaker was an assistant coach for the Graham swim team. AP 135.

[1] In 2002, Bluefield State College became Bluefield State University.

In the years leading up to November 2019, the Graham High swim team had increased in popularity to the point that the team had outgrown its existing facilities and needed a larger facility to hold practices and swim meets. The swim team began holding practices and swim meets at the BSC facility prior to November 14, 2019. AP 81, 87. In addition to Graham High, it is not disputed that BSC hosted other local high schools' swim team practices and meets at the BSC facility. Graham High had a verbal agreement to utilize the BSC facility, but neither TCPS, Graham High or BSC entered into a written agreement. AP 183. BSC set the times for practices as well as provided all staffing, including lifeguards for the BSC facility. AP 233-238.

Prior to the start of the November 14, 2019 swim practice, the Graham High swim team was waiting for the pool because a Bluefield State College swim class, instructed by BSC Professor Dr. William Bennett, was occupying the pool. AP 87-88; AP 233-234. BSC employee Brinnon Morris was also on duty as the lifeguard. AP 234, 299.

While waiting for the pool, Coach Kim Benson instructed the Graham High swim team to begin a series of exercises referred to as "dry land exercises" on the deck area of the pool in order to prevent horseplay amongst the team. AP 87-88. Coach Benson instructed the swimmers, including Benson's own daughter, to choose available spaces along the walls of the BSC facility, including along the glass wall, to perform an exercise called a "wall-sit." Id. Some of the swimmers performed the wall-sit against concrete portions of the interior walls, some against metal partitions between the glass panels and some against the glass panels. Id. The swimmers were instructed to perform the wall-sit for one minute before taking part in a different exercise. Id. During the last 15 seconds of the wall-sit, the glass panel Abigail Shoemaker was placing her weight against shattered

and pierced her body with a large piece of glass. Id.

Plaintiffs alleged that Coach Benson was grossly negligent in blatant disregard of safety when she instructed Abigail (as well as Coach Benson's own daughter) to perform a wall-sit against the glass wall, "an unstable and potentially dangerous surface." AP 11-20. As a result, Plaintiffs alleged Abigail sustained severe bodily injury and emotional distress, and that Chris and Mary Shoemaker sustained severe emotional distress. AP 11-20. Plaintiffs alleged that TCPS was vicariously liable for Coach Benson's alleged gross negligence. AP 11-20.

There is no dispute that the BSC or any of its employees, including Dr. Bennett and lifeguard Brinnon Morris, did not warn Coach Benson or the swimmers that there was any defect or condition in the exterior panels that would cause them to fail. While not mentioned in Plaintiff's brief, Dr. Bennett was recorded stating on Officer K.N. Wright's body camera "They were doing squats against the wall and the glass broke. It was something they've done before." AP 242; AP 1219 Manual Filing of Body Cam Video 4:50 to 5:16. BSC Professor Bennett had been in the swim facility for over 15 years, witnessed others leaning against the glass and never witnessed the glass shatter, crack or otherwise break, nor did Professor Bennett alert anyone to the holes. AP 233.

There is no dispute that there were no warning signs or disclosures that leaning against the glass exterior wall was prohibited or dangerous. The only glass panel that failed was the one Abby was leaning against. Though not stated in Plaintiff's brief, it was Coach Benson, not the BSC lifeguard on duty or any other BSC employee, who performed life-saving first-aid when she applied massive pressure on Abigail's wounds until paramedics arrived. AP 88-90

The BSC facility was built in the 1960s and the facility consists of four levels. The BSC swimming pool is located on the bottom floor of the facility. AP 270. The swimming pool is contained by four walls approximately two to three stories high. AP 272. Three of the walls are cinderblock and one wall consists of three levels of glass panels that form the structural outside wall; the glass panels are the height and width of a standard door. AP 272.

