

STATE OF MICHIGAN
IN THE SUPREME COURT

WAYNE FILIZETTI, as Personal
Representative of the Estate of Amarah
Filizetti, deceased; WAYNE FILIZETTI,
as Next Friend of LAILA FILIZETTI, a
minor; and WAYNE FILIZETTI, as
Next Friend of MELISSA FILIZETTI, a
minor;

Plaintiffs-Appellants,

v.

GWINN AREA COMMUNITY
SCHOOLS;
TRACY BELUSAR; ANTHONY J.
FILIZETTI; ROBERT SOYRING; and
GWINN AREA CLEANING AND
MAINTENANCE INC;

Defendants-Appellees.

Supreme Court No: 162092

Court of Appeals No. 344878

Marquette County Circuit Court

Case No. 16-54781-NO

Filed under AO 2019-6

Plaintiffs-Appellants' Appendix

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Trial Court's
Order Regarding Motions
for Summary Disposition

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

WAYNE FILIZETTI, as Personal Representative of
the Estate of Amarah Filizetti, deceased;
STACEY FILIZETTI;
WAYNE FILIZETTI, as Next Friend of
LAILA FILIZETTI, a minor; and
WAYNE FILIZETTI, as Next Friend of
MELISSA FILIZETTI, a minor,

Plaintiffs,

v

FILE NO: 16-54781-NO

GWINN AREA COMMUNITY SCHOOLS;
TRACY BELUSAR;
ANTHONY J. FILIZETTI;
ROBERT SOYRING; and
GWINN AREA CLEANING AND MAINTENANCE, INC.,

Defendants,

and

GWINN AREA COMMUNITY SCHOOLS,

Cross-Plaintiff/Cross-Defendant,

v

GWINN AREA CLEANING AND MAINTENANCE, INC.,

Cross-Defendant/Cross-Plaintiff,

_____ /

ORDER REGARDING MOTIONS FOR SUMMARY DISPOSITION

At a session of said
Court held in the City of
Marquette this 17th day of
July 2018.

PRESENT: THE HONORABLE JENNIFER A. MAZZUCHI, CIRCUIT JUDGE

The parties to this action appeared before the Court on June 28, 2018 for oral argument on several motions. The Court has already issued orders regarding some of the motions, but has remaining before it the Plaintiffs' and Defendants' cross motions for summary disposition. The Plaintiffs seek summary disposition pursuant to MCR 2.116(C)(9) and (C)(10); Defendants seek summary disposition under MCR 2.116 (C)(7), (C)(8), and (C)(10). For the reasons stated further below, the Court grants partial summary disposition to Plaintiffs regarding the applicability of the Public Building Exception to the Government Tort Liability Act (GTLA). The Court denies all other requests for summary disposition.

Plaintiffs' causes of action stem from a tragic accident that occurred on September 3, 2015 in the Gwinn High School gymnasium. Contained within an alcove in the gymnasium is a collapsible stage that is generally stored beneath a cover. According to the parties' briefing, the shop class at the high school built the cover in 2010. Among the exhibits submitted to the Court is an installation and removal manual. The manual provides step-by-step instructions and photographs of the process required to install or uninstall the panels. The process requires multiple parties and the use of various tools. The panels fit into brackets that are installed on the floor. Attached to the front panels are thick foam pads that serve as cushioning for athletes who might collide with them during their use of the gym. Each of the front panels weighs 325 pounds. Typically, the stage is used for the annual graduation ceremony, and then returned to the alcove and covered by the enclosure. Throughout the rest of the year, the front panels act as padded gym walls.

In 2015, however, the stage cover was not reinstalled after graduation. The Gwinn School District had undergone some staffing changes that impacted its performance of various tasks, including the reinstallation. During the summer months the panels were stored in various locations around the school until September 3, 2015, when Defendants Anthony Filizetti and Tracey Belusar began the process of moving them into the gym for the purpose of installation. During that process they set two of the panels leaning up against the wall near the alcove, and then left the gym. At that same time, four-year-old Amarah Filizetti was playing in the gym with her sisters while their mother coached cheerleading practice. At some point, she came into contact with one of the panels, which fell on top of her and caused injuries that ultimately resulted in her death.

Both parties seek summary disposition regarding the applicability of the Public Building Exception to the Government Tort Liability Act, contained within MCL 691.1406. This excep-

tion to general governmental immunity has five elements: 1) a governmental agency is involved; 2) the public building in question was open for use by members of the public; 3) a dangerous or defective condition of the public building itself existed; 4) the governmental agency had actual or constructive knowledge of the alleged defect; and 5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. *Kerbersky v Northern Michigan University*, 458 Mich 525 (1998).

In their competing motions, both parties argue that there are no disputes of material fact regarding the applicability (or inapplicability) of this statute. The parties agree that the first two elements are established, and there is no dispute about Defendants' notice of the stage wall installation. However, the parties dispute whether the stage cover panels were a condition "of the public building" and whether there had been a "reasonable period" during which Defendants failed to remedy the condition or take other action to protect the public.

For purposes of MCL 691.1406, the definition of public building includes "fixtures." Courts are to use a fixtures analysis if items of personal property "have a possible existence apart from realty." *Fane v Detroit Library Commission*, 465 Mich 68, 78 (2001). The Court first concludes that since the stage cover was designed to be removable - albeit with significant effort - the walls had an existence independent from the realty. Without the ability to remove the panels, the stage would not be accessible for its intended use for graduation. Therefore, the Court uses the fixtures analysis.

In determining whether a particular item is a fixture, a court is to consider the particular facts of a case, as well as three specific factors: 1) annexation to the realty, either actual or constructive; 2) adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriate; and 3) intention to make the article a permanent accession to the freehold." *Velmer v Baraga Area Schools*, 430 Mich 385, 394 (1998) (citations omitted).¹

In *Velmer*, the Michigan Supreme Court considered whether a milling machine in a school building could be a fixture. The machine weighed over 1,000 pounds and was not attached to the floor. The Court concluded that a fixture need not necessarily be attached to be

¹ The Court is mindful of the opinions of Defendants' expert, but finds them of little relevance to the Court's consideration of these factors.

considered a part of the public building, so long as there are objective and visible facts supporting the intention to annex it to the building. *Id* at 394.

In contrast to fixtures are items that are "non-stationary and easily moveable," and thus not part of the building. *Id* at 392. The *Velmer* Court detailed other cases in which courts have considered items such as a ping-pong table, a chair, and an eraser; and found that their ready mobility renders them personal property and not fixtures. In *Fane*, the consolidated case of *Cox v Detroit Public Library* involved an outdoor portable ramp, which the Court described as one that "could be readily moved," and was not intended as a permanent accession to the building. *Id* at 80.

The Court finds that the stage cover was annexed to realty, notwithstanding the annual removal and replacement. There is no evidence that the panels were of any use when they were not installed, and both the panels and the alcove had hardware attached to enable the installation of the stage cover. The addition of the pads on the front panels is objective and visible evidence of the intention to use the panels as gym walls. Exhibit 5 in Plaintiffs' motion is a price quote for construction materials, and the panels are described as designed for "direct to wall permanent mount."

The Court also concludes that the stage cover cannot be considered "easily moveable." Each of the front panels weighs 325 pounds. The many communications set forth in the exhibits establish that reinstallation took many months to coordinate. Installing the cover required multiple people and involved several steps. As a result, the installation process cannot reasonably be considered a "transitory condition or ordinary daily maintenance," such as the slippery floor discussed in *Wade v Dep't of Corrections*, 439 Mich 158 (1992).

In consideration of the applicable case law, the Court concludes that the stage cover and its panels were building fixtures, and that no reasonable trier of fact could conclude otherwise. The Court therefore grants partial summary disposition in Plaintiffs' favor on that issue. However, as Plaintiffs allege, the dangerous condition was an "unsecured and unguarded 325-pound section of a wall." (Plaintiffs' brief, p. 22). The Court concludes that the dangerous condition at issue had not existed for months; rather, it had existed in the gymnasium that morning. Therefore, there are material factual disputes regarding the "reasonableness" of the period during which the governmental agency failed to remedy the defective condition or take action reasonably necessary to protect the public.

The Court also concludes that with regard to the responsibility, conduct, and culpability

of the various parties, material disputes of fact remain. The trier of fact must resolve the remaining issues raised in the parties' motions, including: 1) the degree of negligence of the individually named Defendants; 2) the proximate cause of the injuries; 3) the contributory negligence of various parties;² and 4) Stacy Filizetti's employment status with the Gwinn Area Public Schools.

Based on the above analysis and pursuant to MCR 2.116(C)(10), the Court grants partial summary disposition in favor of Plaintiffs regarding the applicability of the public building exception to the GTLA. All other requests for relief are denied, the Court having concluded that material disputes of fact remain.

SO ORDERED.

Dated: 7/20/2018


JENNIFER A. MAZZUCHI, Circuit Judge

c: J. Paul Janes
Peter W. Ryan
Timothy Sheridan

Date of Mailing: 7/23/2018

² Following oral argument in this matter Plaintiffs' counsel directed to the Court's attention to the recently issued decision of *Estate of Ezekiel D. Goodwin v Northwest Michigan Fair Association*, _____ Mich App _____ (2018). In light of that decision, the Court declines to grant Plaintiffs' motion for summary disposition regarding contributory negligence of a parent responsible for supervision of her child.

Court of Appeals Opinions

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE FILIZETTI, Personal Representative of
the ESTATE OF AMARAH FILIZETTI and Next
Friend of LAILA FILIZETTI and MELISSA
FILIZETTI, and STACEY FILIZETTI,

Plaintiffs-Appellees,

v

GWINN AREA COMMUNITY SCHOOLS,

Defendant/Cross-Plaintiff/Cross-
Defendant-Appellant,

and

WEST EDUCATIONAL LEASING, INC., doing
business as PROFESSIONAL CONTRACT
MANAGEMENT,

Defendant,

and

TRACY BELUSAR, ANTHONY J. FILIZETTI,
and ROBERT SOYRING,

Defendants-Appellants,

and

GWINN AREA CLEANING AND
MAINTENANCE, INC.,

Defendant/Cross-Defendant/Cross-
Plaintiff.

UNPUBLISHED
August 27, 2020

No. 344878
Marquette Circuit Court
LC No. 16-054781-NO

Before: METER, P.J., and O'BRIEN and TUKEL, JJ.

PER CURIAM.

Defendant/cross-plaintiff/cross-defendant-appellant, Gwinn Area Community Schools (the school), and defendants-appellants, Tracy Belusar, Anthony J. Filizetti,¹ and Robert Soyring (the individual defendants, and with the school "defendants"), appeal as of right the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7) (immunity granted by law), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact), and partially granting plaintiffs' motion for summary disposition under MCR 2.116(C)(10). We reverse.²

I. UNDERLYING FACTS

The north wall of the school gym has an alcove that housed a portable stage used for the high school graduation ceremony. In 2010, Joe Routhier, the CADD (computer aided design and drafting) teacher at the school, designed and constructed two panels to cover the stage when it was not in use. The cover consisted of two wooden panels that were 10 inches wide, 6 feet high, and 12 feet long, and weighed 325 pounds each. Each panel had padding on one side and was designed to be rigid enough to absorb impact, to be covered on top to keep refuse from going behind the panels, to be removable, and to be portable. The panels could be affixed to the gym wall and generally were detached from the gym wall only in the days surrounding the school's high school graduation ceremony. When removed, the panels were placed on specially designed carts and stored in the hallway near the CADD room by leaning the panels against the wall at an angle. Routhier and his CADD students removed and reinstalled the panels around the graduation ceremony each year from 2010 to 2014. Routhier's CADD students also removed the panels before graduation in 2015, but they did not reinstall the panels after graduation that year.

Routhier resigned his position at the school at the end of the 2014-2015 school year, but before leaving he created a manual for how to remove and reinstall the panels. The panels were not reinstalled during the summer of 2015 and, as a result, the alcove with the portable graduation stage was exposed in the gym. On September 2, 2015, Soyring, the athletic director at the school, sent an email to Anthony, the director of finance and human services at the school, stating that the panels needed to be reinstalled because the alcove and portable stage were a safety hazard.

On September 3, 2015, Anthony and Belusar, a part-time maintenance worker at the school, began the process of reinstalling the panels. Anthony and Belusar loaded the first panel on one of the carts at 9:22 a.m. and brought it to the gym. Anthony and Belusar noticed that cheerleaders,

¹ All individuals with the last name Filizetti will be referred to by their first names.

² Defendants argue that the trial court erred by granting summary disposition under MCR 2.116(C)(8), but we do not have jurisdiction over interlocutory orders, such as the one at issue here, that grant or deny summary disposition under MCR 2.116(C)(8). MCR 7.202(6)(a)(v); MCR 7.203(A). Defendants failed to seek leave to appeal the trial court's MCR 2.116(C)(8) summary disposition order.

coached by Stacey Filizetti, were practicing on mats on the southeast end of the gym, approximately 80 feet from the alcove area. The first panel was placed in the alcove and leaned against the wall. The base of the panel was placed between 12 and 24 inches from the wall and the panel itself leaned against the wall, to stabilize the panel. Anthony and Belusar then retrieved the second panel and placed it in the alcove at some time before 9:40 a.m. The second panel also was leaned against the wall, with the base 12 to 18 inches out; and two to three feet separated the two panels at their bases. Belusar tested the stability of the panels by pushing her weight against the panels; the panels did not fall. Anthony believed that the two panels were stable as positioned. Neither Belusar nor Anthony saw anyone in the gym other than the cheerleaders and the person they assumed to be the coach; neither saw children in the gym. After placing the second panel against the wall, Belusar told Anthony that she needed to retrieve some tools and would ask another employee to help her reinstall the panels; Anthony told Belusar that he would be in his office if she needed additional assistance. Soyring walked through the gym around 9:30 a.m. and saw the cheerleaders practicing; he did not observe any children in the gym.

Stacey brought her three four-year-old daughters to cheerleading practice with her and estimated that they were with her in the gym at 9:15 a.m. Stacey did not see the panels being wheeled into the gym, but she sent her children to play at the north end of the gym when the cheerleaders began practicing stunts around 10:00 a.m. The panels were still leaning against the wall in the alcove at this time. As the children were on the north end of the gym, one of the panels fell on top of Amarah Filizetti. Amarah died from her injuries the following day.

Plaintiffs filed a complaint alleging that the school was liable for failing to repair and maintain a public building and Belusar, Anthony, and Soyring were grossly negligent. Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10) and argued that they were entitled to immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.* Plaintiffs responded by filing a motion for summary disposition of their own under MCR 2.116(C)(9) and (10) and argued that defendants were not entitled to governmental immunity and that plaintiffs were entitled to judgment as a matter of law. The trial court eventually issued a written opinion and partially granted summary disposition to plaintiffs. Regarding the claims against the individual defendants, the trial court denied their motion for summary disposition, concluding that there were questions of fact regarding the negligence of the individual defendants. Regarding the claim against the school, the trial court denied the school's motion for summary disposition and granted in part plaintiffs' motion for summary disposition. The trial court found that the panels were a fixture of the school, but that whether the school failed to protect the public from their placement in the gym within a reasonable amount of time was a question of fact. This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

The trial court granted summary disposition to defendants under MCR 2.116(C)(7) and (10). A trial court's summary disposition ruling is reviewed *de novo*. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008).

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews a motion brought under MCR 2.116(C)(10) “by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition “is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.* “There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). “Only the substantively admissible evidence actually proffered may be considered.” *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). “Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient.” *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

The moving party has the initial burden to support its claim with documentary evidence but, once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016). Finally, “[i]ssues of statutory interpretation are reviewed de novo.” *City of Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006). “Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning. When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted.” *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011).

B. THE INDIVIDUAL DEFENDANTS

The trial court erred by denying the individual defendants’ motion for summary disposition under MCL 691.1407(2) because reasonable minds could not differ with respect to whether the individual defendants’ conduct amounted to gross negligence.

Under MCL 691.1407(2),

[g]overnmental employees are immune from liability for injuries they cause during the course of their employment if they are acting or reasonably believe they are acting within the scope of their authority, if they are engaged in the exercise or discharge of a governmental function, and if their conduct does not amount to gross negligence that is the proximate cause of the injury or damage.” [*Love v Detroit*, 270 Mich App 563, 565; 716 NW2d 604 (2006).]

“[T]he burden . . . fall[s] on the governmental employee to raise and prove his entitlement to immunity as an affirmative defense.” *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). Here, the only dispute is whether the individual defendants’ conduct amounted to gross negligence that is the proximate cause of the injury or damage. MCL 691.1407(2)(c).

The GTLA defines “gross negligence” as “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.” MCL 691.1407(8)(a). “Evidence of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent.” *Chelsea Investment Group, LLC v Chelsea*, 288 Mich App 239, 265; 792 NW2d 781 (2010). “The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent.” *Maiden*, 461 Mich at 122. Consequently, a mere showing of negligence or that additional safety precautions could have prevented the injury in question is not sufficient to establish that a government employee was grossly negligent. *Tarlea v Crabtree*, 263 Mich App 80, 90; 687 NW2d 333 (2004). Instead, a government employee is only grossly negligent if he or she demonstrates “a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks.” *Id.* Stated differently, a defendant is grossly negligent under circumstances in which, “if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge.” *Id.*

The determination of whether a governmental employee’s conduct constituted gross negligence that proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact. *Briggs v Oakland Co*, 276 Mich App 369, 374; 742 NW2d 136 (2007). But if no reasonable jury could find that the employee’s conduct amounted to gross negligence, the plaintiff’s claim must be dismissed. See *Chelsea Investment Group, LLC*, 288 Mich App at 265.

Here, Soyryng asked Anthony to ensure that the stage cover was reinstalled. Soyryng was not involved in the moving of the stage cover panels to the gym or in leaning the panels against the gym wall. The following day, Anthony and Belusar moved the stage cover panels into the gym and leaned the panels against the wall in the north end of the gym after pushing out the base of each panel to ensure that the panels were stable. Neither Anthony nor Belusar observed anyone inside the gym except for the cheerleaders who were practicing on mats in the south end of the gym; they also did not anticipate that the cheerleaders or anyone else would enter the north end of the gym. Furthermore, Belusar tested the stability of the panels by placing her weight on them, which did not cause them to fall. Anthony believed that the panels were stable and well positioned. The panels were left unattended while Belusar went to obtain the hardware and drill necessary to attach the panels to the wall. Under these circumstances, reasonable minds might differ as to whether Anthony and Soyryng were negligent in leaving the unattended panels leaning against the gym wall for a period of 30 minutes or less, but they could not differ as to whether their conduct

was so reckless as to demonstrate a substantial lack of concern for whether an injury resulted. Further, because the panels were only placed in the gym the morning of the accident, and because Soyering played no role in leaning the panels against the gym wall, reasonable minds could not differ as to whether his conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury would result. Because there was no material question of fact as to gross negligence, the trial court erred by failing to grant summary disposition under MCR 2.116(C)(7) and (10) in favor of the individual defendants.

C. THE SCHOOL

The trial court did not err by finding that the stage cover constituted a fixture and, therefore, part “of a public building.” The trial court did err, however, by denying the school’s motion for summary disposition because leaning the stage cover panels against the gym wall did not constitute a failure to repair or maintain a public building.

“The governmental tort liability act (GTLA), MCL 691.1401 et seq., provides: ‘Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.’ ” *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 83-84; 746 NW2d 847 (2008), quoting MCL 691.1407(1). The public building exception, MCL 691.1406, is one such exception and states, in pertinent part, that

[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place.

Our Supreme Court has held that in order for a plaintiff to avoid governmental immunity under the public building exception, a plaintiff must prove that

1) a governmental agency is involved, 2) the public building in question is open for use by members of the public, 3) *a dangerous or defective condition of the public building itself exists*, 4) the governmental agency had actual or constructive knowledge of the alleged defect, and 5) the governmental agency failed to remedy the alleged defective condition after a reasonable period of time. [*de Sanchez v Dep’t of Mental Health*, 467 Mich 231, 236; 651 NW2d 59 (2002) (citation omitted).]

The duty which the statute imposes is limited to repair and maintenance of a public building. *Renny v Dep’t of Transportation*, 478 Mich 490, 502; 734 NW2d 518 (2007). “It is not

suggestive of an additional duty beyond repair and maintenance.” *Id.* at 501. The parties disputed below whether the stage cover was “of a public building” and whether there had been a “reasonable period” during which the school failed to repair and maintain the public building. Defendants maintained that the stage cover was not a fixture and therefore not “of a public building”, and plaintiffs maintained that the stage cover was a fixture. The trial court granted partial summary disposition to plaintiffs, finding that the stage cover constituted a fixture and thus was part of a public building. The trial court otherwise denied the parties’ motions for summary disposition, finding that questions of fact existed with regard to the reasonableness of the period during which the school failed to remedy the defective condition or take action reasonably necessary to protect the public.

To establish the applicability of the public building exception, “the alleged defect must be a defect of the building itself and not merely a transient condition.” *Johnson v Detroit*, 457 Mich 695, 704; 579 NW2d 895 (1998). Fixtures attached to the public building are considered to be part “of the building itself” and can support a claim under the public building exception. *Fane v Detroit Library Comm*, 465 Mich 68, 77; 631 NW2d 678 (2001). “An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty.” *Id.* at 78. “The controlling intention regarding whether an object has become a fixture of the realty is manifested by the objective, visible facts.” *Carmack v Macomb Co Community College*, 199 Mich App 544, 547; 502 NW2d 746 (1993) (quotations marks and citation omitted). Annexation to the realty may be actual, meaning that the item is permanently affixed to the building in some fashion, or constructive. *Fane*, 454 Mich at 79-80. “Constructive annexation occurs where the item cannot be removed from the building without impairing the value of both the item and the building.” *Id.* at 80.

Here, the objective, visible facts show that the controlling intention was that the stage cover was to be a fixture. The panels were designed and built for the purpose of enclosing the alcove area where the stage was stored, to prevent student athletes from colliding with the stage. The panels themselves were physically attached to the walls. The panels’ size, permanence to the alcove, and function are revealing in that regard. Each of the panels was 10 inches wide, 6 feet high, and 12 feet long, and weighed 325 pounds. The design necessarily contemplated that the panels would not be easily movable without the use of specially designed carts. Once the stage cover was designed and built in 2010, it was, for the overwhelming majority of its five-year existence, stationary. When the panels were moved (once per year), the process required three individuals to load the panels and push them on the carts through the gym to the hallway; during that process, the panels were only moved to a hallway near the CADD room. The once-a-year re-installation required the same process in reverse. The nature of the stage cover stands in contrast to nonstationary items such as library chairs and ping pong tables, which courts have rejected as being fixtures. See *Velmer v Baraga Area Schs*, 430 Mich 385, 396; 424 NW2d 770 (1988) (examining caselaw and finding that a milling machine could be constructively attached to the building by its weight); cf. *Carmack*, 199 Mich App at 547 (finding that gymnastic equipment was not a fixture when it was “easily removable and was removed on an almost daily basis”). Rather, the record evidence, when viewed in a light most favorable to plaintiff, demonstrates that the stage cover functioned as a permanent fixture of the gym, and that it was not intended to be removed except for graduation. Thus, application of the relevant factors suggests that the stage cover was a fixture.

The remaining inquiry concerns whether Belusar's and Anthony's leaning of an unsecured and unguarded panel of the stage cover against the wall in the gym during the installation process constituted a failure to repair or maintain the building. The trial court did not address the necessary element of whether the leaning of the panel against the gym wall constituted a failure to repair or maintain the public building. "[A] failure to repair or maintain appears to consist of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed." *Tellin v Forsyth Twp*, 291 Mich App 692, 705-706; 806 NW2d 359 (2011). Here, there was no evidence to suggest that the school failed to maintain or repair the stage cover. Rather, the "defective condition" in this case was not the lack of a stage cover over the alcove, but, rather, the leaning of unguarded and unsecured panels on the wall as part of the installation process. This sounds more in the nature of a claim that Belusar and Anthony were negligent in the installation process rather than that they failed to repair or maintain the panels. Indeed, plaintiffs' claim is based on the design of the walls that required their removal and reinstallation each year. But design defect claims are outside the scope of the public building exception. See MCL 691.1406; *Renny*, 478 Mich at 500-501. Thus, under these circumstances, this claim is not actionable under the public building exception.

Furthermore, even if we did not conclude that plaintiff's claim was essentially a design defect claim we would still reverse because the panels themselves were not dangerous or defective. Our Supreme Court recognizes that a dangerous or defective fixture "can" or "may" support a claim of liability under the public building exception. *Fane*, 465 Mich at 78; *Velmer v Baraga Area Schools*, 430 Mich 385, 396; 424 NW2d 770 (1988). Even though the panels were fixtures, plaintiffs' claim under the public building exception is untenable under the facts. The dangerous or defective condition was not of the fixtures (and therefore of the public building) themselves, but of how the employees placed the fixtures while installing them. This dangerous or defective condition is more akin to the type of transitory condition described in *Wade v Dep't of Corrections*, 439 Mich 158, 168; 483 NW2d 26, 30 (1992): the dangerous condition posed by the panels was related to the employees' negligence while installing them, not the permanent structure or physical integrity of the building itself. Like in *Wade*, 439 Mich at 171, plaintiffs' "claim alleges no more than mere negligence" that resulted in the complained-of transitory condition. "[T]he transitory condition was not caused by a dangerous or defective condition of the building itself, thus the public building exception does not apply." *Id.* at 161. Accordingly, plaintiff's claim must also fail for this reason.

III. CONCLUSION

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Colleen A. O'Brien

/s/ Jonathan Tukel

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

**STATE OF MICHIGAN
COURT OF APPEALS**

WAYNE FILIZETTI, Personal Representative of
the ESTATE OF AMARAH FILIZETTI and Next
Friend of LAILA FILIZETTI and MELISSA
FILIZETTI, and STACEY FILIZETTI,

Plaintiffs-Appellees,

V

GWINN AREA COMMUNITY SCHOOLS,

Defendant/Cross-Plaintiff/Cross-
Defendant-Appellant,

and

WEST EDUCATIONAL LEASING, INC., doing
business as PROFESSIONAL CONTRACT
MANAGEMENT,

Defendant,

and

TRACY BELUSAR, ANTHONY J. FILIZETTI,
and ROBERT SOYRING,

Defendants-Appellants,

and

GWINN AREA CLEANING AND
MAINTENANCE, INC.,

Defendant/Cross-Defendant/Cross-
Plaintiff.

UNPUBLISHED
August 27, 2020

No. 344878
Marquette Circuit Court
LC No. 16-054781-NO

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Before: METER, P.J., and O'BRIEN and TUKEL, JJ.

METER, P.J. (*concurring in part and dissenting in part*).

I concur with the majority opinion's well-reasoned analysis concerning the individual defendants-appellants, Tracy Belusar, Anthony J. Filizetti, and Robert Soyering. I dissent, however, from the majority opinion's analysis concerning defendants/cross-plaintiff/cross-defendant-appellant Gwinn Area Community Schools (the school). In my view, the school official's replacement of the panels to cover the alcove opening can only be described as repair or maintenance.

"Absent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function." *Maskery v Board of Regents of Univ of Mich*, 468 Mich 609, 613; 664 NW2d 165 (2003). The statutory exception relevant to this case is the public building exception, which states in part:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. [MCL 691.1406.]

The statutory exceptions to governmental immunity are to be narrowly construed. *McLean v McElhaney*, 289 Mich App 592, 598; 798 NW2d 29 (2010).

"The public-building exception excludes claims of design defects. Therefore, to avoid governmental immunity, a plaintiff must assert a claim that the defective condition was the result of a failure to repair or maintain." *Tellin v Forsyth Twp*, 291 Mich App 692, 700; 806 NW2d 359 (2011) (footnotes omitted). Our Supreme Court has recognized and explained the distinction between design defects and a failure to repair or maintain:

The first sentence of MCL 691.1406 states that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." This sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings. Neither the term "repair" nor the term "maintain," which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner. "Design" is defined as "to conceive; invent; contrive." By contrast, "repair" means "to restore to sound condition after damage or injury." Similarly, "maintain" means "to keep up" or "to preserve." Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. "Design" refers to the initial conception of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the

Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception. [*Renny v Dep't of Transp*, 478 Mich 490, 500-501; 734 NW2d 518 (2007) (footnotes omitted).]

A defect caused by the failure to repair or maintain a fixture "is considered to be a condition 'of a public building' within the meaning of [MCL 691.1406]." *Pierce v Lansing*, 265 Mich App 174, 181; 694 NW2d 65 (2005). As the majority discusses, the panels in question are clearly fixtures, and thus are considered part of the school for purposes of the public building exception.

Here, plaintiffs' claim is not premised on a design defect because the alleged defect was not "a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose." *Tellin*, 291 Mich App at 705. Instead, the alleged defect was a failure to "restor[e] or return[] something . . . to a prior state or condition." *Renny*, 478 Mich at 501. The panels, in their original state, were secured over the alcove's opening to cover the stage. The panels had been removed from the alcove to allow the stage to be assembled for the school's graduation ceremony. On the date of the accident, the school intended to return the panels to their original state of being secured to the wall. However, the school's staff failed to properly return the panels to their original state, which resulted in a 325-pound panel falling on a small child, resulting in her death. Thus, this case falls squarely within the public building exception.

Because plaintiffs' claim was premised on the school's failure to repair or maintain the panels, I would hold that the public building exception to governmental immunity applies and affirm the trial court's order denying the school's motion for summary disposition.

/s/ Patrick M. Meter

Trial Court Register of Actions

RECEIVED by MSC 9/24/2021 12:22:30 PM

P 001 FILIZETTI, AMARAH, ESTATE OF VS D 001 GWINN AREA COMMUNITY SCHOOLS, ,
PER-FILIZETTI, WAYNE, C/O-JAYNE, THOMAS,
220 ELM STREET 50 WEST M-35
GWINN MI 49841 GWINN MI 49841
ATY:JANES, J. PAUL, ATY:RYAN, PETER W.,
P-43798 616-235-5500 P-23107 906-774-3808
DISPOSITION 10/09/20 STY MAJ
SERVICE/ANS 09/16/16 ANS

P 002 FILIZETTI, STACEY, VS D 002 WEST EDUCATIONAL LEASING INC, ,
220 ELM STREET DBA-PROFESSIONAL CONTRACT MGMT, ,
RES-BERNARD, ROBERT,
C/O ROBERT BERNARD
212 KENT STREET STE 12
PORTLAND MI 48875
ATY:WEAVER, MICHAEL
P-43985 248-901-4000
DISPOSITION 01/11/17 DSP MAJ
SERVICE/ANS 10/14/16 ANS

P 003 FILIZETTI, LAILA, VS D 003 BELUSAR, TRACY,
NXF-FILIZETTI, WAYNE, 443 W SPRING STREET
220 ELM STREET MARQUETTE MI 49855
GWINN MI 49841 ATY:RYAN, PETER W.,
ATY:JANES, J. PAUL, P-23107 906-774-3808
P-43798 616-235-5500 DISPOSITION 10/09/20 STY MAJ
SERVICE/ANS 09/16/16 ANS

P 004 FILIZETTI, MELISSA, VS D 004 FILIZETTI, ANTHONY, J
NXF-FILIZETTI, WAYNE, 220 MOTTES LANE
220 ELM STREET GWINN MI 49841
GWINN MI 49841 ATY:RYAN, PETER W.,
ATY:JANES, J. PAUL, P-23107 906-774-3808
P-43798 616-235-5500 DISPOSITION 10/09/20 STY MAJ
SERVICE/ANS 09/16/16 ANS

D 005 SOYRING, ROBERT,
365 N ADAMS STREET W 09/05/17
GWINN MI 49841 ATY:RYAN, PETER W.,
P-23107 906-774-3808
DISPOSITION 10/09/20 STY MAJ
SERVICE/ANS 10/23/17 ANS

D 006 GWINN AREA CLEANING & MAINT, ,
135 W GRANITE STREET
GWINN MI 49841
ATY:SHERIDAN, TIMOTH 09/05/17
P-52870 616-752-4619
DISPOSITION 06/28/18 SMD MSD
SERVICE/ANS 10/26/17 ANS

XP001 GWINN AREA COMMUNITY SCHOOLS, VS XD001 GWINN AREA CLEANING & MAINT, ,
ATY:RYAN, PETER W., 10/23/17 ATY:SHERIDAN, TIMOTH 10/23/17

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P-23107 906-774-3808 P-52870 616-752-4619
 DISPOSITION 06/28/18 SMD SMD
 SERVICE/ANS 11/27/17 ANS

XP002 GWINN AREA CLEANING & MAINT,, VS XD002 GWINN AREA COMMUNITY SCHOOLS,,
 ATY: SHERIDAN, TIMOTH 12/11/17 ATY: RYAN, PETER W., 12/11/17
 P-52870 616-752-4619 P-23107 906-774-3808
 DISPOSITION 10/09/20 STY MAJ
 SERVICE/ANS 01/22/18 ANS

IP001 MULLINS, TIMOTHY,
 AKA-CO-COUNSEL FOR DEF 1,3,4,5
 ATY: MULLINS, TIMOTHY 07/30/18
 P-28021 248-457-7020

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments	
1	07/18/16	MAZZUCHI	P 001	SUMMONS AND COMPLAINT	CLK
				RECEIPT# 00215164 AMT \$260.00	
2			P 001	Petition for Appointment of	CLK
				Next Friend; Consent to Act	CLK
				as Next Friend	CLK
3				INFORMATION	CLK JJ
				Proposed Order Appointing	CLK
				Next Friend sent to Judge	CLK
				for review/signature	CLK
4	07/19/16			Order Appointing Next Friend	CLK JJ
7	07/22/16		D 001	RETURN OF SERVICE	CLK DP
				Certified Return Receipt-	CLK
				Gwinn Area Community Schools	CLK
				signed by Jane Flourre	CLK
8			D 002	RETURN OF SERVICE	CLK DP
				Certified Return Receipt -	CLK
				West Educational Leasing	CLK
				Signed by Corbyn Hanley	CLK
5	07/23/16		D 004	RETURN OF SERVICE	CLK DP
				Certified Return Receipt-	CLK
				AJ Filizetti	CLK
6	08/02/16		D 003	RETURN OF SERVICE	CLK DP
				Certified Return Receipt-	CLK
				Tracy Belusar	CLK
9	08/29/16			SET NEXT DATE FOR: 10/18/16 8:00 AM	CLK CHC
				CHECK STATUS	
10	09/16/16		D 001	APPEARANCE	CLK DP
				ATTORNEY: P-23107 RYAN	CLK
11			D 003	APPEARANCE	CLK DP
				ATTORNEY: P-23107 RYAN	CLK
12			D 004	APPEARANCE	CLK DP
				ATTORNEY: P-23107 RYAN	CLK
13			D 001	ANSWER FILED	CLK DP
				Answer, Affirmative Defenses	CLK
				and Reliance Jury Demand of	CLK
				Gwinn Area Schools, Tracy	CLK
				Belusar and Anthony Filizetti	CLK
				& POS	CLK

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14		D 003	ANSWER FILED	CLK	
15		D 004	ANSWER FILED	CLK	
16	10/05/16	P 001	Plaintiffs' 1st Set of Requests for Admissions to Defendant Gwinn Area Community Schools w/POS	CLK	
18	10/14/16	D 002	ANSWER FILED Answer to Complaint, Reliance on Jury Demand & Affirmative Defenses of Defendant Professional Contract Management, Inc.	CLK	
17	10/17/16	D 002	RE-ASSIGNED PRO-PER TO WEAVER	CLK	
19		P 001	PROOF OF SERVICE FILED	CLK	
20	10/19/16		SET NEXT DATE FOR: 11/18/16 8:00 AM CHECK STATUS	CLK	CHC
21	11/02/16	D 001	Gwinn's Response to Plaintiffs' First Set of Requests for Admissions; POS	CLK	
22	11/18/16		NOTICE SENT FOR: 01/23/17 9:30 AM SCHEDULING CONFERENCE	CLK	CHC
23			P/S & NOTICE TO APPEAR	CLK	JJ
24	11/29/16		REMOVE NEXT EVENT: 01/23/17 9:30 AM SCHEDULING CONFERENCE	CLK	CHC
25			NOTICE SENT FOR: 01/23/17 11:00 AM SCHEDULING CONFERENCE TIME CHANGED FROM 9:30 TO 11:00 A.M. at the request of Attorney Ryan.	CLK	
26			P/S & NOTICE TO APPEAR	CLK	JJ
27	01/03/17		Stipulation & Order to Amend Complaint	CLK	JJ
28			INFORMATION Proposed Order sent to Judge Weber for signature/review	CLK	JJ
29	01/06/17		Order	CLK	DP
30	01/11/17	D 002	MISCELLANEOUS ACTION BY JUDGE DISMISSED BY PARTY/PETITIONER	CRT	JJ
31		P 001	First Amended Complaint & Reliance Upon Jury Demand	CLK	JJ
34	01/23/17		ALTERNATIVE DISPUTE RESOLUTION ORDERED	CLK	CKK
32	01/24/17	WEBER	SCHEDULING CONFERENCE HELD Janes for Pla; Ryan for Def. Amend pleadings by 3/3, witness list by 5/1. Case eval by 9/29.	CRT	CKK
33			NOTICE SENT FOR: 11/06/17 9:00 AM PRETRIAL CONFERENCE	CLK	CKK
35	MAZZUCHI		SET NEXT DATE FOR: 08/01/17 8:00 AM CHECK FOR MEDIATION DATE HON. KARL A. WEBER	CLK	CKK
36		D 001	Scheduling Conference Statement of Gwinn Area Community Schools, Tracy Belusar & Anthony J. Filizetti; POS	CLK	JJ
37			P/S & NOTICE TO APPEAR	CLK	JJ

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			Initial Scheduling Order; Order for Alternative Dispute Resolution -- Case Evaluation	CLK	
38	01/30/17	D 001	Answer, Affirmative Defenses to First Amended Complaint, & Reliance on Jury Demand of Gwinn Area Community Schools ("Gwinn"), Tracy Belusar ("Belusar") and Anthony J. Filizetti ("AJ Filizetti"); POS	CLK	
39	01/31/17		Order Appointing Substitute Case Evaluator	CLK	
40	02/07/17	WEBER	CASE REASSIGNMENT FROM: MAZZUCHI, JENNIFER A., TO: WEBER, KARL A.,	CLK	
41	02/15/17		SET NEXT DATE FOR: 09/23/17 8:00 AM CHECK FOR MEDIATION EVALUATION HON. KARL A. WEBER	CLK	
42	03/08/17		Order Appointing Second Substitute Case Evaluator	CLK	
43	03/22/17	D 001	PROOF OF SERVICE FILED	CLK	
44	04/04/17	D 001	Notice of Taking Deposition of Wayne Filizetti; Notice of Taking Deposition of Stacey Deposition & POS	CLK	
45	05/03/17	D 001	Initial Witness List of Gwinn Area Community Schools, Tracy Belusar & Anthony J. Filizetti; POS	CLK	JJ
46	05/08/17	P 001	Plaintiffs' Lay Witness & Expert Witness List	CLK	JJ
47	06/23/17		Joint Motion & Stipulation to Modify Initial Scheduling Order, Allow Filing of Notice of Non-Party Fault Against Gwinn Area Cleaning and Maintenance ("GACM") Pursuant to MCR 2.112(K), and Second Amended Complaint	CLK	JJ
48		D 001	PROOF OF SERVICE FILED	CLK	JJ
49	06/26/17		Subpoena Return - PCMI	CLK	CNS
50	07/03/17		Order	CLK	JJ
51	07/07/17		SET NEXT DATE FOR: 07/31/17 11:00 AM MOTION HEARING HON. KARL A. WEBER	CLK	CKK
			Pla motion for protective order.	CLK	
52	07/14/17	P 001	MOTION FILED RECEIPT# 00225101 AMT \$20.00 Motion to Compel Discovery; Brief in Support	CLK	CNS
53	07/19/17	P 001	Re-Notice of Hearing w/POS	CLK	DP
55	07/31/17		NO HEARING HELD No motion for protective order filed.	CRT	CKK
54	08/01/17		SET NEXT DATE FOR: 08/11/17 9:30 AM	CLK	CKK

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MOTION HEARING

HON. KARL A. WEBER

Case No.	Date	Code	Description	Time	Code	Code
56	08/04/17	D 001	Pla motion to compel discover MOTION HEARING RECEIPT# 00225686 AMT \$20.00 Motion for Entry of Order Granting Leave to File a Notice of Non-party Fault; Notice of Hearing POS		CLK CLK CLK CLK CLK CLK	
57	08/07/17	D 001	Response of Gwinn Area Commu- nity Schools (Gwinn), Tracy Belusar (Belusar) and Anthony J. Filizetti (AJ Filizetti) to Plaintiffs' Motion to Com- pel Discovery; Brief in Sup- port of Defendants' Response to Plaintiffs' Motion to Com- pel Discovery; POS		CLK CLK CLK CLK CLK CLK CLK CLK CLK CLK	
58	08/11/17		MOTION HEARING N JAVS, #8220 Def motion for leave re non- party at fault granted, order signed. Pla motion to compel granted/denied in part, attys will submit a stipulated order. Janes for Pla; Ryan for Defs app'd.		CRT CRT CRT CRT CRT CRT CRT CRT CRT	CKK
59	08/14/17		REMOVE NEXT EVENT: 11/06/17 9:00 AM PRETRIAL CONFERENCE		CLK	CKK
60			NOTICE SENT FOR: 10/02/17 1:00 PM PRETRIAL CONFERENCE HON. KARL A. WEBER Rescheduled from 11/6/2017. Counsel may appear by phone by calling 906-225-8217.		CLK CLK CLK CLK CLK	
61	08/15/17		Order Granting Leave to Defen- dants to file Notice of Non- Party Fault Against Gwinn Area Cleaning and Maintenance Pursuant to MCL600.2957(2) and MCR2.112(K)		CLK CLK CLK CLK CLK	DP
62			P/S & NOTICE TO APPEAR		CLK	DP
63	08/16/17	D 001	Notice of Non-Party Fault of Gwinn Area Cleaning & Mainte- nance, Inc. ("GACM") Pursuant to MCR 2.112(K); POS		CLK CLK CLK CLK	JJ
64		D 001	PROOF OF SERVICE FILED		CLK	DP
65	08/21/17	D 001	PROOF OF SERVICE FILED		CLK	DP
66	08/24/17		Stipulation to Enter Second Amended Complaint		CLK CLK	JJ
67	08/25/17		Stip & Order to Enter Second Amended Complaint		CLK CLK	DP
68	09/05/17	D 001	PROOF OF SERVICE FILED		CLK	DP
69		P 001	Summons & Second Amended Com- plaint & Reliance Upon Jury Demand		CLK CLK CLK	JJ
71		D 005	EXTENSION OF SUMM: 12/05/17 5:00 PM		CLK	JJ

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72		D 006	EXPIRATION OF EXTENSION OF SUMMONS EXTENSION OF SUMM: 12/05/17 5:00 PM	CLK	
74	09/15/17	D 005	EXPIRATION OF EXTENSION OF SUMMONS RETURN OF SERVICE	CLK	NS
75	09/20/17	D 006	Domestic Return Receipt RETURN OF SERVICE	CLK	NS
			Domestic Return Receipt	CLK	
			(scanned under Event #74)	CLK	
73	09/26/17	D 001	PROOF OF SERVICE FILED	CLK	
76	09/28/17		REMOVE NEXT EVENT: 10/02/17 1:00 PM	CLK	CKK
			PRETRIAL CONFERENCE HON. KARL A. WEBER		
			Judge Weber will file DQ as	CLK	
			Plunkett Cooney is filing	CLK	
			appearance for a def. PTC to	CLK	
			be rescheduled w/new judge.	CLK	
78			Order for ESI Discovery -	CLK	NS
			Protective Order	CLK	
77	09/29/17	D 006	APPEARANCE	CLK	NS
			ATTORNEY: P-52870 SHERIDAN	CLK	
			& POS	CLK	
79	10/03/17		NOTICE SENT FOR: 11/09/17 9:30 AM	CLK	CKK
			SCHEDULING CONFERENCE		
			Counsel may appear by phone	CLK	
			by calling 906-225-8217.	CLK	
80		D 001	PROOF OF SERVICE FILED	CLK	JJ
81			Order of Disqualification/ Reassignment	CLK	DP
82	MAZZUCHI		CASE REASSIGNMENT	CLK	DP
			FROM: WEBER, KARL A.,	CLK	
			TO: MAZZUCHI, JENNIFER A.,	CLK	
83			P/S & NOTICE TO APPEAR	CLK	DP
84	10/10/17		***** Transcript Motion Hearing - August 11, 2017 *****	CLK	JJ
85	10/23/17	D 005	APPEARANCE	CLK	JJ
			ATTORNEY: P-23107 RYAN	CLK	
86		D 005	ANSWER FILED	CLK	JJ
			Answer, Affirmative Defenses to Second Amended Complaint, & Reliance on Jury Demand of Gwinn Area Community Schools ("Gwinn"), Tracy Belusar ("Belusar"), Anthony J. Fili- zetti ("AJ Filizetti"), Rob- ert Soyring ("Soyring") & Gwinn Area Cleaning & Main- tenance, Inc. ("GACM")	CLK	
87		XP001	Cross-Claim of Gwinn Area Com- munity Schools Against Gwinn Area Cleaning & Maintenance for Contractual Indemnifica- tion; POS	CLK	JJ
88	10/26/17	D 006	ANSWER FILED	CLK	JJ
			Defendant Gwinn Area Cleaning and Maintenance, Inc.'s An-	CLK	

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			facil mediator. To be completed by 8/31/18.	CLK	
102			Order for Facilitative Mediation	CLK	
103	01/22/18	XD002	ANSWER FILED Gwinn Area Community Schools' Answer and Affirmative Defenses to Gwinn Area Cleaning and Maintenance Inc Cross Claim; POS	CLK	
104	01/31/18	D 006	PROOF OF SERVICE FILED	CLK	
105	02/15/18		SET NEXT DATE FOR: 02/26/18 10:00 AM MOTION HEARING *Plaintiff's Motion to impose sanctions Sched w/Amanda atty Janes ofc; She will notice	CLK	
106	02/16/18	P 001	Brief in Support of Plaintiffs' Motion to Impose Discovery Sanctions	CLK	
107		P 001	Notice of Hearing	CLK	
108		P 001	MOTION FILED RECEIPT# 00230955 AMT \$20.00 Plaintiffs' Motion to Impose Discovery Sanctions	CLK	
109	02/21/18		SET NEXT DATE FOR: 06/28/18 10:00 AM MOTION FOR SUMMARY DISPOSITION Def's motion for summary disp	CLK	CKK
110	02/22/18	D 001	Notice of Hearing; POS	CLK	JJ
111	02/23/18		REMOVE NEXT EVENT: 02/26/18 10:00 AM MOTION HEARING Janes' ofc cancelled	CLK	CKK
112	02/26/18	D 001	Gwinn Area Community Schools, Tracy Belusar, Anthony J. Filizetti, and Robert Soyering's Response to Plaintiffs' Motion to Impose Discovery Sanctions; Gwinn's Brief in Support of Gwinn's Response to Plaintiffs' Motion to Impose Discovery Sanctions; POS	CLK	JJ
113	02/28/18	D 001	PROOF OF SERVICE FILED	CLK	DP
114	03/05/18		Notice of Taking Deposition of Scott Leutz; Darren Sinnaeve; Brian Rice; Karen Anderson; Jane Flourre; Vicki Nelson; Tracy Belusar; Kathy Bowns; Dylan Hart and POS	CLK	DP
115	03/07/18		Subpoena and Subpoena Return for Karen Anderson	CLK	DP
116	03/13/18		Subpoena & Subpoena Return for Kathy Bowns	CLK	DP
117	03/15/18	D 006	PROOF OF SERVICE FILED	CLK	DP
118	03/26/18	D 006	PROOF OF SERVICE FILED	CLK	JJ
119	04/09/18		Amended Notice of Taking Deposition (2) & Notice of	CLK	CNS

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120	04/11/18	D 001	Taking Deposition (2); POS	CLK	
121	04/12/18		PROOF OF SERVICE FILED	CLK	
			Amended Notice of Taking Deposition of Art Nordeen and Bob Thomas; POS	CLK	
122	04/20/18	D 001	PROOF OF SERVICE FILED	CLK	
123			Subpoena Return (Dylan Hart)	CLK	
124	04/23/18	D 006	PROOF OF SERVICE FILED	CLK	
125	05/01/18		2nd Amended Notice of Taking Deposition of Kathy Bowns; Dylan Hart; Art Nordeen; Robert Thomas; POS	CLK	
126	05/07/18	D 006	PROOF OF SERVICE FILED	CLK	
127	05/16/18		Notice of Taking Deposition of Heather Jackson-Santiago; POS	CLK	
128		P 001	Plaintiffs' Amended Lay Witness & Expert Witness List w/POS	CLK	
129	05/18/18	D 001	Subpoena Return - H Jackson-Santiago	CLK	
130	05/31/18	D 001	MOTION FILED	CLK	
			RECEIPT# 00233884 AMT \$20.00		
			Joint Motion for Summary Disposition by Gwinn, Belusar, A.J., & Soyring Pursuant to MCR 2.116(C)(7)(8) and (10); Brief in Support of Motion for Summary Disposition; POS	CLK	
131	06/01/18	P 001	MOTION FILED	CLK	DP
			RECEIPT# 00233919 AMT \$20.00		
			Motion for Leave to File Brief in Excess of Page Limit; Motion in Limine; Motion for Leave to File a 3rd Amended Complaint; Motion for Summary Disposition; Notice of Hearing w/POS	CLK	
132		D 006	Defendant Gwinn Area Cleaning & Maintenance, Inc.'s Lay & Expert Witness List; POS	CLK	JJ
133	06/07/18	D 006	MOTION FILED	CLK	CNS
			RECEIPT# 00234107 AMT \$20.00		
			Gwinn Area Cleaning & Maintenance's Motion for Summary Disposition; Brief in Support Notice of Hearing; POS	CLK	
134	06/13/18	D 006	Gwinn Area Cleaning & Maintenance 1st set of Requests for Admission and Interrogatories Directed to Defendant Anthony Filizetti; POS	CLK	DP
135	06/15/18		Amended Expert and Lay Witness List of Gwinn Area Community Schools, Tracy Belusar, Anthony Filizetti and Rob Soyring; POS	CLK	DP