It was apparent from the manner in which the exterior wall shattered that it was not tempered glass; Plaintiff was injured because a large section of broken glass punctured her back. During discovery it was revealed that these were the original panels installed in the 1960s. AP 297. The glass panels were comprised of annealed glass of an unknown thickness. Despite the fact the panels were annealed glass, they were not replaced until after this subject incident with ¼" clear tempered/safety glass with a safety glazing. AP 272-273, 299. While BSC was aware five years prior to the incident that the glass panels had outlived their useful lives, the holes were not cited as the reason for the need to replace them. AP 849, 854-867. Further, as BSC VP McGonagle testified, it would have taken expertise to discern that the panels were plate glass instead of safety glass. AP 265, 273, 275. Therefore, there was nothing to put Coach Benson on notice that the exterior glass wall panel would shatter due to lateral pressure or that it would shatter into large shards causing significant injury to Abigail.

In 1968, the BSC facility sustained and withstood a bomb blast. AP 270.[2] The bombing took place "on the fourth floor on the opposite end of the building from the pool."

[2] *See also* https://archive.wvculture.org/history/education/bscbombing08.html. The "physical education" building subject to the 1968 bombing is currently the Ned E. Shott Physical Education Building which contains the subject pool.

Id. The bomb blast "blew out the doors and the windows around the door and damage[d] the staircase" at the "complete opposite end of the building from the pool." Id. There was no known damage to the subject glass panels from the bomb blast, however indentations remain to this day in some of the glass panels. Id; see also AP 80-82. No such holes existed or were apparent in the subject glass panel which caused Abigail Shoemaker's injury. AP 80-82; AP 136-137, 151; AP 543.

Plaintiffs' brief contends that the facts the Graham High School Principal recommended that Coach Benson be terminated and that her coaching contract were not renewed are evidence of gross negligence. However, the TCPS Board, which retained the power to remove Coach Benson, did not act to remove Coach Benson or place her removal on the official meeting agenda. AP 191-193. Further, Superintendent Dr. Chris Stacy testified that the discussion to remove Benson as coach was based upon preliminary information. AP 179-181, 185-187. After the school officials learned the information described above, they agreed that removing Benson as coach was not in the best interests of the team. AP 179-181. After her injuries healed, Abigail was able to return and participate in Graham High swim meets as part of the team in January 2020, and Defendant Kim Benson remained as coach. AP 142; AP 73, 76, 113.

Plaintiffs also offer the testimony of Bluefield PD Officer Wright and their expert Dr. Nancy Gartenberg as evidence that Coach Benson's actions were grossly negligent. While Officer Wright testified that he did not "think anyone should have been against the glass," Officer Wright's opinion was lay opinion. AP 547. Further, Officer Wright's testimony that the glass was not safety glass was made after the fact the glass shattered and stands in opposition to the testimony of BSC VP McGonagle that it would have taken

expertise to discern that the panels were plate glass instead of safety glass. AP 265, 273, 275. There is no dispute that Officer Wright did warn anyone the exterior glass wall was plate glass and not to lean on it. Similarly, in offering her opinion that a student should never do a wall sit against glass, Dr. Gartenberg testified that she relied on her experience and "common sense" as a teacher, coach, principal, superintendent and a mom that to lean against a glass wall is "risky" and not recommended. AP 923-928, 981-984, 993-994. Dr. Gartenberg was unable to testify or provide an opinion on what lateral pressure or force a structural glass wall (with no warnings or barriers to alert or prevent otherwise) could withstand as she admitted that she is "not a glass expert" and is not an architect or engineer. AP 923-928, 981-984, 993-994. While Plaintiffs proffer a "fact" that Dr. Gartenberg testified that a high school coach has a duty to do an inspection of a facility before holding a practice, Plaintiffs failed to include Coach Benson's testimony that she did perform such inspection in their brief when Benson testified that she "came into the pool area, did a scan and search of the area – just lifeguard training. I walked the length of the pool, observing nothing different than any other time we had practice there[.]" AP 103-105.

Despite Plaintiffs' allegations, there was no evidence or expert testimony presented to the Circuit Court to support their theory that Coach Benson was negligent, let alone grossly negligent, for the injuries Abigail sustained. Additionally, Plaintiff Mary Shoemaker testified that Coach Benson had never done anything in the past that would be considered dangerous, or that she ever felt unsafe with Coach Benson's overseeing Abigail in her role as swim coach or otherwise. AP 137.

As evidenced by Plaintiff Dee Shoemaker's own words in her texts to Defendant

Kim Benson:

> "you KNOW you did nothing wrong! In fact, if it weren't for you, Abby would not be sitting here smiling at me!!!"
>
> "Sometimes bad things just happen. . . we are not (despite what we tell ourselves) in charge of the universe…"

AP 781.

> "I need you to read this . . but more importantly, I need you to hear this . . . and know It in your heart . . . this was NOT your fault!!! I would have done the same thing without a second thought and I covet my psychotic-ness to be perhaps, one of the most risk-averse people on earth!!! She did not get hurt because of something you did . . . she is, however, alive because of something you did!!!"

AP 784.

Based upon all of these facts, the Circuit Court of Mercer County found that Coach Benson displayed none of the elements of a grossly negligent coach who showed "utter disregard" for the safety of Plaintiff Abigail Shoemaker or any of the members of her swim team and granted Defendants-Respondents summary judgment.

II. SUMMARY OF THE ARGUMENT

Under Virginia law, employees of school systems are entitled to qualified immunity so long as their conduct is not grossly negligent. In Virginia, "gross negligence is the utter disregard of prudence amounting to complete neglect of 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." Volpe v. City of Lexington, 281 Va. 630, 639, 708 S.E.2d 824, 829 (2011) (*quoting* Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 800-1 (1996)). While decisions on gross negligence are normally jury questions, courts are permitted to decide upon gross negligence where "persons of reasonable minds could not differ upon the conclusion that

such negligence has not been established, [then] it is the court' s duty to so rule." Elliott v. Carter, 292 Va. 618, 622, 791 S.E.2d 730 (2016) (*citing* Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987)). After viewing all facts in the light most favorable to Plaintiffs, the Circuit Court properly ruled that the conduct of Coach Benson did not rise to the level of gross negligence. In light of the facts that Coach Benson instructed her own daughter as well as Abby to perform the exercise in an effort to prevent horseplay around a pool, that Coach Benson performed life-saving first aid upon Abby and that Bluefield State College placed no warnings on the glass wall despite its knowledge the glass was beyond its useful life, Coach Benson demonstrated the minimum degree of care that precludes a finding of gross negligence. AP 8-9.

The Circuit Court did not rely on a genuine issue of material fact in dispute. While Plaintiffs argue that the Court relied upon a disputed fact in granting summary judgment– whether the swimmers had performed wall sits against the structural glass wall before – the fact was one that no reasonable jury could differ upon the conclusion that gross negligence was not established. Plaintiffs' insistence that Coach Benson instructing the students to perform the exercises against the glass is a distinction without a difference from the case law the Circuit Court relied upon in making its determination Coach Benson was not grossly negligent.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary pursuant to Rule 18(a)(4) as the dispositive issues have already been authoritatively decided. Respondent respectfully represents that it also appears that the facts and legal arguments are adequately presented in the briefs and

record on appeal and the decisional process would not be significantly aided by oral arguments rendering oral argument unnecessary pursuant to Rule 18(a)(4).

IV. STANDARD OF REVIEW

"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).

"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." Setser v. Browning, 214 W.Va. 504, 507 590 S.E.2d 697, 700 (2003) (*quoting* Syl. Pt. 4, Painter v. Peavy, 192 W.Va. 189 (1994)). "Summary judgment should be granted when it is clear that there is no genuine issue of fact to be tried and inquiry is not desirable to clarify the application of the law." Id. at 510 (*quoting* Hatten v. Mason Realty Co., 148 W.Va. 380, 390, 135 S.E.2d 236, 242 (1964)).

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law. W. Va. R. Civ. P. 56; Powderidge Unit Owners Ass'n v. Highland Properties, Ltd., 196 W. Va. 692, 698, 474 S.E.2d 872 (1996). A dispute about a material fact is "genuine" only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings before the circuit court. Powderidge, 196 W. Va. at 698. Summary judgment is a device designed to effect a prompt disposition of controversies on their merits without resorting to a lengthy trial if, in essence, there is no real dispute as to salient facts or if

only a question of law is involved. Williams v. Precision Coil, Inc., 194 W. Va. 52, 58, 459 S.E.2d 329 (1995).