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136	06/21/18	P 001	Plaintiffs' Response to Defendant Gwinn Area Cleaning & Maintenance Inc.'s Motion for Summary Disposition; Brief in Support of Response to Motion	CLK CLK CLK CLK CLK	
137		P 001	Plaintiffs' Response to Defendants Gwinn, Belusar, AJ Filizetti, & Soyring's Joint Motion for Summary Disposition; Brief in Support of Plaintiff's Response to Motion	CLK CLK CLK CLK CLK CLK CLK CLK CLK CLK	
138			Response to Gwinn Area Schools Tracy Belusar, Anthony Filizetti and Robert Soyring to Plf Motion for Summary Disposition Pursuant to MCR2.116(C) (9) and (10)	CLK CLK CLK CLK CLK CLK CLK CLK CLK CLK	
139			Gwinn, Belusar, AJ & Soyring's Response to GACM's Motion for Summary Disposition; Response to Plaintiff's Motions in Limine; Brief in Opposition to Plaintiffs' Motions in Limine; POS	CLK CLK CLK CLK CLK CLK CLK CLK CLK CLK	
140	06/22/18	D 006	Defendant Gwinn Area Cleaning & Maintenance Response to Plaintiff's and Gwinns Motion for Summary Disposition; Motions in Limine; POS	CLK CLK CLK CLK CLK	DP
141	06/25/18	P 001	Plaintiff's Reply to Defendant's Response to Plaintiffs Motion for Summary Disposition w/POS	CLK CLK CLK CLK	DP
142	06/28/18		MOTION HEARING JAVS,S CTRM, #2552 Court to issue order on various motions.	CRT CRT CRT CRT	CKK
143		D 006	MOTION FOR SUMMARY DISPOSITION JAVS,S CTRM, #2552 SUMMARY DISPOSITION	CRT CRT CRT	JJ
144		XD001	MOTION FOR SUMMARY DISPOSITION JAVS,S CTRM, #2552 SUMMARY DISPOSITION	CRT CRT CRT	JJ
145	07/02/18		Order Regarding Plaintiffs' Motion to Exceed Page Limit, Motion to File Third Amended Complaint, & Motions in Limine	CLK CLK CLK CLK	JJ
146			Order on Defendant Gwinn Area Cleaning & Maintenance, Inc.'s Motion for Summary Disposition	CLK CLK CLK CLK	JJ
147	07/03/18		SET NEXT DATE FOR: 07/23/18 1:00 PM MOTION HEARING Def motion to extend deadline for expert witnesses	CLK CLK CLK CLK	CKK
148	07/05/18	D 001	PROOF OF SERVICE FILED	CLK CLK	JJ

RECEIVED BY MSC 9/24/2021 12:22:30 PM

149		D 001	MOTION FILED RECEIPT# 00234869 AMT \$20.00 Motion for Additional Time to Identify Expert Witnesses; Notice of Hearing; POS	CLK CLK CLK CLK
150	07/11/18	D 001	Amended Notice of Hearing; POS	CLK
151	07/16/18	P 001	Pltf's Response & Brief in Support to Motion for Addi- tional Time to Identify Expert Witnesses	CLK CLK CLK CLK
152	07/18/18		REMOVE NEXT EVENT: 07/23/18 1:00 PM MOTION HEARING	CLK CKK
153			SET NEXT DATE FOR: 08/14/18 3:30 PM MOTION HEARING Rescheduled from 7/23 at Ryan's rqst - he will renotice	CLK CLK CLK
154	07/19/18	D 001	Re-Notice of Hearing; POS	CLK
155	07/23/18		Order Re Motions for Summary Disposition	CLK CLK
156	07/30/18	IP001	Appearance as Co-Counsel for Defendants GACS, Filizetti, Belusar & Soyning	CLK CLK CLK
157	08/02/18	D 001	PROOF OF SERVICE FILED	CLK DP
158	08/06/18		APPEAL FEES PAID RECEIPT# 00235881 AMT \$25.00 Notice of Claim of Appeal & Stay; Claim of Appeal	CLK CLK CLK
159	08/13/18		REMOVE NEXT EVENT: 08/14/18 3:30 PM MOTION HEARING appeal filed	CLK CKK CLK
160			SET NEXT DATE FOR: 10/01/18 8:00 AM CHECK STATUS	CLK CKK
161	08/16/18		Reporter/Recorder Certificate of Ordering Transcript on Appeal	CLK TMN CLK CLK
162	09/06/18	999	MISCELLANEOUS ACTION BY JUDGE STAY	CRT CKK CRT
163	09/20/18		Notice of Filing of Transcript and Affidavit of Mailing	CLK DP CLK
164			***** TRANSCRIPT - Motion Hearing 6/28/18 *****	CLK DP CLK CLK CLK
165	11/15/18		REMOVE NEXT EVENT: 11/26/18 1:00 PM FINAL PRETRIAL Stay pending appeal	CLK CKK CLK
166			REMOVE NEXT EVENT: 12/03/18 9:00 AM JURY TRIAL pending appeal	CLK CKK CLK
167	01/22/19		INFORMATION Mediation report rec'd - not settled	CLK CKK CLK CLK
168			SET NEXT DATE FOR: 03/01/19 8:00 AM CHECK STATUS	CLK CKK
169			Mediation Status Report	CLK JJ
171	02/21/19		INFORMATION File mailed to COA-8 volumes	CLK DP CLK

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172		& 2 transcripts	CLK	
		Certificate of Records Trans-	CLK	
		mitted for Appeal and Notice	CLK	
		to Parties	CLK	
173	03/08/19	SET NEXT DATE FOR: 05/01/19 8:00 AM	CLK	CKK
		CHECK STATUS		
174	05/10/19	SET NEXT DATE FOR: 07/10/19 8:00 AM	CLK	CKK
		CHECK STATUS		
175	07/31/19	SET NEXT DATE FOR: 10/01/19 8:00 AM	CLK	CKK
		CHECK STATUS		
176	10/16/19	SET NEXT DATE FOR: 01/06/20 8:00 AM	CLK	CKK
		CHECK STATUS		
177	04/28/20	SET NEXT DATE FOR: 07/01/20 8:00 AM	CLK	CKK
		CHECK STATUS		
178	07/28/20	SET NEXT DATE FOR: 10/01/20 8:00 AM	CLK	CKK
		CHECK STATUS		
179	08/27/20	Court of Appeals Order (re-	CLK	
		versed & remanded for pro-	CLK	
		ceedings consistent with the	CLK	
		Opinion & Defendants may tax	CLK	
		costs pursuant to MCR 7.219)	CLK	
180		Court of Appeals Order (af-	CLK	
		firming the trial court's or-	CLK	
		der denying the school's mo-	CLK	
		tion for summary disposition)	CLK	
181		999 REMAND FROM APP/SUPREME	CLK	JJ
182		CASE REOPENED	CLK	JJ
183	10/06/20	SET NEXT DATE FOR: 12/01/20 8:00 AM	CLK	CKK
		CHECK STATUS		
184	10/09/20	999 MISCELLANEOUS ACTION BY JUDGE	CRT	CKK
		STAY	CRT	
		Pla appealing to Supreme Ct.	CRT	
		COA ruling not in effect	CRT	
		until disposed of by MSC.	CRT	
		MCR 7.215(F)	CRT	
185	10/15/20	P 001 APPEAL FEES PAID	CLK	DP
		RECEIPT# 00256349 AMT \$25.00		
		Notice of Filing Application	CLK	
		in the Supreme Court	CLK	
186	12/28/20	SET NEXT DATE FOR: 04/01/21 8:00 AM	CLK	CKK
		CHECK STATUS		
187	04/16/21	SET NEXT DATE FOR: 07/01/21 8:00 AM	CLK	CKK
		CHECK STATUS		
188	07/06/21	SET NEXT DATE FOR: 12/01/21 8:00 AM	CLK	CKK
		CHECK STATUS		
..... END OF SUMMARY				

Court of Appeals Register of Actions

Case Search

Case Docket Number Search Results - 344878

Appellate Docket Sheet

COA Case Number: 344878

MSC Case Number: 162092

ESTATE OF AMARAH FILIZETTI V GWINN AREA COMMUNITY SCHOOLS

1	FILIZETTI AMARAH ESTATE OF	ZZ		
2	FILIZETTI LAILA	ZZ		
3	FILIZETTI MELISSA	ZZ	SAM	
4	FILIZETTI WAYNE PERSONAL REPRESENTATIVE/NEXT FRIEND			(43798) JANES J PAUL
5	FILIZETTI STACEY	PL-AE	SAM	
6	GWINN AREA COMMUNITY SCHOOLS Oral Argument: Y Timely: Y	DF-XP-XD-AT	RET	(71913) MILLER JOHN L
7	WEST EDUCATIONAL LEASING INC	DF	RET	(43985) WEAVER MICHAEL D
8	PROFESSIONAL CONTRACT MANAGEMENT	DB		
9	BELUSAR TRACY Oral Argument: Y Timely: Y	DF-AT	RET	(71913) MILLER JOHN L
10	FILIZETTI ANTHONY J	DF-AT	SAM	

[Show all 12 parties](#)

COA Status: Case Concluded; File Open

MSC Status: Pending on Application

Case Flags: Upper Peninsula

08/01/2018 1 Claim of Appeal - Civil

Proof of Service Date: 08/01/2018

Jurisdictional Checklist: Y

Register of Actions: Y

Fee Code: EPAY

Attorney: 71913 - MILLER JOHN L

07/23/2018 2 Order Appealed From

From: MARQUETTE CIRCUIT COURT

Case Number: 16-054781-NO

Trial Court Judge: 51418 MAZZUCHI JENNIFER A

Nature of Case:

Summary Disposition Denied - Gov'tal Immunity

Comments: Order dated 7/20/2018, entered in circuit court ROA 7/23/2018

08/01/2018 3 LCt Document

Date: 07/26/2018

For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT

Attorney: 71913 - MILLER JOHN L

Comments: Request for 6/28/18 Transcript

08/01/2018 4 Docketing Statement MCR 7.204H

For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT

Proof of Service Date: 08/01/2018

Filed By Attorney: 71913 - MILLER JOHN L

08/03/2018 5 Other
Date: 08/03/2018
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT
Attorney: 71913 - MILLER JOHN L
Comments: Register of Actions - Also Linked to Evt. 1

08/03/2018 6 Proof of Service - Generic
Date: 08/03/2018
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT
Attorney: 71913 - MILLER JOHN L
Comments: Register of Actions Served by 1st Class Mail

08/21/2018 8 Appellee Appearance Letter Sent CI-124

08/21/2018 9 Steno Certificate - Tr Request Received
Date: 08/01/2018
Timely: Y
Reporter: 2916 - LARSON SANDRA A
Filed By Attorney: 71913 - MILLER JOHN L
Hearings:
06/28/2018

08/22/2018 10 Appearance - Appellee
Date: 08/22/2018
For Party: 4
Attorney: 43798 - JANES J PAUL

09/24/2018 11 Notice Of Filing Transcript
Date: 09/20/2018
Timely: Y
Reporter: 2916 - LARSON SANDRA A
Filed By Attorney: 71913 - MILLER JOHN L
Comments: Complete transcript filed

11/13/2018 12 Brief: Appellant
Proof of Service Date: 11/13/2018
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 71913 - MILLER JOHN L
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT
Joint Parties: 9

11/21/2018 13 Motion: Extend Time - Appellee
Proof of Service Date: 11/21/2018
For Party: 4
Fee Code: EPAY
Requested Extension: 02/19/2018
Answer Due: 11/28/2018
Comments: 60-day extension - filed jointly by parties to pursue settlement efforts. 2/16/18 is Saturday.

12/04/2018 15 Submitted on Administrative Motion Docket
Event: 13 Extend Time - Appellee
District: L

12/07/2018 16 Order: Extend Time - Appellee Brief - Grant
View document in PDF format
Event: 13 Extend Time - Appellee
Panel: MFG
Attorney: 43798 - JANES J PAUL
Extension Date: 02/19/2019

02/11/2019 17 Brief: Appellee
Proof of Service Date: 02/11/2019
Oral Argument Requested: Y
Timely Filed: Y
Filed By Attorney: 43798 - JANES J PAUL
For Party: 4

02/19/2019 18 Noticed
Record: REQST
Mail Date: 02/20/2019

02/27/2019 21 Brief: Reply
Proof of Service Date: 02/27/2019
Filed By Attorney: 71913 - MILLER JOHN L
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT
Comments: Brief replaced by amended brief in Evt. 24

03/04/2019 19 Record Filed
File Location:
Comments: 7 lcf;2 tr--marquette circ

03/07/2019 22 Defective Filing Letter
Event: 21
Defect:
Index of Authorities - Cured
Table of Contents - Cured

03/21/2019 23 Defect Cured
Event: 21
P/S Date: 03/21/2019
Defect:
Index of Authorities - Cured
Table of Contents - Cured

03/21/2019 24 Brief: Amended - Reply
Proof of Service Date: 03/21/2019
Oral Argument Requested:
Timely Filed:
Filed By Attorney: 71913 - MILLER JOHN L
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT

11/25/2019 35 Appearance - Appellant
Date: 11/25/2019
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT
Attorney: 71913 - MILLER JOHN L

12/04/2019 29 Submitted on Case Call
District: G
Item #: 11
Panel: PMM,CAO,JT

12/04/2019 36 Oral Argument Audio
Listen to audio in MP3 format

08/07/2020 37 Telephone Contact
For Party: 4
Attorney: 43798 - JANES J PAUL
Comments: Atty Janes called and asked for status on appeal.

08/27/2020 38 Opinion - Per Curiam - Unpublished
View document in PDF format
Pages: 8
Panel: PMM,CAO,JT

Result: Reversed and Remanded
Comments: Defendants may tax costs

08/27/2020 39 Opinion - Partial Concurrence/Dissent
View document in PDF format
Pages: 3
Author: PMM

10/08/2020 42 Sct: Application for Leave to Sct
Supreme Court No: 162092
Answer Due: 11/05/2020
Fee: E-Pay
For Party: 4
Attorney: 43798 - JANES J PAUL

10/08/2020 43 Sct Case Caption
Proof Of Service Date: 10/08/2020

10/09/2020 44 Sct: Miscellaneous Filing
Filing Date: 10/09/2020
For Party: 4
Filed By Attorney: 43798 - JANES J PAUL
Comments: Notice of filing

10/09/2020 45 Other
Date: 10/09/2020
For Party: 4
Attorney: 43798 - JANES J PAUL
Comments: Notice of Filing Application in MI Supreme Court

10/09/2020 46 Sct Motion: Immediate Consideration
Party: 6
Filed by Attorney: 28021 - MULLINS TIMOTHY J
Comments: Motion to extend time to 12-07-2020 too file answer and for IC of motion

10/14/2020 47 Sct: Answer to Sct Motion
Filing Date: 10/14/2020
For Party: 4
Filed By Attorney: 43798 - JANES J PAUL
Comments: Answer to motion to extend time

10/14/2020 48 Sct Order: Chief Justice - Grant
View document in PDF format
Comments: Grant AE Gwinn Comm Schools motions for IC and to extend time for filing answer to 12-7-2020.

11/12/2020 49 Supreme Court - Record Sent To
File Location:
Comments: sc#162092 box case** 7 lcf;2 tr

11/12/2020 50 Sct: Trial Court Record Received
2 tr; 7 files

12/04/2020 51 Sct: Answer - Sct Application/Complaint
Filing Date: 12/04/2020
For Party: 6 GWINN AREA COMMUNITY SCHOOLS DF-XP-XD-AT
Filed By Attorney: 28021 - MULLINS TIMOTHY J

12/11/2020 52 Sct: Stipulation Filed
Filing Date: 12/11/2020
For Party: 3 FILIZETTI MELISSA ZZ
Filed By Attorney: 43798 - JANES J PAUL
Comments: Stip to extend time for filing reply to 1-25-2021.

01/25/2021 54 Sct: Reply - Sct Application/Complaint

Filing Date: 01/25/2021

For Party: 4

Filed By Attorney: 43798 - JANES J PAUL

05/21/2021 56 SCt Order: MOAA -Oral Argument on Lv Appl

[View document in PDF format](#)

Comments: Invited AC=Interested persons or groups.

Case Listing Complete

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Marquette County Circuit Court Motion Hearing Transcript

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

WAYNE FILIZETTI, as Personal
Representative of the Estate of
Amarah Filizetti, deceased;
STACEY FILIZETTI;
WAYNE FILIZETTI, as Next Friend of
LAILA FILIZETTI, a minor; and
WAYNE FILIZETTI, as Next Friend of
MELISSA FILIZETTI, a minor;

Plaintiffs,

vs.

File No. 16-054781-NO

GWINN AREA COMMUNITY SCHOOLS;
TRACY BELUSAR; and
ANTHONY J. FILIZETTI;
ROBERT SOYRING; and GWINN AREA
CLEANING AND MAINTENANCE, INC.;

Defendants,

and

GWINN AREA COMMUNITY SCHOOLS;

Cross-Plaintiff/Cross-Defendant,

v.

GWINN AREA CLEANING AND
MAINTENANCE, INC.;

Cross-Defendant/Cross-Plaintiff.

MOTION HEARING

BEFORE THE HONORABLE JENNIFER A. MAZZUCHI

Marquette, Michigan - Thursday, June 28, 2018

1 APPEARANCES:

2 For the Plaintiffs: Mr. J. Paul Janes (P43798)
3 Gruel, Mills, Nims & Pylman, PLLC
4 99 Monroe Avenue NW, Suite 800
Grand Rapids, MI 49503
(616)235-5500

5 For the Defendants
6 Gwinn Area Community
7 Schools, Tracy
8 Belusar, Robert
9 Soyring, and A.J.
10 Filizetti:

Mr. Peter W. Ryan (P23107)
Ryan Law Office
307 East "C" Street
P.O. Box 638
Iron Mountain, MI 49801
(906)774-3808

11 For the Defendant
12 Gwinn Area Cleaning
and Maintenance:

Mr. Thomas L. Cooper (P 44194)
Plunkett Cooney, P.C.
303 Howard Street
Petoskey, MI 49770
(231)348-6433

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RECORDED BY: JAVS Video Courtroom
TRANSCRIBED BY: Sharon A. Grabarczyk, CER 6727
NORTHERN REPORTERS
P.O. Box 27
Marquette, MI 49855
(906)226-2706

1 Marquette, Michigan

2 Thursday, June 28, 2018 - 10:03 a.m.

3 THE COURT: Okay. We are on the record in
4 File 16-54781, the Filizetti versus Gwinn, et al,
5 matters. Good morning, Counsel. Why don't you go
6 ahead and put your appearances on the record, so we
7 make sure we have it all straight.

8 MR. JANES: Good morning, Your Honor. Paul
9 Janes here on behalf of the plaintiffs.

10 THE COURT: All right.

11 MR. RYAN: Good morning, Your Honor. Peter
12 Ryan on behalf of Gwinn Area Community Schools, Rob
13 Soyring, Tracy Belusar, and A.J. Filizetti.

14 MR. COOPER: Good morning, Your Honor. Tom
15 Cooper on behalf of Gwinn Area Cleaning and
16 Maintenance, Inc.

17 THE COURT: All right. And, Counsel,
18 obviously we have a number of motions set for hearing
19 today. You might have noticed it has a tendency to get
20 kind of warm in here, so if you want to remove your
21 jackets at any time, please feel free to do so.

22 In terms of process, let's address a couple
23 of perhaps less controversial issues first. I would
24 note that, in advance of today, I think all parties
25 either filed a motion or requested to exceed the page

1 limit in briefing. The Court would certainly grant
2 that relief and has accepted for filing all of the
3 motions and responses.

4 And then, Mr. Janes, I believe you also filed
5 a motion to -- excuse me -- file a third amended
6 complaint, and I think, Mr. Ryan, Mr. Cooper, there was
7 no opposition to that. Am I correct in that regard?

8 MR. COOPER: No objection from us, Your
9 Honor.

10 MR. RYAN: No objection, Your Honor.

11 THE COURT: All right. So that motion is
12 granted, as well.

13 My intention, Counsel, would then be to --
14 Well, let me finish some housekeeping things to make
15 sure there's no confusion in what we have. Then,
16 Mr. Janes, your other motions were the motions in
17 limine, and then of course the motion for summary
18 disposition. And then from each of the defendants we
19 have motions for summary disposition. And that's
20 everything I think that's set for hearing today.

21 Let's deal with the motions in limine first
22 then, and then we'll move to the motions for summary
23 disposition that are filed by all parties. Go ahead,
24 Mr. Janes.

25 MR. JANES: Thank you, Your Honor. Do you

1 want -- at the podium or here?

2 THE COURT: Wherever you're comfortable is
3 fine, so long as you're near a microphone is the only
4 requirement.

5 MR. JANES: I don't think you'll have any
6 problems hearing me, Your Honor.

7 The response that was filed by the school to
8 my motion was somewhat missing the point of why I filed
9 the motion when I did. Discovery is essentially done
10 except for experts, and we have facilitation in August.
11 And throughout the fact witnesses' testimony, there has
12 been a constant thing, either by questioning or
13 testimony of school employees, that this is a poor
14 school district. The principal said, we're using
15 20-year-old school books, that we can't, you know,
16 exceed our budgets. Things happen because we just
17 don't have the money. Ever since the Air Force base
18 closed, our school numbers have cut in half. We are
19 doing our best to educate our children. That's the
20 theme that I've heard throughout.

21 That is for one purpose only, because every
22 witness has also testified, if you don't have a safe
23 school building, you don't allow the children in the
24 school building. In other words, safety is first,
25 education is second. And it's not -- It didn't cost

1 anything to put this gym wall enclosure up. It didn't
2 cost anything to take it down. And for them to
3 continue to say, we don't have the money, we don't have
4 the resources to do it, is only going to play on the
5 sympathies of the jury that, if we render a verdict in
6 this case, we're going to further deplete the resources
7 of this small school district.

8 So I offered to the Court, if the defendant
9 wants to interject this nonrelevant information of
10 their financial woes, then all we have to have is a
11 simple instruction, jury, please be aware the defendant
12 has liability insurance that will cover the losses in
13 this matter. But they don't want that. So if they
14 don't want that instruction, then they should not be
15 allowed to put in their financial woes. It's just not
16 relevant, and I see no purpose for it.

17 Then the next matter pertains to the loss of
18 a very critical piece of information, and that is the
19 video surveillance tapes of the hallways within the
20 high school. This tragedy occurred on September 3rd.
21 From depositions, we've deigned to know that legal
22 counsel for the school district was notified that day,
23 and may have been there the next day or the following
24 day to participate with subsequent investigations.

25 Yet the school district does not follow their

1 bylaws and complete an incident report form, complete
2 witness statements that would otherwise have been
3 discoverable to the plaintiffs, to verify times, dates,
4 presence of -- who was there, when do they do whatever
5 they do. We don't have that information. Fine. I
6 accept that that may be arguably, hey, it was
7 overlooked, we were doing our best.

8 But when you have legal counsel involved in a
9 matter of this magnitude, the very first thing would
10 be, let's secure all the evidence, let's make sure we
11 got everything. Do we have video surveillance? Oh,
12 yes, we do have video surveillance. Let's get it. No,
13 they didn't do that, and allowed it to exist on their
14 system 30 to 45 days. And under the FOIA request that
15 I submitted in December, within three months of the
16 accident, they said, sorry, it's been destroyed because
17 of recycle. That is spoliation of evidence, either
18 intentionally or through negligence.

19 Now, I did not in my motion in limine ask for
20 the intentional destruction of evidence. I asked for
21 the negligent inference, that those things that would
22 have been otherwise depicted on the -- the jury can
23 infer that it would have been negative to the
24 defendant, or words to that effect. And it's
25 critically important because you read the defendants'

1 brief, and they say, you know, for weeks these panels
2 were being moved in and out of the gymnasium by Gwinn's
3 maintenance employees -- Gwinn Maintenance and --

4 THE COURT: Area Cleaning.

5 MR. JANES: Yeah.

6 THE COURT: Yeah, okay.

7 MR. JANES: I always get them mixed up.

8 THE COURT: Okay.

9 MR. JANES: And -- So they wanted it, but
10 they didn't get to have it. I mean, I want it, too.

11 Now, the very last fact, which this is really
12 sort of problematic in my mind, and I haven't raised it
13 before the Court in any formal way -- manner. But we
14 have conducted hundreds of depositions -- or not
15 hundreds, dozens of depositions on this case. We've
16 got thousands of pages. And the superintendent's
17 administrative assistant is the last person. Plaintiff
18 is taking that deposition because she was copied in on
19 email communications in July -- in late June between
20 Mr. Soyring and then acting superintendent, just to
21 find out, did you get this, did you act upon it. I
22 take those depositions.

23 But much to my surprise, I am told during
24 that deposition that she's in the office, and she sees
25 A.J. Filizetti and Tracy Belusar at 7:34 a.m., before

1 my client or any of the school -- or cheerleaders
2 arrive, moving this panel. Never disclosed in FOIA,
3 never disclosed in all the witness depositions, never
4 disclosed in memorandums. I don't have the incident
5 reports, witness statements. And now I don't have the
6 videotape. Again, I'm not saying it's intentional. It
7 sure smacks of it. A jury ultimately will be able to
8 consider whether it was a coverup or not, because that
9 goes to gross negligence if the Court doesn't rule in
10 my favor on that issue.

11 But if we need to go to the jury on these
12 liability issues, I do believe the instruction, as it
13 relates to insurance, is a necessary component when
14 evaluating the damages of the case, and I do believe an
15 instruction for spoliation of evidence is necessary for
16 evaluation of the evidence for liability in the case.
17 Thank you.

18 THE COURT: I have one question about this
19 motion, Mr. Janes. I believe certainly Mr. Ryan's
20 clients, but perhaps Mr. Cooper's, as well, indicated
21 that the police were contacted, of course, and were
22 responding, but that they did not direct preservation
23 or request the video. Do you agree with that
24 statement, or no?

25 MR. JANES: Again --

1 THE COURT: And I understand you don't agree
2 that it's decisive on the issue. But factually, is
3 there a dispute?

4 MR. JANES: I don't know. Nobody has taken
5 the depositions of any of the police officers, one.
6 Two, this was an emergency situation, which I know this
7 small police force, what they did was do a caravan of
8 all their police agency vehicles to go ahead of the
9 ambulances to block intersections. And they were
10 focused on one thing, saving the life of Amarah
11 Filizetti, unlike the school, who has a policy on a
12 critical incident to do certain things, and they
13 have -- they did not do those certain things under
14 their critical incident policy. So whether or not the
15 police asked them to preserve it or not is not relevant
16 because their own policies say document the scene,
17 witness statements, gather evidence, and they didn't do
18 that.

19 So what -- To answer your question directly,
20 I don't know.

21 THE COURT: Thank you. Mr. Ryan?

22 MR. RYAN: Just as a general matter, Judge,
23 it -- we are about -- and I've made this point in the
24 response -- six months prior to trial. The Court has
25 heard none of the evidence. No witnesses have

1 testified. There has been no meeting with counsel
2 regarding jury instructions. And here we have
3 plaintiffs saying, six months before trial, Judge,
4 preemptively decide which jury instructions are going
5 to be given with regard to these two matters. First of
6 all, we -- with regard to the spolia- -- the video in
7 the hallway and spoliation of evidence, and regarding
8 insurance and the financial status of the school
9 districts, I agree with plaintiffs' counsel that, if
10 Gwinn Schools attempts to offer evidence of their
11 financial condition for purposes of trying to influence
12 the jury verdict, that would be inappropriate. There's
13 no dispute about that.

14 But as the evidence we've attached to our
15 response quite clearly indicates, the School Aid Fund
16 has been raided repeatedly by the legislature and the
17 governor to add to the General Fund, and this has gone
18 on for several years. The evidence that we have
19 attached indicates that the foundation allowance per
20 student this year is less than it was in 2007 and 2008,
21 and it shows that, by the repeated raids by the
22 legislature and the governor of the School Aid Fund for
23 the General Fund purposes, the School Aid Fund is in a
24 deficit position instead of a, you know, positive
25 position. These are the realities that school people

1 deal with every day. The general public probably is
2 not so acutely aware of this.

3 These questions about financial condition
4 came up during the course of the depositions. Most of
5 the questioning was done by Mr. Janes. I did some
6 questioning. Counsel for GACM did some questioning.
7 There wasn't an attempt to instill -- or install this
8 testimony. It came up in response to various
9 questions.

10 The school board minutes -- Karen Anderson
11 was an interim superintendent. I believe -- I believe
12 counsel misspoke, but the evidence in the record can
13 certainly correct me if I'm wrong in this regard. As I
14 heard him, he indicated that the superintendent looked
15 down the hall and saw, at 7:30 or 7:45, these panels
16 being moved into -- into the gym -- a panel, one panel.

17 THE COURT: I believe -- And I apologize for
18 interrupting you. But, Mr. Janes, I believe you said
19 the administrative aide.

20 MR. JANES: Yes, Vicki Nelson.

21 THE COURT: Okay.

22 MR. RYAN: Okay. I apologize.

23 THE COURT: Go ahead, Mr. Ryan.

24 MR. RYAN: I certainly don't want to
25 mischaracterize what you said. That is who said that,

1 it was the administrative aide.

2 The -- What we believe that evidence is going
3 to clarify and show through actual police photography
4 is that A.J. Filizetti was there the next day in shorts
5 and a T-shirt, because that was part of that testimony.
6 I think he now said that he was there in shorts and a
7 T-shirt. And on the day of the incident, he was not in
8 shorts and a T-shirt, he was in a polo shirt and long
9 pants.

10 That she stands alone, in all the evidence in
11 this case, with all the depositions that have been
12 taken, suggesting that this panel was moved in. She
13 sits and has a view down the -- down the hall between
14 the cafeteria and gym. That view is -- is -- I would
15 estimate, and I don't have the exact yardage -- a
16 hundred yards away down the -- down to that area where
17 she would be making an observation. There was
18 in-service that day in the cafeteria, across from the
19 gym. There were carts and a projector that were used
20 in the in-service. The visibility down that hall was
21 not good.

22 Vicki Nelson is a very close friend of the
23 plaintiff, Stacey Filizetti. And they coached together
24 in the past, and they worked together on various
25 projects in the past, and there's an acknowledged

1 friendship there. Her testimony was taken by the
2 plaintiffs within the last month. And she is an
3 absolute outlier in terms of every other shred of
4 evidence, including Stacey Filizetti's own testimony in
5 this case, the police report -- and the -- and the
6 police got statements from probably 20 different people
7 or maybe more -- and the testimony of A.J. Filizetti
8 and Tracy Belusar, and the timeline prepared by A.J.
9 documenting the timing that they went into the gym.

10 There's -- While we're on this -- on this
11 point, there was one other thing that -- one other
12 point I wanted to clarify in the timeline. Rob Soyring
13 initially indicated he thought he went into the gym
14 at -- at about 9:30. In his second deposition, because
15 he was deposed twice, as was Tom Jayne and A.J.
16 Filizetti, once Gwinn cleaning got involved in the
17 case. In his second deposition, he clarified that it
18 could not have been that time, that it was in fact
19 earlier. So he -- When he got in there, he didn't see
20 any panels. He didn't see any -- any four-year-olds in
21 the gym.

22 The issue of the video would actually be
23 helpful to us -- helpful to everybody in the case, but
24 it doesn't exist. There was inquiry. I was not at
25 Gwinn School at the time or immediately after this

1 accident. A first year associate attorney, Jake Lynch,
2 was there the day after the accident, as I understand
3 it or recall it, and there was discussion about is
4 there a video in the gym, because the accident occurred
5 in the gym. There was no discussion with the police
6 about a video in the hall. And at that point in time,
7 we didn't even think -- nobody thought, I think, that
8 it might have been relevant to anything. So there was
9 no attempt to -- certainly intentionally to spoil any
10 evidence.

11 And this isn't a situation where there's some
12 big advantage to the -- to the Gwinn defendants by not
13 having this tape. It would be helpful because there's
14 a serious questions with Stacey Filizetti's timing of
15 events. She didn't have a watch, she didn't look at a
16 clock. The statement of the police officer suggested
17 9:15, and she responded to that, yes, it must have been
18 when I got back to the school. So there's that.
19 There's a question about these panels that two
20 witnesses, not one, two witnesses saw in the gym the
21 week before school. The video would help us -- help
22 everybody clarify that, but it doesn't exist. And this
23 isn't spoliation of evidence, this is simple
24 inadvertence that -- that would be helpful evidence for
25 everybody. But that happens.

1 We take a -- The Karen Anderson deposition
2 was taken a few months ago, at almost three years after
3 the accident, or two -- a good two-and-a-half plus.
4 Vicki Nelson's deposition was taken almost three years
5 after the accident. Memories fade. People put facts
6 together from their own personal biases to -- to flesh
7 out what they think happened. And that -- That's part
8 of the problem with the case that we all have.

9 So with regard to the video, with regard to
10 the motion relating both to the financial situation of
11 the school, it's premature for the Court to enter
12 orders about jury instructions. There will be plenty
13 of time for that later. Once the evidence is in, the
14 Court considers the jury instructions and the charge
15 that the Court will give, and counsel and the Court
16 have an opportunity to discuss the instructions.

17 So we -- The Forsyth police, by the way --
18 And I've been through that police report, like other
19 counsel, many times. There's nothing about a video in
20 the hallway. There's nothing about a video. But they
21 took pictures on the day of the incident. They had a
22 video cam -- body cam on one of the officers on the day
23 of the incident. They came back and took pictures
24 after the incident, when there was an attempt to put
25 the stage enclosure up, and Gwinn Cleaning personnel,

1 and A.J. Filizetti, and Tracy Belusar, and Dylan Hart
2 from Gwinn Cleaning were putting it up. The officers,
3 for the first time, came back and said, wait a minute,
4 we want everybody to stop here. And then they -- for
5 the first time, they pulled out the caution tape, put
6 it around there. But there was absolutely no
7 discussion about leaving everything the way it was.

8 And then the whole suggestion that -- that it
9 should have been left the way it was at the time of the
10 accident begs the question of people lifting the
11 first -- Stacey and the cheerleaders lifting the panel
12 up, leaning it back in the enclosure -- the alcove
13 enclosure where it had been, with nobody securing it,
14 nobody holding it. The focus was on Amarah, and not
15 on -- on the panels, and the location of the panels.
16 And at that point, everybody was concerned about
17 Amarah. Stacey Filizetti came back in, and there's
18 photographic evidence as to A.J., to hold the panels
19 while Amarah and Stacey were in front of them. That's
20 police photographic evidence. So we have police photos
21 of that day.

22 Then we have police photos of the next day,
23 when they came back to do -- to talk with A.J. and do
24 what they said was to be a reconstruction. That's when
25 A.J. is in his shorts and T-shirt, and Vicki Nelson, I

1 believe the evidence is going to clearly show, was
2 simply mistaken in that regard.

3 The -- I alluded to the panels being moved in
4 the gym on two occasions, and -- they were moved within
5 the gym on two occasions. Tracy Belusar saw them on
6 August the 22nd, and saw them again on August the 25th.
7 On the 22nd, they were in the northwest corner of the
8 gym. On the 25th, or after -- shortly after the 25th,
9 they were moved back to the southwest corner of the
10 gym. And then on the day she started, which was
11 August 31st, her first day at work, three days before
12 the incident, the panels were back in the hall, leaning
13 against the hall. And Joe Routhier, who was the CAD
14 instructor, was pretty clear about where he stored the
15 panels. The panels were in a different area than he
16 stored them.

17 We don't know who did that, but the -- but
18 the only people available at the time who could have
19 done that are Gwinn Area Cleaning and Maintenance
20 personnel, who were also doing other maintenance
21 projects in the gym all summer long. May, June, July,
22 August, they were -- they were in there doing projects.

23 So -- So for these reasons, Judge, we would
24 request that the motion in limine be denied now.
25 Plaintiff certainly could raise the issue again at the

1 time of trial or at the time the jury is charged, but
2 we believe it's premature for all of the reasons
3 indicated.

4 THE COURT: One question with regard to the
5 motion on the financial condition. And I understand,
6 you know, certainly general aspects of state funding
7 for schools and some of the things you've stated. But
8 is there any reason for which the school district's
9 financial condition would be relevant for the jury to
10 hear, Mr. Ryan?

11 MR. RYAN: Not in the sense of making it part
12 of the evidence as part of the case, but it may come up
13 inadvertently from a witness. You know, that can
14 happen in a trial, as the Court knows. But -- But
15 it -- But not being introduced, it probably isn't
16 relevant to their case.

17 THE COURT: All right.

18 MR. RYAN: I just think it's premature to
19 decide that at this point.

20 THE COURT: Thank you. Mr. Cooper?

21 MR. COOPER: Your Honor, we'll stand on our
22 response which we filed. Two observations, however.
23 It's very, very difficult as a defense lawyer to think
24 that video would not have been retained. That's one of
25 the first things you ask for. And if counsel's there

1 the day of or the day after, again, it's hard to
2 believe that that would not have been retained. It
3 also would be very helpful to GACM. Why? Same issue
4 as plaintiff. Is A.J. Filizetti doing this -- starting
5 this process at 7:30 on his own, like he said, under
6 Mr. Soyring's direction, or did he start it at 9:30?
7 That would be very helpful.

8 Counsel makes a good point for the school,
9 some of these issues are premature I think. Thank you.

10 THE COURT: Mr. Janes?

11 MR. JANES: Three observations. It is a
12 continuous theme of counsel's questions for the school
13 about how the district was cut in half, how we don't
14 have the resources. It's not inadvertent, might pop
15 up. It is an intentional introduction of a small
16 school district that's struggling to get by. That's
17 what I've heard through numerous depositions. It's not
18 relevant, it's a prejudicial argument.

19 And this outcome -- this motion has bearing
20 because we'll hear -- and they need to hear the
21 message, if this matter is going to go to trial, for
22 facilitation to occur, you're not going to get into
23 that kind of stuff. This isn't going to be, oh, you
24 know, this family is trying to make a lot of money off
25 of this small, rural school district. It's they have

1 the responsibility to make sure their school is safe.
2 Their finances are not relevant. And if they want to
3 introduce it in any fashion, the instruction of
4 insurance should be brought forward.

5 Then he makes two comments. And I have to
6 bring the Court's attention to this because this has
7 been a continuous theme in the briefing that has been
8 presented for the school district. One, he says my
9 client, Stacey Filizetti, doesn't know when she may
10 have left because she didn't look at a clock or she
11 didn't have her watch. Her testimony is crystal,
12 absolutely clear. Her husband -- And I don't have the
13 minutes, but she does because we have the records. Her
14 husband calls her on her cell phone with a time
15 register, honey, I need to have the three kids with
16 you, is that okay?

17 She calls back, time registered. And then
18 her testimony is, literally, I remember making one more
19 call when I was in the -- in the parking lot to go get
20 my car. Time registered. She knows where her house
21 is, it's a short drive away. She knows when she gets
22 back. Those things are defined times. I know she
23 comes in through the main entrance, goes into the
24 hallway, and enters. I would love to have that video
25 evidence to confirm everything my client has testified

1 to under oath.

2 Second point, another omission. Ms. Nelson
3 may be confused. Three years have passed.
4 Ms. Nelson's testimony is absolute. She had it down to
5 7:34 a.m., September 3rd. Then the next day, she says,
6 I'm in my desk, and I have A.J. Filizetti standing in
7 front of me, I have Mr. Jayne standing in front of me,
8 and Mr. Filizetti makes a statement that I find
9 incredible. She takes a pen and paper out, and writes
10 it down, puts it in her wallet, and it stays in her
11 wallet. And she'll -- I guess she showed counsel at
12 some pre-deposition meeting years -- a year ago. But
13 it comes out at her deposition and says, this is what I
14 wrote down the very morning next day of what A.J.
15 Filizetti says. She's not mistaken. She knows exactly
16 what's going on.

17 So to try to insinuate to the Court facts
18 that are not in evidence or omit very important facts
19 is not the way we'd present this case. Again, it's
20 about the videotape of the hallway. It was lost
21 because -- I'm not saying it's intentional, but it's
22 lost because of their failure to secure it.

23 THE COURT: Further argument, Mr. Ryan or
24 Mr. Cooper?

25 MR. RYAN: I think I've made my position

1 known, Judge. Thanks.

2 MR. COOPER: No, Your Honor.

3 THE COURT: All right. Counsel, just so that
4 you're aware, I will be issuing written orders. But on
5 the motions in limine, I think that it's certainly not
6 a premature point to be considering requests regarding
7 instruction, although sometimes those things obviously
8 develop closer to the trial date, and sometimes during
9 the trial. But, I mean, to the extent that there's
10 been as much discovery as there has in this matter, and
11 the case has been, because of its complexity and
12 severity, set on kind of a bit of a longer track, I
13 think it's appropriate to consider requests like this
14 when there is a sufficient record on which the Court
15 can make an evaluation.

16 The first of the motions in limine regarding
17 the financial condition of the school district, I don't
18 think there's any question and really no dispute that
19 that's not a relevant issue for the jury to consider.
20 And an argument from witnesses that the Gwinn district
21 had some -- some dire straits, some financial
22 condition, I think is really not relevant. Now, there
23 are certainly allegations regarding, say, the reasons
24 why various people took or failed to take certain
25 action. And to the extent that a witness, you know,

1 may say, well, we needed to get this done, but, you
2 know, we're always balancing contract and budget
3 issues, I mean, that, to me, is not so inflammatory as
4 to warrant that kind of instruction. But I think
5 evaluating those specific things may require, you know,
6 looking at the evidence that actually comes in.

7 But, in general, the Court will grant the
8 motion that Gwinn cannot argue this case based on its
9 financial condition, and that it's not relevant for the
10 jury to consider that when they're evaluating the
11 district's responsibility under the applicable statute
12 or the standards of liability. So I'm going, on the
13 financial condition motion in limine, to issue an order
14 granting it.

15 Now, as we get closer to trial, I don't
16 intend to reevaluate that aspect, but there are times
17 when the witnesses may, say, need to explain where they
18 were in the contract situation with Gwinn Area Cleaning
19 and Maintenance, or what the situation was that day,
20 why they made certain decisions. Some of those things
21 may not violate that, and at this stage, it's perhaps
22 more difficult to evaluate the fine points based on the
23 testimony given. The Court would, of course, if there
24 is any inappropriate injection of this, consider then
25 the request for an insurance instruction, or something

1 in that regard. And I will issue a written order to
2 this effect.

3 On the other aspect of the spoliation of
4 evidence, the Court intends to take that specific issue
5 under advisement. Again, I don't think it's entirely
6 premature, given the extent of discovery. The Court
7 will issue an order after complete review of the
8 parties' submissions to the Court and the arguments
9 today.

10 So that brings us to the motions for summary
11 disposition. All parties obviously have filed them. I
12 think, in terms of how we proceed, some of the issues
13 overlap. I think Gwinn Area Cleaning and Maintenance
14 is perhaps a bit separate of an issue. But let's just
15 go ahead with plaintiffs' motion, and then when we take
16 up defendants', we can hear additional arguments that
17 haven't been presented already.

18 And, Counsel, I will tell you that I
19 certainly have reviewed the briefs, obviously, in
20 preparation for the hearings today, and some of the
21 exhibits. I have not completed the kind of detailed
22 review that I would need to, to issue a decision, so I
23 won't be deciding them on the record today.

24 Go ahead, Mr. Janes.

25 MR. JANES: Well, that makes my first

1 question maybe a little hard, but I was going to say I
2 think plaintiffs have presented their briefings very
3 thoroughly. My response brief was very thorough, so I
4 did not want to address any general argument. I would
5 have -- If the Court has specific questions as it
6 relates to specific items within my brief, I'll
7 respond. Otherwise I have just some closing sort of
8 observations.

9 THE COURT: Okay. Then hold on one minute.
10 Let me review my notes and determine whether there are
11 any questions I wanted to pose about your briefing to
12 the Court, and then we'll hear your argument. Hold on
13 just a minute.

14 I guess one -- well, a couple of issues. So,
15 Mr. Janes, in reviewing the briefs -- And again, I may
16 not have these dates all specifically correct. Some of
17 the individual defendants, I think Mr. Filizetti and
18 then Ms. Belusar, does plaintiff agree with the dates
19 of their -- the start of their employment? It appears
20 as if both were hired or began their role with the
21 district within the perhaps week -- maybe two weeks
22 prior to the incident. Has that been agreed upon?

23 MR. JANES: Again, I think it is going to be
24 that Ms. Belusar was interviewed August 15th, and
25 identified during her testimony -- identified during

1 her interview process the panels not being in place.
2 And she said, that's weird, they should not -- they
3 shouldn't be there, they should be there (indicating).
4 So she identified the issue on August 16th.

5 Mr. Filizetti I think commenced his
6 employment August 16th and started to review what are
7 called SchoolDude work orders. And August 24th his
8 testimony is that he identified the one SchoolDude work
9 order in question, and it struck him funny, and he went
10 to inquire about it. So he was aware of the open
11 request for repair on August 24th.

12 THE COURT: And so is it plaintiffs' position
13 that Ms. Belusar's -- Well, the briefing uses the
14 phrase I think, or something to the effect of the
15 defendants having prolonged knowledge about the issue.
16 And as opposed to the district as a whole, these
17 individual employees' knowledge, is the onset of that
18 knowledge on or about August 16th for both Ms. Belusar
19 and Mr. Filizetti, from the plaintiffs' standpoint?

20 MR. JANES: Yes, but I don't -- That's not
21 germane to the building defect, when their knowledge of
22 it --

23 THE COURT: I understand that.

24 MR. JANES: But it -- What is somewhat
25 germane is that they had time before September 3rd to

1 do this project, as it relates to gross negligence and
2 their thought processes relative to that.

3 THE COURT: All right. I think that's it
4 then, at this stage, Mr. Janes. Go ahead. You wanted
5 to make some kind of summary or closing argument.

6 MR. JANES: General observations. The first
7 observation is, I think an important issue for the
8 Court to assess is that there is no dispute as to the
9 employment status of Stacey Filizetti, and that the
10 record is clear that the necessary paperwork was not
11 completed for her employment as of September 3rd with
12 PCMI. So expectations and things of that nature, this
13 employment should track exactly the way Tracy Belusar's
14 status was. And although she was intended to be a PCMI
15 contractor as of September 3rd, she was not a PCMI
16 contractor. There is no dispute of those facts. She
17 was an agent employee acting on behalf of the school
18 district.

19 Once that determination has been made, many
20 of these miscellaneous arguments about foreseeability,
21 proximate cause, allocation of fault, go by the wayside
22 because the school district can't allocate fault to its
23 own employee to avoid its responsibilities, nor can
24 their co-employees. And I make that pretty clear in
25 briefing, both in my substantive motion and in response

1 brief to the defendants.

2 Second, and it's not really well briefed, is
3 the general purpose of summary disposition, Your Honor.
4 This is a case, as you've observed, that has been
5 unusually long. And it's been unusually long because
6 of the defendant school districts. They allocate fault
7 to a non-party, and the whole process starts over
8 again. We had -- You know, typically, governmental
9 immunity claims, the governmental agency challenges the
10 immunity early on under C(8). That didn't happen here.
11 We have gone through literally two rounds of discovery,
12 and the defendant now brings C(8), C(10) motions.

13 I am very cognizant of the fact that, if you
14 grant my summary disposition motion against the school
15 district and against the three individual defendants,
16 they have an immediate right of appellate review. But
17 we also have a scheduled facilitation in August. So
18 the complexion of the case changes greatly upon the
19 Court taking it upon itself to do what is right.
20 Eliminate issues that are no longer at controversy.
21 That's the purpose of summary disposition.

22 It goes two ways. The school district, if
23 immunity applies, could have very well a year and a
24 half ago brought motions for summary disposition. The
25 facts never got better for them, it only got worse.

1 They have never had the benefit of governmental
2 immunity for building -- because of the building defect
3 exception and because of the gross negligence
4 exception.

5 The facts are now in. I ask for summary
6 judgment so that this family does not need to go
7 through trials and listen to arguments that have been
8 very strongly advanced by the defendant against my
9 client's mother and the children's mother, or
10 accusations of fault against these children. That's
11 just not appropriate. I want to get this case focused
12 down as quickly as we can, try it if we can in December
13 on the issues of damages. If they need to appeal, we
14 can have them do their appeal, but we still have the
15 opportunity to have the Court's guidance before
16 facilitation in August. I really think the Court
17 should look strenuously at these motions and say, he's
18 right, there are no facts. That's where I'd like to
19 go, Your Honor.

20 THE COURT: All right. Thank you, Mr. Janes.
21 Mr. Ryan?

22 MR. RYAN: As the Court might expect, Judge,
23 we think, as to plaintiffs' motion, there are genuine
24 issues of material fact that surround Stacey
25 Filizetti's status. The *Ray v. Swager* decision is the

1 most recent pronouncement of which I am aware from the
2 Michigan Supreme Court, and that case specifically
3 indicates that the trial court and appellate courts are
4 to determine all causes in fact, compare the causes in
5 fact with proximate cause.

6 As to the individual defendants, the statute
7 is -- is quite clear. Gross negligence under
8 691.1407(a) (sic) is defined as "conduct so reckless so
9 as to demonstrate a substantial lack of concern for
10 whether an injury results." There is no evidence on
11 this record anywhere of that standard being met in this
12 case, not with regard to Rob Soyring, not with regard
13 to A.J. Filizetti, not with regard to Tracy Belusar,
14 not with regard to Gwinn Schools. And if -- Assuming
15 for the moment that Stacey, as Paul argues, is an
16 employee or is a volunteer, and may be entitled to
17 immunity, a good argument can be made that she is
18 ordinarily negligent, if negligent, and that each of
19 these defendants are ordinarily negligent, if negligent
20 at all.

21 So the proximate cause definition, as
22 fashioned by *Ray versus Swager*, requires as to
23 individuals both foreseeability -- and there's been a
24 lot of argument in the briefs, as the Court knows about
25 foreseeability -- as well as to gross negligence. If

1 there is no gross negligence, there's no liability to
2 the individuals. If the -- If any of the individuals
3 aren't the one most immediate direct proximate cause,
4 as the court has repeatedly decided in *Robinson*, and
5 *Ross v. Consumers Power*, and *Ray versus Swager*, then
6 there is no liability for the defendants.

7 So when one applies the *Ray versus Swager*
8 analysis and starts looking at causes in fact, you can
9 develop a large group of causes in fact that arguably
10 could be proximate causes as to a negligent standard.
11 But when you -- when you focus on the people who were
12 around on September the 3rd as -- and the *Ray versus*
13 *Swager* test, we have the triplets, we have Stacey
14 Filizetti, we have A.J. Filizetti, Tracy Belusar all
15 involved, and then we have Gwinn Schools and Rob
16 Soyring. Rob is the other one. So Rob was not in the
17 gym on -- on September the 3rd. His last involvement
18 with this situation was September the 2nd, to send the
19 email to A.J. So Rob is -- is very definitely not a
20 cause in fact of what happened on September the 3rd,
21 and certainly not the one most immediate direct
22 proximate cause. And he wasn't grossly negligent if he
23 was negligent at all.

24 Then we go to A.J. and look at -- look at his
25 conduct, and Tracy Belusar's. They were there on the

1 day of the incident. A.J. responded within -- within
2 24 hours to the email from Rob Soyring of September the
3 2nd, so there's no delay here, a four-month delay. And
4 in fact, by any calculation, I have difficulty seeing
5 how -- although plaintiffs have made the argument, how
6 they come up with a four-month delay. It simply
7 doesn't exist, if you go all the way back to May 25th.
8 So A.J. is arguably a cause in fact. Tracy Belusar is
9 arguably a cause in fact.

10 But the -- But the real fact that remains is
11 the only adult in the gym at the time of the incident
12 is Stacey Filizetti, and she sends the triplets down to
13 the area where the panels had come in. Her testimony
14 is undisputed, that she did not see these two panels
15 come into the gym. She did not notice the "v"
16 formation in the area formed by these panels with
17 two-foot wide yellow and black strips in the alcove
18 area. She sent the children down there to play under
19 the spotlight. The spotlight was still on. And one of
20 the statements by one of the witnesses taken by the
21 police was the spotlight was on, on the north end of
22 the gym, and I -- and my recollection is there's been
23 testimony to that effect, as well. So the only adult
24 in the gym and the one most immediate direct proximate
25 cause is Stacey Filizetti sending the triplets down

1 there.

2 When you consider the triplets, if one or
3 even all three of them bumped the panel, one of them
4 bumped the panel at the bottom, caused it to pivot and
5 fall, that's a cause in fact. But four-year-olds
6 certainly don't have the requisite ability to formulate
7 concepts of foreseeability of danger. So in terms of
8 the one most immediate proximate cause, the standard by
9 which we look at this, and the individual cases, the
10 only one in the gym who most immediately, most
11 proximately was involved in sending the children down
12 was Stacey Filizetti.

13 There is -- A.J. was out of the gym. Tracy
14 was out of the gym. And when you look at what they
15 were doing, A.J. was on standby. He knew that Tracy
16 was going to seek Dylan Hart from GACM to help secure
17 the panels. She immediately did that. She didn't
18 wait. And she left by -- by the testimony and all
19 accounts, it was about quarter to ten when she left the
20 gym after the third trip. She came in twice with the
21 panels, in and out, so -- and then the third time with
22 the hardware. And she was in the process of -- And she
23 contacted Dylan Hart. He agreed to help. She went to
24 Rob, had a brief conversation with him, Rob Soyring,
25 went to Tom Jayne, superintendent, had a brief

1 conversation with him. And the incident happened --
2 the incident happened within ten minutes of the
3 children being sent to the north end alcove area.

4 So we believe summary disposition is
5 appropriate in this case, but it's appropriate on
6 behalf of Gwinn and each of the individual defendants
7 who we represent. The -- Using *Ray versus Swager*
8 analysis, which is where we are on governmental
9 immunity, as I understand it, the Court is compelled to
10 look at that one most immediate efficient (sic)
11 proximate cause.

12 So there are downstream issues that have been
13 alluded to in Paul's motion and our motion. Vicarious
14 liability, he references that. First of all, in a --
15 in this context, if there's any vicarious liability,
16 there has to be vicarious liability for gross
17 negligence of Rob Soyring, A.J., or Tracy Belusar, not
18 ordinary negligence, but gross negligence, because
19 that's the standard that they're held to. And we
20 believe there was no gross negligence here on the part
21 of any of them.

22 I -- I missed the -- when it appeared -- And
23 I apologize to counsel and the Court. I missed, when I
24 did my initial brief -- Vicarious liability is
25 absolutely at the end of the second amended complaint,

1 and that I -- I didn't think Paul had it in there, but
2 it is in there. So vicarious liability, our position
3 is that it would have to be gross negligence, and there
4 wasn't any.

5 So an approach to this case could be that --
6 and I'm sure that's the plaintiffs' argument -- Stacey
7 Filizetti, A), was either ordinarily negligent and not
8 grossly negligent, or she's not negligent at all. But
9 I don't think that survives the *Ray versus Swager*
10 analysis.

11 Plaintiff here has also made much of these
12 portable stage cover panels being fixtures in a
13 building. They -- This case is a lot like *Cox versus*
14 *U of M Regents*, which we cited in our brief, where
15 there was a ramp, a portable ramp that could be moved
16 from one place to another, used -- although there was
17 no evidence apparently that it was -- could be used as
18 a ramp in various places. Similarly, these panels were
19 wheeled in. And last week, last Tuesday, Paul took the
20 deposition of Ben Tiseo, who is our expert architect.
21 There is an un rebutted affidavit, I believe. I know
22 the affidavit is appended to our brief.

23 We checked yesterday with the court reporter
24 to determine if the -- if the final proofread copy
25 of -- of the testimony is available. She didn't get

1 back to us as of seven o'clock last night, but she did
2 send to us, and I would tender to the Court, the -- the
3 non-proofed affida- -- or testimony of Benedetto Tiseo
4 taken June 19th, last week.

5 And if the Court please, I would tender that
6 for consideration by the judge, in conjunction with the
7 affidavit, because one of the arguments in the brief
8 was the affidavit doesn't comport with what is required
9 under the statute for admissibility in a trial of an
10 expert's opinions. Ben Tiseo's opinions are set forth
11 in here in some detail. I didn't ask a question in the
12 deposition. All of the examination was done by Paul.
13 So if the Court -- if the Court please, I would tender
14 this for consideration in conjunction with the
15 affidavit of Ben Tiseo.

16 THE COURT: Let me -- Do you have any
17 objection to that, Mr. Janes?

18 MR. JANES: Yes.

19 THE COURT: Go ahead. We'll just -- We'll
20 interrupt this argument to deal with this issue. Go
21 ahead.

22 MR. JANES: Well, obviously, I made my record
23 on the affidavit and the failures of the affidavit to
24 have the foundations necessary to allow the Court to
25 consider it under motion practice. Now he wants to

1 introduce a new piece of evidence, the deposition
2 testimony. Well, if he would have had a discovery
3 deposition or a conforming affidavit, I would have had
4 an affidavit from my expert to rebut it. I didn't
5 think it was necessary because, on the face of the
6 affidavit, it was not material, and two, didn't have
7 the qualifications necessary for the expert to render
8 opinions for your Court's consideration during his
9 motion practice.

10 So I would object to introduction of a new
11 piece of evidence that I would not have the opportunity
12 to have rebuttal to.

13 MR. RYAN: I would just say, Judge, that this
14 deposition, Paul was -- had to get it in before the
15 motion hearing, for some reason. So we accommodated
16 that request, and it was gotten in before the motion
17 hearing, presumably, I thought, so that there would --
18 there would be evidence available to the Court at the
19 motion hearing. We have that evidence available.
20 There's not a question about cross-examination because
21 the questions were asked by -- by Mr. Janes. Standing
22 on an argument when there is an affidavit in a motion
23 for summary disposition --

24 MR. JANES: Your Honor, you can consider it,
25 to whatever extent it's necessary. I have -- I

1 withdraw because --

2 THE COURT: You're withdrawing your
3 objection?

4 MR. RYAN: It -- It's silly.

5 THE COURT: Okay. I'll take that, Mr. Ryan.
6 Okay. Go ahead, Mr. Ryan.

7 MR. RYAN: So plaintiffs suggest that the
8 decision of the Court to do what's right is to grant
9 plaintiffs' motion. We believe that, based on the law,
10 that's not what the Court is required to do at this
11 point in time.

12 If there -- And we talked about Vicki Nelson.
13 So this is a piece of evidence that was elicited by
14 defendants. Paul took Vicki Nelson's deposition, and
15 she comes up with this suggestion that she sees
16 something that looks like the panel and somebody who
17 looks like A.J. there the day of the incident, earlier
18 than -- than all of the other evidence in the case.

19 The -- The suggestion that -- that somehow or
20 another, that should be binding I think is without
21 merit, and certainly is a controverted fact. Nobody
22 agrees with that except Vicki Nelson. A.J. disagrees
23 with that. His timeline, which is an exhibit,
24 disagrees with that. Tracy Belusar disagrees with
25 that. The police report disagrees with that. Every

1 bit of evidence adduced suggests something different
2 than that.

3 And then there is the issue of -- of Tracy
4 Belusar seeing the panels in the gym. Before we filed
5 our Notice of Non-Party Fault, I knew that Tracy
6 Belusar had -- had indicated and would testify that the
7 panels -- she saw them on two occasions, not the 16th
8 of August, but rather the 22nd of August, a Saturday,
9 when she and Tom did a walk-through, and she stood
10 under the blower in the gym, and saw the panel in the
11 northwest corner of the gym. And then also August the
12 26th or thereabouts, right after the August 25 trip
13 with Art Nordeen to view the facilities in Nordeen's
14 vehicle, which Tracy thought was an unusual event.

15 So she saw them on two occasions, the week
16 before she started. She didn't start work on
17 August 16th. She started work August 31st. She was in
18 there that preceding week to kind of see what -- what
19 she would be doing. Tracy is a hands-on maintenance --
20 mechanical -- mechanically inclined person who can fix
21 a lot of things. She is a maintenance person now, the
22 maintenance person at Munising hospital, and was before
23 she came to Gwinn.

24 She saw the panels near the alcove and
25 thought, these panels go in this alcove. And then she

1 couldn't understand why they got moved back to the
2 other end of the gym. And then, third, on her first
3 day of work, why they're now out in the hallway, and
4 Bob Thomas of GACM was telling her to move the panels
5 today. We've got to -- You've got to do it, Tracy.
6 We've got to wax the hallway. This is the same foreman
7 of GACM who had the instruction installation manual
8 from May the 25th until September 3rd, when it
9 resurfaced right after incident and was shoved at A.J.
10 Filizetti by -- by Art Nordeen, the owner of Gwinn
11 Cleaning, who said, well, I guess we've all learned a
12 lesson today, haven't we. Neither A.J. or Tracy had
13 benefit of knowledge of that manual, but GACM did all
14 summer long.

15 So, you know, we have this situation where
16 she sees it. I would not have filed that Notice of
17 Non-Party Fault on that basis alone, but there was a
18 custodian named Kathy Bowns, with a "B," whose
19 affidavit is in the -- is in the exhibits, our exhibits
20 for GACM. She independently verified to me in early
21 April, and A.J. was present, and Tracy Belusar was
22 present, that she, too, saw panels in the gym. Two
23 weeks later, on a Friday, I prepared the affidavit in
24 my office in Iron Mountain, faxed it to Gwinn Schools.
25 The fax date is at the top of the affidavit as

1 April 21, 2014 (sic). It was given to Kathy Bowns.
2 She had it Friday, Saturday, Sunday.

3 And on Monday morning, April 24th, she went
4 into Wells Fargo Bank and signed the affidavit in front
5 of the bank manager, a woman named Heather Jackson, at
6 that point. She's now Heather Santiago. When she
7 testified on -- I think it was May the 10th or
8 thereabouts, I was flabbergasted when she said she
9 signed the affidavit in my presence at the school, and
10 there was no notary present. I knew it was a lie. And
11 I wasn't sure why she would lie about that, but I knew
12 it was.

13 We finished the depositions on Friday, I
14 believe the 11th of May. The first -- My first thought
15 was, I'm going to go to the local Wells Fargo Bank in
16 Gwinn, and find out if Heather Jackson works here. She
17 did, as Heather Santiago. We took her deposition a few
18 weeks ago. She testified her log verifies that Kathy
19 Bowns was in there signing the affidavit.

20 So Art Nordeen testified that, when he got
21 the affidavit from GACM counsel, he immediately went
22 over it with Kathy Bowns to make sure they were on the
23 same page. He didn't notice that she had corrected the
24 affidavit, corrected her name and Kathy -- and put K.B.
25 because it was misspelled "Downs" instead of "Bowns."

1 So they got on the same page about the affidavit a few
2 months before her deposition and his deposition was
3 taken.

4 So she -- In her deposition, she repudiated
5 the affidavit and said it wasn't true, and it wasn't
6 true because I, in effect, suborned perjury from her by
7 having her sign it, and then I went off to get the
8 signature notarized. So why would she do that after
9 meeting with the president of GACM, after he had the
10 affidavit in hand and was getting them on the same
11 page? So anyhow, there is -- there is that issue of
12 controverted fact that also would preclude granting the
13 motion on behalf of the plaintiffs.

14 As the Court knows, the Governmental Tort
15 Liability Act is intended to provide very broad
16 immunity for employees. And it provides that immunity
17 if the employee is acting with -- within the scope of
18 authority, is engaged in a government function, and is
19 not grossly negligent, and not the -- the proximate
20 cause. All of that is found in MCL 697.1407(2)(a),
21 (b), and (c).

22 Then there is also broad immunity granted
23 to -- to entities, governmental entities for their
24 buildings. And that immunity is intended, except in
25 certain specific areas, to be sovereign immunity. And

1 one of the areas is relating to public buildings,
2 called the public building exception. The appellate
3 courts, and we have cited the relevant cases, have
4 clarified that the defect must be to the building
5 itself, not a -- and it can't be a circumstance or a
6 condition that is created.

7 So there can be a dangerous situation or
8 condition that plaintiffs have argued, but their
9 argument is misplaced here because what we're talking
10 about with the stage enclosure is padded, so that
11 somebody typically playing basketball, who charges
12 toward the basket and can't stop, ends up not flopping
13 onto an unpadded stage. That's photographic evidence
14 in the case. And the testimony from Rob Soyring,
15 Darren Sinnaeve, A.J. Filizetti was, for the time they
16 all attended Gwinn, the stage was unpadded, and in
17 front of it there was about -- there were two boxes
18 that were about three feet high.

19 So what changed? About 2010, Mike Webster,
20 the center for the Pittsburgh Steelers developed --
21 developed brain -- traumatic brain injury, and his
22 brain was analyzed at Boston -- well, actually by Omalu
23 Bennet (sic). Ultimately, Boston University got
24 involved and TBI became recognized. It got to the
25 schools. At some level, at that point, the risk, the

1 danger that is talked about here is a concussion
2 danger, not a danger as the plaintiffs have
3 characterized it.

4 So the argument that there was three months
5 or three-and-a-half months, more than 90 days involved
6 here, not -- and recognizing that not doing anything
7 about the risk is misplaced. It is -- It may have been
8 a dangerous condition for concussions, but the -- that
9 is not what happened here. So our position on the
10 notice argument that plaintiffs have made is that there
11 was not a 90-day notice entitling plaintiffs to a
12 conclusive presumption that the school was aware of it.

13 So the motion of the plaintiff we believe
14 should be denied. The individuals are entitled to
15 immunity, as I've said. The public building exception
16 doesn't apply here because there's no defect in the
17 building. Plaintiffs have clarified in their brief
18 that they're not making an argument for a design
19 defect, although plaintiffs have talked extensively in
20 deposition and argued that they shouldn't have used
21 wood.

22 And a lot of the deposition of Ben Tiseo
23 related to, well, wouldn't it be a code violation for
24 the school to have used wood in the gym. And
25 Mr. Tiseo's response was the floor is made of wood, the

1 bleachers and the stage -- portable stage were made of
2 wood. There's wood all over in a gym. So it's not --
3 And then the other thing that he made perfectly clear
4 in his affidavit and his deposition is that these were
5 portable, moveable partitions, and the various codes
6 that plaintiff alleged in the -- in their complaint
7 simply are inapplicable to this situation. He totally
8 distinguished this. It's more akin to the ramp in the
9 *Cox v. U of M Regents* case that is moveable than it is
10 to any -- any fixed wall or fixtures.

11 One could easily argue that the wall -- the
12 wooden wall behind the Court's bench is a fixture, or
13 these lamps that have been here in the 45 years I've
14 been coming to this courtroom are fixtures. One might
15 not argue that the bookshelves over here are fixtures.
16 They're moveable, they're portable, as are the books.
17 The chandelier above one could argue is a fixture. And
18 it -- And these would survive the fixtures analysis
19 because they're actually annexed to the building,
20 they're adapted for use in the building, and the
21 intent -- intent was to make these examples that I've
22 suggested an accession to the permanent -- to the
23 freehold -- permanent accession to the freehold.

24 That was not the case with these panels. In
25 fact, after -- after this accident occurred on

1 September the 3rd, at the request of plaintiffs, the
2 portable stage cover was removed entirely from the gym
3 because they had a student -- a son attending the high
4 school. And pads were purchased and put in the back of
5 the gym -- in the back of the alcove. I'm sorry.

6 So in terms of the -- in terms of this
7 notice, A.J. and Tracy responded immediately to it.
8 There's no notice issue at all there. And Rob
9 Soyring's actions, and contacting back in May Bob
10 Thomas about installing the portable stage covers, and
11 then in June, on June 23rd, when the question of the
12 angle iron came up, and reinstallation of the stage
13 covers raised by the physical ed instructor, Darren
14 Sinnaeve, Rob again went to his interim supervisor,
15 Karen Anderson, and she indicated Art -- and the email
16 and that exhibit clearly indicates, Art would like to
17 put the larger project on hold. Well, putting a
18 project on hold is different than saying, Art refuses
19 to do the larger project. Art, whose team is taking
20 the angle iron off the floor on June 24th, does not
21 want to put the stage cover in place. He wants to put
22 it on hold.

23 Curiously, Art, on behalf of GACM, had
24 submitted in April a proposal to do, on a permanent
25 basis, maintenance at all Gwinn Schools facilities for

1 the sum of \$54,000, plus -- plus extra billings. So
2 Gwinn Cleaning and Maintenance wanted the maintenance
3 contract. They were -- They were doing -- The only
4 maintenance done in the school in the summer was by
5 them. The only maintenance in the gym in the summer
6 was by them.

7 Not everything -- And this was alluded to in
8 the GACM motion. Not every item that shows up on the
9 bills and the invoices from GACM, showing "M" for
10 maintenance and "C" for custodial -- Not every item of
11 maintenance is covered by a memo. So Gwinn Cleaning,
12 in its argument said, well, you know, we intentionally
13 left out a memo in May about the basket and some other
14 memo. There -- Rob -- Or A.J. Filizetti testified that
15 there were many instances where Gwinn Cleaning and
16 Maintenance was asked to do an item of maintenance, did
17 the item of maintenance with a verbal request, and then
18 billed for it. So the argument that there had to be an
19 email from the superintendent on every item of
20 maintenance is without merit. There was, however,
21 memorialized in the June 23, 24 email chain, an
22 indication that Art of GACM wanted to put the
23 installation of the stage cover on hold.

24 So there was no dangerous condition that
25 existed for an unreasonable period of time. Gwinn is

1 not liable for design defects. And plaintiffs have
2 said, despite all the testimony and all the time in the
3 complaints about alleged code violations -- which
4 really gets to design. You designed it with wood. You
5 shouldn't have used wood. That's a -- That's a
6 disguised design defect claim. Despite that, they have
7 said in their brief there is no design defect. And the
8 last nail in the coffin on that issue was put in by Ben
9 Tiseo in his deposition last week.

10 As to proximate cause, we've cited the
11 *Robinson v. Detroit* case in our brief. I've discussed
12 for the Court, and I'll be happy to answer any
13 questions on the *Ray versus Swager* analysis. There's a
14 case that's in our brief at page 38, and it's called
15 *Lameau versus Royal Oak*. It's a Supreme Court case at
16 490 Mich. 948, 2011 (sic). And the court said, and I
17 paraphrase the first part of this, an individual is not
18 the proximate cause even though he, quote, contributed
19 to and initiated a chain of events that led to a
20 decedent's injury.

21 THE COURT: I do have one question on that --
22 as related to that issue, Mr. Ryan. Your response to
23 plaintiffs' motion requests that the Court consider
24 comparative negligence of the minor child. But then,
25 in the briefing, it wasn't clear to me whether you

1 accept what plaintiff has outlined regarding the state
2 of the law in that regard.

3 MR. RYAN: Judge, let me tell you my
4 understanding of the state of the law. And I'm trying
5 to understand it. I may not have it correct. Here's
6 what I understand it to be. The mother's comparative
7 negligence in a wrongful death case cannot be used to
8 impair the claim of the child. So in this case, the
9 plaintiffs allege conscious pain and suffering of
10 Amarah Filizetti, and fright and shock at seeing the
11 panel. I'm unaware of any medical evidence where
12 there's going to be medical testimony that she had
13 conscious pain and suffering. My understanding,
14 subject to evidence, is that she never regained
15 consciousness from the time she -- the panel hit her.
16 So that's my understanding. But in any event, if she
17 did or she didn't, the negligence of the parent cannot
18 block that -- that part of the claim.

19 They cite the pond case and -- that is the
20 *Wymer* case, *Ken Wymer versus James Holmes and Colleen*
21 *Holmes*. This was a -- at 144 Mich.App. 192, a 1985
22 case, not a case involving a governmental entity. And
23 it's cited for the proposition, I think, that it was
24 foreseeable -- equally foreseeable to the defendant and
25 the plaintiff that injury could occur, if the plaintiff

1 and the defendant, who were in the defendant's kitchen
2 together, failed to observe this child in the pond, who
3 drowned, the child of the plaintiff. This is not a
4 similar situation. We don't have defendants in the gym
5 at the time of the injury. We have only the plaintiff,
6 mom.

7 THE COURT: My apologies for interrupting,
8 but really my question is you're -- it appears that
9 you're arguing that the Court should consider, and that
10 a jury could consider, comparative negligence from a
11 minor child, which the plaintiffs' brief suggests this
12 is simply not permitted. Do you agree with that or
13 disagree with that?

14 MR. RYAN: No, I agree with that.

15 THE COURT: Okay.

16 MR. RYAN: That four-year-olds can't be
17 contributorily negligent.

18 THE COURT: All right. I mean, the response
19 said, seeking order that the comparative negligence of
20 plaintiffs Stacey Filizetti, Amarah, Laila, and Melissa
21 Filizetti, must be compared with alleged negligence of
22 the defendants.

23 MR. RYAN: That -- I apologize for that.

24 THE COURT: Okay. I just wanted to make sure
25 that I'm clear on that.

1 MR. RYAN: No, no, I agree with that.
2 Four-year-olds can't be contributorily or comparatively
3 negligent.

4 Other questions, Judge?

5 THE COURT: Hold on just a minute. I don't
6 think so, but -- Okay. No, thank you, Mr. Ryan.

7 MR. RYAN: Okay. There's -- If I might,
8 Judge, or if you want me to hold off on this, I can, I
9 would like to address Gwinn Area Cleaning's negligence
10 and proximate cause. Do you want me to wait?

11 THE COURT: I just want to -- I guess let's
12 finish plaintiffs' motion argument.

13 MR. RYAN: Yeah.

14 THE COURT: And then, if there are, you know,
15 further -- but I think the -- the issues presented by
16 Gwinn Area Cleaning's motion are somewhat different
17 from the -- the other two, so let's complete those two,
18 and then we'll move to that specifically.

19 MR. RYAN: Okay.

20 THE COURT: Mr. Cooper, on plaintiffs'
21 motion, do you have arguments?

22 MR. COOPER: It dovetails, Your Honor,
23 because it goes to the issue of duty and duty of a
24 contractor. And a contractor's duty can arise from the
25 negligent performance of the contract, the contract

1 itself, or assumption of duty. Here we have neither as
2 to GACM. And that's set forth in our brief.

3 Contrary to the -- And again, this dovetails
4 with the motion -- cross-motions that the school has
5 with GMAC (sic), so it kind of runs together. But
6 contrary to the non-party at fault assertions, the
7 school officials in charge, who had authority, stated
8 under oath record admission -- record admissions, and
9 that's dispositive under subrule (G)(4), and that's --
10 I would suggest to the Court that subrule (G)(4) is
11 terribly important with respect to this case and these
12 motions because it's record admissible evidence, what
13 was actually said in the depositions, and what was
14 said, again, fully contrary to the affidavit of -- or
15 the non-party at fault affidavit.

16 Karen Anderson, that testimony is in the
17 court record. Karen Anderson is the interim
18 superintendent who Rob Soyring acknowledged under oath
19 that, if anything was to be done extra-contractual,
20 maintenance work by GACM, not under the cleaning
21 service contract, it had to okayed by Karen Anderson,
22 someone with money control, which he didn't do. What
23 did Karen Anderson say regarding these emails?

24 Question: You, during June 24th or any time
25 during June of 2015, did not instruct Art or anyone at

1 GACM to install the stage wall cover; correct?

2 Answer: Correct.

3 Question: You didn't expect GACM to
4 reinstall the stage wall cover; correct?

5 Answer: No. We would have -- it would have
6 been specific.

7 Question: I want to be clear. You
8 specifically, as acting superintendent, did not expect
9 GACM to put the stage wall cover back; correct?

10 Answer: Correct.

11 Question: You never instructed them to put
12 it back?

13 Answer: Correct.

14 That's set forth in Exhibit Four. She also
15 had no criticisms of GACM.

16 Now, when you look at then testimony of
17 Mr. Soyring, what's important there, Your Honor, is in
18 May, he had a task list. And this is in briefs, and
19 it's in the testimony, different tasks, who was to do
20 it. And as to putting back the stage wall covers,
21 which was always done by the CAD instructor and his
22 class, he left that blank. And he left it blank after
23 speaking to Bob Thomas, the GACM supervisor who
24 testified, we don't do that, we've never done that,
25 that's not part of our job. So it's left blank after

1 that. Thomas at that time did have a manual. So what?
2 So did the new school principal, and so did the new CAD
3 instructor. Another red herring.

4 Mr. Soyring, at page 60 of his 2018
5 deposition, attached as Exhibit Nine, agreed that any
6 extra expenditures would need Karen Anderson's express
7 permission. Well, we've already heard what Karen
8 Anderson testified under oath, again, dispositive under
9 subrule (G)(4).

10 On September 2nd, one day before the tragedy,
11 Mr. Soyring sent an email to A.J., hey, this needs to
12 get done, do it. And that's what prompted A.J. and
13 Tracy to do what they did. They're the ones undisputed
14 that carried these wall covers into the gym, left them
15 unattended and in a position that could be easily
16 tipped over. A.J. and Tracy said GACM had no input and
17 did not have any involvement whatsoever as to that.
18 What does A.J. say in his second deposition, attached
19 as Exhibit 11, pages 31 to 32?

20 Question: From your hire date, August 10th
21 of 2015, up until September 3rd, you never instructed
22 anyone from GACM to move the stage wall covers;
23 correct?

24 Answer: Correct.

25 Question: In terms of being in a meeting or

1 seeing anyone advise or instruct GACM to move them,
2 that didn't happen?

3 Answer: Not to my knowledge.

4 You never instructed GMC (sic) to move the
5 stage covers?

6 No.

7 And you never anticipated or expected GACM to
8 move the stage wall covers; correct?

9 Answer: Correct.

10 The Belusar -- This is on page 15 of our
11 brief, testimony cited verbatim, Exhibit 12.

12 Question: The issue of propping them up
13 against the wall, that was solely, exclusively you and
14 A.J. Filizetti; correct?

15 Yes, sir.

16 You had zero input from anyone at GACM with
17 respect to the moment A.J. asked you to do this task
18 until the tragic incident?

19 Fair.

20 Question: You're not blaming GACM with
21 respect to any of the setup of these wall partitions,
22 are you?

23 Answer: No.

24 And it goes on and on and on again. Same
25 with Mr. Jayne, the other superintendent. There's some

1 overlap with Karen Anderson. So he's -- Mr. Jayne is
2 the other fellow with the -- the only other guy that
3 could okay this if maintenance from my client was going
4 to do this. Page 40 of his 2018 deposition, again
5 attached as Exhibit 13.

6 Question: Before September 3rd of 2015, you
7 never instructed or directed my client GACM to
8 reinstall the stage wall cover; correct?

9 Answer: Correct.

10 As you sit here right now, can you tell me
11 anyone here at the school that advised or instructed
12 GACM to reinstall the stage wall cover?

13 Answer: No.

14 When we take the unequivocal testimony, and
15 we apply it to -- Gosh, two other times there's -- a
16 person for the school thinks that they saw the wall
17 partitions in a different place, and gosh, maybe it was
18 GACM who moved them, you know, weeks before, from the
19 hallway into the gym, and into the gym -- out of the
20 gym.

21 It's important for the Court to note three
22 things. Number one, no one -- no record admissible
23 evidence, no one's testified that they saw who moved
24 them, if they were in fact moved.

25 Number two, Vicki Nelson, the person in the

1 office of the school that, lo and behold, we were never
2 advised of, who was in a perfect position to see all
3 these things, who testified under oath that she was in
4 the school daily from August 12th on, in the gym daily.
5 Why would she go in the gym daily? Because she
6 practiced in there, and she helped coach in there. She
7 never saw the wall covers in the gym.

8 Number three, red herring. Why? It's
9 analogous, Your Honor, the arguments from counsel for
10 the school. On the way to work I drive my son very
11 often to school, the one that's still at home. Okay.
12 I do it on a Thursday. Friday I have to be to circuit
13 court in the Sault. My wife takes the car and drives
14 my son to school. She's in an accident. She cuts in
15 front of a car. They not only sue my wife, but they
16 sue me because I drove the car the day before. There's
17 no Michigan law to that effect. No, what Michigan law
18 says is, you need negligent performance of the
19 contract, which we don't have here, or assumption of
20 duty, which again we don't have here.

21 And finally, Your Honor, before I sit down, I
22 would just like to cite a few cases, if the Court -- if
23 it wants to take a look at in the days or weeks that
24 follow, that weren't in the brief, which I think are
25 very instructive because they deal with contractor

1 duty. Okay?

2 And the first one is *Fultz*, F-U-L-T-Z, versus
3 *Union-Commerce Associates*, 470 Mich. 460, a 2004 case.
4 First, whether a defendant owes a duty to a plaintiff
5 in a negligent action, question of law for the Court.
6 Number two, if one voluntarily undertakes to perform an
7 act -- an act, having no prior obligation to do so, the
8 duty may arise to do it in a non-negligent manner. And
9 that's at 470 Mich. at 465. Michigan courts draw a
10 distinction between misfeasance -- What's that?
11 Action. That goes back to the *Hart v. Ludwig* line of
12 cases in the '50s -- versus nonfeasance, inaction. For
13 tort based claims, a tort action will not lie based on
14 nonperformance of a contractual duty, that is,
15 omission.

16 The second case, which I think will help the
17 Court in looking at the duty -- which I'm solely
18 focusing on duty in my comments, although our motion is
19 broader -- would be *Davis v. Venture One Construction*
20 at 568 F.3d 570, a 2009 case. There a contractor --
21 the reasoning was, yeah, you had a duty under the
22 fall -- under the Michigan law. What did the
23 contractor do? The contractor in that case left an
24 unhinged door stored outside in a construction zone
25 that fell on the plaintiff. The contractor is the one

1 that left it there unhinged. What did the court in
2 that case do? And again, a real good discussion of
3 Michigan law.

4 Under Michigan law, defendant's failure to
5 complete his contractual -- contracted for performance
6 does not give rise to tort action for lack of duty.
7 However, under Michigan law, if one having assumed to
8 act does so negligently, then liability -- then
9 liability attaches and exists to a third party, the
10 good plaintiffs here, to exercise care and skill. Who
11 did that in this case? Solely the school officials,
12 A.J. and Tracy.

13 The third case, if the Court would be so kind
14 to take a look at, which explains these principles, and
15 then I'll sit down, is *Loweke, L-O-W-E-K-E, versus Ann*
16 *Arbor Ceiling and Partition Company*, and that's at
17 489 Mich. 157, a 2011 case -- 489 Mich. 157. Again,
18 that case is good. Why? The contractor -- A duty was
19 found, and it was the contractor -- the contractor's
20 defendant employees who had stacked cement boards
21 against a wall in an unstable position, pretty much --
22 very similar to this case. And it fell, and it injured
23 another employee of a different -- of a different -- of
24 a different company, a subcontractor. The same law
25 applied. Okay? The question of law for the court,

1 duty. If one having assumed to act does so
2 negligently, then liability exists, to do it in a --
3 with care and skill. What was that act? It was the
4 act of stacking the cement boards.

5 Your Honor, I'll sit down, but before I do
6 that, I'd like to -- to make a practical observation,
7 and that is, I focus on duty, and frankly, it's as a
8 practical matter, as well. And why do I say that?
9 If -- If the Court grants GACM's motion, and it's based
10 on lack of duty, under that case law, if the Court
11 reviews it, and looks at the record, you know,
12 admissions, and agrees with our position, then it's
13 clear that a -- another defendant cannot name -- a
14 party dismissed based on lack of duty cannot name
15 that -- where there's no duty, cannot name that party
16 as a non-party at fault.

17 I'm trying to remember the case, but that's
18 particularly important in this case, where we were
19 named, you know, we go eight months down the road, and
20 it's -- and what Art tells us, it is verified by the
21 school's own employees. But *Romain* -- I think it's
22 *Romain*, R-O-M-A-I-N, *versus Frankenmuth Insurance*.
23 It's a Michigan Supreme Court case. But basically it
24 stands for the proposition that, hey, you can't have a
25 non-party at fault, so the plaintiff is not faced with

1 an empty chair. Thank you, Your Honor.

2 THE COURT: All right. Thank you,
3 Mr. Cooper. Mr. Janes, I guess we're back to you.
4 And, Counsel, I was initially kind of separating these
5 motions. In argument, they've all kind of come
6 together, which is perfectly fine. I just want to
7 ensure that all counsel have adequate opportunity to
8 argue all of these various summary disposition motions.
9 So with that in mind, go ahead, Mr. Janes.

10 MR. JANES: Yeah, there's a couple points.
11 One, please, Your Honor, this is my motion for summary
12 disposition on the material facts that I did not claim
13 are in dispute. Please don't get distracted by all
14 these arguments about partition walls being moved, and
15 who moved them, and where they saw them, all that
16 stuff. That's -- That may be material between the
17 conflict between Gwinn Area Cleaning and Maintenance
18 and Gwinn Area Schools. It has nothing to do with me
19 because -- as it relates to my claim.

20 Again, there's two claims. There's the gross
21 negligence claim against individuals, and the claim
22 against the school district. The school district is
23 being held under the non-delegable duty to repair and
24 maintain their building. And under that, it's -- like
25 I say, it's non-delegable. So it doesn't matter to

1 plaintiff whether or not it was Gwinn Area Cleaning and
2 Maintenance who didn't do the job, or if it was the
3 school employee who didn't do the job, it's still the
4 non-delegable responsibility of the school district to
5 see the job was done. And so all this side squabbling
6 is not my concern.

7 However, what is a concern of mine is that
8 the Court does appreciate what the law is. Okay. And
9 again, the distinction is very important of what --
10 what I've alleged and what I've been arguing. The
11 school district, the school, is being held accountable
12 for its breach of building exception. Obviously, that
13 is being -- they're being held vicariously liable for
14 the failures -- knowledge and failures of its
15 personnel. That could be the superintendent. It could
16 be the principal. It could be anybody who all knew
17 about this and allowed the can to be kicked down the
18 road forever, and ultimately happened the accident.
19 And it also can be -- the knowledge can be even that of
20 Gwinn Area Cleaning and Maintenance because they were
21 their agent. That is the vicarious liability.

22 I do believe -- And I did not brief this
23 because I did not make the allegation. I do believe
24 the law is that there can be no vicarious liability for
25 the school district for the gross negligence of the

1 individual. Rather, the claim is directly against the
2 individual for their gross negligence. I do believe
3 that's an accurate statement of the law. I am not
4 seeking -- I mean, if I could, I would, but I can't, I
5 don't think -- to hold the school district liable for
6 the gross negligence of the three named defendants.

7 Now, I betcha you can probably figure it. I
8 do things pretty ordinar- -- with order, Your Honor.
9 And I did not sue Rob Soyring first, okay, because I
10 appreciate what gross negligence is supposed to be,
11 that is, conduct so reckless as to demonstrate a
12 substantial lack of concern for whether injury results.
13 And the way I viewed the case initially was, yeah, Rob
14 Soyring, he knew about this problem. He could have
15 shut the gym down. He could have done a whole lot of
16 things. But that I didn't think constituted a
17 substantial lack of concern of whether injury could
18 result because I didn't think I had the connection.

19 And that connection was, did he know when the
20 panels were going to be moved into the gymnasium, and
21 did he know that the gymnasium was in use, so that this
22 very dangerous repair activity caused a substantial
23 risk of harm to individuals? And I didn't sue him
24 originally because I only believed I could prove
25 knowledge of individuals, knowledge of the repair

1 activity, and the indifference of their safety against
2 A.J. Filizetti and against Tracy Belusar.

3 A statement that is completely devoid of fact
4 by counsel today is that Rob Soyring was not present in
5 the gym on September 3rd. That was the critical point
6 of his deposition. That is why he was sued, is because
7 he was. And he testified that he was there at
8 nine-thirty. The critical point of why he changed his
9 testimony, to that I was maybe there at eight-thirty or
10 eight o'clock, is because the cheerleaders, and the
11 partitions were not being moved at the time. That's
12 why he was sued, because he had knowledge of the
13 activity, he had knowledge of the children being
14 present.

15 I don't care if we're talking about
16 four-year-olds, or a freshman in high school, or a
17 senior in high school. They're all kids to me. Okay?
18 They're all going to be running around the gymnasium
19 doing whatever.

20 So once he had the knowledge that the repair
21 activity was going on and the presence of these
22 children, I said, that is the indifference necessary.
23 He could have cancelled practice immediately.
24 September 2nd, he sends out the email, hey, we need to
25 get this done. That morning his testimony is he finds

1 out that the repair is going to happen sometime this
2 week. And then at 9:30, he goes into the gymnasium,
3 and it was like (indicating), hey, I'm here, and
4 repairs are going to be happening here. Get out of
5 here. Or, you know, I spend a little bit more time to
6 check things out. Are the repairs underway?

7 What his testimony was at the first
8 deposition was, he walked into the gymnasium, saw that
9 Stacey was directing cheerleading at 9:30, and
10 continued to walk out. He did not make any purposeful
11 observation to the north end of the gym. He did not
12 make any purposeful observation of the gym enclosure or
13 the existence of the children. All that changes in his
14 second deposition. Obviously there's a reason why. I
15 cite the case law that you can't -- you look to the
16 initial testimony, and the other is not material. So,
17 yes, I was very orderly in who I'm bringing in as a
18 party defendant in this case, because I am aware of
19 what the standard requires, and I didn't think
20 initially he had it. But after his deposition, there
21 was no question in my mind that there was gross
22 negligence. There's absolutely gross negligence.

23 How can -- How can counsel stand up in front
24 of this Court when his own agent says this is not an
25 accident, this was horrible, horrible negligence. The

1 same individual says, we know what nothing gets you.
2 We should have done more. The same individual
3 testifies, all the way through moving those panels in
4 there, I knew this wasn't right. The same individual
5 testified, I come into the gymnasium, I see the
6 cheerleaders, I go to A.J., A.J., this isn't right,
7 man. This is how she talks. This isn't right, man.
8 How long are these people going to be in here? A.J.
9 says, not that long. Well, that's not the truth
10 because A.J. didn't know how long they were going to
11 be.

12 But it doesn't matter because she didn't
13 accept A.J.'s testimony -- or his statement. She says,
14 I know I have to do something, I know I have to get
15 those panels up. And then she says she hears the
16 commotion. She says, I'm running down the hall. And
17 she says, that panel fell, didn't it? And I asked her,
18 did you have in your mind's eye which panel it was?
19 And she says, yeah, I knew it was the right one, the
20 one that is clear in her testimony was more wobbly than
21 the left.

22 She testifies -- Then, what did you say to
23 anybody after the accident happens at the scene? She
24 testifies to -- and she says it to Mr. Hart. She says,
25 we were too late, we were just too late. That is a

1 demonstration of conduct so -- as to demonstrate a lack
2 of concern whether injury results. She knew what they
3 were doing was unsafe. She knew the children were
4 there. She knew something had to be done, yet she
5 remained silent and allowed it to be -- happen.

6 A.J. Filizetti is no better. I mean, I got
7 just as ample testimony about A.J. Filizetti saying,
8 oh, I would have never brought these things in if I
9 would have known four-year-olds were there. Well, is
10 it all right to harm 14-year-olds? I mean, it is that
11 bad.

12 I want to switch to the testimony of the
13 proffered expert. I -- I withdrew my objection, Your
14 Honor, because I think you'll see in the testimony the
15 man is bought and paid for. And he is obstinate. Look
16 to Exhibit Three if you have it -- I know it will tough
17 for Your Honor -- to my -- my motion, which is just the
18 photographs.

19 THE COURT: The pictures? Okay.

20 MR. JANES: And Exhibit Four to my motion,
21 which are blueprint plans incorporating the partition
22 wall cover into the gymnasium wall.

23 He says -- He ignores that -- I call it the
24 gym wall stage enclosure needs to be re- -- He ignores
25 all the other components of the enclosure. There's

1 three panels to the roof. There's bracketing on the
2 wall. There's bracketing on the wall, there's
3 bracketing on the floor. And he keeps on saying, well,
4 these two big panels, which are 12 feet high -- or
5 12 feet long, 6 feet high, 10 inches deep, they're
6 movable panels, and therefore they're not structures.
7 Well, then we'll see in the deposition, I read to him
8 various codes, which he acknowledges are relevant to
9 the case and are applicable in the case. And he says,
10 no, that's not a structure.

11 What is that if it's not a structure? I
12 mean, I don't think I need an expert. I don't think
13 any jury in this world is going to have that picture up
14 in front of them, and listen to an expert come and say,
15 you know, that thing that had plans, it's made out of
16 wood, is not built or assembled, because that's all the
17 definition of a structure is, something that's built or
18 assembled.

19 Now, you'll see in the deposition, I cite to
20 many, many codes. And the reason I do this is you need
21 to pay particular attention to one of your
22 predecessor's cases that went up on appeal, and that's
23 the *Tellin* decision, *Tellin versus Forsyth Township*. I
24 cite to it at 291 Mich.App. 698. And at page 12 of my
25 response brief, I say, notably, even injuries caused by

1 poorly designed aspects of a building fall within the
2 building exception when the governmental entity fails
3 to repaint -- repair and maintain them.

4 The reason why that is applicable here is
5 that we also then have applicable code, which is called
6 the International Property Maintenance Code. The
7 International Property Maintenance Code basically
8 says -- and the expert says that it applies -- that if
9 there is a structure that was built in nonconformance
10 to other applicable codes, then it needs to be
11 maintained and repaired, or abated. Okay. So that
12 goes directly to evidence of the repair and maintenance
13 aspect.

14 And it is clear that, when this thing was
15 built, okay -- Keep in mind, Your Honor, this building
16 was designed and constructed in 1963. As counsel
17 cites, sometime around 2010, I guess Mr. Webster
18 visited Gwinn and talked about his closed head injury
19 problem. But either way, they said, hey, we have a
20 danger here. We need to make a repair. And they come
21 up -- And the repair is the enclosure.

22 So you go back again. The actual
23 installation is a repair, but I'm more focused on the
24 actions thereafter, that, hey, yeah, it shouldn't have
25 been there in the first place for all these good

1 reasons. But you know what, the events of the summer
2 of 2015, which are the material issues of fact -- the
3 material issues of fact are the events of what happened
4 after it's taken down. Is there any controversy in
5 those material issues of fact as it relates to the
6 building defect? And there is absolutely no material
7 issues of fact there.

8 Lastly, counsel made some kind of argument
9 that, hey, they were concerned about the danger of
10 concussions when they were talking about the hazard,
11 and not the hazard of the fall and injuring somebody.
12 And that's what all these complaints were and knowledge
13 were in August and July and June of the year. No.
14 Tracy Belusar is quite clear in her testimony that,
15 hey, I couldn't believe it. They leave these things
16 laying around everywhere. She knew leaving these big
17 panels unsecured against walls was a danger, and they
18 did it everywhere.

19 Yeah, they're -- And I don't like to do these
20 analogies, but another analogy could be this. We have
21 outside the school a steel ladder affixed to the brick
22 wall, and it's to gain access to the roof, and it's
23 loose and wobbly. And somebody comes in and says, hey,
24 you know, somebody's going to climb up that darn thing
25 and fall because it's loose and wobbly, it's not

1 connected well. Well, that's not what happens. What
2 happens is, the next day somebody's walking by the
3 building, and that loose and wobbly ladder falls down
4 and strikes the person, and hits him in the head, and
5 kills him. It's the same defect. The circumstance of
6 how somebody was going to be injured is not relevant.

7 Is the condition there hazardous to the
8 public safety? If it is, it needs to be repaired and
9 maintained. It's not whether or not I stub my toe,
10 whether or not I get cut on the bracket, whether or not
11 I collide into the barricade or the thing in the back.
12 It's this enclosure needed to be repaired, put back up,
13 and they didn't do it. Had they done it in June, July,
14 August, Mr. Filizetti's testimony is clear, this
15 accident wouldn't have happened. No one would have
16 gotten hurt.

17 So there's been many attempts by defendant in
18 this case to select evidence or fashion evidence to
19 make it sound plausible that they have a defense. I
20 want the Court -- and I know you will spend the time to
21 review the factual record because I sincerely believe
22 that there is no dispute. The claims that allocate --
23 attempts to allocate fault against Stacey Filizetti is
24 an injustice. They -- Every witness has testified she
25 was there as a cheerleading coach. Every witness has

1 testified she was never forewarned about the dangerous
2 conditions in the gymnasium, and she should have been.
3 She has testified she is busy coaching cheerleaders,
4 and she did not observe the conduct behind her, if
5 there's -- if there's going to be criticism of Stacey
6 Filizetti for failure to do what a reasonable coaching
7 (sic) would do under the circumstances then and there
8 existent.

9 There's only been testimony offered by one
10 other person who knows anything about cheerleading, and
11 that -- that was by Ms. Nelson. And she said -- I
12 guess actually the gym coach said the same thing, and
13 Mr. Sinnaeve said -- or generally said some -- the same
14 thing, is that when a coach comes to the gymnasium,
15 they expect it to be safe for their use, because that's
16 what the public policy -- the school board's policy
17 says, you can't have an athletic facility open if
18 there's a known hazard. So they expect it to be
19 suitable for their use. And therefore, if it's good
20 for cheerleading, it's good for four-year-olds, and
21 they should run about and do whatever they want to.

22 It's -- This is where I don't like the facts.
23 That's why I've argued the law a lot. But the fact
24 is -- this would become the question of fact -- is, is
25 it expected of a gym coach -- or a cheerleading coach,

1 who's got cheerleaders stunting here, yelling cheers,
2 to know what's going on behind her, because everybody
3 says that they walked in behind her. Okay. That's a
4 big no. But you know what, I betcha -- I can see
5 that's a question of fact. So that's the reason why I
6 talk about law, and what she's doing, who she's doing
7 it for. And that's why there can't be the allocation
8 of fault because she's doing it for the school.

9 There are a lot of things said, and I don't
10 have them all, so again, I do rely upon my briefs. I
11 think they're pretty good.

12 THE COURT: Two things, Mr. Janes. One, with
13 regard to -- I keep wanting to call them GMAC -- GAMC's
14 (sic) motion, basically I regarded your response as not
15 necessarily opposing it except to the extent that, if
16 the Court did not grant it, then your theories of
17 liability should still be applicable, as well. I mean,
18 is that a fair --

19 MR. JANES: I -- It was sort of, Judge, do
20 what you gotta do, but if you're going to do it, it
21 doesn't matter if it was based on proximate cause or
22 duty. If they're out, they can't allocate fault.

23 THE COURT: Sure. The other thing is, with
24 regard to the causation or the dangerous condition, I
25 guess I wonder if you can just comment on whether, from

1 plaintiffs' standpoint, it makes any difference as to
2 whether the condition is determined to be the -- the
3 failure to reinstall being the absence of panels, or
4 the presence of panels leaning up against the wall, if
5 you know what I mean, from the distinction. I mean, in
6 most of plaintiffs' brief, it -- the briefing talks
7 about not putting these back where they should have
8 been, failure to install and leaving this area open.

9 And then there's some suggestion, I think
10 it's in the plaintiffs' response to the defendants'
11 motion, that it's sort of also an additional dangerous
12 condition to have the panels there leaning up against
13 the wall. So it's the presence of panels but not where
14 they should be, versus the open area that wasn't
15 covered as it was designed to be, if you understand my
16 question. Does it matter, from plaintiffs' standpoint?

17 MR. JANES: I -- I think I do, and I'll try
18 to phrase it this way. The statutory duty is to repair
19 and maintain the premises in reasonable state
20 condition. When did they have knowledge of the need
21 for reinstallation of the gym wall stage cover, the
22 necessary repair maintenance needed? That was in May.
23 Had they installed it, bolted it back in place, put the
24 covers on, this accident wouldn't have happened. They
25 did not timely repair and maintain it. They chose,

1 however, to repair and maintain it contemporaneous with
2 the cheerleading practice.

3 But the fact is, is that the condition that
4 was complained of, the absence of the gym wall stage
5 cover, continued to be in play. It didn't matter if
6 they were leaning in the back hallway unsecured by
7 Tracy Belusar. They leave these things laying all over
8 the place. It was a hazard there. It's a hazard where
9 they put it. I think the only thing you really need
10 to -- Again, what's the intent, what's the environment
11 of this thing supposed to be? And I think that's key
12 on cases of building defect is, you know, what's the
13 surrounding environment, and what did they need to do
14 to make the area reasonably -- repair and maintenance
15 to make it reasonably safe? It's not what they did.
16 They had still unsecured panels.

17 This is like the *Tellin* case again that --
18 you'll read it, I'm sure -- is that there was a
19 supporting I-beam that was not -- it was installed
20 without proper anchorage at the top, fell over, hit
21 somebody. They -- The claim there was, well, yeah, it
22 was designed maybe that way, but through reasonable
23 repair and maintenance, they should have discovered the
24 insecure anchorage, and fixed it and repaired it, and
25 the accident wouldn't have happened. Same thing here

1 is that, when they identified what needed to be
2 repaired, they didn't do it timely, and as a
3 consequence, the -- the injuries occurred.

4 Did I answer you?

5 THE COURT: Yeah. And I mean, I -- There --
6 I guess the issue I would -- I'm sort of getting at in
7 my mind and just wondering plaintiffs' position, does
8 it make any difference, is that the -- the injury and
9 death here resulted from the panels being leaned
10 against the wall, not the panels not being attached --
11 they weren't attached, that's why they were leaning.
12 But in arguing the period of notice, for example, the
13 length of time they were leaning on the wall, versus
14 not being in place in the stage, and were they in the
15 hall, were they in the gym, were they somewhere else,
16 the injury and death resulted from them being in the
17 gym, leaning against the wall, as opposed to being
18 attached to the wall. Does it make any distinction in
19 plaintiffs' theory whether it was the presence of this
20 big, heavy object against the wall and being wobbly, or
21 the stage that had a cover that wasn't put on?

22 MR. JANES: No, it doesn't because --

23 THE COURT: Okay.

24 MR. JANES: I mean, if they would have been
25 correctly reinstalled, May, June, July, the accident

1 wouldn't have happened. They did not have it properly
2 anchored, and as a consequence, the accident happened.
3 The repair should have been done, and they didn't do
4 it.

5 THE COURT: All right. Mr. Ryan, on your
6 motion, plaintiffs' motion, anything additional on the
7 GAMC's motion?

8 MR. RYAN: Okay. Yes, Judge. Again, to
9 address the last issue that the Court went to, which
10 is, is there a difference between this condition over
11 the summer, versus the day that they're leaning against
12 the wall. On the day they're leaning against the wall,
13 we have, and plaintiffs have argued, Stacey Filizetti
14 acting as a cheer coach. Who was acting as mom,
15 supervising the kids, the four-year-olds? There's only
16 one person, that's Stacey Filizetti, but her attention
17 was focused on the cheerleaders. So if one chooses --
18 And there was no need to bring the triplets to the
19 school on that day. If a parent chooses to bring their
20 four-year-olds, three of them, to the gym with that --
21 with the parent, while the parent is focused entirely
22 on --

23 MR. JANES: Your Honor, I'm going to
24 interrupt, just because, one, it goes beyond what I did
25 on redirect. It's -- Two, it's insulting. My clients

1 are here. Three, there is no -- I mean, if you -- if
2 you're going to argue facts, have a duty. Okay. There
3 is no legal duty, and counsel knows that, and we put
4 forth that in our response brief. I just think it's
5 unfair to this family to have counsel stand up here and
6 make these kind of allegations. I ask the Court to
7 curtail argument.

8 THE COURT: The objection is noted, but I --
9 as the Court indicated initially, the Court intended to
10 take the motions separately, and counsel's arguments,
11 they all sort of became together. So I will hear
12 additional argument. I think all the parties
13 recognized the -- certainly the sensitivity of these
14 issues and the tragedy, by all parties' standpoint,
15 that befell this family. I -- But to the extent that
16 it is relevant, which the Court would decide, in terms
17 of the allocation of duty here, I'd permit some
18 argument on that regard with respect to the plaintiffs.
19 Go ahead, Mr. Ryan.

20 MR. RYAN: Okay. With due respect to
21 plaintiffs and plaintiffs' counsel, I disagree. I
22 believe there is a parental duty here, and the
23 possession -- that real property possession ownership
24 cases don't superimpose the duty to protect little
25 children on a homeowner when a parent is on the

1 premises with the children.