Summary judgment is not a remedy to be exercised at the circuit court's option; it must be granted when there is no genuine disputed issue of material fact. Id. at 59 n.7; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure." Syl. Pt. 3, Williams, 194 W.Va. 52; Syl. Pt. 10, Setser, 214 W. Va. 504.

When a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of his pleading. "To meet its burden, the nonmoving party must offer more than a scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor." Gooch v. West Virginia Dep't of Pub. Safety, 195 W.Va. 357, 465 S.E.2d 628 (1995).

"A non-moving party 'cannot create a genuine issue of material fact through a mere speculation or the building of one inference upon another.'" Chafin v. Gibson, 213 W.Va. 167, 578 S.E.2d 361 (2003). "The evidence illustrating the factual controversy cannot be conjectural or problematic" and "unsupported speculation is insufficient to defeat a summary judgment motion." Williams, 221 W.Va. at 60, 61.

V. LEGAL ARGUMENT

According to the principle of state sovereign immunity, the United States Constitution expressly forbids a private citizen to sue one State in the courts of another unless that State consents to such suit in a foreign court. Franchise Tax Bd., 139 S. Ct. at 1496. Virginia Public School Boards are considered political subdivisions and an arm of the Commonwealth of Virginia and thus enjoy Virginia's sovereignty with respect to tort liability. Kellam, 202 Va. 252, 117 S.E.2d 96; B.M.H., 833 F. Supp. 560. Additionally, employees of Virginia Public School Boards are also immune from suits alleging negligence if the School Board exercises control over the employee. Lentz, 236 Va. 78, 372 S.E.2d 608.

Petitioners' appeal should be denied as the Circuit Court of Mercer County correctly applied Virginia law and found that Coach Benson, as a matter of law, was not grossly negligent. The Circuit Court's reliance upon Virginia cases was proper, and the distinctions drawn by Petitioners are incomplete and inconsistent with Virginia's application of law to gross negligence. Finally, the Circuit Court did not commit error by relying on a genuine issue of material fact in dispute in granting summary judgment to Coach Benson.

A. THE COURT, AFTER VIEWING ALL FACTS IN LIGHT MOST FAVORABLE TO PLAINTIFFS, CORRECTLY FOUND, AS A MATTER OF LAW, COACH BENSON DID NOT ACT WITH GROSS NEGLIGENCE.

Public employees in Virginia are entitled to the state's immunity so long as the employee is not grossly negligent. As a general rule, gross negligence can be an act or an omission. Said another way, gross negligence can be active or passive. Plaintiffs correctly cite that under Virginia law Coach Benson is not entitled to qualified immunity if she acted "wantonly, or in a culpable or grossly negligent manner[.]" Petitioner's Brief p.

10 (citations omitted). However, Plaintiff's definition of gross negligence is inconsistent with Virginia law. Virginia law provides, "gross negligence is the utter disregard of prudence amounting to complete neglect of 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." Volpe v. City of Lexington, 281 Va. 630, 639, 708 S.E.2d 824, 829 (2011) (*quoting* Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 800-1 (1996). A plaintiff must demonstrate proof of "indifference to another and an utter disregard of prudence that amounts to a complete neglect for the safety of such other person," or a degree of negligence that would "shock fair-minded persons." Cowan v. Hospice Support Care, Inc., 268 Va. 482, 603 S.E.2d 916, 918 (Va. 2004). During oral argument on the motion for summary judgment, the Circuit Court correctly noted that gross negligence under Virginia law, "is almost like an intentional standard." AP 168.

As the Circuit Court correctly stated in its Order, gross negligence is ordinarily a matter of fact to be decided by a jury unless "persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, [then] it is the court' s duty to so rule." Elliott v. Carter, 292 Va. 618, 622, 791 S.E.2d 730 (2016) (*citing* Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691(1987)). See AP 6.

Plaintiff's Brief correctly notes (and places in bold faced type) that "[s]everal 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, 708 S.E.2d at 828-829 (quoting Chapman, 475 S.E.2d at 798). However, Plaintiff's Brief again conveniently fails to include the ensuing, and qualifying, quote that

“[d]eliberate conduct is important evidence on the question of gross negligence.” Id. Said another way, as the Court noted during oral argument, gross negligence is something just below an intentional standard. AP 168.