2 So -- So we have, at the time the panel
3 falls, one adult in the gym. It's mom and cheer coach
4 Stacey Filizetti. We have the triplets who were in the
5 exclusive care, custody, and control of mom and cheer
6 coach. We -- There's no other delegee to supervise the
7 children. They're sent on their own about 100 feet
8 away from the extreme southeast corner of the gym where
9 the stunting mats were laid out, where the cheerleaders
10 stayed the entire cheer practice, as far as all the
11 evidence indicates. They're sent down to the other end
12 of the gym.

13 The cheer coach -- And counsel made a
14 statement that I don't agree with, and I think the
15 evidence bears out our position. There is evidence
16 that the cheer coach had her back to the bleachers,
17 looking out at the cheerleaders at one point in time.
18 And there's evidence at another point in time that the
19 cheer coach was looking toward the bleachers. I think
20 there's both, not just one version of where the cheer
21 coach was from -- during this time that the panels were
22 brought in.

23 THE COURT: And I believe, if I'm not
24 mistaken, that Mr. Janes acknowledged there are factual
25 disputes about that. Go ahead, Mr. Ryan.

1 MR. RYAN: Yeah. So the mom and cheer coach
2 missed the open, obvious, visible panels. The argument
3 is open and obvious is not a defense, and we -- we
4 argue it in our -- in our brief. We acknowledge that
5 the courts in Michigan have ruled that in a
6 governmental case, but we also argue that it should be
7 a defense. Here these panels, whether -- whether we
8 use the legal theory or we use the words, they're big
9 panels. They're open and obvious -- obvious and
10 visible. If it's not a legal theory, certainly the
11 words still apply.

12 So they're sent down to the alcove by the
13 cheer coach, focused on the stunting cheerleaders.
14 There's no focus on the children, and there's nobody
15 who is supervising these children, and there's one
16 adult in the room. So that may be the elephant in the
17 room that plaintiffs don't like, but it is the elephant
18 in the room that is the reality of that morning when
19 that panel fell. There was no pre-investigation of the
20 location of the panels. There was not even an
21 observation of three trips in with -- two with the
22 panels, and one with the -- one with the hardware.
23 Those facts are the only -- are unrebutted, undisputed
24 facts in this case regarding Stacey Filizetti.

25 The -- The other points I wanted to address

1 in plaintiffs' argument, the school, he argues, has a
2 non-delegable duty to repair and maintain. We don't
3 believe this is a repair of any defect in the building
4 itself. In fact, the moveable partitions are not
5 attached to the building. There's no way you can say
6 they were attached to the building, and argue
7 simultaneously on the other side of that issue that
8 they were leaned up, not affixed, not attached, and
9 that's why they fell. So if they're leaned up
10 improperly and not attached, they don't become attached
11 by magic. They're not a fixture in that building.

12 Rob -- The statement was made that Rob
13 Soyring was not present in the gym that morning. He
14 obviously was present in the gym. He and the -- And I
15 think Paul recognized that when he said the initial
16 testimony and the subsequent testimony. Rob thought
17 through that testimony. He had a whole year to
18 think -- think through that, that timing. And when he
19 was in the gym, he didn't see the triplets, he didn't
20 see the panels.

21 And Paul cites to the first deposition, where
22 he said, I came up in the center of the gym from the
23 locker room, didn't notice the panels, and didn't
24 notice three four-year-olds. It's hard to miss either
25 one if they're in that gym. Either the four-year-old

1 is with mom when Rob sees the cheerleaders and mom --
2 sees Stacey and the cheerleaders, but doesn't see the
3 four-year-olds or the panels at the other end. So it
4 is quite clear he didn't come into that gym at
5 9:30 a.m. or he would have seen the panels.

6 Also an undeniable fact here is -- and it's
7 a -- it's a timeline issue for plaintiffs, is that
8 neither Stacey (sic) nor A.J. saw the triplets on any
9 of the trips into the gym, anywhere, not one of them,
10 not two of them, not three of them. And so that
11 shows --

12 THE COURT: Excuse me just a minute. You
13 said Stacey. I think you mean Tracy; is that correct?

14 MR. RYAN: Tracy Belusar.

15 THE COURT: All right. Go ahead.

16 MR. RYAN: I'm sorry.

17 THE COURT: That's all right.

18 MR. RYAN: Yeah, I did mean Tracy.

19 Tracy Belusar did talk about -- to the
20 police, and it's in her statement, horrible, horrible
21 negligence. She explained they leave these things all
22 over. That -- She first said that in the police
23 statement. They leave these things all over. When she
24 explained what that meant, they leave them in the
25 northwest corner of the gym, and the southwest -- or

1 northeast and south -- I'm sorry, northwest and
2 southwest corner of the gym, and the hallway. She's in
3 her third day on the job trying to put this together.
4 Why do these panels move three times in one week? And
5 she was -- And then the accident occurs on her third
6 day at work. She is trying to put it all together.

7 She's interviewed on the 7th, three days
8 after the incident. And she explained in her
9 deposition in some detail that she attributed the
10 horrible, horrible negligence, and I put the quote in
11 our brief, to the failure -- if GACM started to remove
12 the angle irons, why -- why were the -- when the panels
13 were in the northwest corner, near the alcove, weren't
14 they installed in the alcove? And she -- she described
15 horrible, horrible negligence, lack of teamwork and
16 laziness. And her exact testimony is in our brief.
17 She was concerned because there was some discussion
18 about leaving the panels over the weekend, and she
19 didn't think that that was a good idea.

20 Plaintiffs' counsel suggests that there's no
21 difference between the judgment of a 14, or a 15, or a
22 16, or a 17-year-old, and a four-year-old. I beg to
23 differ. And the courts clearly distinguish between a
24 child of four, in terms of judgment, in terms of
25 foreseeability of -- and consequences of actions, and

1 teenagers. And although plaintiff counsel argues that
2 the teenagers, it was dangerous for them when they were
3 in the southeast corner. The alcove is 100 feet away
4 on the north end of the gym. The mats are in the
5 southeast corner, not in the alcove. The teenagers and
6 their coach stayed in the southeast quadrant of the gym
7 to do the stunting. There was -- It was recognized
8 they were in there, but there was no danger to those
9 people who were recognized in the gym, the coach,
10 Stacey, and the cheerleaders.

11 I guess when you don't have evidence on the
12 other side of an affidavit and sworn testimony, you say
13 that the expert, who was deposed and who submitted an
14 affidavit to which there was no rebuttal, was bought
15 and paid for. We dispute that vigorously. The CV of
16 Ben Tiseo is attached to his affidavit. A review of
17 that shows a long career in architecture, as well as a
18 long career teaching architecture at Lawrence Tech, and
19 not a dedicated career to testifying in cases as his
20 only activity.

21 And plaintiff counsel asked him a hundred
22 different ways whether the partitions could be a
23 structure, a building, or affixed to the building, and
24 every time he indicated they were moveable partitions.
25 Therefore certain codes did not apply. They were not

1 part of a structure attached to the building.

2 So is the condition of the stage cover up all
3 summer hazardous? Plaintiff says, yes, it was. That
4 same condition, except arguably more hazardous when the
5 box -- steel boxes were in front of the gym for all
6 those years, actually decades, until -- until the stage
7 was removed from the gym in 2000. So from '62 to 2000,
8 almost 30 years, the stage was either occasionally
9 covered with pads thrown over the stage in the alcove,
10 or uncovered, and the boxes were uncovered. And so for
11 almost 30 years this dangerous condition was left the
12 way it was. Obviously we view things differently over
13 time than we did in the past, and so the stage cover
14 enclosure was built to prevent -- prevent mostly
15 basketball players from hitting the stage.

16 THE COURT: Is there any relevance, from your
17 standpoint, as to what it was like before this? I mean
18 I don't see how that fits into the --

19 MR. RYAN: Well, if it was so dangerous, then
20 why -- why was it dangerous for three decades, Judge?
21 I think that's -- I think that's relevant to whether --
22 to the argument the plaintiffs make, it was a
23 horrendously dangerous situation from graduation until
24 September the 2nd.

25 MR. JANES: It's not argument, it's the

1 testimony of the athletic director.

2 THE COURT: Well, I just -- Just a moment,
3 Mr. Janes. I -- I'm not clear on why it would be
4 relevant what the gym was like a long time ago. The
5 question is, is it a dangerous condition now, on the
6 day of the incident? Wouldn't you agree?

7 MR. RYAN: I agree. I think the focus really
8 is on the day of the incident.

9 THE COURT: All right.

10 MR. RYAN: And not even the summer that
11 plaintiffs argue about. Okay. The -- And the Court
12 got to that as the last issue. And I'm -- I see that
13 as an issue, too. The panels being not in place over
14 the summer, I don't see as a dangerous condition. I
15 think the focus here is what was happening on the day
16 of the incident, and who knew what on that day.
17 Thanks, Judge.

18 THE COURT: One question --

19 MR. RYAN: Yeah.

20 THE COURT: -- Mr. Ryan, on GACM's motion.
21 And I -- It appears that the school district
22 acknowledges that there's no contractual liability,
23 there was no contract for performance of this
24 particular work; is that correct?

25 MR. RYAN: That is correct.

1 THE COURT: And so what is the basis for
2 assigning any liability here to GACM?

3 MR. RYAN: When the Notice of Non-Party Fault
4 was initially filed, as -- as I alluded to, to the
5 Court, I did so only after I had that affidavit of
6 Kathy Bowns because I understood the case would be
7 circumstantial. I did not know, and GACM argues in its
8 brief that I should have known, but that -- if one is
9 throwing stones at a glass house, one needs to be
10 careful, because that same argument could apply to
11 Kathy Bowns falsifying her testimony, had reasonable
12 inquiry been made and a diligent attempt to find
13 Heather Santiago, which was not very difficult to do.
14 I did it within five minutes of leaving the school on
15 the last day of depositions. One could argue that, had
16 that been done by Gwinn Cleaning, maybe she wouldn't
17 have lied in her deposition. Now, we didn't argue
18 that, but it -- but it seems to me that the argument
19 is, if I knew exactly a year ago how Karen Anderson
20 might testify in her deposition in March, somehow I
21 should have learned that and -- and that would have
22 precluded the Notice of Non-Party Fault. But I -- when
23 I prepared that notice, I carefully prepared it.

24 THE COURT: And I -- And I'm sorry to
25 interrupt. But I understand that part.

1 MR. RYAN: Yeah.

2 THE COURT: I mean, that issue is really more
3 with regard to a party's requests or sanctions or
4 costs. But as we sit here now --

5 MR. RYAN: Yeah.

6 THE COURT: -- what is Gwinn's theory for any
7 basis for liability against GACM?

8 MR. RYAN: That GACM undertook the repair
9 in -- on June 24th with the angle iron, deferred the
10 installation of the portable stage cover to a later
11 date, decided when it wasn't -- when it knew, on
12 August 25th, when Art Nordeen took Tracy Belusar,
13 recently hired by Gwinn, and starting on August 31st,
14 took her around to show her the buildings. And she was
15 advised by Bob Thomas that Gwinn Cleaning and
16 Maintenance was upset that it wasn't getting the
17 maintenance contract, with Bob Thomas harassing her
18 about getting the panels out of the CAD hallway so they
19 could wax, and then the panels being seen by two
20 witnesses, Tracy Belusar and Kathy Bowns, in the week
21 before Tracy starts, in the gym. But once that trip
22 with Art Nordeen takes place, August 25th, the panels
23 leave the gym and end up back in the CAD hallway.

24 It's circumstantial, but we believe that a
25 reasonable jury could conclude, from all of those

1 circumstances and all of those facts, that despite
2 denials by GACM, there is evidence in this record to
3 support the proposition that GACM was the party that --
4 and its employees, the people who moved the panels into
5 the gym. Once they determined -- Art Nordeen
6 determined they weren't going to get the maintenance
7 contract, the panels got moved from the northwest
8 corner by the alcove, to the south -- southwest corner,
9 and then back into the CAD hallway.

10 THE COURT: But to the extent that you've
11 argued, I mean, a few minutes ago that it's relevant
12 what happened that day, in terms of responsibility of
13 the parties, and their location within a hallway or,
14 you know, some other location prior to this day is not
15 so much relevant, what responsibility did GACM have on
16 this day? I don't understand the theory for liability.

17 MR. RYAN: Okay. If -- If the Court focuses
18 on the -- on the last day, and if that -- if the Court
19 believes that all the events prior to that last day are
20 really not critical to --

21 THE COURT: Well, I -- And I shouldn't -- I
22 mean, I don't know that that's really the case.
23 There's certainly a lot of relevant things. But I
24 mean, on the day that -- Clearly GACM did not have the
25 contract. There's no theory of contractual liability.

1 MR. RYAN: Right.

2 THE COURT: So under what -- I mean, if GACM
3 had the responsibility to do it, why did Filizetti and
4 Belusar take it upon themselves to do that? I don't
5 understand the theory.

6 MR. RYAN: Because A.J. Filizetti responded
7 to the email on September 2nd, when it became apparent
8 that -- to Rob Soyring that the panels were not
9 installed, and that's why they did it, the way they did
10 it or when they did it. A.J. Filizetti thought it was
11 a needed task of maintenance to be completed.

12 THE COURT: All right. Thank you.

13 MR. RYAN: Okay.

14 MR. COOPER: Your Honor, nothing to add.
15 That's in the briefs, and it's been stated by me.
16 Thank you.

17 THE COURT: Let me just take a minute,
18 Counsel, to make sure I have everything here.

19 All right, Counsel, just briefly I guess to
20 recap here. So I'm going to prepare an order regarding
21 the page limit, third amended complaints, and the
22 motion in limine. And then one aspect of the motion in
23 limine was taken under advisement, as are the motions
24 for summary disposition. I -- This will require,
25 obviously, some fairly thorough review by the Court. I

1 will attempt to have the Court's decision done as
2 quickly as possible, but obviously, as you know, there
3 are some lengthy briefs and many exhibits for the Court
4 to review, which I've done certainly in preparation for
5 today, but not completely enough to decide today.

6 Anything for the record before we conclude
7 for the day then?

8 MR. JANES: Thank you for your patience.
9 Have a nice Fourth of July.

10 THE COURT: Thank you. Same to you.

11 MR. RYAN: Likewise, I join the sentiment,
12 Judge.

13 MR. COOPER: I appreciate the patience, Your
14 Honor. Thank you.

15 THE COURT: Thank you. We're in recess then.

16 * * * * *

17 (The hearing concluded at about 12:30 p.m.)

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1 STATE OF MICHIGAN)
2 COUNTY OF MARQUETTE)

3 I certify that this transcript, consisting of 93 pages,
4 is a complete, true, and correct transcript of the
5 proceedings and testimony taken in this case on June 28,
6 2018.

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September 20, 2018 Sharon A. Grabarczyk
Date Sharon A. Grabarczyk, CER/0727
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Court of Appeals
December 4, 2019 Oral Argument

Transcript unavailable

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audio_344878_12042019_100442.
mp3](http://publicdocs.courts.mi.gov/coa/public/audiofiles/audio_344878_12042019_100442.mp3)

Photos and Video Screenshots



Figure 1 – Figures 1 through 3 show Defendant, Tracey Belusar, (back to camera) holding up the wall panel after it had fallen and then been stood back up into the position it had been left before it fell on Amarah Filizetti. The image is a still photo taken from the first responder video following Amarah’s injury. Examination of the photo demonstrates that the right wall panel, in particular, was close to vertical and there is no wall behind the panels against which the panels were leaning to keep them stable. Instead the wall panels were stood on edge near the location they needed to be in order to be secured to the wall of the gym. Unfortunately, the angle irons and hardware required to attach the wall panels to the wall were neither attached to the walls nor even located in the gym at the time the panels were balanced in the alcove.



Figure 2



Figure 3



Figure 4 - This photo, taken between 2010 and 2015, shows the padded safety enclosure installed as intended for the safety of athletes, students and other members of the public.



Figure 5 - Immediately following the tragic incident on September 3, 2015, the wall panels were installed and secured to the building. The photo was taken as part of the police investigation. The area around the enclosure was cordoned off during the installation process. The plywood sheets on the floor form the ceiling or cover for the enclosure. See *Figure 4*, above.

1









Robert Soyring
Selected Pages of April 14, 2017
Deposition Transcript

Wayne, Stacey, Laila, and Melissa Filizetti
v.
Gwinn Area Community Schools, Tracy Belusar, and
Anthony J. Filizetti

Case No. 16-54781-NO

Transcript of the Testimony of
Robert Soyring

April 14, 2017



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1 the superintendent, the middle school/high school
2 principal reporting to the superintendent, the principal
3 of Gilbert reporting to the superintendent, and the
4 principal of Sawyer reporting to the superintendent?

5 A. That's my understanding.

6 Q. And so you're on an equal plain with the principals of
7 all three schools?

8 A. That's my understanding.

9 Q. And as it makes sense, as the AD then, it's your job
10 responsibilities to oversee the athletic facilities of
11 the various schools; is that true?

12 A. Yes.

13 Q. Do you, as the AD, have any involvement with oversight of
14 what would possibly be the playgrounds or activities at
15 the elementary schools?

16 A. No, nor their gyms.

17 Q. The responsibilities of the AD, then, are confined to the
18 middle school/high school athletic facilities and
19 athletic programs?

20 A. Yes.

21 Q. And in 2012 then, when you came to Gwinn, did you have to
22 obtain any specialized training to become the athletic
23 director for the school district?

24 A. No.

25 Q. You transferred your years of experience as being a

1 decades. I don't know the exact number.

2 Q. How many schools participate in the conference?

3 A. As we speak, there's been seven within that conference.

4 Q. So I would assume in 2012, you had seven confirmed -- or
5 no, six confirmed games, and you needed to fill in three
6 slots?

7 A. With that example, we had one or two -- I believe two
8 non-conference games already scheduled that was
9 contracted and renewed annually. And there was one
10 specific opening, I remember, we wanted to fill so that
11 we didn't have any gaps for the kids participating.

12 Q. So you ended up having to play a Class A high school and
13 having a tough time of it, huh?

14 A. Fortunately, it wasn't Class A, but it was a team from
15 downstate that we helped commute up here and made sure
16 the game could happen.

17 Q. Yeah. The -- I may be pronouncing it or stating it
18 wrong, but one of the big responsibilities of the AD is
19 before the school year commences, that you evaluate your
20 facilities to determine what needs to be done to allow
21 the sporting activity to commence, true?

22 A. Correct.

23 Q. I mean, and that -- I mean, that's -- I mean, that's the
24 entire facility, from the press box to the locker rooms
25 to the concession stands to the football field or the

1 meeting with them to gain an understanding of what was or
2 wasn't in their contract, Gwinn Area Cleaning and
3 Maintenance, for that 2014 school year.

4 Q. Yeah. I've taken the partial deposition of the
5 superintendent.

6 And under the contract with Gwinn Area Cleaning, the
7 contract calls, I think, actually, for weekly meetings
8 between a school representative and the team
9 leader/foreman of Gwinn, and he identified you as the guy
10 that sits through most of those; is that a fair
11 statement?

12 A. I've tried to take the lead, athletically speaking, to
13 discuss items within a weekly or biweekly meeting. I
14 would guesstimate we, either face-to-face or in some form
15 of correspondence, talk about needs at least biweekly
16 when we're in the midst of an actual season.
17 When there is time in between seasons, we might not meet
18 as often, I think is a fair statement.

19 Q. But being the guy that you are, it sounds like, one, you
20 might come to these meetings with a laundry list of
21 things you might want to talk about; or do you just come
22 to the meetings, and you talk about it?

23 A. No, I typically -- I'd say it's safe to say I typically
24 have my list of items that I'd like to discuss.
25 I believe in efficiency.

1 Q. And do you maintain those lists today?

2 A. I can't recollect if I have 100 percent of those lists
3 handwritten to paper, but I believe I have those annual
4 checklists going from school year to school year.

5 Q. And you would -- If -- The way you just phrased another
6 answer, if it was done by e-mail, you don't delete them;
7 you keep them?

8 A. I do not delete e-mails, no, on any of the topics during
9 my tenure here.

10 I think it's important to note that the during-season,
11 during the postseason, and the preseason
12 responsibilities, those are laid out in the Gwinn Area
13 Cleaning and Maintenance contract.

14 Q. Oh, yeah. Yeah.

15 A. Those are stated in there.

16 Q. Yeah.

17 A. And so when there are items that I may have a question on
18 that I don't see that exact verbiage in there, that might
19 be unique to the moment, that's where we have those
20 conversations.

21 Q. But even so, you do it routinely on a weekly or biweekly
22 basis during the season, and that's what you need to do
23 as a reasonable athletic director to stay on top of
24 things, true?

25 A. True.

1 Q. And, again, you need to, as the athletic director, have
2 these weekly or biweekly meetings to make sure that the
3 required, reasonable, preventative maintenance is being
4 conducted; in other words, you're keeping an eye on them
5 they're doing their job so that a safety hazard or defect
6 doesn't develop?

7 A. Yes.

8 Q. And you came on in 2012 as it relates to the gymnasium.
9 Were you aware that the north wall of the gymnasium had
10 an enclosure that incapsulated an alcove where a stage
11 was stored?

12 A. Yes.

13 Q. When did you first become aware of that?

14 A. I don't recollect the exact date and time.

15 But I would assume, because I was a coach within the
16 school district --

17 Q. Oh, I didn't know that.

18 A. So that -- That's a part of the employment, as well.

19 Q. Okay. Yeah. We've got to back up. I'm sorry. Yeah.

20 A. Absolutely. Whenever you feel the time is appropriate.

21 Because of being a basketball coach from '97 until 2012,
22 when I was offered the athletic director position and I
23 resigned from coaching middle school basketball, I was
24 occasionally in the gym.

25 So the first time I recollect knowing that there was now

1 want to explore it? Come on down."

2 A. Yes.

3 Q. I mean, pretty -- It's as simple as that. I hear you.
4 Do you recall the actual interview that you had with
5 Stacey Filizetti?

6 A. I don't recall which questions were specifically asked.
7 I don't recall what my notation may have been. There --

8 Q. That's not necessarily the question. The question --

9 A. Please repeat then.

10 Q. Do you recall the interview?

11 A. Yes.

12 Q. Where did it occur?

13 A. In my office.

14 Q. And how long did it go?

15 A. I would estimate no more than an hour.

16 Q. And what do you recall talking about?

17 A. I recall talking about what her past involvement was in
18 any of her coaching capacities. I do recall -- I do
19 recall at the end, when the standard question comes up,
20 "Do you have any questions for me or concerns or anything
21 about the job," I do recall Stacey mentioning she has the
22 triplets, the kids, and at times, she may need to be with
23 them on site; I do recall that.

24 And I do recall I had stated back something along the
25 lines of, "Keep in mind, I had children, as well, while

1 coaching, and they were occasionally at the practices."

2 So other than those specifics of the conversation that I
3 can remember and am confident with, I don't know any more
4 to that specific or anything else during that, what I
5 believe to be, probably less-than-an-hour interview.

6 Q. Okay. And maybe I'm going to ask some questions to jog
7 your recollection; but I would imagine maybe one of them
8 was, "Why did you stop coaching?"

9 Do you recall that she said, "I stopped coaching because
10 I had triplets"?

11 A. I think I do remember probably that conversation.

12 It's -- I'm going off of recollection, so I can't sit
13 here and say 100 percent we discussed that.

14 But I do remember talking about, like I referred to, her
15 personal timeline on when she got into it, what was her
16 role, you know, were there more districts involved. I
17 believe there was some -- you know, Westwood High School,
18 or might even have been Aspen Ridge Middle School, which
19 is Westwood. You know, I believe there was conversation
20 along those lines, as well.

21 And in that, I think I do recollect something about that
22 type of conversation.

23 Q. Sure. And now, because, obviously -- And I'm just
24 looking, you know, from Stacey's mindset, is that, "Okay,
25 I had to leave because I became pregnant with triplets,

1 so I know I've got triplets." And that's probably the
2 reason why she prompts you at the end -- "Do you have any
3 questions?" And she prompts you, "Well, I've got
4 triplets. You know, it's a handful. From time to time,
5 I might need to have them at practice; is that going to
6 be a problem?"

7 And your response was what?

8 A. My response, once again, was, "Well, keep in mind, you
9 know, I had Logan, as well, during my boys basketball
10 stint, and he was occasionally at my practices also."

11 Q. You didn't see that as a problem, did you?

12 A. In that moment, no.

13 Q. Okay. And do you think you may have also offered, "Well,
14 there's other coaches here that have kids, too, and they
15 come to practice"?

16 A. Could have been a part of the conversation.

17 Q. Yeah.

18 A. I think there's a chance. I don't recollect, but ...

19 Q. All I know is that I've got -- I mean, we've talked about
20 my kids. And I know they're buddies would -- When their
21 coaches were -- their dads would be assistant coaches for
22 the football team or basketball team, the boys loved
23 going to practice with their dads, because they got to
24 see the big guys play.

25 A. Yes.

1 Q. I mean, it's not unusual, is it?

2 A. It's not unusual in the capacity of what I see within,
3 like, the U.S.; you know, growing up around sports,
4 continuing on and coaching, you know, middle school or
5 high school sports. It's not unusual.

6 Q. In fact, it promotes community spirit. It promotes your
7 future athletes. They get young and they want to grow up
8 to be like the big brothers or whoever they saw playing
9 varsity ball.

10 A. I believe that, as well.

11 Q. And we flash back now to your scheduling, which is
12 Exhibit 9.

13 A. Oh, 9? Okay.

14 (Brief pause)

15 THE WITNESS: Okay, Paul.

16 BY MR. JANES:

17 Q. You indicated that the first practice that Stacey would
18 have directed was the evening of August 17th.

19 But Exhibit 9 is an e-mail that you generated on
20 August 20th at 2:52 p.m., and you directed it to Bob.

21 Who is Bob?

22 A. Bob would be this facility's coordinator for custodial
23 projects.

24 Q. Bob is the coordinator for Gwinn Area Cleaning and
25 Maintenance?

1 work schedule depending on the duties for that specific
2 day or week.

3 Q. Sure. I would imagine if, you know, during the calendar
4 year, if you're going to have to be at a basketball game
5 that runs until 10:00 o'clock at night, you might be able
6 to come in at 1:00 o'clock.

7 But in the summer, that June of 2015, any sporting
8 events, except for maybe if you've got -- you know, going
9 into tournaments and baseball or softball, they're done.
10 I mean, so what would have been your attendance in that
11 time frame in June of '15?

12 A. Typically, because I was still on that .5 so-called
13 part-time contract, my average hours and days would have
14 been, like, a Monday through Friday, 7:30 a.m. until
15 12:30/2:00 o'clock p.m.

16 Q. Okay. And after discussing this with Bob on May 26th --
17 and this is Exhibit 75 -- you obviously kept a copy of
18 it.

19 Did you then, through the month of June, monitor the
20 tasks being accomplished by Gwinn Area Cleaning and
21 Maintenance?

22 A. Yes. We would have -- We would have met on occasion,
23 whether it was a scheduled meeting or in passing, to try
24 to keep each other updated as to where we were with
25 projects.

1 A. Inform me?

2 Q. Yeah.

3 A. I don't know.

4 Q. Do you think it would have been prior to mid-June,
5 earlier than mid-June, I mean, contemporaneous, May 29?
6 When do you think it would have been?

7 A. I feel he told me within a week's time of submitting that
8 in SchoolDude.

9 Q. And knowing now that one of your people thinks there's a
10 danger associated with its absence, what did you do?

11 A. And that's where I then had reached out to Karen Anderson
12 to say, you know, "Where are we going with this?"

13 Q. So this is even now, understanding that you had already
14 met with Bob on May 26th and raised this issue with him
15 that the enclosure needs to be placed back up, and
16 knowing then, because your subordinate, Darren, brings it
17 to your attention that the partition panels are not back
18 up and the angle iron presents a danger, you then go to
19 the acting superintendent for direction?

20 A. That was my approach, yes.

21 Q. And what did the acting superintendent tell you to do?

22 A. She didn't tell me to do anything. The first time I got
23 communication back from that, Ms. Karen Anderson, would
24 have been June -- I want to say June 23rd.

25 Q. Okay. And how do you know it was June 23rd?

1 June 6th or earlier through June 23rd on your part,
2 because you made an assumption that because the
3 information was entered into SchoolDude, it would be
4 acted upon?

5 A. Yes.

6 Q. But unfortunately, your assumption turns out to be
7 incorrect, because on June 23rd, Darren comes back to you
8 and says, you know, "Rob, it's still not addressed,
9 someone could get hurt, the walls need to be put back
10 up," true?

11 A. Yes.

12 Q. And at that point in time, you took it upon yourself to
13 run it up to the next level to the acting school
14 superintendent, true?

15 A. Yes.

16 Q. Now, the next question then turns around.
17 Okay. You've got this response by the superintendent
18 that she is going to discuss the problem with Art.
19 And she comes back to you on Wednesday the 24th after
20 discussing it with Art, and Art says to tape off -- or
21 "... taping the angle irons down and putting the larger
22 project on hold at this time. Are you okay with this
23 resolution? You may want to take a look in the gym."
24 Did you take a look in the gym?

25 A. I didn't need to take a look in the gym because I knew

1 what Darren was referencing.

2 Q. Okay. And you knew that Art's suggestion was
3 inappropriate, true?

4 A. Based on my response of trying to come up with a
5 solution, yes.

6 Q. Okay. Because it just wasn't going to fix the problem.
7 What Darren had asked for needed to be done, true?

8 A. Yes.

9 Q. And then you make a suggestion.

10 Upon receiving the acting superintendent's response
11 outlining her discussions with Art, you indicate in a
12 response e-mail on June 24th at 4:05 --

13 MR. JANES: And, I'm sorry, but what exhibit
14 number are we going to be on? Is this Exhibit 84?

15 THE COURT REPORTER: That's the one we just
16 marked, yeah.

17 MR. JANES: 84.

18 BY MR. JANES:

19 Q. (Continuing) -- you respond back to the boss that that's
20 not adequate and not reasonable, true?

21 A. I responded back with a possible option to consider.

22 Q. Yeah. Because the reason being is that you did not
23 believe that the suggestion for that angle iron to be
24 taped down was feasible to remove the potential hazard as
25 identified by Darren and yourself?

1 A. Yes.

2 Q. And what you believed was required to eliminate the
3 hazard was to reinstall the enclosure at the alcove,
4 true?

5 A. Yes.

6 Q. And you went so far as suggesting to the superintendent,
7 if Art can't do it because he's busy -- And I'm assuming
8 he's busy at Gwinn Elementary; is that where you're
9 referring to, or just busy in general?

10 A. Busy in general.

11 Q. Okay. So if Art's too busy, maybe we can do a grassroots
12 efforts, i.e., we can pull guys together ourselves and
13 get the job done?

14 A. Yes. In my example, it's seeing if Darren would get
15 permission to do something like that.

16 MR. RYAN: 79.

17 MR. JANES: Yeah, I know.

18 (Brief pause)

19 MR. JANES: Because you're talking about the
20 removal?

21 MR. RYAN: Pardon?

22 MR. JANES: You're talking about the removal?

23 MR. RYAN: Yeah.

24 MR. JANES: Yeah. Okay.

25

1 BY MR. JANES:

2 Q. And your exchange -- I haven't gotten you directed there
3 yet. Okay?

4 A. Okay.

5 Q. Your exchange with the superintendent stopped at that
6 point in time, at least, according to the e-mail chain;
7 is that true?

8 A. Yes.

9 Q. Did she ever get back to you in response to your
10 proposal?

11 A. I don't believe so.

12 Q. So why was it then dropped at that point in time?

13 A. Because I put my assumption that the superintendent would
14 continue to work on the solution.

15 Q. Okay. So the problem's been identified since May 26th,
16 and it's been -- I'm going to try to enumerate them --
17 Joe Routhier, Jane Flourre, Rob Soyring, Bob Thomas,
18 Karen Anderson, Darren Sinnaeve, Vicki Nelson, and Art
19 Nordeen for nearly a month, and nothing has gotten done;
20 that is a true statement, isn't it?

21 A. Yes.

22 Q. Did you become aware of the fact that the ultimate fix
23 was that on June 24th, Louie and Tony of Gwinn Area
24 Cleaning and Maintenance went and just removed the angle
25 bracket from the gym floor?

1 A. I wasn't aware that those specific gentlemen did it, or
2 did it on that specific day.

3 Q. I'm --

4 A. Because are you referencing --

5 Q. I'm referencing Exhibit 79.

6 A. Okay.

7 Q. At least, that's when they invoiced the school for the
8 maintenance and repair of equipment, wherein they
9 identified that they removed an angle bracket for gym
10 stage padding.

11 A. That next week I was aware that somebody would have, at
12 least, removed the angle brackets, because they were no
13 longer there.

14 Q. Okay. But the job wasn't completed, was it?

15 A. No. And I still didn't know why, myself.

16 Q. Because at least as far as you knew, the partition walls
17 served a purpose, i.e., they were a safety partition to
18 act as a barricade between the athletic floor and the
19 stage that would be stored behind it?

20 A. Yes.

21 Q. And that the athletic floor, the activities conducted
22 thereon, a participant could inadvertently collide with
23 the stage, and because of its configuration, could be
24 injured?

25 A. Yes.

1 Q. And therefore, that's why they put the padding up, to
2 eliminate that hazard from occurring?

3 A. Yes.

4 Q. And in addition to the natural hazards presented by the
5 stage, the absence of the stage wall allowed these angle
6 irons to be exposed, which increased the hazard?

7 A. Yes.

8 Q. And were there angle irons on the wall, to your
9 knowledge, or don't you know?

10 A. I do not know.

11 Q. Okay. But what happened on June 24th, by removing the
12 angle iron that may have been on the gym floor, it only
13 addressed one of the two known hazards that existed as of
14 that date, true?

15 A. Yes.

16 Q. The hazard of the bleacher -- or not the bleacher -- the
17 stage was still present?

18 A. Yes.

19 Q. So you as the athletic director knowing that, what did
20 you do?

21 A. I waited for the people who have to solve this to either
22 inform me or come up with a solution.
23 Because once again, we were still of permission to use
24 the area. I continued to inquire, because I'm trying to
25 be proactive and not allow somebody to slide and get hurt

1 or -- Concussions are really big right now with MHSAA.

2 Q. Oh, sure.

3 A. That has the potential for a potential concussion, things
4 like that.

5 Q. Sure.

6 A. So here I am, still with permission to offer things
7 without that surround on there. But I'm continuing to
8 inquire because I'd like to see it up, just like Darren
9 Sinnaeve, who's in there for basketball open gyms, so
10 that way we're alleviating potential slides, you know,
11 whatever.

12 Q. A risk of injury?

13 A. Yes.

14 Q. Okay. Now I'm going to have to harken back, though, to
15 your training and experience back at the Y.

16 And that is, when you were the -- What was the
17 direction -- What was your title at Sawyer?
18 Facilities ...

19 A. It was either program director or center director.

20 Q. Center director.

21 A. Center director for the last --

22 Q. Okay. So as the center director, and you had a
23 gymnasium, and you understood that once in a while, a
24 hazardous condition would arise, and you would be aware
25 of it.

1 You took proactive measures to barricade off that area
2 until such time as the hazard was eliminated; do you
3 remember your testimony in that regard?

4 A. Yes.

5 Q. Okay. Why didn't you do that for the entirety of the
6 time between May of 2015 through the tragic circumstances
7 that occurred in September of 2- -- Did I say 2013?
8 Why didn't you put up a barricade or some other device
9 putting that end of the gymnasium out of use from May of
10 2015 through the tragic circumstances that happened in
11 September of 2015?

12 A. Because I also know that any item in the gym that's
13 structural can cause injury, so that's one of what could
14 be anything. But then secondly, I grew up coming through
15 the school district with that being exposed, so I was
16 used to it being as is in that moment.

17 Yet, since that was put up in X year as, hopefully,
18 proactive measures to decrease accidents, that was hence
19 my continuing inquiry, "Can we please put it up so that
20 way we don't have the potential for an injury?"

21 Q. Sure. But you also -- And I'm trying to probe your mind.
22 So you didn't put up a barricade because you thought,
23 from your youth, that you might not need it; is that your
24 answer?

25 A. Yes.

1 to be taken care of prior to the school year occurring,
2 true?

3 A. Yes.

4 Q. So in May, according to Exhibit 75, I guess you sort of,
5 you know, ambiguously passed the baton about putting the
6 stage enclosure back up to Bob, because you talked about
7 it. It needed to be done, but you just, at that time,
8 couldn't agree as to who needed it to get done, right?

9 A. On May 26th, correct.

10 Q. Yeah. So then on August 16th, according to Exhibit 10,
11 you send Bob an e-mail, true?

12 A. Yes.

13 Q. And not only do you say that you took some time over the
14 weekend to walk around the facility, here's a list of the
15 upcoming needs, you make a point to him to say, "Some of
16 these items were on our original list discussed before
17 the summer, and some are new"?

18 A. Yes.

19 Q. So you're clearly bringing to his attention your list
20 that was done in May, right?

21 A. Yes.

22 Q. Would you have given a copy of this list to Bob in May?

23 A. Yes.

24 Q. Okay. So when I say "this list," you would have given
25 Bob a copy of your notes on Exhibit 75?

1 knows they're unresolved. And so as of August 16th,
2 again, now you see, hey, the stage cover is not back up.
3 What did you do with Bob at that point in time to discuss
4 the stage cover enclosure needing to be erected before
5 practices started within the gymnasium?

6 A. I did not strike up knowledge with Bob on that project
7 again because I still was not informed that Bob was
8 responsible for it.

9 Q. Okay. Well, who was supposed to inform you one way or
10 the other? Who were you waiting to hear from then?

11 A. I wasn't waiting to hear back from anybody for me to
12 initiate it, because I had passed the baton to the
13 superintendent to take care of a maintenance project.

14 Q. Rob, I'm going to ask you. I mean, you are the athletic
15 director. You know that the following week the gymnasium
16 is going to start being used by your students for
17 practices. The girls volleyball team, the little middle
18 schoolers' girls basketball team, the cheerleaders.
19 Now, you're the AD. You're in charge of those teams'
20 practice schedules, and you're in charge of the
21 facilities.

22 Why is it that you think it's okay to 45 days ago pass it
23 up to a person who's no longer within the district, and
24 say, "I don't need to do anything further about it,
25 nobody has instructed me, so I can just leave it there"?

1 A. I don't know, Paul.

2 Q. Would you say that you dropped the ball?

3 A. No, I wouldn't say I dropped the ball. Because once
4 again --

5 Q. Okay. Then if you didn't drop it, who dropped the ball?

6 A. I feel that the people or person who was responsible for
7 seeing through actual maintenance projects were going to
8 accomplish this at some point in time.

9 I want to reiterate, I could still accomplish what we
10 needed to do in the gym. We could -- This not being
11 accomplished wasn't stopping us from holding open gyms.
12 It wasn't stopping us from starting volleyball inside.
13 So we could continue on.

14 And I then continued to inquire, "Who has" -- the
15 superintendent or whoever has now passed the torch to --
16 "Who's going to accomplish this?"

17 In this period of time, Amy Luoma-Finkbeiner, at some
18 point, if I'm not mistaken, with Karen's transition, was
19 starting to oversee then facility projects and to see
20 them through. Because at some point then, when she
21 phased out, those responsibilities transitioned over to
22 A.J.; hence, right before the school year was to begin,
23 my re-approach then to A.J. to say, "Hey, we still have a
24 couple athletic projects that haven't been accomplished.
25 Where do we go from here?"

1 Q. Yeah. And that's where I'm going to go next, is that ...
2 Let's go to Exhibit 11.

3 A. 11.

4 Q. And this is your September 2nd, 2015 e-mail. And I'm
5 going to use your words, paragraph 3: "The wooden
6 surround needs to be reattached to the gym wall where
7 are [sic] stage risers are located. It was taken off
8 last year for graduation but never put back up. It's a
9 terrible safety hazard right now because we have no wall
10 padding on that end of the gym. We will once the
11 enclosure is put back up."

12 I read that correctly, didn't I?

13 A. Yes, you did.

14 Q. So your words, as the athletic director, was that you
15 knew your gymnasium had been used all summer long with a
16 terrible safety hazard present, true?

17 A. Yes.

18 Q. I don't care if somebody gives you permission to use the
19 gymnasium.

20 If you're the athletic director, you have the
21 responsibility to alleviate terrible safety hazards,
22 don't you?

23 A. Yes.

24 Q. And you didn't do it?

25 A. I did not do it because I was not given the person to

1 work with.

2 Q. So you, as the athletic director, it was well within your
3 power to say, "Teams, you're not practicing in this
4 gymnasium because there is a terrible safety hazard
5 present," true?

6 A. Yes, I had that authority.

7 Q. And you didn't exercise that, did you?

8 A. Correct, I did not.

9 Q. And, in fact, when you sent this letter on
10 September 2nd -- or e-mail on September 2nd, you were
11 aware since, at least, August 17th that practices had
12 commenced for cheerleading, varsity volleyball, and
13 junior varsity volleyball, as well as middle school
14 basketball within the gymnasium?

15 A. Yes.

16 Q. And you, yet, continued to schedule those activities, as
17 evidenced by Exhibit 9, where you sent on August 20th,
18 2015 an e-mail to Bob?

19 A. Yes.

20 Q. Now, when you send the e-mail to A.J. on the 2nd of
21 September, why is it you have any faith that A.J. could
22 get anything done, especially seeing that he's a newbie?

23 A. For me, it was communicating to the new person coming in
24 that we still have some remaining projects. I don't know
25 that any of that other information you're pertaining to

1 gymnasium, you were aware that the school district, at
2 that point in time, was having inservice days within the
3 high school, weren't you?

4 A. Yes.

5 Q. And that meant all of the school employees were coming to
6 the high school for inservice work, true?

7 A. Yes.

8 Q. They were here that day on September 2nd?

9 A. Yes, district staff were all here on September 2nd.

10 Q. At 10:11 a.m., true?

11 A. In the morning, yes.

12 Q. And A.J. was here, Tom Jayne was here, and we've got
13 80-plus adults here.

14 Why didn't you go forth that day and say, "I have a
15 terrible safety hazard, let's get it fixed," when in
16 June, you thought, "Hey, you know what, let's just do a
17 grassroots effort and get kids to do it for us."

18 Why didn't you pick it up and get it done?

19 A. Yeah, I don't know.

20 Q. Okay. Tragedy happens the very next morning, didn't it?

21 A. Yes, September 3rd.

22 Q. Okay. And because the newbie, A.J., being the guy he is,
23 went and found one person, a woman, to attempt a job that
24 he had never performed before, true?

25 A. Yes.

1 Q. And he had no training on it, true?

2 A. That would be speculation on my part. I don't know what
3 he's done in the past or what -- his knowledge of that
4 specific project. I truly don't know.

5 Q. Okay. Well, did you tell him that he needed to get it
6 done that morning?

7 A. No.

8 Q. Did you give him, other than your communication here on
9 September 2nd, 2015 at 10:11 a.m., any other
10 communication about the task of putting back the gym
11 wooden surrounds?

12 A. No.

13 Q. You're certain that you didn't talk to him that
14 afternoon?

15 A. A.J. Filizetti?

16 Q. Yeah.

17 A. I don't remember talking to A.J. after the e-mail, no.

18 Q. Okay. When you say, again, you don't remember, did you
19 or didn't you?

20 A. I'm going to say no.

21 Q. Did you talk to him that night?

22 A. I'm going to say no, I don't remember.

23 Q. Did you talk to him the next morning?

24 A. I'm going to say no, I don't remember.

25 Q. Okay. Did you send him a text at any point in time

1 between 10:11 on the 2nd through the point of tragedy?

2 A. I'm going to say no, I don't remember.

3 Q. Did he ever contact you by text that you did not respond
4 to between 10:11 on the 2nd and the point of tragedy?

5 A. I'm going to say no, I don't remember.

6 Q. Why is it, then, that A.J. Filizetti felt so compelled
7 that he had to do it by himself with another girl the
8 next morning when the gymnasium was scheduled for
9 cheerleading practice?

10 A. I do not know.

11 Q. Okay. You were at school Thursday the 3rd?

12 A. Thursday the 3rd? Yes.

13 Q. Okay. I know that because of the fact that after the
14 tragedy happens, you come into the gymnasium, true?

15 A. True.

16 Q. And before the tragedy happens, Tracy Belusar comes to
17 you and says that, "This job that A.J. has got me doing
18 is too much for the two of us;" do you remember that
19 conversation?

20 A. No.

21 Q. It didn't happen?

22 What did your conversation with Tracy Belusar that
23 morning occur -- What occurred in the conversation you
24 had with Tracy Belusar before the tragedy?

25 A. In the main office where the secretaries are located and

1 the copy machine at that time, Tracy and I had crossed
2 paths at some point. And I remember her stating, "By the
3 way, I think we're going to bring those partitions in the
4 gym to complete that project before Tuesday." And I then
5 rebuttaled, "Just keep in mind we have practices on
6 occasion between now and then;" and that's all that I
7 remember to the conversation.

8 I believe she went on her way then to do whatever, and
9 then I just went back into my office and continued on
10 with projects.

11 So that conversation, with my recollection, was 30
12 seconds or less.

13 Q. Okay. But that was the morning of the 3rd?

14 A. That is correct.

15 Q. And the reason you say what you say to Tracy is, you did
16 not want those panels being moved into the gymnasium
17 while practices were underway?

18 A. No, that wasn't necessarily my thought process at that
19 time, and I don't know that that went through my head.

20 Q. Well, why is it then --

21 A. What I --

22 Q. Why is it -- Hold on.

23 Why is it, then, that you would say to Tracy, "Hey, but
24 keep in mind there's practices underway between now and
25 then in the gym"?

1 A. Because I knew she was just starting, so I wasn't sure if
2 she was aware of that. So I was just making sure she had
3 any information that she thought might be important to
4 whatever they end up doing.

5 Q. Sure sounds like you were trying to caution her to make
6 sure she wasn't going to do this measure during practice
7 time.

8 A. One could think that, yeah.

9 Q. Well, isn't that what you were trying to convey to her?

10 A. Well, like I just mentioned, I wanted to make sure she,
11 at least, had the information. Because without school in
12 session and her being a new employee, she very well could
13 have thought that it is -- there's nobody in there from
14 start to finish until Tuesday when that bell rings.

15 Q. Okay.

16 A. So once again, in all honesty, I was just looking to make
17 sure that she knew that -- in that, once again, 30-second
18 conversation, in my opinion, she knew that. It was just
19 an instinctual response.

20 Q. That's fine. Do you recall what time of day it was?
21 I mean, it had to be in the morning, but exactly when?

22 A. I'm -- I started work that day, I believe, at 7:00 a.m.
23 And I think that crossing paths and her mention to me
24 probably was around 8:30 -- between 8:00 and 8:30.

25 Q. Okay. Did you reach out to Stacey Filizetti and say,

1 "Hey, I was told that maintenance may be attempting to
2 move these panels in, watch out"?

3 A. No, I did not.

4 Q. Okay. You know that Stacey Filizetti had a morning
5 practice scheduled for the cheer team between 8:00 a.m.
6 that morning to 11:00 a.m. that morning, true?

7 A. Yes.

8 Q. Okay. You would expect it's reasonable for a coach not
9 to have done what you do -- Or strike that.

10 You would agree with me that Stacey Filizetti did not, as
11 of September 3rd, 2015, have this extensive knowledge of
12 what's been transpired that you had relating to the gym
13 stage enclosure?

14 A. You're reference to "extensive knowledge" is what?

15 Q. All the stuff that we --

16 A. My conversation with Tracy?

17 Q. No. All this stuff that we've talked about that has
18 transpired from May through that date.

19 A. Correct, I would not expect Stacey to know that.

20 Q. Okay.

21 A. I don't know that she was informed of any of that.

22 Q. Okay. And if she was going to be informed, her direct
23 supervisor is you?

24 A. I am the direct supervisor, yes.

25 Q. So if that information was to be passed on, it would have

1 student athletes?

2 A. Yes.

3 Q. And when you entered at 9:30 center gym fully
4 illuminated, other than Stacey and her cheerleaders and
5 the mats under the cheerleaders, did you make any
6 observations of anything else underway in the gymnasium?

7 A. No. And, therefore, I continued on without even striking
8 up a conversation with Coach Filizetti, because she was
9 in the midst of instruction. So I exited, and then
10 continued straight back to my office.

11 Q. Did you see Stacey's little girls?

12 A. No, I did not.

13 Q. They could have been there, you just didn't see them?

14 A. I did not see them within the gym -- the true gym floor.

15 Q. Okay.

16 A. Nor did I hear any voices in that short amount of time
17 exiting from locker rooms to hallway of voices other than
18 cheerleaders or Stacey on the upper deck. So I did not
19 see or hear --

20 Q. Nor did you see or hear movement of the gym wall panels
21 into the gymnasium at that time, true?

22 A. Yes. True.

23 Q. Okay. The reason I say that is --

24 MR. RYAN: What number?

25 MR. JANES: 78.

1 BY MR. JANES:

2 Q. (Continuing) -- A.J. Filizetti has kindly put together a
3 timeline, which has been marked as Exhibit 78, and has
4 testified about that; that at plus or minus two minutes,
5 at 9:24, he and Tracy Belusar loaded the first portable
6 stage cover on the carts in the hallway outside the band
7 room and transported it to the gym, and that he
8 accomplished that task, and that he and she then, plus or
9 minus two minutes, at 9:33 a.m. transported the second
10 panel into the gymnasium.

11 So if you are correct that you entered the gymnasium at
12 9:30 and you observed a fully-illuminated gym, the panel,
13 according to Mr. Filizetti's timeline -- the first panel
14 would have been in place; but you didn't see that, did
15 you?

16 A. No. But please keep in mind, I said my estimated time
17 was probably 9:30.

18 Q. Okay.

19 A. So I don't have anything, in doing my due diligence and
20 research, that can better predict down to the minute when
21 I officially walked through there, so ...

22 Q. Sure. But again, based on your best recollection of
23 events, you went in there at 9:30?

24 A. Yes.

25 Q. And if that's the case, you didn't see at that point in

1 time based on your observations, that, in fact, one of
2 the panels had already been moved into the gymnasium;
3 you could have just simply missed it, right?

4 A. Yes.

5 Q. And, likewise, you could have just simply missed the fact
6 that three little girls were in the gymnasium, true?

7 A. True.

8 Q. Well, if you could have missed a 10-foot long, 7 -- or
9 6-foot high panel, you could have missed three little
10 girls?

11 A. Yes.

12 Q. Okay. How soon after your walk-through did -- Well,
13 strike that.

14 After your walk-through, did you have any communications
15 with anyone prior to being alerted to the tragedy?

16 A. Repeat, Paul.

17 Q. After doing your walk through the gymnasium, and prior to
18 being alerted to the tragedy, did you have communications
19 with anyone?

20 A. No.

21 Q. Where did you go after completing your walk through the
22 gymnasium?

23 A. To my office.

24 Q. So to accomplish your return to your office, would you
25 have just retaken the steps that you did to get down to

1 the boys' locker room?

2 A. The same route I took to get down there I took on the way
3 back, yes.

4 Q. And while you were walking down the hallways, did you
5 encounter -- Strike that.

6 While you were walking down the hallways, did you see
7 A.J. Filizetti and Tracy Belusar moving a panel towards
8 the gymnasium?

9 A. No.

10 Q. You get to your office. How long do you remain in the
11 office before being alerted to the tragedy?

12 A. I remain in the office the entire time until I'm alerted
13 to the tragedy.

14 Q. Okay. And my question is time frame.
15 How long do you believe that to be?

16 A. I believe that to be 20 to 30 minutes.

17 Q. Okay. And how did you become alerted to the tragedy?

18 A. While sitting in my office, I overheard a female voice,
19 that I believe I remember being a youth female voice
20 versus an adult female voice, coming into our main office
21 with an elevated tone to her words, asking, "Where is
22 Mrs. Viitala? Mrs. Viitala is needed down in the gym
23 right away."

24 Q. Is she the school nurse?

25 A. Theresa Viitala is our guidance counselor.

1 Q. Oh, okay.

2 A. And her office is in the same general area, more located
3 within the "guidance" listed on the map. She's in the
4 same vicinity.

5 Q. But because you could -- you heard this youth's tone of
6 voice, you knew something was up, and somebody was needed
7 in the gymnasium?

8 A. Yes.

9 Q. And did you take it upon yourself to get up and get to
10 the gymnasium?

11 A. Yes.

12 Q. Would you have walked or ran to the gymnasium?

13 A. Because of the elevation of the voice, I did not walk.
14 I went in what I would say would be a jog to get down
15 there sooner than later.

16 As I -- May I continue on with my direction?

17 Q. Yeah. Just run with it.

18 A. Okay. Thank you.

19 As I leave the main office, I turn left to get into -- or
20 eventually get into what I refer to as our athletic
21 hallway. So I turn left to the superintendent's office
22 door, and then round the corner for the athletic hallway
23 straight stretch.

24 As I'm jogging down there going to see what the commotion
25 is about, I see individuals entering into Sue Anderson's,

1 Q. And so you used the young girl who comes into the office
2 with the raised voice and you pinpoint that time, and you
3 work back in your mind a period of time to when you
4 believe you did your walk-around that caused you to enter
5 into the gym?

6 A. Yes.

7 Q. Okay. And when you entered the gym, I believed it was
8 your testimony you said you were surprised to see the
9 women in the gym because it was such a nice day outside?

10 A. Yes.

11 Q. And that then you understood, because of the fact you saw
12 that they were stunting, that that's why they had to be
13 in the gym that morning, true?

14 A. Yes.

15 Q. So human nature is that if you encounter something that
16 is unexpected involving a group of teenage girls who are
17 doing stunting, I would imagine your attention is
18 directed to that location, true?

19 A. Yes.

20 Q. Okay. And likewise -- I don't have the drawing -- but
21 your course of exit was directly in the direction of the
22 activity that surprised you that was underway in the gym,
23 i.e., you were walking directly towards the young women
24 who were stunting, true?

25 A. Yes.

Tracy Belusar
Selected Pages of
Deposition Transcript

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

WAYNE FILIZETTI, as Personal)
Representative of the Estate)
of Amarah Filizetti, deceased;)
STACEY FILIZETTI; WAYNE)
FILIZETTI, as Next Friend of)
LAILA FILIZETTI, a minor, and)
WAYNE FILIZETTI, as Next Friend)
of MELISSA FILIZETTI, a minor,)

Plaintiffs,)

v.)

File No. 16-54781-NO

GWINN AREA COMMUNITY SCHOOLS;)
TRACY BELUSAR; ANTHONY J.)
FILIZETTI, ROBERT SOYRING; and)
GWINN AREA CLEANING AND)
MAINTENANCE INC.,)

Defendants,)

and)

GWINN AREA COMMUNITY SCHOOLS,)

Cross-Plaintiff,)

v.)

GWINN AREA CLEANING AND)
MAINTENANCE INC.,)

Cross-Defendant.)

DEPOSITION OF TRACY LYNN BELUSAR

Taken by the Defendants Gwinn Area Community
Schools; Tracy Belusar; Anthony J. Filizetti;
Robert Soyring/Cross-Plaintiff on the 8th day
of March, 2018, at the Gwinn High School Board Room,
50 M-35, Gwinn, Michigan, at 9:02 a.m.

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17 ALSO PRESENT: Wayne Filizetti
18 Stacey Filizetti
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1 Gwinn, Michigan

2 Thursday, March 8, 2018 - 9:02 a.m.

3 THE COURT REPORTER: Do you solemnly swear or
4 affirm that the testimony you are about to give in this
5 cause will be the truth, the whole truth, and nothing but
6 the truth?

7 MS. BELUSAR: I do.

8 TRACY LYNN BELUSAR

9 (At 9:02 a.m., was sworn and testified as
10 follows)

11 EXAMINATION

12 BY MR. RYAN:

13 Q. Tracy, would you state for us, please, your full name and
14 your present address.

15 A. Tracy L. Belusar -- Or Lynn. Do you want me to say Lynn?
16 Tracy Lynn Belusar. 233 Fortress Street, Gwinn,
17 Michigan.

18 Q. Tracy, how old are you at the present time?

19 A. 52.

20 Q. Are you presently employed?

21 A. Yes.

22 Q. Have you been at work this morning already?

23 A. Yes.

24 Q. Where do you work?

25 A. Munising Memorial Hospital.

Page 4

1 Q. So you left Munising and drove to Marquette, then drove
2 to Gwinn to get here for the deposition?

3 A. I just drove 94 across.

4 Q. Okay. When did you first start at Munising Memorial
5 Hospital?

6 A. 2005.

7 Q. And what were you hired to do?

8 A. I was a housekeeper.

9 Q. And have you worked continuously at Munising since then?

10 A. Yes, until I came here for that. I left Munising
11 Hospital to take this job at Gwinn School.

12 Q. For a while did you work both jobs --

13 A. Yes.

14 Q. -- where you were working here and then leaving here --

15 So when you started here, what hours did you work?

16 A. 6:00 to 10:00, but that was only if -- If I worked the
17 afternoon shift at the hospital, I'd work 6:00 to 10:00
18 here. But if it was -- Then I'd switch them around.
19 I'd work 2:00 to 10:00 at the hospital. Yeah, 6:00 to
20 10:00 here, 2:00 to 10:00 at the hospital, or switch them
21 from -- just the opposite. So I'd be in here in the
22 evenings.

23 Q. All right. I want to spend a little time talking about
24 your background.

25 A. Sure.

1 Q. Are you married at the present time?

2 A. No.

3 Q. Single. You've been married in the past?

4 A. Yes.

5 Q. Where did you go to high school?

6 A. Pickford.

7 Q. When did you graduate?

8 A. 1983.

9 Q. Your date of birth is?

10 A. 6-1-65.

11 Q. And since you graduated from Pickford in 1983, what have
12 you done?

13 A. I worked in a saw mill for five years. Then I took --

14 Q. Okay. Let's start -- Let's do this chronologically.

15 A. Okay.

16 Q. So you graduated --

17 A. You're really going to rack the brain here, buddy. Where
18 are we going here? Painful.

19 Q. You graduated in '83, right?

20 A. Right.

21 Q. And then where did you go to work after that?

22 A. I went to Wood Forest Industries. They made bi-fold
23 doors for pre-fab homes.

24 Q. Pickford is on the east end of the U.P.?

25 A. Yeah, by Sault Ste. Marie.

1 Q. And where did you work at that bi-fold door
2 manufacturing --

3 A. Kinross.

4 Q. The former Kinross airport?

5 A. Right.

6 Q. Had that shut down at that point?

7 A. Yep.

8 Q. When did that shut down?

9 A. Oh, I don't know.

10 Q. Before that sometime?

11 A. Yeah, years before that. They turned it into prison
12 city, we called it.

13 Q. Okay. So you worked five years in that mill. What kind
14 of work were you doing?

15 A. Everything. I ran a chop saw, finger jointer, rip saws,
16 anything to do with industrial saws. Ran a forklift, all
17 that stuff.

18 Q. After that five-year period in that mill, what did you do
19 in that manufacturing operation?

20 A. I went to school.

21 Q. Where?

22 A. To Lake State.

23 Q. Lake Superior State University?

24 A. Yep. And became a corrections officer.

25 Q. Did you receive any kind of certification from Lake

1 Superior State University?

2 A. Yeah. You had to get certified to be a corrections
3 officer. It was like a 23-credit-hour thing back then.

4 Q. And when were you certified to be a corrections officer?

5 A. I was hired in 1990 with the Michigan Department of
6 Corrections. So it was two years, about 1988, and then
7 taking the civil service test. You've got to go through,
8 you know, the whole spiel, then finally they hire you.

9 Q. Were you doing some of the coursework while you were
10 working at the --

11 A. Oh, yeah, that's what we did.

12 Q. -- at the bi-fold panel shop?

13 A. Yep. They were so desperate for prison guards back then
14 because they took -- Kinross, basically, took that huge
15 airport and turned it into prisons, and so they needed --
16 They were coming into the factories and asking us to
17 leave our jobs to be prison guards. They needed so many.

18 Q. Okay.

19 A. And so a lot of us did, you know. We were making
20 5 bucks, we went to 9, you know?

21 Q. Yeah.

22 A. It was huge.

23 Q. Sure. Sure. And so when did you actually start at
24 Kinross?

25 A. At the prison?

1 Q. Yes.

2 A. Okay. So I went to the Earl F. DeMarse class, and that
3 class opened up Alger Max.

4 Q. Okay. That's Earl F. DeMarse?

5 A. The Earl F. DeMarse class, yeah. I was the class that
6 opened Alger Maximum Prison. Before that, you went to
7 Lansing, you had your training. And because it took them
8 so long to open Alger Max, we had to -- they sent us to
9 different prisons. We went -- A bunch of us went to
10 Kinross for three, four months. So I was at Kinross for
11 three, four months, ended up at Marquette Branch Prison
12 for six months, and then finally they let us get on the
13 property at Alger Max.

14 Q. Okay. So after your certification, if I'm understanding
15 what you're saying, you went to Kinross?

16 A. Yes, as a red tag.

17 Q. And that was for how long?

18 A. Two months. I think back then it was two months. So you
19 had two months at Kinross Correctional Facility. You
20 worked a day shift and an afternoon shift. That's a long
21 time ago. I didn't remember that.

22 Q. And then you went to Marquette?

23 A. Yep.

24 Q. And then you went to Alger Max?

25 A. Yep.

1 same trip, he took me over to Gilbert. They were opening
2 Gilbert.

3 Q. Yes.

4 A. And on that night I met Louie -- a guy named Louie and a
5 guy named Tony, and then I don't know if Bob was there
6 that day. I don't think Bob was there that day. But I
7 met Louie, Tony, Art was there, and I think Kathy was
8 there too. But that was a quick, "This is my crew, this
9 is what we're doing, this is how far we've come," and get
10 back in the truck. Then he got that strange phone call,
11 and we ended up down 553 on a two-track with some guy in
12 a -- I think it was a front-end loader or something.

13 Q. So how long was this tour with Bob, how many hours was
14 that?

15 A. With Art?

16 Q. With Art. I'm sorry.

17 A. That's okay. I think it was about like three hours.
18 Yeah. It was a long time to be really told nothing.

19 Q. Yeah. Did you have an understanding when you were hired
20 in as to who you would report to, who would be your
21 supervisor?

22 A. No. I made that person.

23 Q. Okay. And what do you mean by that?

24 A. So when I came here, there was really nobody like ...
25 I felt like I could do anything. Like, well, wait a

1 minute. If I want to go down and get something from
2 Ace Hardware, I just go there and do that and just spend
3 your money? This seems kind of odd. I've never --
4 Nobody does that. So I went to Tom, and -- I went to
5 Tom one day, and I said, "Okay, I'm not doing this.
6 You have to make me accountable to somebody. I'm not
7 just gonna go spend your money and do this and do that.
8 I need a boss. I want a boss. I don't want to be
9 accountable" -- You know -- Yeah, you just can't be.
10 You're talking about people's money. You just don't take
11 their money and go downtown and spend it, you know.

12 Q. Yeah.

13 A. So I said, "Get me a boss, somebody that can look at the
14 work order system who can say, 'Okay, Trace'" -- You
15 know, because they were just coming in. They just kept
16 coming in and coming in. I said wow.

17 Q. What kept coming in?

18 A. The work order. The work order program.

19 Q. Okay.

20 A. So somebody gets a work order, they put it in, they
21 submit it, and it just comes to you.

22 Q. All right.

23 A. Well, they were so far behind. They were just stacked in
24 there. Turn the computer on, it was just literally
25 hundreds of them.

1 "panels."

2 A. Okay.

3 (Witness complying)

4 THE WITNESS: So I didn't say anything to Tom,
5 but in my brain I'm putting mechanics together. I said,
6 them panels look like them panels. They go in that hole.
7 And I knew that, them panels belong in that hole, just
8 standing there observing. You know, just -- It's my
9 first day, so I'm sucking it all in, right? It's
10 interview day, whatever. So --

11 MR. SHERIDAN: And to be clear, this is
12 Saturday, August 18th, or no? When you say --

13 THE WITNESS: It's the Saturday that --

14 MR. JANES: August 18th is a Tuesday.

15 MR. RYAN: Yeah.

16 THE WITNESS: Right. So it's that Saturday.
17 Tom couldn't meet with me during the week, so I said,
18 "Hey, can you meet me on Saturday?"

19 MR. SHERIDAN: Saturday, August 22?

20 THE WITNESS: Sure. Somewhere in there.

21 MR. SHERIDAN: I'm sorry.

22 THE WITNESS: That's okay.

23 MR. JANES: So this meeting was on Saturday the
24 22nd? Because you said earlier it was the day you
25 interviewed.

1 THE WITNESS: No, it's not the day I
2 interviewed, no.

3 MR. JANES: Okay.

4 THE WITNESS: The day I interviewed --

5 MR. JANES: Saturday the 22nd was a
6 walkthrough?

7 THE WITNESS: Yeah, it was a walkthrough.
8 There you go.

9 MR. JANES: Gotcha. Okay.

10 THE WITNESS: Okay. So that's what I did.
11 When I looked at them panels, I knew they belonged there,
12 it only made sense, because I'm looking around going
13 okay, well, all right. And because I did that, I guess
14 I -- I always kept track of them. Every day that I'd go
15 to the school, I kept track of them panels.

16 So I'm there, I don't know, probably a couple
17 of days go by, and I'm back in the gym again and I'm by
18 myself. This is -- So I'm by myself, and I'm standing in
19 the gym and I'm thinking, man, I got to get out the
20 scaffolding, I'm going to have to get up -- Because that
21 air handler was driving me crazy. And when I looked
22 down, the panels were gone. I said, wow, where did they
23 go? They're not in the hole where they belong,
24 obviously. And when I turned around (demonstrating),
25 they were here.

1 (Witness marking exhibit)

2 THE WITNESS: Somebody, not saying who, moved
3 them panels from there to this wall right next to the
4 door (indicating). So the door would be here, the door
5 of the entrance. Now they're leaning against this wall.

6 (Witness marking exhibit)

7 THE WITNESS: And in my head I went, wow, why
8 would you take them further away from where they need to
9 be? And who's moving them? Who's moving these monsters?
10 Okay, so I just let it go. I didn't know who to tell,
11 because apparently, somebody had been moving them.

12 BY MR. RYAN:

13 Q. So they were moved from the --

14 A. Yes.

15 Q. -- what was the northwest corner --

16 A. Yes.

17 Q. -- to the southwest corner of the gym?

18 A. Yep. And there they were. And then that's when I said
19 to myself, how come they're getting further away from the
20 hole? That doesn't make any sense. So time goes by --

21 Q. Do you know whether they were resurfacing the gym at all
22 during that time?

23 A. Nope. And I didn't -- You know, I want to say I said to
24 Bob, but I can't say that for sure. I'm only -- Like,
25 "Hey, Bob, why are you guys moving them panels around?"

1 But I'm not sure I said that to him.

2 Q. All right.

3 A. I'm probably thinking in my head, boy, I should have
4 asked Bob -- I should have asked Bob, "Are you guys
5 moving them panels? Somebody's got to be. It's not me,
6 but they're sure getting moved around a lot." So,
7 oddity. So a couple of days go by --

8 Q. This is still before the 31st when you -- your official
9 start date, this first week, correct?

10 A. Right. So the 31st, on that Monday -- Is that the 31st,
11 the Monday?

12 Q. Yes.

13 A. That Monday I come to work, and them panels are moved
14 again even further away than where they're supposed to
15 be.

16 Q. Where are they then?

17 A. Now I come into the shop door -- the back door like I'm
18 going to work. I always come in the back door of the
19 shop. Walk through, come into the hallway, which is
20 right here (indicating), and them panels, by God, are
21 sitting there. I was like, what the heck are these
22 panels doing here? How did they get out of the gym
23 again -- Or I mean, how did they get moved again? How
24 did they get moved again? And who moved them?

25 MR. SHERIDAN: And that hallway, just so we're

1 clear, which hallway do we call that? Is that adjacent
2 to which classroom or --

3 THE WITNESS: It's right next -- It's between
4 the shop and the CADD. They're moved into what I call my
5 hallway, the maintenance hallway.

6 MR. SHERIDAN: Can you just mark in that
7 hallway where they were?

8 THE WITNESS: Sure. Right here.

9 (Witness complying)

10 THE WITNESS: This is my shop. And if this is
11 the door, they're between the CADD door -- They're either
12 between the CADD door and my shop, or they're between the
13 wood shop and the CADD door. Anyway, they're on this
14 wall (indicating). Between that wood shop and here, they
15 are right on that wall. And how they got there, nobody
16 would say, but I knew.

17 MR. JANES: When you say "that wall," can you
18 specify -- I know the hallway. Can you specify, would it
19 be the east side of the hall or the west side of the
20 hall?

21 THE WITNESS: If --

22 MR. RYAN: Here's your map. East, west --

23 THE WITNESS: Okay. It's on the east side.
24 East side of the hall.

25 (Witness marking exhibit)

1 to make it clear, just put your initials by the
2 maintenance shop so we know that's your area that you
3 worked out of.

4 THE WITNESS: Sure.

5 MR. SHERIDAN: Because you did a nice job of
6 describing where the GACM folks were.

7 (Witness complying)

8 THE WITNESS: "T.B."

9 MR. SHERIDAN: Yep.

10 BY MR. RYAN:

11 Q. Okay. So did you have conversations with -- Well, let's
12 step back one step first.

13 Were these panels stacked one against the other,
14 one against the wall, and the other one against that one?

15 A. Yes. Yes.

16 Q. Okay. Sort of sandwich style?

17 A. And the same way in the gym.

18 Q. In the gym?

19 A. In the gym. One against the wall, the other one
20 sandwiched on top. And again on that end, they were
21 specifically one against the wall, one on top.

22 Q. Okay. So now this is your first day officially on the
23 payroll --

24 A. Yeah.

25 Q. -- it's August 31st, and you've seen these panels in

1 three different spots in a week?

2 A. Yeah.

3 Q. So you were curious about that?

4 A. Well, yeah.

5 Q. Did you have a conversation with Bob Thomas about it?

6 A. So I said to Bob -- I go -- So somewhere within that week
7 I see Bob. And, see, Bob would just show up. He'd just
8 come in the maintenance shop, he'd open up the door, he'd
9 just walk in.

10 Q. Into your shop?

11 A. Yeah. Because some of the Gwinn Maintenance and Cleaning
12 stuff is in the maintenance shop. The lawnmowers, their
13 football equipment, all that stuff is in our same area.
14 Besides the big lunch truck and the other truck, you
15 know, they're all there. So there's a lot of people in
16 and out of there.

17 But Bob, he would just come in. "Hey, how you
18 doing? Blah, blah, blah." And I said to him -- I said,
19 "Hey, holy man, what are you guys doing with them
20 panels?" And he goes, "It ain't our job to move them."
21 I go, "Well, you moved them over to these halls. You
22 moved them to the hallway." He didn't answer me. I
23 said, "Come on, Bob." He goes, "That's your job to move
24 them panels." I said, "Bob, I can't move them panels."
25 "We don't get paid to move them;" that's what he said.

1 Bob said, "We're not getting paid to move them and put
2 them back, we're not putting them back." I go,
3 "Whatever." That's all I said, "Whatever. I'm not
4 moving them. I can't move them. They could sit there
5 and rot for all I care."

6 Q. They're too big for one person --

7 A. They were too big. It was ridiculous. I said, "No, I'm
8 not touching them. It's not happening." He'd shrug it
9 off, "Well, we got to wax that hallway." I said, "Well,
10 then you better get your (indiscernible) down here, pal,
11 and get that moved out because I can't move them."

12 Q. Yeah. When he said, "We got to wax that hallway," what
13 hallway were you --

14 A. That hallway that -- The hallway that this was in.

15 Q. That the panels were in?

16 A. The panels were in. See, and there was a whole -- There
17 was other stuff stacked in this hallway too. They had
18 been kind of using it -- and A.J. was upset about it.
19 They were kind of using this area as a storage area.
20 Like, there was band stuff and stage stuff and just stuff
21 in the hall, just until one day we -- I think it was
22 after the accident we cleaned it all out.

23 Q. All right. So Bob is telling you they're not moving
24 them, you move them, but they had to wax that hall?

25 A. He kept saying, "We have to wax or clean that hall, so

1 you got to get them out of there."

2 Q. Got to get the panels out?

3 A. "You got to get" -- Well, I didn't put them there, so I'm
4 not moving them. I didn't put them panels there. I
5 think I -- I know I probably said to him, "Why did you
6 even move them out of the gym?" But he would never admit
7 to it. Come on, man, elves didn't come and take them
8 panels out of the gym.

9 Q. Was there anybody else at the school with the personnel
10 to be able to move the panels --

11 MR. SHERIDAN: Objection to foundation, form.

12 BY MR. RYAN:

13 Q. -- who you knew about?

14 A. No. There was -- Only after -- Only after the incident
15 did I find out that there's this whole procedure, that
16 them walls were supposed to be put up by the CADD class,
17 that there was a manual that appeared. I didn't know
18 anything about any of that.

19 Q. When you started?

20 A. When I started and the day of the incident. I had no
21 idea.

22 Q. Okay. So you start on the 31st; that's Monday. The 1st
23 is Tuesday, the 2nd is Wednesday, the 3rd is Thursday,
24 and the 3rd is the date of the incident.

25 A. Okay.

1 Q. So what happens on the 3rd? Did you come into work at
2 normal time?

3 A. Yep. 6:00 to 10:00.

4 Q. Your normal shift was four hours --

5 A. Yep.

6 Q. -- 6:00 a.m. to 10:00 a.m.?

7 A. Yes.

8 Q. And do you know what you did that day?

9 A. Sure.

10 Q. Okay. So tell us.

11 A. So I came to work. And because it was the holiday, the
12 weekend was coming up, I had all these things that I
13 wanted to get done. There was some leakage issues over
14 at K.I., and whatever else. But that water issue --
15 toilet or sink issue at K.I., I wanted to get that done
16 right away just because school was going to start, you
17 know, and I didn't want a toilet leaking all over when
18 kids were coming in there, you know. So then we're
19 just -- I had this little list that I had.

20 And so I'm putzing around in my shop getting ready
21 to go do my thing, and I had been here a couple hours.
22 And so I didn't make it over to K.I., but that morning I
23 did a few things in the high school. But then -- So what
24 are we talking, right around 9:00 o'clock -- Whenever
25 A.J. gets here, between 8:30 and 9:00, he came in and he

1 said, "What do you got going on?" Because A.J. was my
2 boss. He'd come down and he'd check on me every day,
3 you know, "Hey, what's happening? What are you doing?
4 Blah, blah, blah."

5 So he came down and he goes, "I got some things
6 that I want us to do." I said, "Man, A.J., I really got
7 my own agenda today. I know, I know, but, you know, I
8 got this" -- "I really want to get that water issue fixed
9 because I don't want water running all over on Tuesday
10 here, you know." He says, "Oh, it's just a couple of
11 things." And he had a light he wanted me to look at and
12 something else in the -- I think it was in the boys'
13 locker room, which was important. There was a panel -- a
14 light panel that was falling down.

15 I said, "Okay." So then I was getting ready to
16 walk away, and he goes, "And we're going to move them
17 panels." I said, "What?" He goes, "I think me and you
18 can do it. We're going to move them panels into the
19 gym." I said, "A.J., we are not moving them panels,
20 dude. We can't do it. This is not a good idea, A.J.
21 It's not a good idea." I said, "Well, who's going to
22 help us?" He goes, "No, we're going to do it, me and
23 you. Where's the dollies?" Well, the dollies were in
24 the maintenance shop, as soon as I figured out what they
25 were for.

1 them up?

2 A. Yep. We got the ropes out. I said, "Okay. If you think
3 so." A.J.'s a hard guy to say no to. He's big, you
4 know. He's a big boy. So I said, "All right, boss, here
5 we go." So -- And then -- But the whole time I'm
6 complaining. "A.J., why are we moving the panels back
7 when they were originally there to begin with? Why are
8 we doing this? If they put them out here, whoever they
9 are, get them to put them back. They obviously had
10 enough people to move them three times." I was hostile.
11 Hostile.

12 Q. Now, you were -- You've given a statement to the police,
13 and you're aware of that?

14 A. Yeah.

15 Q. And you described on that statement that you were
16 bitching.

17 A. Yeah, I was complaining because ... I don't tolerate
18 laziness very well. And to me -- I mean, I can't say
19 that Gwinn's maintenance or whatever -- or cleaning
20 company moved them, but they were the only ones here
21 besides me. They were the only ones here. And it became
22 obvious that them panels were the, oh, so you're the big
23 hotshot maintenance chick. Oh, yeah? Move them panels.
24 That's the attitude I got, you know what I mean, from
25 them -- from Bob and them, like, we're not getting paid

1 for it, Trace, so, you know, good luck. That attitude.
2 I would have never moved them. They would have rotted
3 there. They would have rotted there.

4 Q. That was that first week when you started that that
5 attitude changed?

6 A. Yes.

7 Q. Okay.

8 A. Yeah, things went awry. But to me, you had them right
9 there.

10 Q. In the gym?

11 A. Even if somebody's not paying you, for God's sake, man.
12 Yeah.

13 Q. For God's sake what? You had them there?

14 A. Put them in the hole. You had them there. Put them
15 where they belong. But no, let's move them. Let's move
16 them from here to there to what I believe was a personal
17 vendetta against me. Now, see, this is what we've done.
18 Now you move them. It's your problem.

19 Q. Did you try to confirm that suspicion with any Gwinn
20 employees? Did you talk to any Gwinn employees about --

21 A. Yeah. Well, Bob would ask me all the time, "When are you
22 going to move them?" I said, "Bob, I'm not going to.
23 I'm not going to move them. Bob, you know I can't, so
24 quit messing with me."

25 Q. Did you think that's what he was doing, messing with you?

1 A. Oh, sure. Yeah. He just wanted to see what I was going
2 to say. You know, it was just ...

3 Q. So --

4 A. I mean, that's my personal opinion, but that's how I
5 felt.

6 Q. That's how you felt?

7 A. Sure.

8 Q. Okay.

9 A. I've seen that more than once in my life, so, you know,
10 it's not like it's a no-brainer.

11 Q. A woman doing your kind of work?

12 A. No-brainer there, dude.

13 Q. Yeah. Yeah.

14 A. Yeah.

15 Q. And you worked in the prison system?

16 A. Sure. You know, it was all just -- Come on. Who does
17 that?

18 Q. You know it when you see it?

19 A. Sure. Who's going to move panels three times? That's a
20 lot of effort. That's a lot of work.

21 Q. Yeah.

22 A. To mess with somebody? Holy man, come on. Come on.

23 Q. So -- Okay. You and A.J. are in the process of moving
24 them in. You get them into the gym?

25 A. We get them into the gym.

1 southeast.

2 Q. Southeast corner?

3 A. Yep.

4 Q. So label it "cheerleaders."

5 A. Okay.

6 (Witness complying)

7 BY MR. RYAN:

8 Q. Okay. And when you got the panels to the north end of
9 the gym, what did you do with them?

10 A. So when we took in the first one, we made the decision
11 whether we were going to put them against the wall.
12 Now -- Okay. So let's back up to a conversation that me
13 and A.J. are having as we're putting these panels up.

14 Q. Okay.

15 A. Okay. So A.J. says, "Well, where do you think we should
16 put them?" I said, "Well, we can put them over here."
17 (Indicating) I said -- And the other thing I said is,
18 "I want to know how long these cheerleaders are going to
19 be in here." I said, "A.J., how long are the
20 cheerleaders going to be in here?" And he said, "Oh,
21 they're not going to be in here very long at all."
22 I said, "Okay." I said, "You don't have a time?"
23 He goes, "When the cheerleaders are done, the gym is
24 going to be locked for the weekend." That is exactly
25 what he told me. I said, "You're telling me this gym is

1 going to be locked, right, A.J.?" He goes, "Yeah, the
2 gym will be locked for the weekend." I said, "Okay.
3 You're sure of that?" "Yeah. Nobody's on the schedule.
4 There shouldn't be anybody in here." So I don't know
5 where this schedule is. I never saw a schedule. I just
6 did what A.J. told me to do.

7 I said, "Okay, now listen. Nobody is going to be
8 in here." I said, "Now, how long are them cheerleaders
9 going to be here?" "Not very long. They're not going to
10 be in here very long at all." I said, "So it's almost
11 over, practice?" He said, "Yeah." I said, "Okay."
12 Now, whether he knew that or not, I have no idea, but I'm
13 just giving you the information that he gave me. I said,
14 "Okay. All right."

15 So I said, "Well, is it just" -- "Who's going to
16 help us put these up?" He said, "Well, we'll get them in
17 here, and then on Tuesday we'll get with more people,"
18 whoever the more people were, "and we'll get them put in
19 place." I said, "Okay." So I said, "Depending on the
20 number of people, you want them far away or you want them
21 close?" I said, "Because if it just ends up being you
22 and me, we have them on the dollies. Let's get them
23 where they're supposed to be. Why lean them against that
24 wall and have to do all this" -- Because I'm thinking in
25 my head, they've already been leaning against too many

1 THE WITNESS: All right. This is the alcove.
2 So this is them little sets of bleachers, right here.
3 So it was kind of at an angle. So this is -- They set
4 out from there. So this is the wall. It comes out a
5 little bit like that. And this is the wall over here.
6 So it was leaning partially against this wall and about
7 in the middle, so it kind of made a thing like -- Well,
8 it probably wasn't that big, but like that. So it leaned
9 against the wall and into the center of the bleachers.

10 BY MR. RYAN:

11 Q. Did you set the panel on the northeast part of the alcove
12 like you've just drawn that?

13 A. Yep.

14 Q. Northwest, I'm sorry.

15 A. Northwest. Okay. Sure. That's a good description.

16 Q. Northwest.

17 A. Okay. We got the other -- Took -- Walked out of the gym,
18 went back. Same routine: A.J. lifted it up, I rolled
19 them under, both ends, jimmy-jacked down the hall back
20 into the gym, and we put the other one the same way. So
21 this one is leaning -- So this would be east --

22 (Witness drawing)

23 BY MR. RYAN:

24 Q. Northeast.

25 A. Northeast. Okay. So they're sitting, like, at an angle.

1 So this is just barely touching that, and then this is
2 kind of tucked in, you know, where the stage is, so it's
3 like that (gesturing).

4 Q. Yeah.

5 A. So they're kind of like this (gesturing).

6 Q. So the inside of the V that you formed where the panels
7 hit the stage, the outside hits the alcove --

8 A. Yes.

9 Q. -- poles -- corners.

10 A. The corners.

11 Q. All right.

12 A. But as I'm looking at it, I figure out how it goes
13 together. Because I have no idea how this thing goes
14 together. I have no idea. So when we get them both in
15 there, I look at it and I go, oh, I get it. This side
16 gets zipped to the wall, and the brackets that are laying
17 in the maintenance shop that I've been kicking around for
18 a month -- or sorry, three weeks, I know what them go to
19 now.

20 MR. SHERIDAN: Can you please clarify which
21 maintenance shop. Your maintenance shop?

22 THE WITNESS: My maintenance shop, yeah.

23 MR. SHERIDAN: Is where the brackets are?

24 THE WITNESS: Yes. I know what the -- So --
25 Well, anyways, that's probably ahead of the story.

1 BY MR. RYAN:

2 Q. Okay. So you set the panels in there.

3 A. Mm-hmm.

4 Q. And did you go back to get the hardware?

5 A. Yes.

6 Q. Did you and A.J. exit the gym at the same time?

7 A. A.J. was ahead of me. Because as he was walking away, he
8 goes, "I'm going to e-mail Rob and tell him that the
9 panels are in here." And I turned around and I looked at
10 the cheerleaders and I looked at the panels
11 (demonstrating). And I remember turning to A.J., and I
12 go, "A.J., are you sure they're not going to be in here
13 very long?" "Nope, they're the last ones in here. It's
14 not going to be long. I'm going to e-mail." I said,
15 "All right." And so I didn't -- Because I believed him
16 that they were going to be done.

17 Q. Yeah. So he left first?

18 A. He left first, and I stood there.

19 Q. Now, when you looked at the cheerleaders on that
20 occasion, you had made two trips in before that?

21 A. Yep. Yep.

22 Q. And on each occasion, did you look over at the
23 cheerleaders each time you came in?

24 A. Yeah, just passing. Cheerleaders.

25 Q. Did you see three little four-year-old girls?

1 A. No. No.

2 Q. If you had seen three or one or two little four-year-old
3 girls, what would you have done?

4 A. Them panels would have never went in that thing, never.
5 No. No. No. I would never put them panels in there.

6 Q. All right.

7 A. Based on my information that I was given, "Tracy, the
8 cheerleaders aren't going to be in there very long" --
9 Because that was my big thing, like, "A.J., are you sure
10 that nothing" -- "like, nobody's going to be here over
11 the weekend? Nobody?" "Yes, Tracy. Yes, Tracy."
12 "Okay." Based on that information, that's how I acted.

13 Q. Okay. You thought it would be okay if --

14 A. Yes. I really thought they were leaving.

15 Q. They were leaving?

16 A. I really thought from what he -- But you can't assume,
17 see, you can't assume.

18 Q. Yeah. Now, Stacey Filizetti is in this room.

19 Did you see Stacey there when you made these trips in
20 with the panels?

21 A. No, I didn't pay any attention. All I saw -- They're all
22 the same height, you know what I mean? It's just a group
23 of girls, a group of girls, a group of girls.

24 Q. And the girls were at the other end of the gym?

25 A. Yes.

1 Q. So did that raise any immediate concerns, the location of
2 the girls versus where you were putting the panels?

3 A. No. It just didn't because of what I was told, the time
4 when they were leaving. You know, nobody was going to be
5 there. But still in the back of my mind, I'm running
6 around trying to find somebody to help me, right?

7 Q. Yeah.

8 A. Yeah, so ...

9 Q. So you exit the gym. A.J. is ahead of you --

10 A. Yep.

11 Q. -- if I'm understanding this?

12 A. Yep.

13 Q. And does he -- Did you follow him? Do you know where he
14 went?

15 A. He said he was -- He told me he was going back to his
16 office to e-mail Rob. And that's the last I saw him.

17 Q. And did you -- What did you do after you left the gym?

18 A. I said to myself, okay, Trace. Because A.J. wasn't
19 really specific on who was going to help us get them in,
20 what was going to happen. And it had been my experience
21 since I had been there, you know, in and out of the gym,
22 in and out of the school during that weeks [sic] before I
23 got hired that -- or before payroll day or whatever that
24 day is you guys got, that people could just show up
25 randomly any time they wanted. I'd go in the gym,

1 there's people in the gym. Be like, how did you guys get
2 in here? Because I just wasn't -- I'm not used to that,
3 you know. And there would be -- There's people all the
4 time everywhere.

5 Q. It's different at the hospital is what you're saying?

6 A. Sure. Yeah. Assuming my background, I'm like, wow, you
7 just don't go running a muck anywhere you want to. That
8 just doesn't happen.

9 Q. Yeah.

10 A. So I didn't really believe him. I know what he said was
11 true, that nobody was going to be in there, but from what
12 I had saw, I was like, mm-mm, I've got to get these
13 panels against this wall. I've got to try. I've got to
14 get going. So I went and got the hardware, brought it
15 back into the gym.

16 Q. Your third trip into the gym?

17 A. My third trip into the gym. I set it right on this --
18 I can tell you because we've got it all mapped out here.
19 I set the hardware on the north -- right here
20 (indicating) -- northeast [sic] corner. The panel was
21 right here (indicating). I set that hardware right there
22 on the floor (indicating).

23 Q. Label it where you set it down.

24 (Witness complying)

25 THE WITNESS: Hardware. Yep. I put that

1 hardware right there.

2 MR. RYAN: Yeah. Why don't you initial this
3 one too --

4 THE WITNESS: Okay.

5 MR. RYAN: -- and we'll mark it as an exhibit.

6 (Witness complying)

7 THE WITNESS: I put the hardware on the floor
8 right here (indicating), right on that corner. I went
9 and found Rob Soyring. I went into Rob's office --

10 MR. RYAN: Okay. Give this to the court
11 reporter. Natalia will mark it 108.

12 (Deposition Exhibit No. 108

13 marked as requested)

14 BY MR. RYAN:

15 Q. So you brought the hardware in. You again had an
16 opportunity to see the cheerleaders. You look at them.
17 Did you see little girls?

18 A. No.

19 Q. On none of those occasions?

20 A. None.

21 Q. Okay. You leave the gym, and you went to see Rob?

22 A. Yep.

23 Q. Did you meet with Rob?

24 A. Rob was at the copy machine.

25 Q. And what was your conversation?

1 MR. SHERIDAN: What location? Where are we
2 now?

3 THE WITNESS: The copy machine is --

4 BY MR. RYAN:

5 Q. By his office?

6 A. Yeah, the school office.

7 Q. The high school office?

8 A. The high school office. Where Nancy is. Wherever Nancy
9 is.

10 MR. SHERIDAN: Help me out on one of the
11 exhibits.

12 THE WITNESS: High school office, right here
13 (indicating). There's a copy machine -- was a copy
14 machine --

15 MR. SHERIDAN: Don't -- No, this is your new
16 one. Go ahead. I'm sorry.

17 THE WITNESS: Okay.

18 MR. SHERIDAN: It's Exhibit -- just so we're
19 clear on the record, it's 106.

20 MR. RYAN: Yeah.

21 (Witness marking exhibit)

22 THE WITNESS: There's a copy machine -- used to
23 be a couple years ago right there. That's where I met
24 with Rob, that copy machine. And so he's standing there.
25 So I come into the -- "Meet Rob" --

1 MR. RYAN: "Met Rob at copy machine."

2 THE WITNESS: "Met Rob at copy machine."

3 MR. RYAN: Okay. In the high school office?

4 THE WITNESS: In the high school office, yeah.

5 MR. SHERIDAN: Thank you.

6 THE WITNESS: You bet.

7 So I come in, I see Nancy, and I -- Rob's at
8 the machine. Or did I say to Nancy? No. I said
9 to Nancy -- I did. I said to Nancy, I go, "Hey, Nancy,
10 is Rob in here?" She goes, "Yeah, he's back there in his
11 office." And when I came out, when I came down that
12 little section, Rob was coming out of his office. I met
13 him at that copy machine.

14 I go, "Hey, Bob. Them panels are in the gym."
15 I said, "Dude, I can't put them up by myself. Can't do
16 it. Somebody's got to help." He goes, "Well" -- I said,
17 "So the gym is going to be empty," I said, "for the
18 weekend, so I'm assuming they're going to be okay there,
19 right? The gym is going to be empty, right, Rob?" "Yep.
20 Yep. Locked down. It's going to be locked. Don't worry
21 about it." I said, "Well, I am worried about it, Rob,
22 because on Tuesday morning when I get here, is anybody
23 going to be here to help me put them panels up?" He
24 said, "The basketball team is having an early practice."
25 He said, "We'll help you get them bolted to the wall."

1 MR. SHERIDAN: And the "we" being the
2 basketball team?

3 THE WITNESS: "We" being the basketball team.
4 He says, "I'll get the boys from the basketball team to
5 give you a hand with that." I said, "Okay." I said,
6 "But for right now, I'm going to go get" -- "I've got the
7 hardware in there. I've got it ready to go. I'm at
8 least going to get them zipped to the wall, at least."
9 And he goes, "Okay. See you on Tuesday morning."
10 I said, "I'll be here at 6:00." He goes, "Practice is
11 done by 7:00 or 8:00." I said, "Perfect." Out of there
12 I ran back to the maintenance shop. I get in the
13 maintenance shop --

14 MR. SHERIDAN: Which maintenance shop?

15 THE WITNESS: My maintenance shop.

16 MR. SHERIDAN: Thank you.

17 BY MR. RYAN:

18 Q. You didn't run, did you?

19 A. Yeah, well, I probably was running. I probably was
20 panicking. I'm telling you, I -- my brain knows things
21 it should never know.

22 MR. SHERIDAN: You were panicking as you were
23 going to your maintenance shop?

24 THE WITNESS: Yeah, because I want them zipped
25 to the wall. Because like I said, everything I had seen

1 in this school since I'd been here was like anything
2 could happen here, because there's just little kids --
3 there's kids. You know, they're not going to be safe.
4 The reason I was freaking out is because I wanted them
5 zipped to the wall for the weekend. That was my concern,
6 the weekend. Somebody is going to get in there, and
7 they're going to fall or something stupid is going to
8 happen. Well ...

9 So anyways, I go to the maintenance shop.
10 Dylan from Gwinn Cleaning comes in the back door to get
11 the lawnmower. And he opens up the back door and he
12 comes in, and I say, "Hey, Dylan, dude, do me a favor."
13 And I know he's not supposed to. I know he's not
14 supposed to because that's already been set.

15 BY MR. RYAN:

16 Q. He's not supposed to help you?

17 A. No, he's not supposed to help me. I go, "Okay, bud."
18 I said, "Look, Dylan, we got to get them panels zipped to
19 the wall." He goes, "Oh, I got some experience with
20 that. You know, our CADD class put them together" -- or
21 whatever, something about his CADD class. I go, "Okay.
22 Cool, dude. I don't care. You've got to help me put
23 them to the wall. You're all I got, dude. Come on.
24 Me and you could do this." And he goes, "All right.
25 Well, Trace, I'm going to be right out back with the

1 lawnmower. If you need my help, just stick your head out
2 the door and yell." I said, "All right, man." I said,
3 "I got to go see Tom. I got to tell him what I got to
4 do. I got to tell him I need just a little bit more
5 time."

6 Q. How long did you think it would take to zip them to the
7 wall?

8 A. Well, because when I looked at them, I saw that piece of
9 hardware coming down the side, and then when we put them
10 against the wall, I went ah. And then there was another
11 rail that came down; that rail fit to that rail. I said,
12 okay, these go together fairly easy with enough manpower.
13 And so I said, okay, the least I can do with the strength
14 I had and Dylan was to straighten them up, zing, zing,
15 zing, zing, zing, get them stuck to the wall, and they
16 wouldn't have come down.

17 Q. Okay.

18 A. So I said, "All right, Dylan. That would be cool, dude."
19 He goes, "Yeah, yeah, no problem." To the office I go.
20 I'm standing in there --

21 MR. SHERIDAN: Let me stop you right on that
22 thought. Where does Dylan go? Does he leave?

23 THE WITNESS: He leaves. Takes the lawnmower,
24 goes outside, goes and does his job.

25

1 BY MR. RYAN:

2 Q. And you go to Tom's office?

3 A. I go to Tom's office.

4 Q. So where is Tom's office on this diagram?

5 A. Tom's office is -- Well, I go to the superintendent's
6 office. So I'm here (indicating). I'm in the doorway
7 right here.

8 (Witness marking exhibit)

9 THE WITNESS: The secretaries, they also --
10 There's the secretary, there's the other one. So he's in
11 the --

12 MR. SHERIDAN: So just so I'm clear, so you
13 go -- After the Dylan conversation, you go from the
14 maintenance to the superintendent's office?

15 THE WITNESS: Yes.

16 MR. SHERIDAN: I'm with you. Thank you.

17 THE WITNESS: You bet. So to tell him I'm
18 going to be running a little late -- I'm going to get out
19 of here late. I need some more time. So I go in there.
20 I go, "Hey, Tom, I want to get them panels zipped to the
21 wall. Hey, buddy, I'm going to be a few minutes late."
22 He goes, "Don't worry about it. Don't worry about your
23 time, Tracy. Don't worry about it." And that was the
24 last words. And as I turned the corner to come out of
25 the office to go get the drill and to get Dylan, it was

1 too late.

2 BY MR. RYAN:

3 Q. So what did you do then? Did you go down to the gym?

4 A. So there was this woman coming down the hall, and she's
5 got these little kids with her, and she's going,
6 "Something happened in the gym." And I immediately
7 looked at her. I said, "Oh." I said, "What happened?"
8 I said, "The wall fell, didn't it? Didn't it? Didn't
9 it?" And she goes, "How did you know?" She goes, "It
10 scared the girls. The girls are scared." So the only
11 girls I see is these two girls -- two little kids, right?
12 And I'm like, little kids? What the hell is going on?
13 And I start running.

14 I get in there, and, of course, there's three
15 little kids, and the wall was down. And by then,
16 somebody had picked it up. I don't know who picked it
17 up. I didn't know any of the names of the people that I
18 saw. And so what happened next? So that was it. And so
19 then the guy that was holding the wall up, I said, "Hey."
20 I said, "Go help her, and I'll hold the wall up." And so
21 I just stood there and held the wall until it was over.
22 That was it.

23 Q. Until the EMS people came, is that what you're saying?

24 A. Yeah -- Well, until everybody was gone. Then I cleaned
25 up.

1 Q. Okay. So did the police come?

2 A. Yes.

3 Q. And how long were they there?

4 A. Well, at first -- At first when the gym cleared out,
5 there was some of -- Kathy was there, Dylan was there,
6 Tina was there.

7 Q. When you say "Kathy," Kathy from Gwinn Area Cleaning?

8 A. Yeah, Gwinn Area Cleaning.

9 Q. And Tina?

10 A. And Tina, yeah. And so we cleaned up the floor. And
11 A.J. came in. I can't remember anybody else. I just
12 can't remember. So then --

13 Q. Did anybody tell you not to clean anything up?

14 A. Yeah. Tina said something to me about, "We can do this."
15 I said, "No, I can help."

16 Q. No, I mean, did, for example, any of the police officers
17 who were there take yellow tape and put it around and
18 say, "Don't" --

19 A. I'm getting to that.

20 Q. Okay.

21 A. They're not here yet.

22 Q. Oh, okay.

23 A. Yeah, there's no police. There's nobody.

24 Q. So no police responded?

25 A. Not right away.

1 Q. Not right away.

2 A. So me, Tom -- Not -- Me, Dylan, A.J. Dylan goes and gets
3 a screw gun. The hardware is there. And so we, three of
4 us, commence to putting the wall together. And we got
5 about halfway through that wall, when the police came
6 through the other door and said, "Stop. Don't touch
7 anything." And that was it. That was the end of that.

8 Q. So how was the wall left?

9 A. Half up. They told us to stop, so we stopped. The
10 wall -- So then they came over. And now -- Then there
11 was like two, three police there by then. And so we
12 backed up. So Dylan, me, and A.J., we were like, wow,
13 you know. So now we know something bad is -- you know,
14 this is bad. Well, it was bad to begin with, but now
15 it's ...

16 So while we're standing there, in through the back
17 doors --

18 Q. Which back doors?

19 A. I'll show you.

20 Q. You're looking at Exhibit 106?

21 A. Yes. And so there's two doors right here on the back of
22 the gym.

23 (Witness marking exhibit)

24 BY MR. RYAN:

25 Q. On the north end of the gym?

1 A. Yep.

2 Q. And where did the interview take place?

3 A. In my maintenance shop.

4 Q. And he asked you a series of questions?

5 A. Yep.

6 Q. And you've had a chance to look at the videotape?

7 A. Sure.

8 Q. Did you, at some point in that interview, reference the
9 panels in the gym? Did you make reference to the panels
10 being stacked in the hall and stacked --

11 A. Oh, yeah, yeah. Yep.

12 Q. Did you make a comment to him at the end of the interview
13 about horrible, horrible negligence?

14 A. Yeah. Well, here's the thing. I thought they told you
15 that they had you on camera. Well, the guy must have had
16 it on him when he came in, because I had no idea I was
17 being filmed.

18 Q. Yeah.

19 A. So maybe that's my being naive, but I didn't put two and
20 two together. I thought he came for a statement.

21 Q. Yeah.

22 A. So when I said to him, "Hey, that's off the record that
23 this is horrible, horrible negligence," I can tell you
24 exactly what I was feeling and saying.

25 Q. Go ahead. Tell us.

1 A. Because I just can't get over -- could not get over the
2 fact that them panels were in the gym, and they got moved
3 so many times, and nobody wanted to put them up because
4 of money. I mean, that's just -- it was incredible.
5 To me, that was derelict of duty and laziness, absolute
6 laziness. No team effort. How do you -- It's made no
7 sense to me. So yeah, I'm really mad.

8 And I don't want to say it was horrible negligence
9 on me and A.J.'s part. Like anybody's boss, I did what
10 I was told. But given with what we had to work with and
11 scurrying around for somebody to help us, yeah, I was
12 just really mad. And I said horrible, horrible
13 negligence, and I meant that toward Gwinn Cleaning and
14 Maintenance. I don't know if they're the ones that moved
15 them panels, but it sure as heck had to have been.
16 There's no reason for that, none.

17 MR. RYAN: I don't have any additional
18 questions.

19 MR. JANES: Okay. I'm Paul Janes. I have the
20 responsibility of representing Wayne and Stacey Filizetti
21 and the family of the Filizettis associated with this.

22 THE WITNESS: Sure.

23 MR. JANES: And I apologize to you to have to
24 ask you these questions. I have a job to do; do you
25 understand that?

1 THE WITNESS: Sure. Got it.

2 MR. JANES: And the reason I'm asking these
3 questions is because, obviously, it impacted your
4 lives --

5 THE WITNESS: Sure.

6 MR. JANES: -- but it has impacted this entire
7 family in a significant way.

8 THE WITNESS: Yes, sir.

9 MR. JANES: So at any time if you start to feel
10 overwhelmed, please tell me to stop, and I'll give you a
11 break.

12 THE WITNESS: Got it.

13 MR. JANES: I do not want you to endure
14 something that makes you emotionally upset. If you need
15 a break, I'll give you a breather. Okay?

16 THE WITNESS: Okay. Gotcha.

17 EXAMINATION

18 BY MR. JANES:

19 Q. The chronology of your work experience, I need to go
20 back.

21 A. Okay.

22 Q. Because even in your police interview, you said that,
23 "I was a safety officer. I'm trained in safety."

24 A. Yeah.

25 Q. "You don't do things that way."

1 A. Sure.

2 Q. Do you remember saying something like that?

3 A. Sure. Yep. Yep.

4 Q. So now I need to understand your work experience in
5 relationship to workplace safety, customer safety,
6 visitor safety. Okay?

7 A. Okay.

8 Q. Please tell me where you've received that training.
9 And I'm going to assume it's bi-fold with the Department
10 of Corrections as well as the hospital, but you take me
11 where you got to go.

12 A. Most of my training from the hospital is with FEMA, the
13 natural disaster thing, FEMA; that's where most of my
14 training comes from. Did I have any training in
15 school-related things? No.

16 And I guess when I'm saying I was in safety, it's
17 because it did cross my mind to put up a banner, to put
18 up, you know, the cones. My thinking process was driven
19 that way, sure. I don't know if it would have made a
20 difference; I don't know that. But given the information
21 that I was given by A.J., they were going to leave the
22 gym. They weren't going to be in there long. That's --

23 Q. I'm going to give you the opportunity to talk all about
24 that.

25 A. Okay.

1 to gravity energy?