Further, in Virginia, because "the standard for gross negligence is one of indifference, not inadequacy," a claim for gross negligence must fail as a matter of law when the evidence shows that the defendant exercised some degree of care. Kuykendall v. Young Life, 261 Fed. Appx. 480, 491 (4th Cir. 2008) (relying on Frazier, 234 Va. at 392, 362 S.E.2d at 690-91, Chapman, 252 Va. at 190, 475 S.E.2d at 801, and Cowan, 268 Va. at 486-87, 603 S.E.2d at 918 to interpret Virginia law); *see, e.g.,* Colby v. Boyden, 241 Va. 125, 133, 400 S.E.2d 184, 189 (1991) (affirming the circuit court's ruling that the plaintiff failed to establish a prima facie case of gross negligence when the evidence showed that the defendant "'did exercise some degree of diligence and care' and, therefore, as a matter of law, his acts could not show 'utter disregard of prudence amounting to complete neglect of the safety of another'"); Elliott, 292 Va. at 622-23, 791 S.E.2d at 732-33 (holding a 16 year old scout leader was not grossly negligent as the scout leader exercised “ some degree of care” when the leading boy scouts who could not swim out into a river when scout leader knew younger scouts could not swim and one drowned).

Virginia utilizes a four-part test to determine whether a public employee is entitled to qualified immunity. Lentz, 236 Va. at 82; *see also* Kellam, 202 Va. 252, 254; Rector, 267 Va. at 242, 244-6. In Lentz, the Virginia Supreme Court held that a high school gym teacher observing students playing tackle football without any protective equipment was immune from negligence claims resulting from injuries sustained during the game due to

the teacher's alleged negligent supervision and failure to provide equipment. Lentz, 236 Va. at 82. In making the determination that immunity applied, the Court examined the school employee's actions under a four-factor test to decide if the school's immunity was attributable to the employee. The factors considered include: "(1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion." Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984).

Applying Messina, the Court held that the gym teacher was afforded immunity as the teacher's actions did not rise to the level of gross negligence or intentional acts, that the teacher was acting in the scope of his employment at the time of the injury, the teacher was performing a "vitally important public function," the school board had an "official interest and direct involvement in the function of student instruction and supervision," the school board exercised "control and direction over the employee through the school principal" and the teacher's decision on the protective equipment and attire the students wore during activities involved discretion and judgment. Lentz, 236 Va. at 82. The Court reasoned that if teachers or other school employees were to be held personally liable for such actions, then "fewer individuals will aspire to be teachers, those who have embarked on a teaching career will be reluctant to act, and the orderly administration of the school systems will suffer, all to the detriment of our youth and the public at large." Id. at 83.

Here, the Circuit Court made no error in granting summary judgment. The Circuit Court clearly considered Plaintiffs' view of the evidence to support its gross negligence

argument, namely: (1) Coach Benson's knowledge of previous damage to the glass walls where there was indisputably no damage noted in any area where the wall-sits were performed; (2) Benson failing to report damage to BSC or TCPS; (3) Benson instructing the swimmers to place their bodies against the glass while holding weights despite having knowledge of the damaged glass walls; and (4) Plaintiffs' expert opinions that Benson should never have instructed the swimmers to perform such exercises against the glass wall. See AP 6-7. The Circuit Court examined Virginia case law where summary judgment was granted in cases where gross negligence was not found, and found the facts in those cases to be "much more egregious than the alleged negligent conduct of Benson in this matter." See AP 7-9. After viewing the entirety of the facts in the light most favorable to the Plaintiffs and applying Virginia law, the court reasoned that Coach Benson's actions, demonstrated "a minimum degree of care, precluding a finding of gross negligence." Id. The Circuit Court further found that despite "valiant attempts" by Plaintiffs' to characterize Coach Benson as grossly negligent, Benson's actions if proven would amount to simple negligence. Id.

The Circuit Court correctly found that Coach Benson did not demonstrate "utter disregard" to Abigail or the other swimmers, including her own daughter. Coach Benson was not deliberate or intentional in her actions. As the Circuit Court found, Coach Benson was attempting to minimize horseplay amongst the swimmers and BSC did not provide any warnings regarding the glass walls. Id. Coach Benson's actions were not grossly negligent and the Circuit Court's findings were not an erroneous application of fact to law and should be upheld by this Honorable Court.