2 A. No.

3 Q. When you would use, like, a floor scrubber to maintain
4 hallways, do you lock out that area where you're using
5 the floor scrubbers, or do you just put up cones?

6 A. Just the wet floor sign.

7 Q. My client, Wayne, was a correctional officer. And last
8 night he said this at dinner, that he had a supervisor
9 that instructed him in his training that safety is
10 paramount.

11 A. Sure.

12 Q. "I don't want to hear from any of you," he said, "the
13 statement, 'It's not my job' when it comes to officer
14 safety, inmate safety, or visitor safety." Did you
15 receive such training when you were an officer?

16 A. Wow, that was a long time ago, 1990. I don't know.
17 I mean, did they say it to me?

18 Q. Do you believe that safety is first?

19 A. Sure, I'm going to believe that.

20 Q. So when it comes to safety of visitors or students at the
21 school here, it's everyone's job to make sure this is a
22 safe environment for the visitors and students, correct?

23 A. Correct.

24 Q. As you said, "Kids are kids. You never know what they're
25 going to do. They could get into everything." Right?

1 clarification is, the first time you saw them, you said
2 that the panels were overlapping one another on the
3 northwest -- on the west side of the north wall. How was
4 the orientation of the panels? Was it wood side against
5 wall, pad out, wood side against pad, or was it pad
6 against wall, pad against wood? How was it?

7 A. Wood against the wall, pad out, and the other one right
8 over the top of it.

9 Q. Pad --

10 A. Pad out.

11 Q. Pad out?

12 A. Pad out. So I saw the colors; that's what made me put
13 two and two together that that's where they belonged.

14 Q. And when you saw them there, was it just the two panels,
15 or did you see the cradle carts too?

16 A. Nope, just the panels.

17 Q. And you called them monsters?

18 A. Yeah, they're monster walls. They're big, man. Them
19 things are big.

20 Q. When you saw them, did you observe any blocking
21 underneath them so that they would stay?

22 A. No.

23 Q. Did you see any cones or taping?

24 A. No.

25 Q. You make a mental observation that, oh, they're just like

1 'till 10:00, 11:00 o'clock, just looking -- looking
2 around, checking everything out, seeing if things were --
3 you know, just getting used to the place. And at that
4 time, though, there were still -- I could get on the work
5 order system and get that organized as well, seeing,
6 you know, just what exactly was going on.

7 Q. Any time during the week of August 24th, were you ever in
8 the school facilities in the morning hours?

9 A. I can't say yes or no. I don't -- I'd have to figure out
10 which shift I was working then. I'm going to say
11 probably not. It was probably in the evenings and on
12 weekends. Evenings and weekends.

13 Q. Because you identified when you were here during these
14 walkthroughs and the time you're cleaning your shop, your
15 testimony is that there were kids all over the place.
16 They were just coming and going in and out.

17 A. Yeah. Well, you have to go back to when I went to
18 school. So if I was here at 6:00 o'clock, there was kids
19 all over the hallways. And I always thought to myself,
20 wow, we never got away with that when I was a kid.
21 Kids would be coming down the maintenance shop like --

22 Q. I'm just trying -- I thought you identified before this
23 accident happened, which would have been inclusive of the
24 week of August 24th -- school had not started yet --

25 A. Yeah.

1 Q. -- that you had seen kids --

2 A. Sure. Yeah.

3 Q. -- all over the place.

4 A. Yeah, there was kids. It was amazing how -- Because
5 that's what I thought. I'm like, wow, whose kids are all
6 these kids?

7 Q. Okay. When you're here --

8 A. Teachers' kids or something, I don't know. But on the
9 weekends if you went in the gym, there was people all
10 over in the gym. There would be guys up in the weight
11 room. And I'm like, how are these people getting in
12 here? So maybe they give out a lot of keys.

13 Q. I don't know. But I want to be as specific as possible
14 to confine myself to these days.

15 A. Sure. Okay.

16 Q. So the week of August 24th, every time you came into the
17 school, there was plenty of kids you encountered?

18 A. Not -- Well, I wouldn't say numerous. I'd say ten,
19 you know. Then I'd see a parent or a teacher, and then
20 there would be a couple of kids with them or a couple of
21 kids with this person. Or you'd open the gym, and
22 there'd be, I don't know, a couple of teenagers playing.
23 And then there -- You know, it just seemed odd.

24 Q. During that first week, did you meet any teachers who
25 introduced themselves and their kids?

1 A. No.

2 Q. You just formulated possibly --

3 A. Yep. Yeah.

4 Q. -- that this is a teacher and kids?

5 A. Yeah.

6 Q. Were these teachers, when you saw them with children,
7 were they children that were not of the age to be in
8 middle school/high school? In other words, they were
9 elementary or younger children?

10 A. No, they were bigger.

11 Q. The time periods that you were here, did you ever see --
12 the week of August 24th, did you ever see active athletic
13 practices underway?

14 A. If that was happening in the gym, I didn't go in there,
15 but I could hear through the door. I know that there had
16 to have been, but I never went in there. Because then
17 I just was like, okay, it's off limits. If I wanted to
18 go in there and work on that air handler or on a
19 bleacher, I knew that, eh, forget it, I'm not going in
20 there, and so I didn't.

21 Q. Where do you come up with this knowledge that if the gym
22 is being utilized for practice, it's off limits, you're
23 not going in there?

24 A. To me, that's common sense. It's common sense.

25 Q. And you knew that that very first week?

1 Q. Let's talk about that, because I need to go back now
2 then. Because on Saturday the 22nd, you identified the
3 panels being positioned on the northwest wall of the
4 gymnasium. What day was it when you came and saw them
5 moved to the southwest wall?

6 A. It had to be within that week I was here.

7 Q. Well, that's what I'm trying to find out.

8 A. Yeah. What day it was, I couldn't tell you. But it had
9 to be in that -- Because they sat there for quite a few
10 days on that southwest wall until I came in on that
11 Monday. So you got all the dates there. So this is the
12 first time I see them, is what day? The --

13 Q. You said it was Saturday the 22nd.

14 A. Okay. So then we've got -- I go on the ride with Nordeen
15 on the 25th.

16 Q. On the 25th.

17 A. They are moved after the 25th; I know that.

18 Q. But prior to the weekend?

19 A. Prior to the weekend. I think so.

20 Q. And --

21 A. But no, because I'm shocked when I get to work.

22 Q. On Monday, the 31st?

23 A. Yes. Right. So they had to be moved over that weekend,
24 you know what I mean?

25 Q. Okay. From the southwest corner?

1 A. Yeah.

2 Q. I'm trying to find when they were moved from the
3 northwest to the southwest, the first time they were
4 moved.

5 A. Yeah, see, I don't --

6 Q. And it would have been sometime the week of August 24th?

7 A. Right.

8 Q. But after your --

9 A. Right.

10 Q. -- venture with Mr. Nordeen?

11 A. Right.

12 Q. When you saw them moved and positioned now on the
13 southwest wall, they were on the south wall of the
14 gymnasium, correct?

15 A. Yep, right there (indicating).

16 Q. Not the west wall, bleachers, but on the --

17 A. Yep, on the south wall. If you just took them and just
18 did the same thing (gesturing).

19 Q. And again was it wood side against the wall, pad out?

20 A. Pad out.

21 Q. Wood side against pad, pad out?

22 A. Same thing. The same thing. Wood, pad, wood, pad.

23 Q. And at this time, was there any cones --

24 A. No.

25 Q. -- or tape around those areas?

1 A. No.

2 Q. Was there any blocking underneath them so it wouldn't
3 tilt?

4 A. No.

5 Q. In your police interview, you made a statement to the
6 effect, "They just leave things laying around here,
7 that's not how it's done," or words to that effect.

8 A. Right. Well, that's -- that's exactly how I felt, you
9 know.

10 Q. When you made that statement, were you specifically
11 talking about these panels, or was it other items too?

12 A. No, I was talking about them panels.

13 Q. Okay. Because -- Okay.

14 Now, when you're here and you're seeing this
15 transition take place, and you talk to A.J. about the
16 attitude being changed towards you, did you mention
17 anything to A.J. the week of August 24th, "What's the
18 deal with those panels?"

19 A. I don't think I said anything to him about it except for
20 the day when we moved them.

21 Q. Okay. How about when you went to Mr. Jayne and said,
22 "I need a boss," did you say, "What's the deal with those
23 panels that you and I saw in the gym a week ago?"

24 A. Nope. I think the only person I mention ed that to was
25 always Gwinn Cleaning and Maintenance, because I assumed

1 terrible safety hazard because those panels are not put
2 up, we need to take care of it," would you have stopped
3 and turned your attention to take care of that task?

4 A. Yeah, and I would have found five people, I would have.
5 If administration would have come to me and said, "Okay,
6 Trace, we got to get these panels out of here," I would
7 have formulated a plan, it would have took days, there
8 would have been every step in order because I would have
9 been in charge of it, and that's the way it would have
10 been done. And if it would have hauled Tom off his hind
11 end off that chair, he'd have come and done it, he would
12 have.

13 Q. "Tom" being Tom Jayne?

14 A. Jayne, yeah. Yeah. Sure. Because that's the kind of
15 people that were -- That's all that was in here, just
16 teachers and administrators and Gwinn Maintenance and
17 Cleaning. Sure. Had a plan been formulated, we wouldn't
18 be sitting here today.

19 Q. Well ...

20 A. It wasn't my call. I'm not trying to put the blame on
21 anybody either, but ... I was there.

22 Q. Can you turn to Exhibit 84. It's actually two pages.

23 A. Okay. There's something you're missing, though.

24 Q. Just please read the exhibit.

25 A. Oh, read this page. Okay. I'll read it.

1 Q. The second page too.

2 A. Oh.

3 MR. RYAN: Did you read it all the way to the
4 bottom?

5 THE WITNESS: Yeah. Oh, okay, there's a second
6 page.

7 MR. RYAN: The very top.

8 THE WITNESS: Okay.

9 BY MR. JANES:

10 Q. So I'm not missing -- I think you were going to say,
11 "Hey, the angle iron wasn't there," right? Was that
12 your -- You were going to make that point or not?

13 A. No, no, that wasn't my point. Go ahead.

14 Q. Okay. So the fact is, is that in June, June 23rd,
15 Mr. Sinnaeve is repeating his concern that the enclosure
16 needs to be put back up, the padding needs to be put up
17 around the stage; you see that, right?

18 A. Right.

19 Q. And he's bringing it to the administration's attention,
20 correct?

21 A. Correct.

22 Q. And the administration is bringing it up to the
23 superintendent's attention that something needs to be
24 done, correct?

25 A. Correct.

1 Q. And the superintendent brings it to the attention of
2 Gwinn Area Cleaning and Maintenance, and they said --
3 they made a suggestion of taping down the angle iron, and
4 the response was by the athletic director, "That doesn't
5 solve the problem." You saw that, right?

6 A. Right.

7 Q. And that was June 24th when the athletic director says,
8 "That doesn't solve the problem. Maybe I need to get
9 some grass roots to put the thing back up." That didn't
10 happen did it?

11 A. No.

12 Q. So when you say, "That's the kind of people around here,
13 they just don't let things happen," well, I want to take
14 question to that, because I've got a document now,
15 June 24th, where the administration is aware of a safety
16 hazard, and it doesn't get fixed, there's no plan.
17 Do you agree with me?

18 A. I agree with you, no plan, yes.

19 Q. Do you agree with this statement from your training and
20 experience in maintenance and custodial work that if a
21 room is not environmentally safe for its intended use,
22 you can't allow it to be used?

23 A. True.

24 Q. So if a gymnasium has a safety hazard that might be
25 presented for those who would use it for the purposes of

1 a gymnasium, you can't allow that gymnasium to be used
2 until it's fixed, true?

3 A. If administration knew that, yes.

4 Q. But here at Gwinn, it's clear by this document that they
5 were allowing their gym to be used --

6 A. Yes. Didn't bother stopping.

7 Q. -- when a safety hazard exists, true?

8 A. True. Can't fight that fact.

9 Q. And, in fact, as Exhibit 11 -- And I don't want to put
10 words into the mouth of the athletic director, but the
11 athletic director's words in Exhibit 11 was that, "It's a
12 terrible safety hazard right now because we have no wall
13 padding on that end of the gym."

14 A. And he was going to have basketball that Monday
15 morning -- or -- yeah. Tuesday morning he was going to
16 have the basketball team in there.

17 Q. So the fact is is that this terrible safety hazard had
18 been identified by the basketball coach in May of 2015?

19 A. Mm-hmm.

20 Q. Yes?

21 A. Sure. That's what it says.

22 Q. It didn't change?

23 A. No.

24 Q. And all of a sudden, it became an urgent it's got to get
25 done today on September 3rd?

1 A. That's what happened.

2 Q. No plan?

3 A. No plan.

4 Q. And every fiber of your body, the newbie, is going,
5 this ain't right?

6 A. I said that out loud.

7 Q. But the boss says it needs to be done, A.J., true?

8 A. True. He was my boss.

9 Q. And in your words, he's a hard man to say no to, true?

10 A. True. He was my brand new boss.

11 Q. What happened that morning on September 3rd, when you
12 have said to me now at least three different times the
13 week before on August 24th or the first Monday, Tuesday,
14 Wednesday, "If that gym is in use, I don't go into it"?

15 A. That's right. And I asked A.J. that.

16 Q. Well, what happened that morning when he says, "We need
17 to move these things in," and you get there, it's in use?

18 A. I asked him before we even grabbed them. I said, "Is
19 there anybody in the gym?" He said, "Yes, the
20 cheerleaders." I said, "Then let's not do this. I don't
21 want to do this today. The cheerleaders are in there."
22 "But they're leaving." He was adamant that they were
23 leaving. I mean, he didn't have a time. I said, "A.J.,
24 they are the last ones in there and they are leaving?"
25 He said, "Yeah, they'll be done in 10, 15 minutes."

1 And I had no way to say -- I didn't have a schedule or I
2 didn't have anything to say, "Well, you're wrong, A.J.,
3 they're not going to be gone in 15." I don't have that
4 information. So I say my piece, but I still go.

5 Q. We're going to get through this. Okay?

6 A. All right. All right.

7 Q. But even before you take on the task of even trying to
8 budge it off the ground, you're telling me A.J. comes and
9 he says -- he identifies two tasks; one has to do with
10 the light fixtures in the gymnasium, and, "Oh, by the
11 way, we've got to move these things into the gymnasium,
12 these panels" --

13 A. Yes.

14 Q. -- and you say immediately, "No way, no how, they're too
15 big"?

16 A. I said, "Yeah, A.J., this is crazy, they're too big, and
17 is there anybody in the gym?"

18 Q. Okay. Well, that's what I want to understand. Was it
19 simultaneous, or, "No way, no how, we can't do it," the
20 first thing, and then he responds, "Yeah, we can give it
21 a go"?

22 A. Yes, he responds, "We can give it a go."

23 Q. And was it at that time that you say, "Well, hey, I don't
24 like this, but is there anybody in the gym?"

25 A. Yes.

1 Q. Is that how the sequence happened?

2 A. Yes.

3 Q. So if I understand it correctly, the first thing then
4 is -- when he tells you about the task of moving them
5 into the gym, you're responding, "No way, no how, they're
6 too big, it's not safe for us to do it just by
7 ourselves," true?

8 A. True.

9 Q. Because -- "It's not safe for us" because your casual
10 observation of them the week before was that this is a
11 five-man job?

12 A. Sure. That's what I would have wanted on that job, yeah.

13 Q. But you didn't get the option of having a plan in place?

14 A. No.

15 Q. The boss says, "Well, we got to move them," right? Yes?

16 A. Yes. I'm sorry.

17 Q. And the next concern that you have is, "Well, okay, I may
18 put myself at risk and listen to the boss. If he says
19 we're going to move them, I guess I'm going to move
20 them."

21 A. Right.

22 Q. But the next question that goes in your mind is, "But
23 hey, A.J., is there anybody in the gym?"

24 A. (Nodding)

25 Q. You're concerned about other people's safety now, right?

1 MR. RYAN: What were those pages, Paul?

2 MR. JANES: 147 through 148.

3 MR. RYAN: Okay. Thanks.

4 BY MR. JANES:

5 Q. So you move the first panel into the gymnasium, and it's
6 the panel that would be on the northwest --

7 A. Yes.

8 Q. -- the left section if you were looking at the wall,
9 correct?

10 A. Correct.

11 Q. And when you're wheeling this object in, it's
12 weebly-wobbly, and you have to keep constant balance on
13 it?

14 A. Mm-hmm.

15 Q. Yes?

16 A. Yes. Yes.

17 Q. And if you don't keep constant balance on the
18 weebly-wobbly, it might fall and collapse and hurt you,
19 true?

20 A. Could have.

21 Q. Could have. And so you are concentrating -- I'm assuming
22 you're on one end and he's on the other end, yes?

23 A. He's on the front and I'm on the back.

24 Q. So he's pulling and you're pushing?

25 A. Yep.

1 Q. Yes?

2 A. Yes.

3 Q. And so when he turns, your testimony is because of the
4 weeble-wobble wheels, you have to -- it will make it
5 spin, so you have to push a counterforce to keep it
6 straight?

7 A. Yes.

8 Q. So you bring it up the hallway into the gymnasium, and
9 you bring it across?

10 A. Yes.

11 Q. And you said it -- Your testimony was that there was a
12 discussion at some point in time between you and A.J.,
13 "Do we put it against the cinder block wall, or do we put
14 it in the hole?"

15 A. Yes.

16 Q. When did that conversation happen?

17 A. We stopped. We stopped right in front of -- right in
18 front of the door -- the northwest door. We're right in
19 front of that door, and he said, "Do you think we should
20 put it against the wall, or should we put it in the
21 hole?" I said, "A.J., how many people are going to be
22 here to help us put this" -- "to move it? As long as we
23 have it on these carts, and it's just" -- "if this is
24 just going to be me and you, let's put it where it
25 belongs so that if it's just going to be me and you

1 again, we're not hauling it again from over here to over
2 here." So that's the discussion.

3 Q. But let me stop again. I got to back up because it's
4 clear in my mind.

5 A. Okay.

6 Q. At this point in time, were you thinking that you were
7 going to put them in and affix them in the hole that day?

8 A. No. I was going to put -- I was going to attach them to
9 the -- I mean, me and A.J. together were not going to
10 affixate them to the -- we were not going to affix them
11 to the wall.

12 Q. So before you pick up Panel 1 and move it, did you have
13 an understanding all you were going to do was transport
14 the panels from the back hall back into the gym?

15 A. Yes, to get them --

16 Q. Close?

17 A. To get them close, because Rob Soyring wanted them up
18 that Tuesday morning when he had basketball practice.
19 That was the goal, to make Rob happy, to get this off the
20 list, to get them panels in the gym and then -- Go ahead.

21 Q. No, you just --

22 A. That's all. That's what that was about.

23 Q. But this is Thursday. You have Friday yet, right?

24 A. I'm assuming that quite a few people weren't going to be
25 there Friday, you know, because it was going to be a

1 Q. But it was more straight up and down, and when you tested
2 it, you were pushing at your height of 5 foot 5, yes?

3 A. Yes. Okay.

4 Q. So when the two were in place, were they -- the center
5 points, were they butting up next to each other?

6 A. Oh, I have to really think about that. This one
7 (indicating), looking at it like this, was not touching
8 this one (indicating). It was slightly over the top of
9 it, you know what I mean?

10 Q. I mean, if it's over the top of it, it's touching it
11 then.

12 A. Well, if you butted two things together, they'd be even
13 (gesturing).

14 Q. Okay.

15 A. Okay? So this one was like that (gesturing). So they're
16 touching, but this one isn't butted up. We're not
17 talking even.

18 Q. So if I understand what you're saying to me then is that
19 the first panel is pushed in at an angle as best as you
20 can, and then when you bring the second panel in, a
21 portion of its back is actually on the front facing of
22 the first panel?

23 A. Yes, about that much (gesturing).

24 Q. Which also then makes it a reason why it's more up and
25 down -- straight up and down, because you can't kick it

1 where we're going to put them, and then like I said, my
2 theory of, if it's just going to be me and you again,
3 then we should put them where they belonged, or ...

4 Q. Was it communicated to you before the task started that
5 day that the two -- the plan was not just to move them
6 in, but to install it that day?

7 A. We weren't going to install them that day, not me and
8 A.J. No.

9 Q. You're certain about that?

10 A. I'm certain about that.

11 Q. Could you have done that?

12 A. Could me and A.J. have done it?

13 Q. Yes.

14 A. Yes, with difficulty. But the trigger is, we didn't have
15 the book to know how to put them together. I mean, I had
16 it formulated in my mind what ...

17 Q. I understand.

18 A. Okay.

19 Q. Now, I want to go through some of his testimony with you
20 too, because -- We'll have to read it together. I'm
21 sorry.

22 But at Page 66, Line 24, the question was
23 presented:

24 "And upon seeing the panels, at that point in
25 time did she verbalize an objection?"

1 could. I set them right there in the shadow of that ...

2 Q. Okay. Now, did you lean -- Were they vertical or were
3 they laying flat on the floor?

4 A. The brackets were only a handful. It's just a handful of
5 nuts and bolts and two brackets that go across the top,
6 now that I know that, that lock the top together.

7 Q. Okay. Were they in a bucket, or --

8 A. Nope. They were just laying there next to where I got
9 the hand carts.

10 Q. And on this third occasion now, you're in there in the
11 gym bringing the bracket material, did you make your
12 presence known to the cheerleaders?

13 A. No.

14 Q. Did the cheerleaders have any recognition of your
15 presence in the gymnasium?

16 A. Well, things were different when I got back. They were
17 out into more of the floor. Not -- still on that -- past
18 the -- what do you call that -- the center line. They
19 were still on that end of the gym. But they were
20 mingling more. They were -- They weren't in the
21 formation. They were talking and -- like they were
22 waiting for something or waiting for somebody. I don't
23 know, it just -- it was a different atmosphere. And so I
24 put the brackets down, I looked at them all, and I just
25 walked out.

1 Q. Okay.

2 A. I don't know, you know, eye contact or anything. Just
3 walked back out. But they weren't in the formations they
4 were in.

5 Q. Okay.

6 A. And there was more light. There was a little more light
7 on. And I don't know if that's because they come on with
8 motion. Some of the lights in there come on with motion.
9 And when I went in the third time, there was more light.

10 Q. Okay.

11 A. That's -- And then I walked out.

12 Q. You're going to love this question.

13 A. I know.

14 Q. You know what it is.

15 The third time you were in there, what time was
16 that?

17 A. It's only a couple of minutes.

18 Q. Would it have been about a quarter to 10:00?

19 A. I wouldn't say it was that late. Maybe.

20 MR. RYAN: Tracy, don't guess.

21 THE WITNESS: Oh, okay.

22 MR. RYAN: If you don't know, you don't know.

23 BY MR. JANES:

24 Q. And I don't want you to guess. Okay?

25 A. Okay. I don't know.

1 MR. RYAN: You've been guessing the whole time
2 at times.

3 THE WITNESS: Yeah.

4 MR. RYAN: If you don't know, you don't know.

5 THE WITNESS: I don't know.

6 MR. RYAN: It's okay to say that.

7 THE WITNESS: Okay.

8 BY MR. JANES:

9 Q. But in any event, the practice itself, are you telling me
10 that there's no structured instruction going on at that
11 point in time? The kids seem to be milling about
12 without --

13 A. Not like that. Not like -- Just kind of standing there.
14 Not cheering. Because I had heard them cheering earlier,
15 you know. So no, there was no cheering. Like they were
16 getting something. I don't know.

17 Q. It may have been a break?

18 A. Yeah, sure, anything like that. That's what it kind of
19 looked like, to tell you the truth. They looked like
20 they were, okay, well, just take a pause here, you know,
21 regroup.

22 Q. But now the cheerleaders are no longer in line formation
23 as indicated on the court. They're now more out towards
24 center court just walking, mingling around?

25 A. Not haphazardly. They were still on that side of the

1 court.

2 Q. They were still on the south half, but they were farther
3 out into the --

4 A. Just a little bit, yeah. Maybe right out in front of the
5 basket now, not -- Not the full length of it by any
6 means.

7 Q. I gotcha.

8 A. Okay.

9 Q. But whatever it was, the north end of the gym now had
10 more lights on?

11 A. There was more light. I remember there being more light.
12 Where it came from I can't tell you, but there was more
13 light.

14 Q. Okay. And you drop those brackets off. In your mind,
15 your plan was, I'm tacking those things up. I'm finding
16 a way to get it done, right?

17 A. Yes, sir.

18 Q. Because in your mind, you did not have confidence to
19 leave them in the orientation that they were because
20 something could happen, right?

21 A. Yes, sir.

22 Q. And there was no cones or tapes or anything else?

23 A. No.

24 Q. But in your mind, you had thought that morning, maybe we
25 should put some cones or tapes up, right?

1 A. I did. I didn't know where I was going to get a cone,
2 though.

3 Q. I hear you.

4 A. I don't have a cone.

5 Q. Well, that's what I was going to ask you.

6 In the shop class -- In your --

7 A. In my maintenance shop?

8 Q. Are there cones or things like that?

9 A. I didn't see any.

10 Q. I mean, I've got to believe that you're mopping floors
11 around the school. At some point in time, you put out a
12 placard, caution, wet floor, or something like that.

13 They got to be somewhere.

14 A. Well, most of that stuff is in Gwinn Maintenance and
15 Cleaning maintenance -- their shop, because they're the
16 ones that put out the cones and the -- you know ...

17 Sure.

18 Q. Did you know they had those?

19 A. Well, I know they got wet floor signs, but I don't know
20 if they had cones. I don't know anything about that.

21 Q. Did you know they had them as of the day you were doing
22 this task? Did you know that there was some kind of
23 caution placards in --

24 A. No, I did not know that. I didn't know if they had them,
25 no.

1 A. No, I didn't take it. I didn't grab it.

2 Q. You didn't?

3 A. I didn't. Because --

4 Q. Okay. Tell me what happens then.

5 A. Well, I want to make sure that Tom Jayne knows I'm
6 staying. So as soon as I get done talking to Dylan, I
7 run down to Tom's, to the office, to say, "Hey, I'm
8 getting the drill, Dylan is going to help me. Do I have
9 more time?" He comes out, he goes, "Don't you worry
10 about your time. You go do what you got to do."

11 Q. You find Tom Jayne here in central offices?

12 A. Yeah. He came out this door. I was standing in there.

13 Q. And you were right out where --

14 A. Yeah.

15 Q. -- Jane Flourre and Vicki Nelson's desks are?

16 A. Yep.

17 Q. And you talked to Tom Jayne in that area?

18 A. Yep.

19 Q. And do you tell Tom Jayne, "Tom, we just brought those
20 panels into the gym, I'm going to work late to get them
21 secured to the wall"?

22 A. I can tell you what I said. Hang on. So I'm standing
23 there. He comes out. And I had my thumb up like this
24 (demonstrating). I said, "Hey, Tom, hate to bug you,
25 man, but I'm going to need more time. I got to get them

1 panels in the gym zipped to the wall." And he goes,
2 "Don't worry about it. Go do what you got to do." And I
3 turned to go, and that was it.

4 Q. A woman was coming down the hall with two small children?

5 A. Two small children, one by each hand, and she says -- I
6 said -- She's screaming. Now there's people yelling.
7 And I'm like, "What's going on?" She said, "The gym."
8 And I said, "The wall fell, didn't it?" And she goes,
9 "How do you know?" I said, "Did the wall fall?" She
10 said, "The children are scared." She said, "The children
11 are scared." Okay, I started to run, but in my mind I'm
12 thinking that the wall fell and scared them, it made a
13 crash and scared everybody.

14 Q. In your mind when you hear this news that the wall fell,
15 did you have in your mind which section of wall fell?

16 A. Yep.

17 Q. Which section of wall?

18 A. The right-hand side.

19 Q. Okay. The side that you knew was not secure?

20 A. That's the side I wanted to get zipped to the wall.
21 Intuition is a horrible thing sometimes.

22 Q. Well, the woman that was bringing the girls in hand, do
23 you know who she was?

24 A. I have no idea. I didn't know half the people in that
25 gym when I got down there. I had never seen them all

1 A. Not while I was there, yes.

2 Q. Okay. The only movement of the panel that you are aware
3 of is that, obviously, it falls down and somebody lifts
4 it back up. But when you come in, they look to be the
5 similar orientation as you had left them with A.J., true?

6 A. Yes. Yes.

7 Q. Did Dylan Hart come in at any point in time to assist you
8 in holding up the panels?

9 A. Yes.

10 Q. When did that happen?

11 A. Dylan came in the back door, and I was -- I had the panel
12 like this (gesturing), and I was just staring straight at
13 the ground. And Dylan came up on my left-hand side. And
14 he comes and gets in front of me, and I go, "Dylan, go
15 down to the other end of this panel and just hang onto
16 it, okay, just hang onto it, all right?" And he goes,
17 "What happened?" I go, "We were too late, buddy. We
18 were too late." And so he stood there as long as I did,
19 and we held -- we stood there staring at each other
20 'till ... And that was it.

21 MR. SHERIDAN: Just, when you say "came in the
22 back door," if we look at Exhibit 106, are we talking the
23 exterior door on the north side of the gym?

24 THE WITNESS: Yes. I believe he came in
25 through this crash door here (indicating). There's a

1 crash door that comes out.

2 MR. SHERIDAN: Right adjacent to the alcove?

3 THE WITNESS: Yeah. Yeah. There's a north
4 door there. And he came in that door, and we were all
5 standing right here (indicating). He came around me.
6 And I asked him -- I said, "Get on that end and just
7 stand there," and he did.

8 BY MR. JANES:

9 Q. Did anybody -- Well, let me ask this:

10 You went into the gym and you saw the little girl.
11 I don't know if you verbalized, "Where did the little kid
12 come from," or did you think --

13 A. I said it out loud.

14 Q. You said it out loud. Did anybody answer that question?

15 A. No.

16 Q. Okay. At any point in time subsequent, did you find out
17 an understanding of what happened, how the kids were
18 there?

19 A. I don't personally know how the kids got there, but I
20 knew who they belonged to, yeah.

21 Q. Who did they belong to?

22 A. Mr. and Mrs. Filizetti.

23 Q. Okay. The cheerleading coach's children?

24 A. Yes, the cheerleading coach. Yeah, that would be
25 correct. Yes.

1 Q. You don't have any problems with cheerleading coaches
2 bringing their kids to practice, do you?

3 A. No. I don't have anything to do with that, you know.

4 Q. A gymnasium is supposed to be safe for cheerleading
5 practice, isn't it?

6 A. I would like to think all schools are safe. That's where
7 we send our kids. Yeah.

8 Q. A gymnasium is supposed to be safe not only for
9 cheerleading practices, but for four-year-old kids too,
10 right? True?

11 A. I would hope true. I would hope true.

12 Q. But it was because of the activity that Mr. Filizetti
13 insisted that had to be done during cheerleading practice
14 that this gymnasium was not safe that day, true?

15 A. I'm not going to put it all on him.

16 Q. Well, but it was not safe that day because there was an
17 activity -- the repair activity was underway, correct?

18 A. In my opinion, yes.

19 Q. I've shown you documents that this condition, the hazard
20 of these pads not being in place were known by the school
21 administration since May.

22 There was plenty of opportunity to do this task at
23 other points in time, true?

24 A. True. Apparently true.

25 Q. Unfortunately, you didn't know about those things --

1 is an accident. It's nobody's fault. This is nobody's
2 fault." Because he was trying to de-escalate, I'm sure.
3 You know, hey, it was ugly, you know.

4 Q. I know it was ugly. But I mean, when he's saying that,
5 I mean, obviously are you having a different mind --
6 thought going through --

7 A. Oh, I'm freaking out.

8 Q. Did you have a different thought going through your mind?

9 A. Sure. Yeah.

10 Q. Did you say it was somebody's fault?

11 A. No, I didn't say nothing.

12 Q. But did you think it to yourself it was somebody's fault?

13 A. Mm-hmm.

14 Q. Yes?

15 A. Yes.

16 Q. What was going through your mind when he's saying that?

17 A. I didn't make it in time.

18 Q. Okay. The next photograph is the third photograph, and I
19 want to draw attention to the lights.

20 A. Okay.

21 Q. When you said that you noticed more lights were on when
22 you came in with the brackets, does the lighting that you
23 see illuminated in the third photograph sort of trigger
24 with what you're saying was the lighting when you came in
25 with the brackets?

1 the back side of the wall, correct?

2 A. Yes.

3 Q. And you can see the padding is affixed to the front side
4 of it, right?

5 A. Yes.

6 Q. Okay. And when it was -- Did you make an observation
7 that day, if you were standing there holding it in a
8 vertical like this (gesturing), if there was a tendency
9 of it to want to fall one way or the other?

10 A. Oh, if you were just standing there holding it?

11 Q. Yes. If you were to let it go -- If it was standing just
12 vertical like that (gesturing) and you were to release
13 it, which way would it have fallen?

14 A. Toward the pads.

15 Q. Okay. Because the weight is on the front?

16 A. Sure. Yes.

17 Q. In this photograph, behind it on the floor you see this
18 white -- it looks white and a stripe on it on the floor,
19 then black, and then the stage enclosure area; do you see
20 that?

21 A. Yes.

22 Q. Okay. Because of the orientation of the wall, you would
23 agree with me that some portion of the 2-by-4 base would
24 have had to cross whatever this white surface is on the
25 floor, correct?

1 A. There was -- If you're trying to get at caution tape, I
2 didn't have any of that, I know I didn't.

3 Q. Rope?

4 A. Rope, possibly, if I would have kept digging. I could
5 have probably got some. But -- Because the maintenance
6 crew -- the Gwinn stuff was still there. You know, they
7 had buckets all over.

8 Q. But in your area you had trash cans and, at least, rope?

9 A. Trash cans I'll say yes to. Rope, not sure.

10 Q. Okay. When you bring the first one in and you prop it up
11 on the left with A.J., you both left the gym, correct?

12 A. Yes, sir.

13 Q. For some period of time the first one is up completely
14 unattended?

15 A. Yes, sir.

16 Q. Cheerleaders are in the gym at that time?

17 A. Yes, sir.

18 Q. Nothing prevented you or A.J., when you're leaving the
19 gym, to simply put it down on the floor flat, fair?

20 A. Fair.

21 Q. Second one comes in. You and A.J. prop it up as you've
22 described in great detail. I won't go into that.

23 Nothing prevents you and A.J., when you leave the
24 second time with A.J., to set it down on the floor, fair?

25 A. Fair.

1 Q. When either one are set down on the floor -- When both
2 are set down on the floor, I should ask, they're not a
3 risk of falling on someone?

4 A. Oh, you mean lay them down on the floor?

5 Q. Lay them down on the floor.

6 A. Lay them down on the floor.

7 Q. Yep.

8 A. Yeah, you're absolutely right. Sure.

9 Q. Nothing prevented you and A.J. from doing that when you
10 both left the gym, he on two occasions, you on three
11 occasions, correct?

12 A. Correct.

13 Q. Had they been laid down on the floor, they're no longer a
14 hazard of falling down on someone, correct?

15 A. Correct.

16 Q. And then when you come back in with the help you're going
17 to try to get -- Rob mentioned the basketball players,
18 correct?

19 A. True.

20 Q. -- or whomever you were going to get, you simply pick
21 them up and then do the task, i.e., secure them, either
22 tack them in as you said, or do the full-blown job, fair?

23 A. Fair.

24 Q. And had that example been done, this tragic incident
25 doesn't happen, correct?

1 A. Right. Okay.

2 Q. And my simple question is, give me your best estimate
3 from the time you and A.J. leave the first panel
4 unattended until you hear the screams --

5 A. 45 minutes; that's a pretty good estimate.

6 Q. Okay. From your earlier testimony, it sounds like there
7 was uncertainty in your mind when you bring the second
8 one in whether or not -- Well, strike that.

9 You knew that A.J. was not going to help you either
10 tack them in or attach them permanently, fair?

11 A. Fair.

12 Q. Yeah. You knew you couldn't do it by yourself?

13 A. Yes.

14 Q. What you heard from Rob is, the priority is wait 'till
15 Tuesday morning early, and utilize the basketball team?

16 A. Yes.

17 Q. You were not comfortable with that?

18 A. Yes.

19 Q. That amount of time of those things propped in that
20 alcove would have been a major problem, correct?

21 A. Yes.

22 Q. So you elected not to follow what Rob suggested, just
23 wait 'till Tuesday, correct?

24 A. Correct.

25 Q. You took it upon yourself, let's at least get this thing

1 tacked in?

2 A. Yes.

3 Q. Meaning, secured to the -- each --

4 A. To the sides.

5 Q. -- to the sides, not attaching the middle and the
6 brackets and all that other stuff?

7 A. Right. That takes more than one person.

8 Q. And probably a fair amount of time?

9 A. Yes.

10 Q. But your conclusion was, at least tacking them in when
11 I'm going to leave for the fourth time permanently is
12 going to be the safer option?

13 A. Something. Better than nothing. We know the result of
14 nothing.

15 Q. Yeah. And when this happened, you had left for the third
16 time, and you're at Tom's office when you hear the
17 screaming?

18 A. Yes.

19 MR. SHERIDAN: I'm all set. I appreciate your
20 patience.

21 MR. RYAN: Okay. You're done, Trace.

22 MR. SHERIDAN: Are you all set?

23 MR. JANES: Yeah, I'm done.

24 (At 4:35 p.m., witness excused)

25

Defendant's Answer and Affirmative Defenses

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MARQUETTE

WAYNE FILIZETTI, as Personal Representative of
the Estate of Amarah Filizetti, deceased;
STACEY FILIZETTI;
WAYNE FILIZETTI, as Next Friend of
LAILA FILIZETTI, a minor; and
WAYNE FILIZETTI, as Next Friend of
MELISSA FILIZETTI, a minor;

File No. 16-54781-NO

Judge Jennifer A. Mazzuchi

Flaintiffs,

v

GWINN AREA COMMUNITY SCHOOLS;
WEST EDUCATIONAL LEASING INC. d/b/a
PROFESSIONAL CONTRACT MANAGEMENT INC.,
a Michigan Corporation;
TRACY BELUSAR; and
ANTHONY J. FILIZETTI;

Defendants.

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**ANSWER, AFFIRMATIVE DEFENSES AND RELIANCE ON JURY DEMAND OF
GWINN AREA COMMUNITY SCHOOLS ("GWINN"), TRACY BELUSAR
("BELUSAR") AND ANTHONY J. FILIZETTI ("AJ FILIZETTI")**

NOW COME, Gwinn, Belusar and AJ Filizetti, by Ryan Law Offices, for their Answer and Affirmative Defenses to Complaint and Jury Demand of Wayne Filizetti as personal representative of the Estate of Amarah Filizetti, deceased, Stacey Filizetti, Wayne Filizetti, as Next Friend of Laila Filizetti and Melissa Filizetti, hereafter ("Filizettis" or individually as "Wayne," "Stacey," "Laila," or "Melissa") and state:

VENUE/JURISDICTION

1. Gwinn, Belusar and AJ Filizetti admit.
2. Gwinn, Belusar and AJ Filizetti admit.
3. Gwinn, Belusar and AJ Filizetti admit.

4. Gwinn, Belusar and AJ Filizetti admit.
5. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information relating to West Educational Leasing Inc. d/b/a Professional Contract Management Inc. ("PCMI") and for the reason that such allegation does not relate to Gwinn, Belusar or AJ Filizetti.
6. Gwinn, Belusar and AJ Filizetti deny that Belusar was an employee within the scope of her employment with PCMI at the time of the incident complained of and was, at that time, effectively an employee of Gwinn residing in Marquette County, Michigan.
7. Gwinn, Belusar and AJ Filizetti admit.
8. Gwinn, Belusar and AJ Filizetti admit.
9. Gwinn, Belusar and AJ Filizetti admit.

GENERAL ALLEGATIONS

10. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-9 above as if more fully stated.
11. Gwinn, Belusar and AJ Filizetti admit.
12. Gwinn, Belusar and AJ Filizetti admit.
13. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific reference identifying which health, safety, fire, building, and rehabilitation statutes, codes and regulations are referred to. Gwinn therefore moves for more definite statement and leaves Filizettis to their proofs.
14. Gwinn, Belusar and AJ Filizetti admit.
15. Gwinn, Belusar and AJ Filizetti admit that an alcove exists in the north perimeter wall. They neither admit nor deny that the purpose of the alcove was to store a collapsible stage.
16. Gwinn, Belusar and AJ Filizetti admit.
17. Gwinn, Belusar and AJ Filizetti deny that between 1963-2010 crush/sport padding was affixed to the collapsible stage for the reason that such claim is untrue. There was no padding affixed to the moveable stage during that period of time based upon information and belief at the time of making this answer.
18. Gwinn, Belusar and AJ Filizetti admit based upon information and belief at the time of making this answer that the CADD class designed and constructed the portable

- graduation stage cover, and deny that the stage cover was intended to be or constitute a “gym wall.”
19. Gwinn, Belusar and AJ Filizetti admit that the components of the portable graduation stage cover used wood 2 x 6s, 2 x 4s, 1 x 4s and plywood. It is denied that the portable graduation stage cover constitutes a gym wall, partition wall, partition or structural component of a building wall or partition. The plans and specifications for construction specifically utilize the terminology portable graduation stage cover and not “gym wall,” “partition wall” or “partition.”
 20. Gwinn, Belusar and AJ Filizetti admit that the Construction of School Buildings Act at MCL 388.851a(b) and MCL 380.443(2) states substantially what is alleged. Gwinn, Belusar and AJ Filizetti deny that the portable graduation stage cover was the alteration, construction or remodeling of panels, or alteration or construction of structural components including walls, roofs, panels for the reason that such terms and definitions do not apply to the portable graduation stage cover. The portable graduation stage cover did not constitute “remodeling” as used in the Construction of School Buildings Act, at MCL 388.851(a)(b) or Michigan’s Revised School Code at MCL 380.443(2). Such claim is denied since, upon information and belief, it does not relate to this matter. They leave Filizettis to their proofs.
 21. Gwinn, Belusar and AJ Filizetti deny for the reason that such claim is untrue.
 22. Gwinn, Belusar and AJ Filizetti deny that the Construction of School Buildings Act, MCL 388.855a(5) mandates that any “remodeling of an existing school” must conform to the requirements of the Act. The quoted section states: (5) This Act applies to the remodeling of school buildings and other buildings to be used for school purposes.” The portable graduation stage cover did not constitute “remodeling” as used in the Construction of School Buildings Act, at MCL 388.855(a)(5) or Michigan’s Revised School Code at MCL 380.443(2). Such claim is denied since, upon information and belief it does not relate to this matter and therefore leave Filizettis to their proofs.
 23. Gwinn, Belusar and AJ Filizetti admit that MCL 388.851(1)(b) and (c) require that walls and panels could be constructed with fire resisting materials. The portable graduation stage cover did not constitute “remodeling” as used in the Construction of School Buildings Act, at MCL 388.851(1)(b) and (c). Such claim is denied since, upon

- information and belief it does not relate to this matter and therefore leave Filizettis to their proofs.
24. Gwinn, Belusar and AJ Filizetti deny. The allegation is a claim of law, which requires no answer. The portable graduation stage cover did not constitute “remodeling” as used in the Construction of School Buildings Act, at MCL 388.855(a)(7). Such claim is denied since, upon information and belief it does not relate to this matter and therefore leave Filizettis to their proofs.
 25. Gwinn, Belusar and AJ Filizetti admit that R29.1904(1) requires that plans and specifications for a school remodeling project be submitted to the Bureau of Fire Services, deny that R29.1904(1) makes reference to review and approval, and deny the applicability of such rule to the Gwinn portable graduation state cover which was not a school remodeling project. The portable graduation stage cover was not a remodeling project or alteration of the gym as contemplated by the Department of Licensing and Regulatory Affairs (“LARA”) R29.1904(1).
 26. Gwinn, Belusar and AJ Filizetti deny the applicability of the International Building Code, Michigan’s Rehabilitation Code for Existing Buildings, and Michigan Building Codes to the CADD class’ design, construction and installation of the portable graduation stage cover, deny that such is an “alteration” of the gym, and move for more specific allegation citing particular provisions of each of the above codes, which Filizettis claim apply. Such allegation is further denied since it constitutes a claim of law.
 27. Gwinn, Belusar and AJ Filizetti deny the applicability of the International Building Code, Michigan’s Rehabilitation Code for Existing Buildings, and Michigan Building Codes to the CADD class’ design, construction and installation of the portable graduation stage cover, deny that such is an “alteration” of the gym, and move for more specific allegation citing particular provisions of each of the above codes, which Filizettis claim apply. Such allegation is further denied since it constitutes a claim of law.
 28. Gwinn, Belusar and AJ Filizetti deny alteration of the gym as alleged by Filizettis, and deny that the portable graduation stage cover caused Gwinn High School gym to be in violation of any existing laws, codes, or administrative rules.

29. Gwinn, Belusar and AJ Filizetti deny that the portable graduation stage cover as installed violates existing laws or codes, violates the International Building Code, Michigan's Rehabilitation Code for Existing Buildings, or Michigan Building Codes, and deny that there was any prohibition to its installation within the gym for the reason that such claims are untrue.
30. Gwinn, Belusar and AJ Filizetti deny violation of Michigan statute and regulation, deny requirement of submission to the Bureau of Fire Services, deny failure of submission to Gwinn Schools' superintendent for criticism, suggestion and approval prior to commencement of the project for the reason that such claims are untrue.
31. Gwinn, Belusar and AJ Filizetti deny applicability of R29.1905(1)(a) and (b) for the reason that such rule does not apply to the portable graduation stage cover. The rule contemplates a substantial project, not moving a portable graduation stage cover, where architects, engineers, or owners construction representatives provide notification to the Bureau of Fire Services (a) When a building is framed and mechanical systems are substantially complete but before concealment, or (b) upon completion of construction. The portable graduation stage cover was not a remodeling project or alteration of the gym as contemplated by LARA, R29.1905. Gwinn, Belusar and AJ Filizetti deny the remaining allegations.
32. Gwinn, Belusar and AJ Filizetti deny violation of any statute related to construction of the portable graduation stage cover, deny a statutorily defective structural component fixture for the reason that such stage cover is not defective, was not a structural component, and is not a fixture to be incorporated in the gym wall. The same was moved in and out of the gym every year since 2010.
33. Gwinn, Belusar and AJ Filizetti deny that the portable graduation stage cover was defective, deny a duty to inspect, maintain and repair the gym, and state that they fulfilled all legal duties.
34. Gwinn, Belusar and AJ Filizetti admit.
35. Gwinn, Belusar and AJ Filizetti deny Gwinn's Policies 7430 and 8405 mandated compliance with Maintenance standards for the reason that such claims are untrue. Policy 7430 is directed toward compliance with OSHA standards and Policy 8405 relates to policies directed at environmental health and safety, and promotion of reasonable policies in compliance with law to promote same.

36. Gwinn, Belusar and AJ Filizetti admit use of SchoolDude, deny that SchoolDude allows immediate reporting of a hazardous condition to maintenance personnel so repairs can be undertaken for the reason that such claim is untrue. SchoolDude allows submission of emails and/or reports to school personnel including maintenance personnel. This system is designed to allow recordation and completion of maintenance tasks in a timely manner. Gwinn, Belusar and AJ Filizetti deny that all conditions reported are hazardous, and deny that reporting requires alleviation of conditions in all circumstances for the reason that such claims are untrue.
37. Gwinn, Belusar and AJ Filizetti deny that the portable graduation stage cover constituted a gym wall, but admit that the portable graduation stage cover was disassembled, stored and reassembled for graduation ceremonies between 2010-2015.
38. Gwinn, Belusar and AJ Filizetti admit that the annual disassembly, storage and reassembly were performed at the direction of the CADD instructor and/or possibly with maintenance personnel. It is denied that disassembly, storage and reassembly constitute "maintenance."
39. Gwinn, Belusar and AJ Filizetti deny that the portable graduation stage cover was a gym wall and admit that the CADD instructor and students would disassemble and transfer the portable graduation stage cover to storage and would reinstall same in reverse fashion after graduation occurred.
40. Gwinn, Belusar and AJ Filizetti admit that the CADD class fabricated metal carts to transport the portable graduation stage cover to and from storage. Gwinn, Belusar and AJ Filizetti deny that the separate portable graduation stage cover components constituted "cumbersome partitions" for the reason that the portable graduation stage cover was not a "partition" as that term is used in statutes and rules identified above or otherwise applicable to school buildings.
41. Gwinn, Belusar and AJ Filizetti admit that the CADD instructor, in the spring of 2015, prepared a manual, which provided instructions for the removal and reinstallation of the portable graduation stage cover. The claim of cautionary instructions is denied for the reason that such allegation is untrue.
42. Gwinn, Belusar and AJ Filizetti deny "maintenance procedures" to access the portable graduation stage cover, and further state:
 - a. Admit.

- b. Admit that an individual unbolts the rear braces and anchors securing 2 x 4s to the concrete block gym wall, concrete floor and one another. They deny that the panels constitute "partitions."
 - c. Admit that the fixation screws at the right end of the right panel on the exterior side are removed. They deny that the panels constitute "partitions."
 - d. Admit that an individual behind the right panel would push it forward and admit that the panel would be loaded onto a cart with individuals positioned providing vertical support. They deny that the panels constitute "partitions."
 - e. Admit that once loaded onto a cart a panel would be moved to storage. They deny that the panels constitute "partitions."
 - f. Neither admit nor deny the location and manner of storage, but leave Filizettis to their proofs. They deny use of the term "partitions" as that term is used in statutes and rules identified above or otherwise applicable to school buildings.
 - g. Admit.
43. Gwinn, Belusar and AJ Filizetti deny the allegations for the reason that such claim is untrue. On or about September 3, 2015 all angle iron floor and wall brackets had been removed and were not visible due to removal.
44. Gwinn, Belusar and AJ Filizetti neither admit nor deny actions or activities of prior Gwinn administration for lack of specific information at the time of making this answer. Filizettis are left to their proofs. Gwinn, Belusar and AJ Filizetti deny the disassembly, removal, storage or reinstallation of the portable graduation stage cover was dangerous, or constructed in violation of Michigan statute for the reason that such claim is untrue. They deny use of the term "partitions" as that term is used in statutes and rules identified above or otherwise applicable to school buildings.
45. Gwinn, Belusar and AJ Filizetti deny that the Gwinn Schools' maintenance employee retired after the 2013-14 school year for the reason that such claim is untrue. He retired 9/1/11. He thereafter was a contract employee through PCMI.
46. Gwinn, Belusar and AJ Filizetti admit.
47. Gwinn, Belusar and AJ Filizetti admit that the Agreement for Human Resources Staffing Services required PCMI to provide tools and equipment not specific to the district or workspace in which the PCMI employee is performing duties. They deny

- the Agreement specifically requires tools and equipment be provided by PCMI to perform maintenance within Gwinn Schools for the reason that such claim is untrue.
48. Gwinn, Belusar and AJ Filizetti admit.
 49. Gwinn, Belusar and AJ Filizetti deny use of the term "gym wall" but admit disassembly and storage of the portable graduation stage cover.
 50. Gwinn, Belusar and AJ Filizetti admit that effective June 30, 2015 the CADD instructor resigned and terminated his employment with Gwinn School.
 51. Gwinn, Belusar and AJ Filizetti admit the portable graduation stage cover was not returned to the gym and reinstalled after graduation, neither admit nor deny the reason was the resignation of the CADD instructor, and deny that the portable graduation stage cover constituted a gym wall.
 52. Gwinn, Belusar and AJ Filizetti deny that a Gwinn School employee recognized that the missing portable graduation stage cover created a dangerous condition within the gym for the reason that such claim is untrue. They deny that the portable graduation stage cover constituted a gym wall.
 53. Gwinn, Belusar and AJ Filizetti admit that a request work order number 4519 was entered into SchoolDude on May 29, 2015, deny actual completion 10/28/15 for the reason that such is the date of entry into SchoolDude, not the date of reinstallation of the portable graduation stage cover which occurred on or about September 3, 2015. They deny this constituted "maintenance."
 54. Gwinn, Belusar and AJ Filizetti deny for the reason that such claim is untrue. They have no specific information regarding failure to process the work order on or before June 3, 2015. They admit that the Gwinn High School principal had tendered his resignation and would soon no longer be employed with Gwinn.
 55. Gwinn, Belusar and AJ Filizetti admit that the high school gym was open for use by the general public in the summer 2015. They deny that the block gym wall required repair for the reason that such claim is untrue, deny that reinstallation of the portable graduation stage cover was part of the gym wall, and admit that the portable graduation stage cover was not reinstalled in the summer 2015, and deny reinstallation constituted wall repair.
 56. Gwinn, Belusar and AJ Filizetti admit the Gwinn Schools athletic director inspected all athletic facilities on August 16, 2015.

57. Gwinn, Belusar and AJ Filizetti deny that the athletic director advised a representative of Gwinn Area Cleaning and Maintenance of conditions within athletic facilities requiring repair for the reason that such claim is untrue. Gwinn Area Cleaning and Maintenance, based upon information and belief, did not perform repairs at Gwinn High School facilities. It performed installation, removal, assembly and preparation of various athletic facilities.
58. Gwinn, Belusar and AJ Filizetti admit.
59. Gwinn, Belusar and AJ Filizetti admit.
60. Gwinn, Belusar and AJ Filizetti admit.
61. Gwinn, Belusar and AJ Filizetti admit.
62. Gwinn, Belusar and AJ Filizetti admit.
63. Gwinn, Belusar and AJ Filizetti admit.
64. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information, but leave Filizettis to their proofs.
65. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information, but leave Filizettis to their proofs.
66. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information, but leave Filizettis to their proofs.
67. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information, but leave Filizettis to their proofs.
68. Gwinn, Belusar and AJ Filizetti deny that approximately 9:15 a.m. Stacey with the girls rejoined the cheerleading practice for the reason that such claim is untrue.
69. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information, but leave Filizettis to their proofs.
70. Gwinn, Belusar and AJ Filizetti admit.
71. Gwinn, Belusar and AJ Filizetti admit a conversation regarding sink repair took place and that the repair could wait, and admit that Belusar was asked to move the portable graduation stage cover into the gym for installation. They deny that the portable graduation stage cover constituted a "gym wall stage cover" for the reason that such claim is untrue.
72. Gwinn, Belusar and AJ Filizetti admit that on the way to Belusar's office near the rear hallway, the portable graduation stage cover was stored against a wall for the summer

2015. They deny that the portable graduation stage cover constituted a “gym wall stage cover” for the reason that such claim is untrue.
73. Gwinn, Belusar and AJ Filizetti deny that Belusar advised AJ Filizetti the panels were too large for the two of them to safely move for the reason that such claim is untrue.
74. Gwinn, Belusar and AJ Filizetti admit that the portable graduation stage cover was to be installed, deny that Belusar protested, and deny that AJ Filizetti ignored Belusar’s statements for the reason that such claims are untrue.
75. Gwinn, Belusar and AJ Filizetti admit that they transferred the first and second portable graduation stage cover panels from storage and leaned the panels against the corner of the cinder block gym wall and stage.
76. Gwinn, Belusar and AJ Filizetti deny that the second portable graduation stage cover panel was moved into the gym and positioned at the opposite side of the alcove after Stacey and the triplets had arrived for the reason that such claim is untrue. The second panel was moved into the gym and positioned prior to Stacey and the triplets arriving at the gym.
77. Gwinn, Belusar and AJ Filizetti admit that the gym was being utilized for a high school cheer squad practice. There were no young children in the gym when the portable graduation stage cover panels were brought into the gym. Since the alcove was at the opposite end of the gym from where the cheerleader practice was, there was no need to secure, anchor or brace the portable graduation stage cover panels since the cheerleaders were high school students and Stacey was an adult coach. The area where the portable graduation stage cover was to be installed was darker than the cheerleader practice area. There were no students or adults anywhere near the vicinity of the alcove. Belusar and AJ Filizetti are parents. Belusar is a grandmother. If there had been little children in the gym, the portable graduation stage cover panels would have been removed from the gym. They carefully leaned the panels in the area intended for installation. They deny need to secure, anchor or brace the panels because there was no danger of unintended collapse at the time the panels were brought to the gym.
78. Gwinn, Belusar and AJ Filizetti admit that there was no safety railing placed near the portable graduation stage cover panels since there were no children below high school age in the gym, there were no little children in the gym at the time, the panels were

- placed in a darker portion of the gym across the gym from where the adolescent cheerleaders and adult coach were. They deny that the portable graduation stage cover end of the gym was under repair for the reason that such claim is untrue.
79. Gwinn, Belusar and AJ Filizetti admit that no warning was given to the cheerleader squad after the portable graduation stage cover panels were placed at the opposite end of the gym. There were no little children in the gym. It was not necessary to provide warnings to the high school students and their adult coach who were at the other end of the gym under lighting. The panels were moved and placed openly, obviously, and the route into the gym was directly opposite the cheerleaders and their coach across the gym to the other end. They deny that there were little children in the gym at any time during placement of the portable graduation stage cover for the reason that such claim is untrue.
80. Gwinn, Belusar and AJ Filizetti admit.
81. Gwinn, Belusar and AJ Filizetti admit that after departure from the gym Belusar requested assistance from the athletic director, deny a demand for assistance, deny any repairs were to be completed, deny that the portable graduation stage cover is a wall, and admit that the portable graduation stage cover was to be installed.
82. Gwinn, Belusar and AJ Filizetti admit that Belusar went to speak with the superintendent, admit that she stated she would need to work overtime, admit that she requested help, but deny there was to be a reinstallation repair for the reason that such claim is untrue. Belusar requested assistance in reinstallation of the portable graduation stage cover, not repair.
83. Gwinn, Belusar and AJ Filizetti admit that Belusar was speaking with the superintendent and others in the central office administration/reception office. They admit Belusar heard screams and movement coming from the gym.
84. Gwinn, Belusar and AJ Filizetti neither admit nor deny that Belusar ran to the gym, neither admit nor deny what Belusar might have known or been thinking, and leave Filizettis to their proofs.
85. Gwinn, Belusar and AJ Filizetti admit that after they left the gym the triplets apparently came into the gym with their mother and were allowed to play under the spotlight in the area of the panels by their mother. Either they or their mother turned the spotlight on in the alcove and portage graduation stage cover area. The spotlight

made the condition of the panels open, obvious and visible including the manner in which the panels were leaning in the alcove area. They admit that the triplets were playing away from the cheerleading practice, away from their mother and cheerleading coach, away from direct supervision, and in the area of the portable graduation stage cover panels. They admit that one of Amarah's sisters brushed against a portion of a portable graduation stage cover panel. They deny the panels were partitions.

86. Gwinn, Belusar and AJ Filizetti admit that the four year old's impact with the portable graduation stage cover caused it to fall.
87. Gwinn, Belusar and AJ Filizetti neither admit nor deny that Amarah put up her arms, but admit that a portion of the portable graduation stage cover panel was knocked down upon her by another 4 year old child while their mother was coaching cheerleaders at the opposite end of the gym.
88. Gwinn, Belusar and AJ Filizetti admit that the weight of the falling portable graduation stage cover panel caused Amarah to fall to the floor. They neither admit nor deny the remaining allegations, but leave Filizettis to their proofs.
89. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
90. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
91. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
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96. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
97. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
98. Gwinn, Belusar and AJ Filizetti admit.
99. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
100. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
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112. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
113. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
114. Gwinn, Belusar and AJ Filizetti neither admit nor deny for lack of specific information at the time of making the answer and therefore leave Filizettis to their proofs.
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GWINN SCHOOLS' NEGLIGENT MAINTENANCE AND REPAIR OF THE HIGH SCHOOL

125. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-124 above as if more fully stated.
126. Gwinn, Belusar and AJ Filizetti admit.

127. Gwinn, Belusar and AJ Filizetti neither admit nor deny that the State of Michigan has adopted the International Property Maintenance Code (IPMC), the National Fire Prevention Association (NFPA) Life Safety Code, and International Building Code (IBC), but admit to the adoption of Michigan's Rehabilitation Code for Existing Buildings. Filizettis are left to their proofs as to all matters not admitted.
128. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. They move for more definite statement identifying specific building and safety code provisions, which apply to the allegations. They deny any violation of applicable building and safety codes for the reason that such claim is untrue. Gwinn, Belusar and AJ Filizetti indicate that all repairs and maintenance performed at Gwinn was performed in a workmanlike and skilled manner.
129. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. They move for more definite statement identifying specific building and safety code provisions, which apply to the allegations. Gwinn, Belusar and AJ Filizetti deny any violation of applicable building and safety codes for the reason that such claim is untrue. They deny that the high school gym was in an unsatisfactory condition as relates to the public's general welfare and safety.
130. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. They move for more definite statement identifying specific building and safety code provisions, which apply to the allegations. They deny any violation of applicable building and safety codes for the reason that such claim is untrue. Gwinn, Belusar and AJ Filizetti deny that the building was "unsafe."
131. Gwinn, Belusar and AJ Filizetti deny that the portable graduation stage cover is a "partition wall," deny that was a "dangerous structure," and neither admit nor deny the allegations contained in subparagraphs a-d for the reason that such claims are allegations of law and require no answer. To the extent such allegations are not matters of law, they are denied. Gwinn Belusar and AJ Filizetti move for more definite statement identifying specific building and safety code provisions, which apply

- to the allegations. They deny any violation of applicable building and safety codes for the reason that such claim is untrue.
132. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. Gwinn, Belusar and AJ Filizetti move for more definite statement identifying specific building and safety code provisions, which apply to the allegations.
 133. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. Gwinn, Belusar and AJ Filizetti move for more definite statement identifying specific building and safety code provisions, which apply to the allegations.
 134. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. Gwinn, Belusar and AJ Filizetti move for more definite statement identifying specific building and safety code provisions, which apply to the allegations.
 135. Gwinn, Belusar and AJ Filizetti neither admit nor deny the allegations contained therein since they are claims of law and leave Filizettis to their proofs. To the extent such are allegations of fact, Gwinn, Belusar and AJ Filizetti deny repair activities, deny any requirement for a railing or other assistive or warning device. Gwinn, Belusar and AJ Filizetti move for more definite statement identifying specific building and safety code provisions, which apply to the allegations.
 136. Gwinn, Belusar and AJ Filizetti deny the portable graduation stage cover was a structural component of a gym wall for the reason that such claim is untrue. They further deny any requirement for inspection by the Bureau of Fire Services since it was used as a temporary portable graduation stage cover not a structural component of the gym wall.
 137. Gwinn, Belusar and AJ Filizetti deny that prior to September 3, 2015 Gwinn Schools failed to reasonably inspect for hazards, maintain or repair the high school gym for the reason that such claim is untrue. Gwinn denies that use of the portable graduation stage cover was a structural component of the gym wall, and denies that use of same was hazardous or improperly maintained for the reason that such claims are untrue.

138. Gwinn, Belusar and AJ Filizetti deny failure to properly inspect, maintain and repair the high school, deny a dangerous and defective structural component, deny that the portable graduation stage cover constituted a dangerous or defective structural component, deny that the unattached portable graduation stage cover was part of the gym wall, deny that the unattached portable graduation stage cover required annual maintenance to allow access to the graduation stage all for the reason that such claims are untrue.
139. Gwinn, Belusar and AJ Filizetti deny that there was a maintenance practice of removing the portable graduation stage cover for the reason that such claim is untrue. The portable graduation stage cover was removed and replaced between 2010 and 2015 as a piece of equipment set up for the specific purpose of facilitating use of the gym during the school year and removed for the specific purpose of facilitating access to the graduation stage. Gwinn, Belusar and AJ Filizetti deny that the practice created dangerous and unsafe conditions in the rear hallway, deny that the gym was dangerous and unsafe since metal angle brackets were removed from the floor as part of the set up and disassembly, deny that the metal angle brackets were exposed on the floor and walls, and admit that both areas were open to the general public.
140. Gwinn, Belusar and AJ Filizetti deny this allegation because it is untrue, and since the same is speculative and without any basis in fact. They further deny as untrue that there was any dangerous or unsafe condition relating to the portable graduation stage cover, its removal or reinstallation including storage of the panels and metal angle brackets when the portable graduation stage cover was removed.
141. Gwinn, Belusar and AJ Filizetti deny as speculative that the Gwinn principal knew repairs were necessary to alleviate dangerous conditions in the high school, deny and failure to act and require that the portable graduation stage cover be reinstalled within the gym wall, deny that the portable graduation stage cover constituted unsecured panels, deny that they were portions of a wall in the gym, and deny that repairs were necessary to the gym all for the reason that same are untrue.
142. Gwinn, Belusar and AJ Filizetti deny as speculative that the athletic director knew dangerous and unsafe conditions existed within the high school, deny that the portable graduation stage cover constituted a dangerous or unsafe condition, and admit that the athletic director recognized that the portable graduation stage cover

- needed to be reinstalled prior to the school year. Matters denied are untrue. They admit that the athletic director knew that the end wall of the gym without padding would be unsafe and dangerous.
143. Gwinn, Belusar and AJ Filizetti deny that AJ Filizetti knew dangerous and unsafe conditions existed within the high school, deny that the portable graduation stage cover constituted a dangerous or unsafe condition, and admit that AJ Filizetti recognized that the portable graduation stage cover needed to be reinstalled prior to the school year, and admit that AJ Filizetti knew that the end wall of the gym without padding would be unsafe and dangerous.
144. Gwinn, Belusar and AJ Filizetti deny that AJ Filizetti and the athletic director knew repairs were necessary to alleviate dangerous and unsafe conditions. They recognized that reinstallation of the portable graduation stage cover with padding would cause a safer environment within the gym, and that reinstallation before team practices in the 2015-16 school year would be beneficial.
145. Gwinn, Belusar and AJ Filizetti deny failure to inspect, maintain or repair any portion of the school including a gym wall, deny that the portable graduation stage cover was a gym wall, deny any dangerous, unsafe or statutorily nonconforming structural component arising out of the portable graduation stage cover, all for the reason that such claims are untrue.
146. Gwinn, Belusar and AJ Filizetti deny the portable graduation stage cover was a structural component fixture with the gym's north wall for the reason that such claim is untrue. They deny that annual graduation ceremonies required maintenance to be performed in order to access the collapsible stage for the reason that such claim is untrue. The portable graduation stage cover was moved to facilitate graduation ceremonies during each of those years.
147. Gwinn, Belusar and AJ Filizetti deny what the high school principal knew in May 2015 for the reason that such claim is speculative, deny that repair/maintenance was necessary within the gym, deny that metal angle brackets were exposed since such claims are untrue, admit that reinstallation of the portable graduation stage cover would cover partially or totally the metal brackets.
148. Gwinn, Belusar and AJ Filizetti deny for the reason that it is untrue.

149. Gwinn, Belusar and AJ Filizetti deny that AJ Filizetti was assuming a maintenance or repair task to the gym wall for the reason that such claim is untrue. AJ Filizetti participated in moving the portable graduation stage cover into the gym to assist with temporary installation prior to the beginning of the school year. They deny AJ Filizetti abandoned or failed to complete a required repair for the reason that such claim is untrue, deny that installation of the portable graduation stage cover was a repair, for the reason that such claim is untrue, deny there was a dangerous condition made more dangerous by balancing unsecured panels within the alcove for the reason that such claim is untrue. AJ Filizetti was available, if needed, to provide further assistance to Belusar or others regarding placement of the portable graduation stage cover.
150. Gwinn, Belusar and AJ Filizetti deny that installation of the portable graduation stage cover was a required repair, deny that moving the portable sections of the portable graduation stage cover into the gym constituted a required repair, deny that there was a dangerous condition or that he created a more dangerous condition by balancing the portable graduation stage cover sections in the alcove, all for the reason that such claims are untrue.
151. Gwinn, Belusar and AJ Filizetti deny that the accident on September 3, 2015 was the result of dangerous, defective and unsafe conditions within the high school gym. They admit that the accident on September 3, 2015 could have been prevented if three 4-year old children had not been brought to Stacey's job site, into the gym after the portable graduation stage cover was moved into the end of the gym, if appropriate monitoring, babysitting or supervision had been provided to the 4-year old children to prevent them from moving to the side of the gym opposite their mother, if the spotlight had not been turned on to facilitate their play, and if the attention of Stacey had been directed toward supervision of the three 4-year old girls rather than concentrating on activities as a cheerleading coach with high school students.
152. Gwinn, Belusar and AJ Filizetti deny that the injuries and damages described in the complaint were proximately caused by Gwinn's negligent maintenance and repair of the gym for the reason that such claim is untrue. They deny that the portable graduation stage cover constitutes a portion of the alcove within the northern wall of the gym, or that it did on September 3, 2015 for the reason that such claim is untrue,

and deny that a dangerous, defective and unsafe condition existed within the gym, all for the reason that such claims are untrue.

153. Gwinn, Belusar and AJ Filizetti deny such allegations and leave Filizettis to their proofs.

GROSS NEGLIGENCE OF DEFENDANT ANTHONY J. FILIZETTI

154. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-153 above as if more fully stated.
155. Gwinn, Belusar and AJ Filizetti admit.
156. Gwinn, Belusar and AJ Filizetti admit that they were all engaged in the exercise and discharge of governmental functions, deny that such functions were maintenance and repair of the school building, gym and gym wall for the reason that such claims are untrue. The exercise and discharge of governmental functions of Gwinn, Belusar and AJ Filizetti constituted the preparation for the 2015-16 school year by addressing myriad issues required for completion prior to commencement of the school year, including moving the portable graduation stage cover into the gym, locating the hardware necessary for installation, and tending to various other needs, directives, and issues arising in the days immediately preceding commencement of the school year. Gwinn, Belusar and AJ Filizetti deny that moving the portable graduation stage cover into the gym constituted maintenance and repair of the school building, gym and gym wall for the reason that such claim is untrue.
157. Gwinn, Belusar and AJ Filizetti admit that high school cheerleading practice was being directed by Stacey, cheerleading coach. Gwinn, Belusar and AJ Filizetti deny there were any young children present when the portable graduation stage cover was moved into the gym, deny all allegations of recklessness, and deny reckless attempt to repair the gym wall, for the reason that such claim is untrue. No repairs were being made to the gym wall. All such claims of reckless attempts to repair and denied for the reason that they are untrue.
158. Gwinn, Belusar and AJ Filizetti deny there was any attempt to perform a labor intensive and dangerous repair of the gym wall for the reason that such claim is untrue, deny that there were young children present when the portable sections of the portable graduation stage cover were moved into the gym for the reason that such

claim is untrue, admit that high school cheerleading students were present on the south side of the gym when the portable graduation stage cover was moved into the north side, and deny any substantial lack of concern for whether an injury could or would occur for the reason that such claims are untrue.

159. Gwinn, Belusar and AJ Filizetti deny reckless conduct constituting gross negligence by AJ Filizetti, including subparts a-p as follows:
- a. Deny repair of the gym wall, deny reinstallation of the portable graduation stage cover, admit that the moveable graduation stage cover was moved into the gym when no young children were present and deny that he required training to perform the task;
 - b. Deny repair of the gym wall, deny need to review "GHS Graduation Stage Cover Removal and Reinstallation" manual, deny repair, deny failure to appreciate risk of injury with regard to installation of the temporary portable graduation stage cover, and deny careless performance of tasks associated with moving the portable graduation stage cover;
 - c. Deny repair of the gym wall, deny attempt to reinstall the moveable graduation stage cover without the required number of workers necessary to safely and completely perform the installation for the reason that such claim is untrue. Belusar was in the process of obtaining additional workers to safely and complete the installation;
 - d. Deny repair of the gym wall, attempted reinstallation of the portable graduation stage cover, deny that Belusar expressed objections that they could not safely perform the task;
 - e. Deny any repair of the gym wall, admit that the south end of the gym was actively being utilized for cheerleading practice by high school students and their coach, Stacey;
 - f. Deny that the portable graduation stage cover sections were too heavy for two people to safely manage, and deny that AJ Filizetti and Belusar were not going to be able to complete the repair for the reason that such claim is untrue;
 - g. Deny repair of a gym wall, since the portable graduation stage cover was not a gym wall. Admit knowing high school cheerleaders and their coach and PCMI employee, Stacey, were present on the south end of the gym, away from the north

- end portable graduation stage cover, deny that the 4-year old Filizetti children were present for the reason that such claim is untrue, and admit that Belusar alone would be unable to complete the installation of the portable graduation stage cover without additional assistance;
- h. Deny that continuing with installation of the portable graduation stage cover was gross negligence, deny necessity to return the first section of the portable graduation stage cover to storage since the cheerleaders and their supervising coach, Stacey, were in the south end of the gym, far away from the north end of the gym where the portable graduation stage cover was to be installed, and deny that the installation could not be completed safely by Belusar and AJ Filizetti;
 - i. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny balancing/tilting the panels in the alcove gym wall provided the appearance that the panels were properly placed for the reason that such claim is untrue, and deny that temporarily leaning the portable graduation stage cover sections was improper;
 - j. Deny that the north end of the gym was under repair, admit that it was not cordoned off since the high school cheerleaders were approximately 80 feet away, the length of the basketball court, were with their supervising coach, Stacey, and Stacey's 4-year old children were not present at the time of placement of the portable graduation stage cover panels in the alcove;
 - k. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny failure to properly secure the portable graduation stage cover sections in place since there was no danger of high school cheerleaders supervised by their coach, a PCMI employee, and who were engaged in cheerleading practice 80 feet across the gym;
 - l. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny failing to warn everyone present regarding the portable graduation stage cover sections since they were open, obvious, in plain sight, and since it was apparent to the high school students and their coach, Stacey, present in the gym that such portable graduation stage cover sections had nothing to do with cheerleading practice at the other end of the gym;

- m. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny ament of the portable graduation stage cover installation, admit temporarily exiting the gym with the portable graduation stage cover sections leaning against the wall, admit there was not a cordoned off safety railing installed since there were no 4-year old children present in the gym who would inadvertently enter the area of the graduation stage at the time the sections were left in the gym;
 - n. Deny leaving the gym in a dangerous condition, deny there was any area under repair that was left unguarded, admit that AJ Filizetti returned to his office temporarily and briefly, deny that others were not solicited by Belusar to aid her in completing the installation, deny the existence of hazardous and unsafe conditions in the gym, and deny that installation of the portable graduation stage cover sections were repairs;
 - o. Deny wantonly disregarding applicable health and safety standards while performing the installation of the portable graduation stage cover, deny repair of the gym wall portable graduation stage cover; and
 - p. Deny failing to exercise vigilance for the protection of the high school cheerleaders known to be present within the gym at the time the portable graduation stage cover sections were brought there on dollies, and deny that Stacey's 4-year old children were present in the gym at the time the panels were brought into the gym. The children were brought to the gym by Stacey after the panels were placed on the north of the gym.
160. Gwinn, Belusar and AJ Filizetti deny reckless conduct of AJ Filizetti and deny that the one most immediate, efficient and direct cause of Plaintiffs' injuries and damages as described in the Complaint had anything to do with the actions or inactions of AJ Filizetti. The one most immediate, efficient and direct cause of the injuries and damages to Filizettis was Stacey's decision to bring her children to work while she coached cheerleaders, her failure to directly monitor and supervise three 4-year old children, allowing the children to play at the opposite end of the gym from the location of her cheerleading activities, ignoring the open and obvious condition of the portable graduation stage cover panels leaning in the alcove, either turning on the spotlight or allowing the children to turn on a spotlight so they could play directly in

the vicinity of the open and obvious portable graduation stage cover panels, or the action or inaction of one or more of the children in bumping, pushing, climbing on or otherwise moving one of the portable graduation stage cover panels.

161. Gwinn, Belusar and AJ Filizetti deny that AJ Filizetti was grossly negligent, deny that he was negligent at all, and deny that his actions were the proximate cause of Plaintiffs' injuries and damages described in the Complaint for the reason that such claims are untrue. The one most immediate, efficient and direct cause of the injuries and damages to Filizettis was Stacey's decision to bring her children to work while she coached cheerleaders, her failure to directly monitor and supervise three 4-year old children, allowing the children to play at the opposite end of the gym from the location of her cheerleading activities, ignoring the open and obvious condition of the portable graduation stage cover panels leaning in the alcove, either turning on the spotlight or allowing the children to turn on a spotlight so they could play directly in the vicinity of the open and obvious portable graduation stage cover panels, or the action or inaction of one or more of the children in bumping, pushing, climbing on or otherwise moving one of the portable graduation stage cover panels.

NEGLIGENCE AND/OR GROSS NEGLIGENCE OF DEFENDANT TRACY

BELUSAR

162. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-161 above as if more fully stated.
163. Gwinn, Belusar and AJ Filizetti admit that Belusar was intended to be a contractual employee hired by and paid by PCMI. At the time of incident, Belusar was a new employee in her first days of work at Gwinn. PCMI paperwork had not been processed, and was not processed until October 2015. She was ultimately paid retroactively by PCMI and accepted as a PCMI employee retroactive to her first day of employment. On September 3, 2015 Belusar was acting within the scope of her authority and employment with Gwinn pending completion of PCMI paperwork.
164. Gwinn, Belusar and AJ Filizetti admit that high school cheerleading practice was being directed by Stacey, cheerleading coach. Gwinn, Belusar and AJ Filizetti deny there were any young children present when the portable graduation stage cover was moved into the gym, deny all allegations of recklessness, deny reckless attempt to

repair the gym wall, for the reason that such claim is untrue. No repairs were being made to the gym wall. All such claims of reckless attempts to repair are denied for the reason that they are untrue. No repairs were being made.

165. Gwinn, Belusar and AJ Filizetti deny there was any attempt to perform a labor intensive and dangerous repair of the gym wall for the reason that such claim is untrue, deny that there were young children present when the portable sections of the portable graduation stage cover were moved into the gym for the reason that such claim is untrue, admit that high school cheerleading students were present on the south side of the gym when the portable graduation stage cover was moved into the north side, deny any substantial lack of concern for whether an injury could or would occur for the reason that such claims are untrue. If Stacey's young children had been in the gym at the time the panels were brought in, the panels immediately would have been taken back to the storage area.
166. Gwinn, Belusar and AJ Filizetti deny reckless conduct constituting gross negligence by AJ Filizetti, including subparts a-p as follows:
- a. Deny repair of the gym wall, deny reinstallation of the portable graduation stage cover, admit that the moveable graduation stage cover was moved into the gym when no young children were present and deny that he required training to perform the task;
 - b. Deny repair of the gym wall, deny need to review "GHS Graduation Stage Cover Removal and Reinstallation" manual, deny repair, deny failure to appreciate risk of injury with regard to installation of the temporary portable graduation stage cover, and deny careless performance of tasks associated with moving the portable graduation stage cover;
 - c. Deny repair of the gym wall, deny attempt to reinstall the moveable graduation stage cover without the required number of workers necessary to safely and completely perform the installation for the reason that such claim is untrue. Belusar was in the process of obtaining additional workers to safely and complete the installation;
 - d. Deny repair of the gym wall, attempted reinstallation of the portable graduation stage cover, deny that Belusar expressed objections that they could not safely perform the task;

- e. Deny any repair of the gym wall, admit that the south end of the gym was actively being utilized for cheerleading practice by high school students and their coach, Stacey;
- f. Deny that the portable graduation stage cover sections were too heavy for two people to safely manage, and deny that AJ Filizetti and Belusar were not going to be able to complete the repair for the reason that such claim is untrue;
- g. Deny repair of a gym wall, since the portable graduation stage cover was not a gym wall. Admit knowing high school cheerleaders and their coach and PCMI employee, Stacey, were present on the south end of the gym, away from the north end portable graduation stage cover, deny that the 4-year old Filizetti children were present for the reason that such claim is untrue, and admit that Belusar alone would be unable to complete the installation of the portable graduation stage cover without additional assistance;
- h. Deny that continuing with installation of the portable graduation stage cover was gross negligence, deny necessity to return the first section of the portable graduation stage cover to storage since the cheerleaders and their supervising coach, Stacey, were in the south end of the gym, far away from the north end of the gym where the portable graduation stage cover was to be installed, and deny that the installation could not be completed safely by Belusar and AJ Filizetti;
- i. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny balancing/tilting the panels in the alcove gym wall provided the appearance that the panels were properly placed for the reason that such claim is untrue, and deny that temporarily leaning the portable graduation stage cover sections was improper;
- j. Deny that the north end of the gym was under repair, admit that it was not cordoned off since the high school cheerleaders were approximately 80 feet away, the length of the basketball court, were with their supervising coach, Stacey, and Stacey's 4-year old children were not present at the time of placement of the portable graduation stage cover panels in the alcove;
- k. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny failure to properly secure the portable graduation stage cover sections in place since there was no danger of high school cheerleaders supervised

- by their coach, a PCMI employee, and who were engaged in cheerleading practice 80 feet across the gym;
- l. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny failing to warn everyone present regarding the portable graduation stage cover sections since they were open, obvious, in plain sight, and since it was apparent to the high school students and their coach, Stacey, present in the gym that such portable graduation stage cover sections had nothing to do with cheerleading practice at the other end of the gym;
 - m. Deny that the sections or panels of the portable graduation stage cover constituted partitions, deny ament of the portable graduation stage cover installation, admit temporarily exiting the gym with the portable graduation stage cover sections leaning against the wall, admit there was not a cordoned off safety railing installed since there were no 4-year old children present in the gym who would inadvertently enter the area of the graduation stage at the time the sections were left in the gym;
 - n. Deny for the reason that such claim is untrue and deny there was no area under repair being conducted;
 - o. Deny failing to exercise vigilance for the protection of the high school cheerleaders known to be present within the gym at the time the portable graduation stage cover sections were brought there on dollies.
 - p. Deny for the reason that such claim is untrue.
167. Gwinn, Belusar and AJ Filizetti deny that Belusar was grossly negligent, deny that he was negligent at all, and deny that his actions were the proximate cause of Plaintiffs' injuries and damages described in the Complaint for the reason that such claims are untrue. The one most immediate, efficient and direct cause of the injuries and damages to Filizettis was Stacey's decision to bring her children to work while she coached cheerleaders, her failure to directly monitor and supervise three 4-year old children, allowing the children to play at the opposite end of the gym from the location of her cheerleading activities, ignoring the open and obvious condition of the portable graduation stage cover panels leaning in the alcove, either turning on the spotlight or allowing the children to turn on a spotlight so they could play directly in the vicinity of the open and obvious portable graduation stage cover panels, or the

action or inaction of one or more of the children in bumping, pushing, climbing on or otherwise moving one of the portable graduation stage cover panels.

BYSTANDER CLAIMS

168. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-167 above as if more fully stated.
169. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.
170. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.
171. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.
172. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.
173. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.
174. Gwinn, Belusar and AJ Filizetti deny that Plalintiffs Filizetti are entitled to damages for the alleged claims and injuries set forth.

WRONGFUL DEATH DAMAGES

175. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-174 above as if more fully stated.
176. Gwinn, Belusar and AJ Filizetti deny the allegations in paragraph 176 including subparagraphs a and b for the reason that such claims are allegations of law requiring no answer. Specifically in addition:
 - a. Deny physical pain and suffering, emotional suffering, anxiety and fear on the part of Amarah; and
 - b. Deny economic damages attributable to lost earnings and services since there were no lost earnings and no established capacity to earn or perform services by 4-year old Amarah.

177. Gwinn, Belusar and AJ Filizetti deny the allegations in paragraph 177 including subparagraphs a-d for the reason that such claims are allegations of law requiring no answer.

VICARIOUS LIABILITY OF DEFENDANTS PCMI AND GWINN SCHOOLS

178. Gwinn, Belusar and AJ Filizetti incorporate the answers to paragraphs 1-177 above as if more fully stated.
179. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.
180. Gwinn, Belusar and AJ Filizetti neither admit nor deny and therefore leave Filizettis to their proofs.

WHEREFORE, Gwinn, Belusar and AJ Filizetti request that the Court enter judgment on their behalf against Filizettis of no cause of action, deny Filizettis claims for damages in excess of \$25,000, deny interest and attorney fees, and award attorney fees and costs to Defendants.

AFFIRMATIVE DEFENSES

Gwinn Area Community Schools (“Gwinn”), Tracy Belusar (“Belusar”), Anthony Filizetti (“AJ Filizetti”), through their attorneys, Ryan Law Offices, state the following for their Answer and Affirmative Defenses:

1. Gwinn is a governmental agency entitled to immunity as a matter of law pursuant to MCL 691.1401 et seq.
2. AJ Filizetti is an employee of Gwinn entitled to governmental immunity pursuant to MCL 691.1401 et seq.
3. Belusar, at the time of the incident complained of, was an employee of Gwinn entitled to governmental immunity pursuant to MCL 691.1401 et seq.
4. Gwinn, Belusar and AJ Filizetti are entitled to Summary Disposition under MCR 2.116(C)(7). They were engaged in the conduct of a governmental function at the time of the injury. Filizettis have failed to plead facts in avoidance of governmental immunity as to Gwinn.
5. Belusar and AJ Filizetti at all times were acting within their authority as employees of Gwinn. The action or inactions of Belusar and AJ Filizetti were not

- the one most efficient, direct, immediate, proximate cause of Amarah's alleged injuries and death. *See, Beals v State*, 497 Mich 363; 871 NW2d 5, (2015); *Dean v Childs*, 262 Mich App 48; 684 NW2d 894 (2004), Rev'd, 474 Mich 914; 705 NW2d 344 (2005).
6. Belusar and AJ Filizetti were engaged in the performance of a governmental function at the time of the injury. Belusar and AJ Filizetti were not negligent, and not grossly negligent. They were not the one most efficient, direct, proximate cause of the injuries and damages. *See, Beals v State*, No 149901, 2015 Mich LEXIS 1436 (June 18, 2015), and *Ray v. Swager*, No 322766, Mich Ct App, unpublished (October 15, 2015).
 7. The one most immediate, efficient, direct, proximate cause of the injuries and death of Amarah were as follows:
 - a. The action of Stacey bringing her 4-year old triplets to work and allowing them to play unsupervised in the gym;
 - b. The climbing, pushing, playing on or around the portable graduation stage cover panels by three 4-year old children with one child making contact with a panel proximately causing it to fall; and
 - c. The encouragement and facilitation of her 4-year old triplets playing on the north end of the gym and allowing or facilitating lighting of that area of the gym approximately 80 feet from the location of her focus with the high school cheerleaders in the south end of the gym.
 8. Independent, intervening and/or superseding contact with the portable graduation stage cover section by one or more of the Filizetti triplets causing the panel to fall on Amarah.
 9. The negligence, gross negligence, failure to observe, control, monitor, and supervise three four year old children playing 80 feet away in the presence of the portable graduation stage cover sections, which were open and obvious to student high school cheerleaders and Stacey at the other end of the gym.
 10. Negligence and gross negligence of Stacey in failure to exercise reasonable care , control and supervision for the safety of her 4-year old children who were allowed to play in the area of the portable graduation stage cover sections.

11. Filizettis' claims are barred and precluded since Stacey's conduct constituted greater than 50% of the fault for Plaintiffs' injuries and the claims are therefore barred and precluded pursuant to MCL 600.2959.
12. Claims of independent bystanders are barred and precluded by operation of the Michigan Wrongful Death Act, MCL 600.2922.
13. Stacey is an employee of PCMI and her claims are barred by the operation of the exclusive remedy provisions of the Michigan Worker Compensation law. Claims for injury or damage to her arising out of or in the course of her employment are governed by Michigan Worker Compensation law. She is therefore barred by operation of law from making bystander claims.
14. Filizettis' injuries and damages were caused, contributed to and/or exacerbated by their own negligence and gross negligence.
15. Gwinn, Belusar and AJ Filizetti are entitled to summary disposition pursuant to MCR 2.116(C)(8) for the reason that Filizettis have failed to state a claim upon which relief can be granted.
16. Gwinn, Belusar and AJ Filizetti are entitled to summary disposition pursuant to MCR 2.116(C)(10) for the reason that except as to the amount of damages there is no genuine issue as to any material fact, and Gwinn, Belusar and AJ Filizetti are entitled to summary disposition as a matter of law.
17. The accident could have been prevented if the three 4-year old children had not been brought to Stacey's job site and into the gym after the portable graduation stage cover was moved into the north end of the gym.
18. The act of Stacey sending her children to the north end of the gym to play in the spotlight in the area of the portable graduation stage cover sections is an intervening and/or superseding event, which constitutes the one most direct, immediate proximate cause of the injuries and death of Amarah.
19. The act of one or more of the Filizetti triplets in bumping, pushing, brushing against, playing near, or otherwise activating the portable graduation stage cover section, causing it to fall, is the one most direct, immediate proximate cause of the injuries and death of Amarah.
20. The Construction of School Buildings Act, MCL 388.851a(b), is inapplicable to this case since the portable graduation stage cover panels as relates to this case do

- not constitute "remodeling" or the alteration, construction or remodeling of panels or structural components of a building including walls or panels. As such, the Construction of School Buildings Act including all of its component sections are inapplicable to this case.
21. The International Building Code, Michigan's Rehabilitation Code for Existing Buildings, and Michigan Building Codes do not apply since there was no alteration of the gym causing violation of any applicable codes, and installation of the portable graduation stage cover was not prohibited by such laws or codes.
 22. There was no violation of statutes, codes, or administrative rules by Gwinn, Belusar or AJ Filizetti.
 23. There was no violation of Gwinn policies regarding moving the portable graduation stage cover sections into the gym.
 24. Gwinn did not negligently maintain and repair the high school, and the actions of it, Belusar and AJ Filizetti on September 3, 2005 did not constitute maintenance or repair of the high school.
 25. The portable graduation stage cover did not constitute a structural component of a gym wall, or partition, nor was it a fixture on the gym's north wall.
 26. Moving panels, sections or components of the portable graduation stage cover for the purpose of its installation did not constitute maintenance or repair of a gym wall, partition, or any other portion of the gym.
 27. At all times relevant Belusar acted reasonably within the scope of her authority and employment and was engaged in a governmental function, i.e. the preparation of the school for the arrival of students in the fall 2015.
 28. At all times relevant AJ Filizetti acted reasonably within the scope of his authority and employment and was engaged in a governmental function, i.e. the preparation of the school for the arrival of students in the fall 2015.
 29. None of the activities of Belusar and AJ Filizetti constituted maintenance or repair of a partition or of a gym wall.
 30. Gwinn, Belusar and AJ Filizetti complied at all time with applicable statutes, rules, codes, and policies.
 31. Installation and removal of the portable graduation stage cover does not constitute installation of partitions, walls, fixtures, or permanent parts of the gym so as to

become part of a gym wall. The panels, sections and components were not affixed in any way to the gym wall, nor to any other part of the gym at the time a panel was bumped by one of the Filizetti children proximately causing the injuries and death of Amarah.

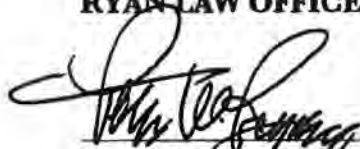
32. Gwinn, Belusar and AJ Filizetti reserve the right to add to, delete from, or modify any or all of the above Affirmative Defenses prior to, during or upon completion of proofs at trial as the evidence may warrant.

RELIANCE ON JURY DEMAND

Gwinn Area Community Schools ("Gwinn"), Tracy Belusar ("Belusar"), Anthony Filizetti ("AJ Filizetti"), by and through Ryan Law Offices, hereby rely upon the demand for trial by jury made by Plaintiff in the above matter.

RYAN LAW OFFICES

Date: September 15, 2016


Peter W. Ryan (P23107)
Jacob D. Lynch (P78810)
307 East "C" Street, P. O. Box 638
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GHS Graduation Stage Cover Removal and Reinstallation Manual

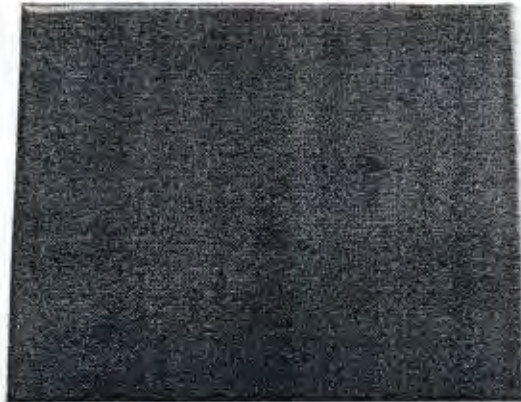
GHS GRADUATION

**STAGE COVER
REMOVAL**

AND

REINSTALLATION

- 1) CLIMB ON TOP OF THE STAGE COVER - REMOVE THE TOP SHEETS OF PLYWOOD BY REMOVING THE SCREWS FROM THE SIDES, FRONT, AND BACK – AND THE 1 X 4 STRIPS IN THE MIDDLE.



- 2) LIFT UP THE MIDDLE SHEET OF PLYWOOD FIRST (IT HAS THE 1 X 4 STRIPS ON IT ALSO) – REMOVE THIS SHEET FIRST AND PUT IT IN STORAGE.



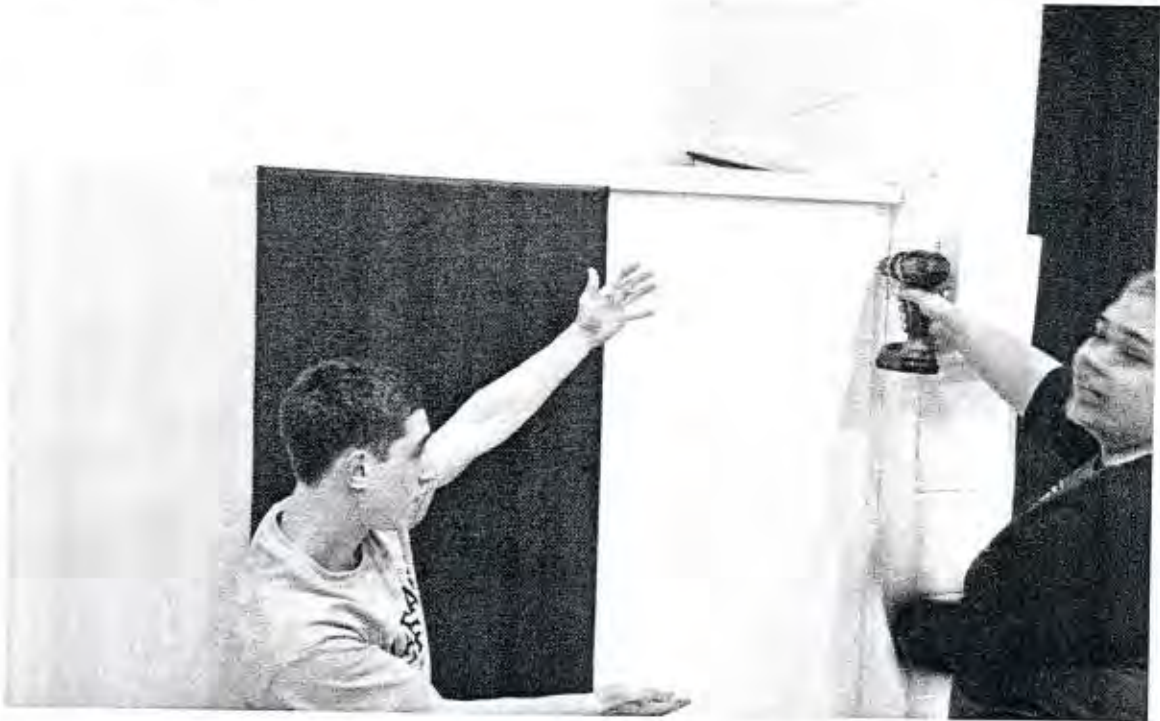
- 3) REMOVE THE END TWO SHEETS NEXT – SLIDING THEM FORWARD OVER THE WALL AND PUT THEM IN STORAGE.



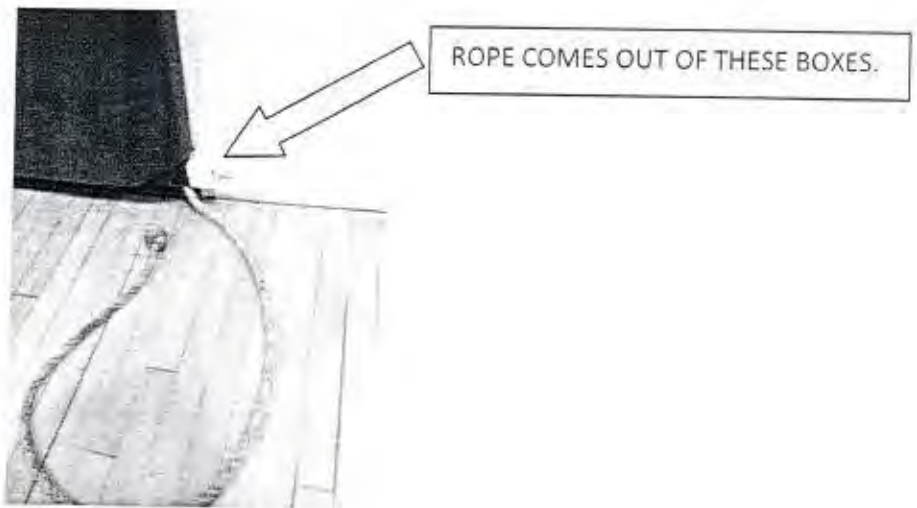
- 4) IN BEHIND THE WALL ARE SOME BRACKETS THAT HOLD A STEEL TUBE – AS A REINFORCEMENT – AND THE BOLTS NEED TO BE REMOVED SO THE TUBE COMES FREE



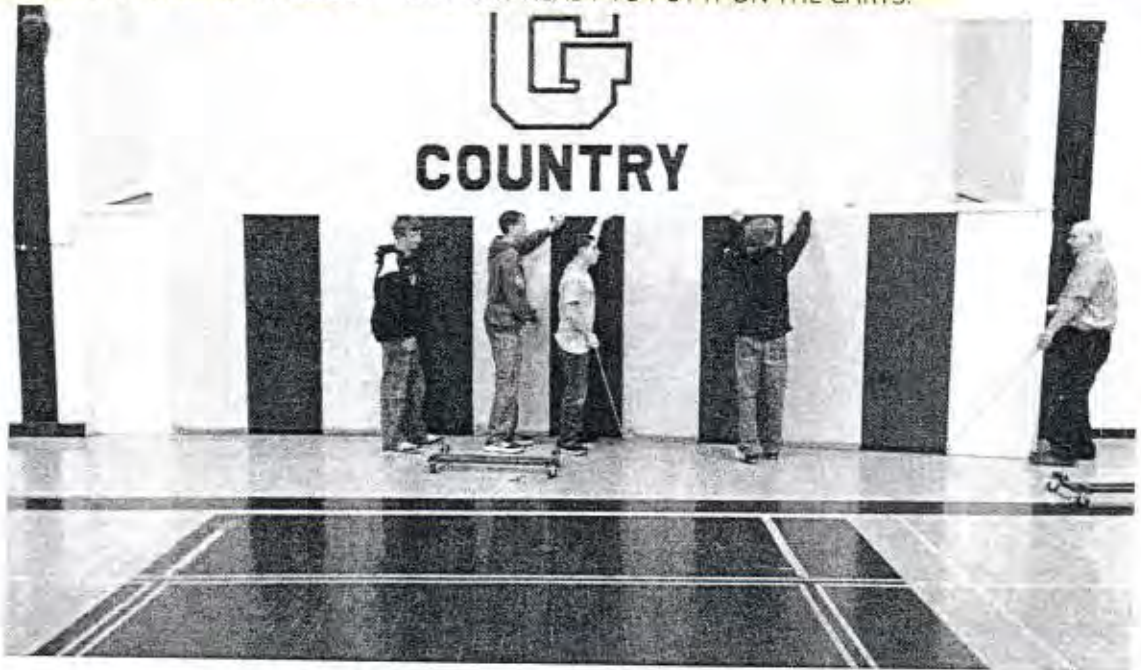
- 5) ONCE THE TUBE HAS BEEN REMOVED – THE SCREWS NEED TO BE REMOVED FROM THE FAR END OF THE **RIGHT** SIDE. THE RIGHT SIDE SCREWS ARE SHOWN BEING REMOVED HERE. ITS IMPORTANT TO DO THE RIGHT SIDE FIRST – SINCE THAT IS THE ORDER THAT THEY SHOULD BE TAKEN DOWN.



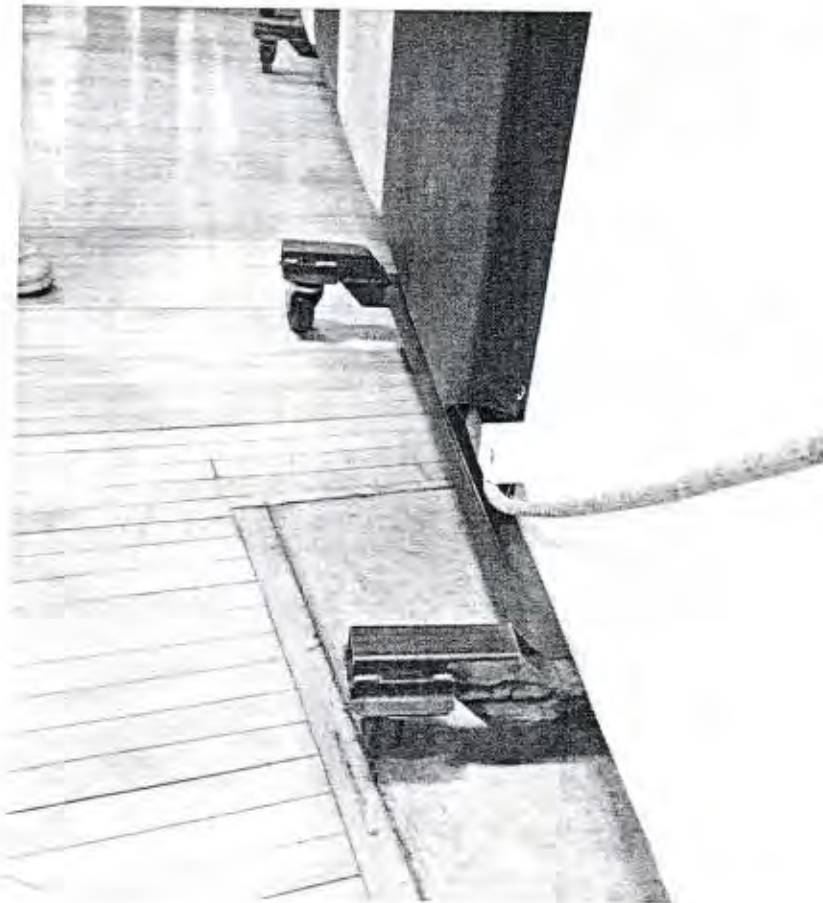
- 6) AS YOU MOVE THE WALL FORWARD, LOOK FOR THE SMALL ANGLE IRON BOXES AT BOTH ENDS OF THE 12' FOOT WALL SECTIONS NEAR THE BOTTOM. SOMEONE SHOULD PUSH THE ROPE THROUGH FROM THE BACK – OUT OF THESE OPENINGS – THE ROPE WILL BE USED TO LIFT AND STEER THE WALL.