B. THE CIRCUIT COURT PROPERLY APPLIED VIRGINIA LAW.

In the Circuit Court's Order granting Defendants summary judgment, the Circuit Court looked to cases in which the Virginia Supreme Court granted summary judgment based on immunity as guidance to determine whether Coach Benson acted with gross negligence. AP 5-9. Plaintiffs attempt to criticize the Circuit Court's use of several Virginia cases for guidance as basis for their argument summary judgment was erroneously granted. However, the Court's reliance on such cases was proper.

Plaintiffs point to two cases the Circuit Court relied upon in making its determination that Coach Benson was not grossly negligent: Frazier v. City of Norfolk, 234 Va. 388, 362 S.E.2d 688 (1987) and Elliot v. Carter, 292 Va. 618, 791 S.E.2d 730 (2106).

In Frazier, a municipality was alleged to be grossly negligent when it failed to install protective devices or post warnings for children at a platform edge, despite having such safety equipment available, and having awareness of a similar injury in recent history. AP 7-8. The municipality was found to be negligent, but not grossly negligent, and thus entitled to immunity. Here, it was BSC that placed no warnings, and the Circuit Court found that Benson's knowledge of damages to the glass panels was not sufficient when weighed against the inactions of BSC to amount to gross negligence. AP 8-9. In a strange twist, Plaintiff now argues that Coach Benson did not fail to take some action that could have prevented Abby's injuries (i.e., perform a safety inspection, inform BSC of faulty glass). Instead, Plaintiff argues that because Coach Benson instructed Abby, as well as all other team members, to perform wall-sits, Frazier is somehow distinguishable. However, the issue in Frazier also included the fact that the danger – the edge of the

platform – was open and obvious. The undisputed facts here the Circuit Court relied upon were that the glass panels did not present an open and obvious hazard to Coach Benson or the members of the swim team. Regardless, the Circuit Court's reliance upon the principle espoused in Frazier - that the cumulative acts of the City did not rise to gross negligence – were not relied upon in error when applied to the instant facts.

In Elliot, the Virginia Supreme Court upheld a trial court granting summary judgment based upon a finding that gross negligence was not present in a fatality case. The facts and holding in Ellliot the Circuit Court of Mercer County's reliance upon Elliot, are as follows:

> On June 25, 2011, Caleb was a 13–year–old Boy Scout on an overnight camping trip with his troop along the Rappahannock River near Sharps, Virginia. Carter, then 16 years old, was the Senior Patrol Leader, the troop's peer leader. Caleb had been taking lessons to learn how to swim—he had had one from Carter that morning—but he could not yet swim.
>
> At about 11:00 a.m., Carter led Caleb and two other Boy Scouts into the river along a partially submerged sandbar. One of the other two Scouts could swim (Scott), and the other could not (Elijah).
>
> When they were approximately 150 yards into the river, Carter and Scott decided to swim back to shore. Carter told Caleb and Elijah to walk back to shore the way they had come, along the sandbar. As Caleb and Elijah walked back to shore along the sandbar, they both fell into deeper water. Caleb yelled to Carter for help and Carter attempted to swim back and rescue him. Although *621 Elijah was rescued, neither Carter nor three adult Scout leaders, who attempted to assist, were able to save Caleb.

Id. at 620-621, 731.

In finding Carter's actions could not be grossly negligent, as a matter of law, the Virginia Supreme Court reasoned, "although Carter's efforts may have been inadequate or ineffectual, they were not so insufficient as to constitute the indifference and utter disregard of prudence that would amount to a complete neglect for Caleb's safety, which is required to establish gross negligence." *Id.* at 623, 733.

Here, the Circuit Court found Coach Benson's actions to be akin to those of Caleb in Elliot. As stated *supra*, the Circuit Court found that Coach Benson's instructions to perform wall-sits were intended to prevent her students from engaging in horseplay. Further, despite BSC placing no warnings on the glass wall panels, Benson's knowledge of holes in some panels, and the fact wall-sits had previously been performed against the panels, the Circuit Court found Benson's conduct "represents a minimum degree of care, precluding a finding of gross negligence." AP 8-9.

Plaintiffs again attempt to distinguish the facts in Elliot based on the fact that Coach Benson instructed all of the students, including Abby, to perform wall-sits against the wall. This is a distinction without a difference. As in Elliot, where the Virginia Court found that Carter swimming back to Caleb to render aid was evidence of some minimal degree of care, here Coach Benson was the first responder to keep Abby alive. As Plaintiffs contend that Abby was minutes from death, the aid provided by Coach Benson should not be so minimized to a finding of gross negligence. Further, as the Circuit Court found, Coach Bensons instructions were to prevent horseplay, and thus potential injury among the swimmers on the pool deck, while waiting for their turn in the pool.

Here, the Circuit Court relied on all of the facts available (not merely the limited facts Plaintiffs have presented in their brief) in its finding that "[a]t most, Kimberly Benson's actions, if proved, constitute simple negligence." AP 9. Therefore, the Circuit Court did not commit error in finding Coach Benson was not grossly negligence and accordingly granting summary judgment.

C. The Court Did Not Rely on a Material Fact Genuinely in Dispute to Make Its Determination As A Matter of Law, Coach Benson Did Not Act With Gross Negligence.

Plaintiffs argue that the Circuit Court erred in granting summary judgment because it relied on a disputed fact - whether the swim team previously performed wall-sits on the glass wall – in finding that Coach Benson was not grossly negligent. Petitioner's Brief p. 9; see also AP 9. Plaintiffs assert that the basis of the dispute is Abby's testimony that the swim team did not previously perform wall sits during practice or against the glass wall. AP 542-543. However, this is not an issue of material fact to preclude summary judgment.

As guided by the West Virginia Supreme Court of Appeals, a genuine issue is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving part for a reasonable jury to return a verdict for that party." Sugar Rock, Inc. v. Washburn, 237 W. Va. 347, 354, 787 S.E.2d 618, 625 (2016), quoting Syl. pt. 5, Jividen v. Law, 194 W.Va. 705, 461 S.E.2d 451 (1995). The second half of the equation is a material fact that "has the capacity to sway the outcome of the litigation under the applicable law." Id.

As the complete record demonstrates, the Circuit Court relied upon the undisputed facts in finding that Coach Benson's actions could not rise to the level of gross negligence. The Circuit Court's reasoning that Coach Benson's conduct represented "a minimum degree of care" did not rely solely on the fact that the students had performed the excises previously. The Circuit Court relied on the fact that Coach Benson instructed the students to perform the exercises to curtail horseplay while the students waited for the pool, and more importantly that BSC "had provided no warning about any potential danger of the glass." AP 8-9. Whether or not the swimmers had performed wall-sits against the glass exterior wall before is irrelevant. Either way, these facts do not support gross negligence unless the glass had shattered in the past or there was otherwise notice of the danger.

Of course, neither are true. Additionally, the Circuit Court had the body cam video of Officer Wright where Dr. Bennett stated that swimmers had performed the exercise against the glass wall before. AP 242; see also AP 1219 Manual Filing of Body Cam Video 4:40-5:16. As such, based upon all of the evidence before the Circuit Court, no error was committed as no reasonable jury could differ upon the conclusion that gross negligence was not established.

VI. CONCLUSION

WHEREFORE, Defendants-Respondents, Tazewell County Public Schools and Kimberly Benson, request that this Honorable Court affirm the Circuit Court's December 16, 2022, Order granting summary judgment, dismiss this appeal and for any such other and further relief which the Court deems appropriate.

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ABIGAIL SHOEMAKER,
MARY SHOEMAKER, and
CHRIS SHOEMAKER,

Plaintiffs-Petitioners,

v. **Appeal No.: 22-ICA-327**

TAZEWELL COUNTY PUBLIC SCHOOLS and KIMBERLY BENSON,

Defendants-Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Defendants-Respondents, Tazewell County Public Schools and Kimberly Benson, do hereby certify on May 30, 2023, that a true copy of the foregoing ***Defendants-Respondents', Tazewell County Public Schools and Kimberly Benson, Response Brief*** has been filed with the Clerk of the Court using the CM/ECF system, which will send notification to counsel:

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