- 7) WITH A PERSON AT EACH OF THE WALL SECTION AND PEOPLE IN THE MIDDLE FOR ADDITIONAL SUPPORT, PULL THE WALL OUT – AND GET READY TO PUT IT ON THE CARTS.



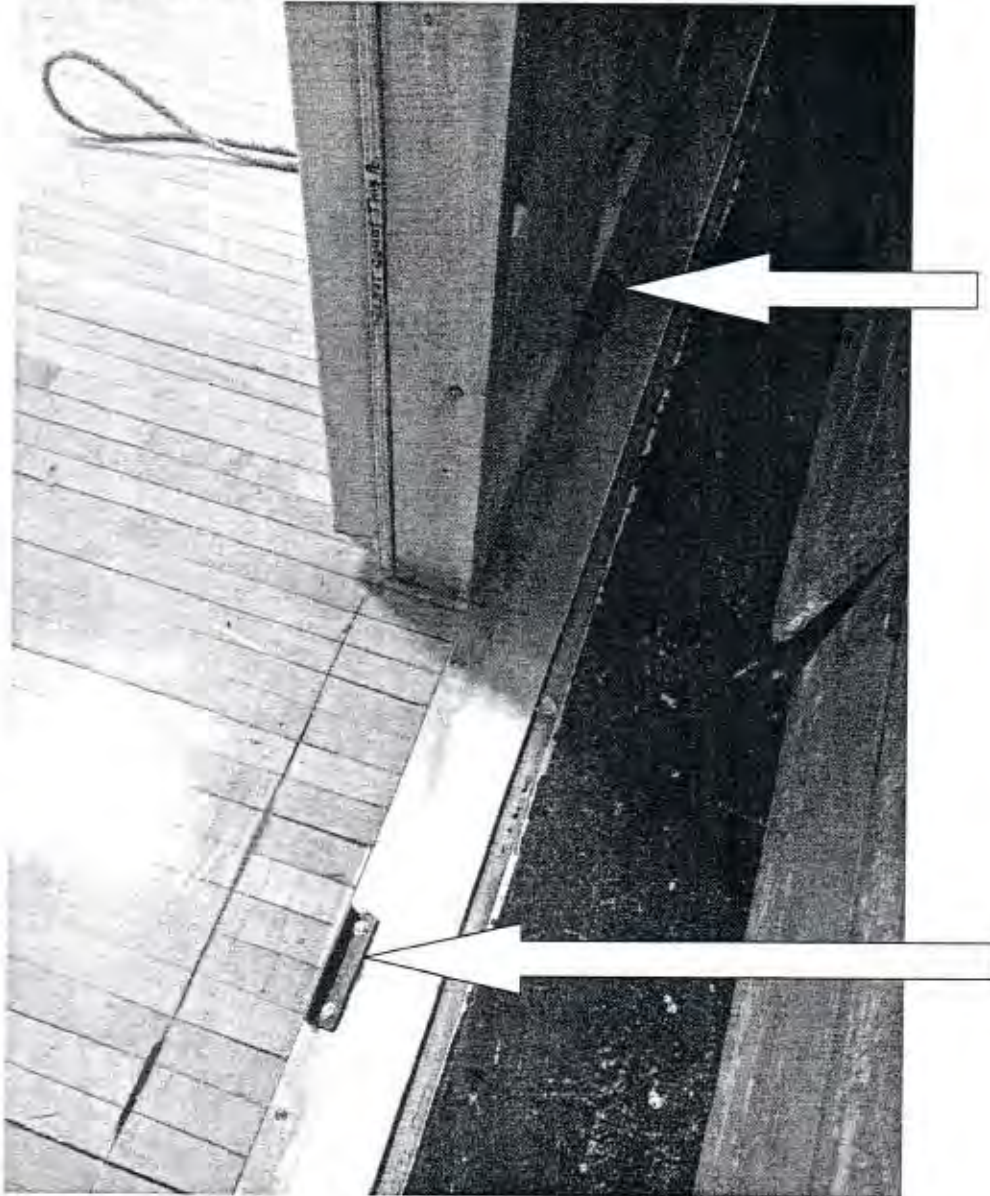
- 8) USING THE ROPE IN ONE HAND AND HOLDING ON TO A WALL STUD WITH THE OTHER HAND, LIFT THE WALL UP 4-5" AND HAVE SOMEONE PUT A CART UNDER THE WALL SECTION – MAKING SURE TO CENTER THE WALL IN THE DROPPED/LOWERED SECTION OF THE CART.



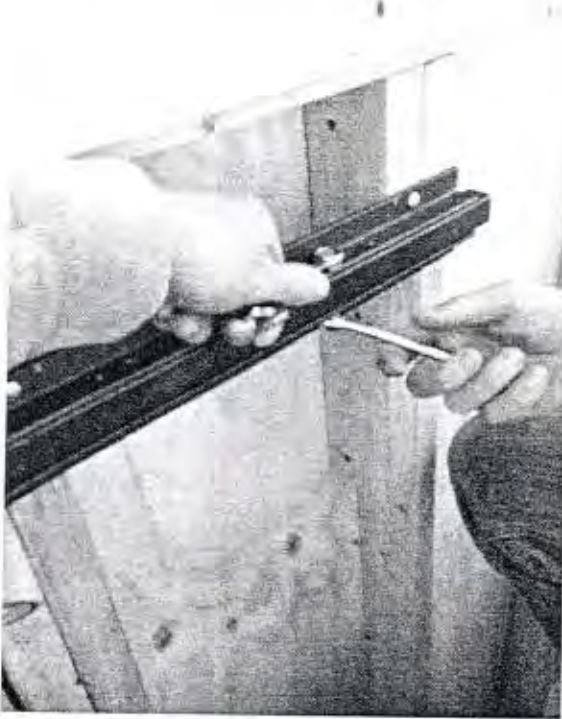
- 9) AS EACH WALL SECTION IS REMOVED – LOADED ON A CART ON EACH END – IT CAN BE CAREFULLY WHEELED TO STORAGE. WE RECOMMEND ONE PERSON AT EACH END- AND ONE PERSON IN THE MIDDLE ON EACH SIDE OF THE WALL. GO SLOWLY – BE CAREFUL.



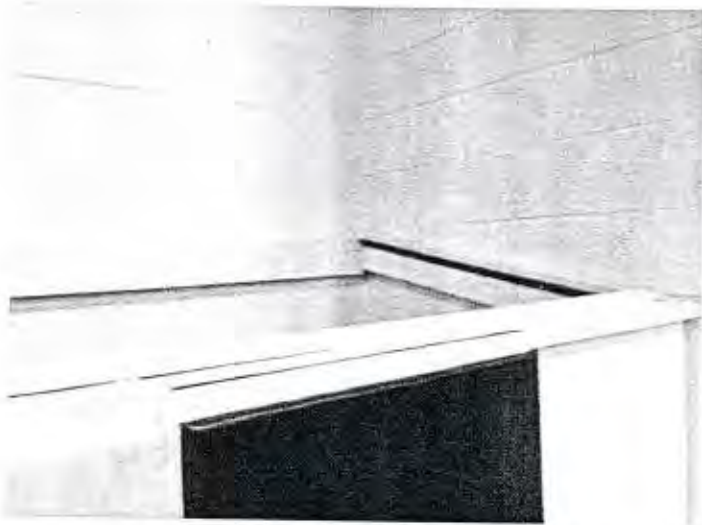
- 10) RE-ASSEMBLY IS THE SAME AS TAKE -DOWN, BUT IN REVERSE. START BY PUTTING BACK THE LEFT WALL - AND MAKE SURE YOU ALIGN THE LEFT EDGE FOR SCREWS AND PUSH THE BOTTOM IN AGAINST THE BRACKETS ON THE FLOOR - SEEN HERE.



11) WHEN BOTH WALLS ARE SCREWED IN ON BOTH ENDS AND THE MIDDLE TUBE HAS BEEN REINSTEALLED...



IT IS OKAY TO PUT THE PLYWOOD BACK UP – MAKING SURE YOU SEAT IT CAREFULLY ON THE MOUNTING EDGES – AND DO NOT SCREW IT IN PLACE UNTIL ALL PIECES HAVE BEEN FIT BACK WHERE THEY BELONG.



Maintenance List

May 19
26
27
s calendar

Rob's Meeting with Bob Thomas re: maintenance to be done.

- Bob's Gym Move Girls B-Ball Posters
- Bob's Bleachers Wheels Fixed & Put Back In
- Bob's Painting Tape Taken Down
- Bob's Girls Basketball Champions Banner Taken Down
- Angie Gym's A/E Handlers On
- Bob's Staging Enclosure Put Back Up
- Bob's Take Away With Dry Boards
- Bob's Take Out Tennis Courts & Seeds
- Bob's Blow/Sweep Off Tennis Courts
- Bob's Haul Away or Move Metal Beams From Guard Rail
- Bob's Put Up Sponsor Boards / Athletic Enclosures - Purchase Zip Ties 1" Needs
- Bob's Move Benches
- Bob's ~~Strip Benches to Football~~
- Bob's New Benches to Front of Courts (not back)
- Bob's ~~Strip Benches Off of Sidewalks~~
- Bob's Remove Field: Fill In Low Spots w/ Topsoil
- Bob's Finish Lining Practice & Football Field
- Bob's Done Every Varsity Locker (JV, water, etc.)
- Youn/Fred Pick Up Debris: Fields / Athletic Parking lot / Under Sidewalks
- Bob's Haul Away Old Fencing / Fence / Concrete
- Bob's Clean Bathrooms
- Bob's Gym's Electrical Box
- Bob's Cordless Sprayer for 6 Pins / ~~Business Print On Site~~
- Bob's Put Up Announced Flag
- Bob's Clean Outside Trash cans
- Bob's Place Black Mats Over Pote Holes & Cement Pads
- Bob's Load of Sand Added to W Pit
- Bob's All Gym Benches Done

7/1

May 29, 2015
Maintenance Request



Home Calendar New Work Order Reports Services Account Setup MyDude

Search for Advanced Search

Services | Help

Actions: Add | List | Graph | Report

Work Order Shortcuts Related Links Legend

Add/Update Work Order

Work Order: 4519

Status Complete

Priority Medium

Status Date: 10/28/2015 2:30:47 PM
Status Last Changed By: Anthony Fillzetti
Date Last Printed: 1/21/2016 11:32:02 AM

Created By: darren sinnaeve
Date Created: 5/29/2015 8:13:46 AM
Last Changed By: Anthony Fillzetti

Request Info

Location: Gwinn HS

Building: -- No Building Available--

Area: Gym

Area Number: stage area north end

Request Date 5/29/2015

Emergency?

Request Description
The wooden enclosure and padding that covers the stage needs to be put back in place. The steel pieces of angle iron on the floor that it attaches to are dangerous when they are exposed.

Back to Shortcuts

Deferral

New Due Date Deferred By

Reason for Deferral

Back to Shortcuts

Contact Info

Name (Select "OTHER" if requester not in list and type their name in field below.)

sinnaeve, darren

First Name: darren

Last Name: sinnaeve

Email: dsinnaev@gwinn.k12.mi.us

Phone: _____

Pager: _____

Cellular Phone: _____

Survey Requester Now

Back to Shortcuts

Assignment Info

Assigned To: Luukkala, Kevin



RECEIVED by MSC 9/24/2021 12:22:30 PM

1/21/2016

MaintenanceDirect

Route for approval or review?

Target Start Date

5/29/2015



Target Completion



Requested Completion

6/3/2015



Actual Completion

10/28/2015



Estimated Costs

0.00

Actual Costs: 0.00 (Note: Actual costs exclude tax amounts.)

Total Costs: 0.00

Estimated Hours

0.00

Actual Hours: 0.00

▶ Back to Shortcuts

Budget Info

Purpose

General Maintenance

Craft

General Craftsman

Budget

-- Select Budget Account --

Custom Category

-- Select Custom Category --

Project

-- Select Project --

Equipment



Classification

<-- Select Classification -->

Type

<-- Select Type -->

▶ Back to Shortcuts

Action Taken

Action

▶ Back to Shortcuts

Message Center

New Message

Click on a Message to Reply

- Work order 4519 is Complete **SchoolDude Message Center** 10/28/2015 2:30:47 PM (0)
- Status Change for work order 4519 **SchoolDude Message Center** 10/28/2015 2:30:47 PM (0)
- New Work Order Notification (4519) **SchoolDude Message Center** 5/29/2015 8:13:47 AM (0)

S

▶ Back to Shortcuts

Journal Notes

New Note

Date	Journal Note
	No Journal Notes at this time

▶ Back to Shortcuts

Transactions

New Purchase Transaction

New Labor Transaction

No Transactions for this Work Order yet.

▶ Back to Shortcuts

Approval Routing

Date	Approved?	By	Routed To
5/29/2015 8:13:46 AM	System Route	darren sinnaeve	Kevin Luukkala

▶ Back to Shortcuts

File Attachments

Attach New File (Maximum allowed is two attachments with a size of 3MB or less per file.)



▶ Back to Shortcuts

◀ Prev Next ▶

Save & Print Form

Back to Shortcuts

Legend

- Required Information
-  Automatically saves on click
-  Shortcut menu

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PID: 3
CUA: Chrome

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My Account(257634000) Services Help Logout |

Need help? Call us 1-877-868-DUDE (3833)

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June 2015 Emails
Regarding Alcove Cover
Repair/Maintenance



Rob Soyring <rsoyring@gwinn.k12.mi.us>

Gym

5 messages

Darren Sinnaeve <dsinnaev@gwinn.k12.mi.us>
To: Rob Soyring <rsoyring@gwinn.k12.mi.us>

Tue, Jun 23, 2015 at 2:17 PM

We need to get someone on repairing the volleyball cover on the north end of the main floor before someone gets hurt. Jordan Stein last week ended up flat on his back last week as the cover slide out of place across the floor. I duct taped it down but it still is not laying flat because the volleyball team pulls it up to use it. Also the padding should be place over the stage. Someone could get hurt on the angle iron pieces attached to the floor to put the walls up Thanks, Darren.

Rob Soyring <rsoyring@gwinn.k12.mi.us>
To: Karen Anderson <kanderson@nsacd.com>
Cc: Vicki Nelson <VNelson@gwinn.k12.mi.us>, Darren Sinnaeve <dsinnaev@gwinn.k12.mi.us>

Tue, Jun 23, 2015 at 2:54 PM

Karen,

Not sure how to solve Darren's concerns (see included) without Alvin working. Thoughts?

RS

Sent from my iPhone

Begin forwarded message:

From: Darren Sinnaeve <dsinnaev@gwinn.k12.mi.us>
Date: June 23, 2015 at 2:17:51 PM EDT
To: Rob Soyring <rsoyring@gwinn.k12.mi.us>
Subject: Gym

-84-

We need to get someone on repairing the volleyball cover on the north end of the main floor before someone gets hurt. Jordan Stein last week ended up flat on his back last week as the cover slide out of place across the floor. I duct taped it down but it still is not laying flat because the volleyball team pulls it up to use it. Also the padding should be place over the stage. Someone could get hurt on the angle iron pieces attached to the floor to put the walls up Thanks, Darren.

Karen Anderson <kanderson@nsacd.com>
To: Art Nordeen <GwinnAreaCleaning@yahoo.com>
Cc: Rob Soyring <rsoyring@gwinn.k12.mi.us>

Tue, Jun 23, 2015 at 3:04 PM

Art,

Could you please look at this problem area and we can discuss tomorrow.

Thank you.

KA

[Quoted text hidden]

Karen Anderson <kanderson@nsacd.com>
To: Rob Soyring <rsoyring@gwinn.k12.mi.us>
Cc: Vicki Nelson <VNelson@gwinn.k12.mi.us>, Darren Sinnaeve <dsinnaev@gwinn.k12.mi.us>

Wed, Jun 24, 2015 at 2:20 PM

4/12/2017

Gwinn Area Community Schools Mail - Gym

Art suggested taping the angle irons down and putting the larger project on hold at this time. Are you ok with this resolution? You might want to take a look in the gym.

KA

[Quoted text hidden]

Rob Soyring <rsoyring@gwinn.k12.mi.us>

Wed, Jun 24, 2015 at 4:05 PM

To: Karen Anderson <kanderson@nsacd.com>

Cc: Vicki Nelson <VNelson@gwinn.k12.mi.us>, Darren Sinnaeve <dsinnaev@gwinn.k12.mi.us>

Karen,

I'm familiar with Darren's concerns. The iron angles don't have the ability to be taped down unless "taped down" has a different definition I'm unfamiliar with. It's truly not Darren's responsibility and I feel guilty recommending this but while Alvin is out for medical reasons and Art is busy with other district projects somebody like Darren might need to recruit some kids to bring our storage walls back into the gym and re-secure them to the area once again enclosing our stage risers. A grass roots effort seems to be our only option to provide safety during this challenging time of inadequate general maintenance coverage. As for the volleyball standard floor plate, we can continue to tape but volleyball does need to untape it for some open gyms.

Do we have any idea as to when Alvin is returning?

RS

Sent from my iPhone

[Quoted text hidden]

RECEIVED by MSC 9/24/2021 12:22:30 PM

AJ Filizetti
Selected Pages of April 13, 2017
Deposition Transcript

Wayne, Stacey, Laila, and Melissa Filizetti
v.
Gwinn Area Community Schools, Tracy Belusar, and
Anthony J. Filizetti

Case No. 16-54781-NO

Transcript of the Testimony of
Anthony J. Filizetti

April 13, 2017



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Natalia Rutkowski, CSR, RPR

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Fax: (906) 273-2114

rutkowskicourtreporting@gmail.com

www.rutkowskicourtreporting.com

1 principal, combining the middle school and high school
2 principal, and I believe the other one was the special
3 programs director that did special ed and some of the
4 other title programs.

5 So Sandy Petrovich was going to be the principal at K.I.
6 Sawyer, and we were looking to hire a new principal that
7 had a special education focus at Gilbert.

8 Q. And so an outside candidate filled that position?

9 A. Correct. Amy Borash.

10 Q. And so she became not only the principal, but she assumed
11 the capacities of the special education director?

12 A. Correct.

13 Q. And then when you become an employee, you take the job
14 responsibilities of the financial officer.

15 But then you also then -- There was a facilities director
16 that was out on medical leave and wasn't coming back; you
17 assumed those job responsibilities, too?

18 A. Correct. Brenda Kurian had been out, and was not
19 anticipated to be able to get medical clearance to
20 return.

21 So I believe over that summer of 2015, Karen Anderson
22 identified our head boss mechanic, Doug Zimmerman, as the
23 person who was going to take care of getting our bus
24 routes put together for the school year, and the HVAC,
25 SchoolDude, facilities management portion of Brenda's job

1 cleaning lockers. There was stuff in the hallway that
2 shouldn't be there still. It should have been put back
3 in the classrooms or put back into its normal storage
4 location.

5 Q. Okay. So when you came in -- Was it August 15th, your
6 start day?

7 A. I started on August 10th.

8 Q. So when you walked in here as an administrator on
9 August 10th, as soon as you walked into the hallway, you
10 knew things weren't going the way they were supposed to
11 be for summer remediation?

12 A. I didn't know if that was normal or not at that point in
13 August. Normally, I would believe by August the rooms
14 would have been done, and stuff would have been put back
15 into place, and they would have been tidying up by that
16 point.

17 Q. Because school starts in three weeks?

18 A. School starts in three weeks, but you also -- that means
19 football is probably back and using the locker room and
20 practicing outside. When I was in school, it would have
21 been basketball, which is now volleyball season. So
22 volleyball would have been in. Cheerleaders would have
23 usually been outside or in the gym, I believe, if they
24 were practicing stunting.

25 Q. So the school was coming back to life?

1 August 10th and the Memorial Day holiday?

2 A. I believe --

3 Q. Or is it Labor Day? Labor Day holiday. I'm sorry.

4 A. I believe at some point prior to that, yes, I had gotten
5 access to SchoolDude, and was in the process of
6 reviewing -- I think I went back to either May or June of
7 the previous year to try and look through anything that
8 was flagged high priority that hadn't been closed out,
9 anything that was open that hadn't been closed out, to
10 try and ascertain what, if anything, had been done with
11 no maintenance person over the summer.

12 Q. And when did you do that?

13 A. I'd have to review my -- I believe I have an e-mail on it
14 when I was getting it set up. It probably would have
15 been the week of the 24th.

16 Q. Who would you have sent this e-mail to? I don't believe
17 I've seen it.

18 A. It was communicating with somebody at SchoolDude. I
19 believe I had gotten an e-mail from them telling me what
20 the login was, and we were trying to set up a training
21 with them on the use of SchoolDude.

22 Q. Okay. Had you already accessed SchoolDude at that point
23 in time, or was this SchoolDude saying, "Hey, let's take
24 an opportunity to have our people come in and train"?

25 A. On the 24th, I believe that was me getting set up with

1 access to SchoolDude.

2 Q. So when they offered to come in for training, it was at
3 their initiation as opposed to you already reviewing this
4 and saying, some things are not right here?

5 A. No. As soon as I contacted them to get set up, they
6 initiated the offer of, "We'll have a rep call you, being
7 a new person, and take you through getting it set up,
8 getting it organized."

9 Q. Okay. So that's done the week of August --

10 A. I believe it was August 24th or thereabouts.

11 Q. And there's an e-mail that may exist in that regard?

12 A. Yes, I believe there is.

13 Q. After that date and before the accident, then you start
14 accessing SchoolDude to see what jobs are entered there
15 and have gone unfulfilled?

16 A. Correct.

17 Q. And one of those jobs was an entry of 5-29-15 by
18 Darren --

19 A. Sinnaeve.

20 Q. Sinnaeve. Was he your basketball coach in the day?

21 A. Yes. He would have been my freshman coach.

22 Q. And the requested description at that time was, "The
23 wooden encloser and padding that covers the stage needs
24 to be put back in place. The steel pieces of angle iron
25 on the floor that it attaches to are dangerous when they

1 are exposed;" did you see that?

2 A. No. That piece was not in the gym. I can show you in --

3 Q. No, no, no, no, no. That's not my question.

4 Did you see that entry in SchoolDude?

5 A. Oh, the entry? Yes.

6 MR. RYAN: What number is that?

7 MR. JANES: It's Work Order 4519.

8 MR. RYAN: The exhibit number is?

9 MR. JANES: Oh, the exhibit is that compilation
10 exhibit that I put together, number 3.

11 MR. RYAN: 3? Okay. Gotcha.

12 BY MR. JANES:

13 Q. Okay. So you see that entry; did you note that it was
14 open and unfulfilled?

15 A. Yes.

16 Q. You didn't make any entry, as far as I know, because
17 there's a history log that you can put into, at that time
18 then on or about August 24th, as to your involvement in
19 the process; is that correct?

20 A. Correct. When I noticed that that was open, I believe I
21 took a walk to the gym, because I wasn't sure what he was
22 referring to.

23 Q. Because there was no --

24 A. So --

25 Q. Just hang on.

1 order was not closed out.

2 Q. Because not only was something that was described as
3 being -- existing in May of '15 is not there, but what
4 was requested to be done in May of '15 did not occur?

5 A. A portion of it occurred. The angle iron was removed at
6 some point.

7 Q. Well, "the wooden enclosure and padding need to be put
8 back in place" did not occur?

9 A. Correct, that had not been done yet. Correct.

10 Q. And instead what happened is, is that steel pieces of
11 angle iron on the floor that it attaches, which means the
12 enclosure -- necessary for the enclosure to be attached
13 had been removed?

14 A. You said the angle iron ...

15 Q. It says right here, "The steel pieces of angle iron on
16 the floor that it" -- "that it" meaning the wooden
17 enclosure and padding -- "attaches to are dangerous when
18 they are exposed."

19 So the request here was to put up the wooden enclosure
20 and padding and attach it to the angle iron; you
21 interpret it that way, don't you?

22 A. Yes. My --

23 Q. And then what happened, though, is somebody doesn't do
24 what's requested, and, in fact, takes a necessary piece
25 of angle iron off the floor contrary to what the task

1 A. -- that specific line item, I don't think I realized who
2 removed it until a few days ago.

3 Q. But -- Okay. So now we still have a situation in the
4 week of August 24th. You go and investigate the
5 circumstances of an open work order, and you realize the
6 wooden enclosure that was asked to be put up in May
7 wasn't put up. What did you do then?

8 A. At that point, nothing yet.

9 Q. Why?

10 A. Because there were still things in the hallway that were
11 going to need to be brought back into the gym. Down that
12 same hallway were wrestling mats that would have needed
13 to be moved back up onto the mezzanine. So at that time,
14 I was still under the assumption that that was summer
15 work still not yet completed.

16 Q. Well, it's not only summer work, it was spring work that
17 was requested in May, true?

18 A. Correct.

19 Q. And the stage was there, wasn't it?

20 A. Yes.

21 Q. And you made an investigation that somebody did
22 something.

23 Did you go and say to Gwinn Area Maintenance -- or Gwinn
24 Area Cleaning and Maintenance, "We have this open work
25 order. Somebody did something. What's going on?"

1 A. I can't recall if I checked with Gwinn Area Cleaning and
2 Maintenance at that point or not, or if I just assumed
3 that Alvin had removed that piece of angle iron prior.

4 Q. But Alvin was on disability in May.

5 A. But he -- No, he -- I believe he was still working in
6 May. I don't think he left until June.

7 Q. Okay. But you know that somewhere in the school then are
8 two large panels that were supposed to be installed at
9 that location?

10 A. Correct.

11 Q. Did you ever go and try to investigate where those panels
12 were?

13 A. I believe at that time I knew they were down the -- what
14 would be the band or the shop hallway.

15 Q. When you say "at that time," again, I need to clarify --

16 A. That would have been at some point the week of the 24th
17 when I would have, I believe, went in and checked to see
18 if that angle iron was removed.

19 Q. Did you, at any point in time from August 10th to the
20 24th, see those wall panels at another location?

21 A. No. I don't believe prior to that week I knew they were
22 in the band hallway.

23 Q. Okay. The question, again, is, that you're newly
24 employed, and you may have walked around and checked
25 things out.

1 Do you have a recollection of seeing these panels, which
2 are pretty (inaudible), at any point in time during your
3 walk around?

4 A. No.

5 THE COURT REPORTER: I'm sorry. Did you say
6 "pretty ..."

7 MR. JANES: Pretty big.

8 THE COURT REPORTER: Pretty big. Sorry.

9 MR. JANES: Enormous.

10 BY MR. JANES:

11 Q. Okay. So we have the week of August 24th. We know we
12 have an unfulfilled work order. You look and you find
13 the panels in the back hallway near the shop.
14 Did you seek out anybody at that point when you
15 discovered that the panels were still back there, that,
16 "These need to be done before Memorial Day weekend"?

17 A. No, I did not, not until I got the e-mail from Rob on the
18 2nd.

19 Q. And that was after Memorial Day weekend?

20 A. No, that was prior to Memorial Day weekend.

21 Q. Okay. You're right.

22 A. Labor Day weekend. I'm sorry. You're throwing me off.

23 Q. I get that wrong all the time. Labor Day weekend.

24 Because Labor Day was the 5th?

25 A. Yeah. Memorial Day would reference the work order for

1 BY MR. JANES:

2 Q. You were aware in your job capacity, by receiving an
3 invoice from Gwinn Area Cleaning and Maintenance for
4 services rendered in July, that they had been performing
5 maintenance tasks throughout the summer; isn't that
6 correct?

7 A. I would have to look to see if I received that invoice,
8 if it was processed prior to my start date.

9 Q. Okay. Well, then let's ask it a different way.

10 While you were there in August, from the 10th through
11 September 2nd, you are aware that Gwinn Area Cleaning and
12 Maintenance was performing maintenance tasks at the
13 school?

14 A. Yes. That I could definitively answer.

15 Q. And so you know that their crew had been performing
16 maintenance in the school. And you then just had a new
17 person, Tracy, three days prior come onboard from PCMI.
18 She's a newbie. You know that there's crews in here that
19 have been doing it all summer.

20 Why didn't you call Gwinn Area Cleaning and Maintenance
21 on that day at 11:00 o'clock, and say, "Guys, we got to
22 get this job done, let's get it done"?

23 A. Because at the time, I didn't --

24 Q. Think about it?

25 A. -- believe that it was of immediate necessity, because I

1 wasn't aware of --

2 Q. Okay. You didn't think it was an immediate necessity.

3 So you're going to kick the can down.

4 How long are you going to kick the can down the road?

5 A. The next morning.

6 Q. Okay. So your plan was to do it the next morning?

7 A. Correct.

8 Q. But you were aware the next morning would have started
9 another big inservice day for the school district at that
10 high school/middle school?

11 A. Correct. They would have been in the cafeteria during
12 that time.

13 Q. Okay. And the inservice day for September 2nd would have
14 ended at what time?

15 A. I don't know what time it ended on the 2nd, if they were
16 done at 2:00 or 3:00.

17 Q. Okay. Either way, all the people that were inservice,
18 the 100 or 85 people that would be in the school, they'd
19 be out of the school at 2:00 or 3:00 o'clock, so that
20 would leave from 3:00 o'clock to 5:00 o'clock, a workday,
21 for you to have the opportunity to get the crew in and
22 get the job done before the next morning, true?

23 A. True.

24 Q. And you were also aware that there had been sporting
25 teams doing practices in the morning hours on school

1 property, true?

2 A. True. I knew about the football team practicing outside.
3 I had not been down to the gym that week.

4 Q. Either way, the practices for the sporting teams are in
5 the morning in August/September so that they're not out
6 in the afternoon heat and sun; you know that, don't you?

7 A. Correct.

8 Q. But you didn't avail yourself to the crew that was on
9 site to have the job done between 3:00 and 5:00.
10 Instead, you kicked it down the road to the next morning.
11 And you asked who to help you?

12 A. Tracy Belusar.

13 Q. Wasn't there a Gwinn Area Cleaning and Maintenance person
14 on site the next morning, too?

15 A. Yeah. There would have been a couple of them on site.

16 Q. A couple?

17 A. Yes.

18 Q. Who were they?

19 A. I believe that day Bob Thomas was here, and I believe
20 Dylan Hart was here.

21 Q. Okay. So two men were here, and you didn't approach two
22 men to help you move two large partition panels, you
23 approached a woman to help you?

24 A. Correct.

25 Q. You're an administrator.

1 Why didn't you administrate and say, "It's your job, get
2 it done"?

3 A. To who?

4 Q. To the people whose job it was to get it done.

5 A. I believed that I was going to Tracy as our newly-hired
6 maintenance person, and telling her -- reviewing this
7 list with her, and asking her if she believed we could
8 move those into the gym and install them or not.

9 Q. Is that how you think it went down?

10 A. Yes, I do.

11 Q. Okay. Are you stating, then, to me that you didn't tell
12 Tracy that, "This needs to be done this morning"?

13 A. I said, "It needs to be done, and -- "

14 Q. And didn't she actually object to you and say, "I'm about
15 to leave, and I've got to get over to Sawyer and fix a
16 sink"?

17 A. I don't believe her objecting to me, no.

18 Q. So did she mention a sink?

19 A. Yes. She was working on a sink at Gilbert -- or at
20 Sawyer. I'm sorry.

21 Q. And so you recall her making a mention that she needs to
22 do something about a sink, but you don't think she
23 objected?

24 A. Correct. I --

25 Q. Okay. You've got to be very -- When I'm asking my

1 A. At that time, I believe she mentioned that that morning,
2 Bob Thomas from Gwinn Area Cleaning and Maintenance had
3 asked her when they were going to be moved back into the
4 gym, so that they could wax that hallway for the start of
5 school.

6 Q. Okay. So based on that, again, you have a fourth piece
7 of evidence -- a fourth -- Excuse me. Strike that.
8 Based on that, you now have a fourth piece of information
9 that Gwinn Area Cleaning and Services were aware that the
10 requested task of them in May had not been completed?
11 In other words, at some point in time in recent days,
12 they were complaining about the fact they're not in place
13 and they need to clean that back hall, true?

14 A. I believe that to be a true statement. Yes.

15 Q. So she conveys that information to you before undertaking
16 the task.

17 Did she make objections?

18 A. No. She mentioned that the carts were in the shop, and I
19 believe then I asked if she thought we could move them,
20 and we went to the shop and retrieved the carts.

21 Q. Okay. By that question, then, it infers to me that you
22 had doubt?

23 A. I did until we lifted the panels onto the cart.

24 Q. And the reason you had doubt was because of the size of
25 the panels?

1 A. That would be a correct statement.

2 Q. And your size, sir, is?

3 A. 5'11", 310.

4 Q. And what was your size back in September of 2015?

5 A. The same.

6 Q. So you are a stout, strong individual?

7 A. Correct.

8 Q. And even though you are a stout, strong individual, you
9 had concern whether or not you could do this task with
10 one other person?

11 A. Prior to getting the carts and lifting them onto the
12 carts, yes.

13 Q. If that were the case, why didn't you remove any
14 uncertainty in your mind, to make sure you had more
15 people available to do the task, and that you would not
16 have any doubt that you could do it properly?

17 A. I viewed the biggest issue was going to be getting it on
18 the cart. I didn't view once they were on the cart,
19 moving them into the gym as being an issue.

20 Q. There wasn't any urgency, was there?

21 A. The only urgency was, that obviously with school starting
22 in three days, getting those installed to allow the floor
23 to be waxed and ready for the start of the school year.

24 Q. Okay. Well, therein lies another good point.

25 That waxing was going to be done by Gwinn Area Cleaning

1 and Maintenance, right?

2 A. Correct.

3 Q. So if those boys wanted to get that area cleaned and
4 waxed, they could have helped in moving those panels into
5 the gym?

6 A. Yes, they could have.

7 Q. It's been that way all summer long, right?

8 A. Correct.

9 Q. School didn't start for three days, correct?

10 A. Correct.

11 Q. Tracy didn't have to leave in 30 to 40 minutes? I mean,
12 the time frame -- Her hours were going to end at 10:00.
13 So there wouldn't be any rush if we would have gotten
14 Gwinn Area people to do it later in the day, correct?

15 A. Correct.

16 Q. But you elected not to do it that way?

17 A. I elected to have Tracy help me. Correct.

18 Q. And it's your testimony -- And I'm going to use a
19 crude ...

20 But it's your testimony that Tracy did not bitch to you
21 about this?

22 A. The bitching, as it was stated, I believe, in the police
23 report, in my mind was primarily due to Gwinn Area
24 Cleaning and Maintenance.

25 Art Nordeen had taken her on a tour of the facilities, I

1 get a sense of whether or not it was a stable object?

2 A. When I lifted the panel onto the dolly or cart, I would
3 say yeah. The weight of it helped stabilize it on the
4 cart, but it was still going to need to be moved
5 carefully.

6 Q. And the cart itself, though, it's got a V to slide it in,
7 and then a flat surface to rest upon, right (gesturing)?

8 A. Correct.

9 Q. But when you lifted it up, did you use the rope with one
10 hand, or did you have to use two hands with the rope to
11 lift it up?

12 A. I believe I used one hand on the rope, and the other hand
13 on the back support (gesturing).

14 Q. And did -- So you were holding it to stabilize it on one
15 side.

16 Did you have Tracy at the other end holding her end so
17 it's stabilized on both sides?

18 A. I believe that was how we did it, yes. So I lifted and
19 put the cart under while she stabilized the other end,
20 and then we traded spots, and I lifted the other end, I
21 believe.

22 Q. So we've got -- And I'm going to animate here for the
23 record.

24 By the way, at this point in time, you had no knowledge
25 that a graduation stage cover removal and reinstallation

1 manual was put into place the spring before, were you?

2 A. No, I had no knowledge of a stage manual.

3 Q. Okay. Did you ask anybody in the office to say, "Hey,
4 I've been asked to do this. Is there anything to tell me
5 what to do or how to do it?"

6 A. No, I did not.

7 Q. Was Jane in the office on the 2nd or 3rd of September?

8 A. Yes, I believe Jane would have been here.

9 Q. And she, according to Mr. Jayne yesterday, as well as two
10 other ladies that work in the office, are invaluable.
11 They're the historical reference point, and he would
12 never trade them for the world; do you share that
13 opinion?

14 A. Yes.

15 Q. Okay. And you were new to the table or the task.
16 And did you avail yourself to talk to these three wise,
17 longstanding employees to see if there was any
18 information as to how to go about the task of
19 reinstalling the panels?

20 A. No.

21 Q. So you are correct. I'm looking at the police report,
22 which has been marked as Exhibit 12, and there is
23 measurements contained indicating that the height of the
24 panels are 72 inches high, the width of the panels are
25 10 inches wide, the length of the panels are 145 inches

1 A. Oh, true. Yes.

2 Q. So why is it that you picked 9:05 as the time you believe
3 you went and sought out Tracy?

4 A. Because I believe before going into the hallway, we had
5 spent a few minutes talking about the -- what she was
6 working on at Sawyer with the sink.

7 Q. The word "believe" always causes me concern. Okay?
8 So I don't know what "believe" means to you, but I know
9 it means to me that "I don't know for certain."

10 So did you talk to Tracy at some point in time prior to
11 9:05?

12 A. No, I don't believe I talked to her sometime prior to
13 9:05.

14 Q. Okay.

15 A. Sorry.

16 Q. Let's try to leave that "believe" out of there, buddy.

17 A. Sorry. No, I don't recall leaving my office before
18 9:00 o'clock.

19 Q. When was the first time that you encountered Tracy that
20 morning?

21 A. Shortly after 9:00 o'clock.

22 Q. And where was that?

23 A. I think I encountered her in her office. I don't think I
24 met her in the hallway. I think I actually found her in
25 her office.

1 Q. So you sought her out?

2 A. Yes. I was looking for her.

3 Q. And the Gwinn Area Maintenance -- or Gwinn Area Cleaning
4 and Maintenance, that office is closer to your office
5 than Tracy's, isn't it?

6 A. Yes.

7 Q. And that office is right around the corner from where
8 these panels were stored, correct?

9 A. Yes.

10 Q. And their crew was here in the building at that point in
11 time?

12 A. Yes.

13 Q. A thought just came to my mind. I apologize. I'm going
14 to take a diversion.

15 So you seek her out at 9:05.

16 Why is there a 20-minute delay between seeking her out
17 and starting the task?

18 A. Like I said, I recall talking about the sink. Then we
19 would have gone out into the hallway where the stage
20 cover was stored, talking about that for a minute.
21 That's where I believe we talked about Bob mentioning the
22 fact that he had asked. So then we went back into the
23 maintenance shop to retrieve the ...

24 Q. Carts?

25 A. The carts. And then went back out into the hallway.

1 Q. Okay. And your timeline indicates that you believe that
2 at 9:24 a.m., you load first portable stage cover.
3 That's not the term that you used in describing it to the
4 police; is that correct?

5 A. I don't know what term I used in describing it to the
6 police. I would have to look.

7 Q. That's fine. Let's find it.

8 (Brief pause)

9 BY MR. JANES:

10 Q. It's Exhibit 12, sort of towards the middle.
11 Your interview is towards the top.

12 A. Okay.

13 Q. The recording of the police officer of that conversation
14 he had with you is that you referred to it as a "safety
15 partition."

16 A. Okay.

17 Q. And, in fact, in the second sentence, he again repeats
18 "safety partition."

19 Would you have likely referred to it as a safety
20 partition on that day?

21 A. Probably.

22 Q. Okay. So going back to 78.

23 You, at 9:24, load first portable stage cover, AKA
24 safety partition, onto carts in hallway outside of band
25 room and transport to gym.

1 And you then put in the plus or minus time period two
2 minutes.

3 Is the two-minute time frame the loading of the stage
4 cover on the carts, or was it the complete task of
5 loading and transporting them to the gym?

6 A. I added the plus or minus because I couldn't be exact.
7 This was my best estimate of the time I believe it to
8 have taken place.

9 Q. I'm going to ask you again to try to understand my
10 question before responding to it.

11 A. So the two minutes in that column would mean it could
12 have been 9:22 or 9:26.

13 Q. Okay. So it's the start time -- plus or minus the start
14 time. It's not two minutes to complete the task?

15 A. Correct.

16 Q. Okay. And so it's -- The complete -- The task is, you
17 believe, a nine-minute task, if I am correct, because you
18 went 9:24 for the first one, and 9:33, the start of the
19 second one?

20 A. Correct.

21 Q. So you, with the assistance of Tracy, move the left panel
22 into the gymnasium at 9:24 or thereabouts, according to
23 88 [sic] and 78.

24 And now looking at 77. I'm trying to get a sense of what
25 the intent of this drawing is.

1 A. Will rest against the stage. I see what you're saying.

2 Q. And at that point, there's only a kick out, or a change
3 of elevation of whatever it is in height, of the angle to
4 the exterior point. In other words, it could be, I
5 don't know, 2, 3 -- I don't know how many inches.

6 Did you make an observation of how many inches the
7 outside of the wall may have been off the ground as
8 opposed to the inside point?

9 A. No.

10 Q. Did you know when you were picking these things up that
11 they were top-heavy?

12 A. Not until we leaned them against the wall.

13 Q. Oh. So when you leaned them against the wall, you
14 noticed that they were top-heavy?

15 A. (Nodding)

16 Q. Yes?

17 A. That was when we kicked them out a little bit more.

18 Q. The very first one, you knew it was top-heavy?

19 A. (No response)

20 Q. Yes?

21 A. Yes.

22 Q. If you knew they were top-heavy, i.e., then unstable, as
23 you put it there, why didn't you just say, "You know
24 what? We shouldn't do this. We should put it back on
25 the cart and bring it back."

1 A. When we brought the first panel in through the door and
2 realized that the cheerleaders were on the mats, the
3 cheerleaders were on their mats practicing stunting or
4 practicing on blue mats approximately 80 feet from where
5 we were going. And with the weight of the wall leaned
6 against, with the kick out on the bottom, I didn't see a
7 risk of the cheerleaders going down there and interacting
8 with where we were performing work.

9 Q. That's an assumption on your part, right? Because you
10 didn't ask them, "Are you going to come down here,"
11 right?

12 A. No. There was no communication between myself or the
13 cheerleading coach.

14 Q. And there was no communication between Tracy and the
15 cheerleading coach?

16 A. Correct.

17 Q. When you came in with the first panel, was Tracy
18 Filizetti observed by you -- Stacey Filizetti. I
19 apologize.

20 A. Her -- Her obs- --

21 Q. Let me ask the question again --

22 A. Sorry.

23 Q. -- because I made a misstatement.

24 When you brought in the first panel, did you observe
25 Stacey Filizetti present in the gymnasium?

1 A. Specifically, no. I viewed a person standing with their
2 back to the bleachers watching the cheerleaders, who I
3 assumed to be the coach.

4 Q. Okay. The back side of that person, please describe it.

5 A. Not -- With their back to the --

6 Q. I understand. You saw a back side of a person?

7 A. No. I'm saying I saw a person looking across through the
8 cheerleaders at us. So --

9 Q. Oh, so you saw -- You saw there was somebody towards the
10 bleachers?

11 A. They had their back to the bleachers, watching the
12 cheerleaders, looking at the doors we came in.

13 Q. Okay. And you don't know who that person was?

14 A. Correct. I believed that person to be the coach.

15 Q. Please answer my question.

16 You didn't know who that person was?

17 A. Correct.

18 Q. You know who Stacey Filizetti is?

19 A. Correct.

20 Q. The person that you believed to be the coach, even though
21 you had prior knowledge of who Stacey Filizetti was, you
22 didn't associate that person to be Stacey Filizetti?

23 A. No.

24 Q. Okay. So we have one person who you don't believe -- or
25 don't associate to be Stacey Filizetti there, and

1 cheerleaders.

2 My question is, did you see Stacey Filizetti in the
3 gymnasium when you brought the first panel in?

4 A. Stacey Filizetti, no. I saw who I believed to be the
5 coach.

6 Q. Okay. I appreciate that, but I don't want to have the
7 record confused.

8 You knew who Stacey Filizetti was as of September 3rd,
9 2015, right?

10 A. Yes.

11 Q. Okay. I don't know if you knew Stacey Filizetti was the
12 coach or not the coach.

13 But the fact is, is that Stacey Filizetti wasn't in the
14 gym when you moved the first one in -- at least, you
15 didn't see her?

16 A. I don't know that I would have recognized her from where
17 we brought the panels in and where I saw a person
18 standing.

19 Q. Okay. The person that you saw standing looking out, can
20 you describe any feature of that individual?

21 A. No.

22 Q. Okay. So it could have been one of the older girls?

23 A. Yes.

24 Q. And so now you have positioned the panel.

25 And let me make sure I'm -- Again, I'm going to be

1 particular about the time.

2 When you observed the cheerleaders and this person
3 standing with their back to the bleachers, was that when
4 you were bringing the panel in, or was that when you were
5 exiting the gym?

6 A. I believe that would have been both.

7 Q. Both times. Okay.

8 Now going back to a point I was trying to make.

9 You said that because of the position -- And the
10 gymnasium -- Let's do this:

11 Now with your blue pen, because they were blue mats,
12 where were the mats and the cheerleaders positioned when
13 you entered the gymnasium for the first time?

14 (Witness writing on A.J. Filizetti No. 82)

15 BY MR. JANES:

16 Q. Okay. And would you please, again --

17 A. Arrow and label?

18 Q. Yep.

19 (Witness complying)

20 BY MR. JANES:

21 Q. And when you entered the gymnasium, from my understanding
22 of how things operate, there's motion detectors upon
23 entry, that the south half of the gymnasium lights will
24 come on, true?

25 A. If they are turned on at the switch, yes.

1 Q. Okay. And when you entered into the gymnasium that day,
2 were the south half of the lights of the gymnasium on?

3 A. I'm sorry. Hang on. Can you go back to the previous
4 question? Because you said --

5 Q. When you enter the gymnasium and you're entering from the
6 south --

7 A. Yes.

8 Q. -- it was my belief -- and maybe I'm wrong -- that there
9 was motion detectors that would turn on the lights for
10 the south half of the gymnasium.

11 A. The south half was already lit.

12 Q. Okay. But I'm asking a different question.

13 Not when you walked into the gym that morning, but when
14 anybody walks into the gymnasium and it's dark, if you
15 walk in, would a motion detector turn on the south half
16 lights?

17 A. If the switch located on this wall is on (indicating),
18 yes, it would.

19 Q. Okay. So on that day, though, you walk in -- And were
20 you walking with your back guiding the panel on the
21 carts, or were you walking with your front pushing the
22 panel on the carts?

23 A. I don't recall.

24 Q. And so when you walk into the gymnasium, you are certain
25 that the south part of the gymnasium was fully

1 illuminated by the lights, true?

2 A. True.

3 Q. And the mezzanine to the east of the gymnasium, were the
4 lights on up there?

5 A. No.

6 Q. Certain?

7 A. Yes.

8 Q. Okay. Any other lights activated in the gymnasium?

9 A. No. I believe it was only the -- It was the south bank
10 of lights.

11 Q. So if I understand it correctly then, you have now
12 brought in a 10-foot long, 300 pound-plus panel, and
13 tilted it on one point of a corner, and balanced it on a
14 stage 4 feet or less in a dark end of the gymnasium,
15 true?

16 A. Yes. We transported the panels through the lit end of
17 the gym to a section where the lights did not come on.

18 Q. And you did that, and you did not advise the cheerleaders
19 or person you believed to be the coach that, "We just
20 positioned a large, 10-foot panel, unsecured except for
21 kicking it out from the wall, down at this end of the
22 gymnasium at the dark end," true?

23 A. Correct. There was no communication between myself and
24 the cheerleading team or Tracy and the cheerleading team.

25 Q. And you just assumed that the cheerleading team was going

1 to stay where they were in the gymnasium?

2 A. Yes. I reached that assumption based on the location of
3 the mats.

4 Q. And then you leave the gymnasium with that panel
5 positioned in that way at the dark end of the gym, true?

6 A. Correct.

7 Q. Without any communication, without blocking it
8 (gesturing) -- You know what blocking is, don't you?

9 A. Yes.

10 Q. Okay. What's blocking, to you?

11 A. Stopping something, similar to a chock block of a
12 vehicle.

13 Q. Okay. And so that means that it has more stability, that
14 it will stay where it's supposed to be, true?

15 A. True.

16 Q. And you didn't block either of the ends?

17 A. Correct.

18 Q. And you did not put up any cones or any other indication
19 that that area was an area of work in progress, true?

20 A. Correct.

21 Q. So then you leave that area with that panel in that
22 position, and you go and retrieve the second panel, and
23 you repeat the process, true?

24 A. Correct.

25 Q. And, again -- and we won't have to relive everything we

1 end of the gym, you rest the second panel on the points
2 that we've discussed, true?

3 A. True.

4 Q. And at any point in time, either between the first or
5 second panel, did Tracy Belusar object to you and say,
6 "We shouldn't be doing this, the gymnasium is in use"?

7 A. No.

8 Q. Did she give you any verbalization whatsoever -- Did she
9 say anything when the two of you were in the gymnasium
10 about this task?

11 A. No.

12 Q. Did you give her any direction about the task when you
13 brought the first panel in?

14 A. After bringing the first panel in?

15 Q. Yeah. Bringing in the first panel, did you provide Tracy
16 Belusar direction?

17 A. I don't remember if it was during the process of moving
18 the first panel or after moving the second that the plan
19 was to have her go back to the maintenance shop to get
20 the drill and the bucket of the hardware. And she
21 mentioned that she may grab Dylan, and I told her to come
22 to the office and grab me, if needed.

23 Q. The point in time you mentioned that when you first
24 positioned the first panel, you had positioned it in such
25 a way that you -- I assume you took your hands off and

1 said, "You know what, we've got to kick it out more;" do
2 you recall that testimony?

3 A. Yes.

4 Q. How far was it away from -- the kick out away from the
5 wall when you first positioned it, before you make the
6 realization that, hey, I've got to kick it out even more?

7 A. Less than a foot.

8 Q. So less than a foot away from the corner point, you
9 believed it was not kicked out far enough to be stable
10 and you needed to kick it out farther?

11 A. Correct.

12 Q. When that portion of the task was underway, was it your
13 direction to kick it out farther, or did you just think
14 that yourself, and you did it yourself?

15 A. I believe that was just thought and done.

16 Q. In other words, you didn't articulate to Tracy, "We need
17 to kick this thing out farther," you just thought about
18 it and you did it?

19 A. Correct.

20 Q. You, in your own mind, processed the fact that this is
21 not stable enough, we need to kick it out farther?

22 A. Correct.

23 Q. And when the second panel was brought in, you already
24 learned from your experience, and you just naturally
25 positioned it in a similar fashion that you already did

1 Q. (Continuing) -- Dylan to assist her.

2 And you indicate to her you are going to go where?

3 A. Back to my office.

4 Q. And then you also indicate that, "Hey, if you need me,
5 come get me"?

6 A. Correct.

7 Q. And your timeline for that endeavor was that you believe,
8 give or take a minute, at 9:45, you went to your office?

9 A. Correct.

10 Q. And with certainty, you know you were in your office at
11 9:50 and 9:51, because of timestamps on e-mails that you
12 had sent out?

13 A. Correct.

14 Q. And that at some point in time soon thereafter at give or
15 take 9:54, Judy Kitchen comes in to the administrative
16 offices and said, "Hey, there's a great discussion going
17 on in the cafeteria, you should head on down," right?

18 A. She was here looking for Tom.

19 Q. Okay. But she conveyed that information to you?

20 A. Yes.

21 Q. She didn't ask you to come on down, she just wanted to
22 make Tom aware of that?

23 A. Correct.

24 Q. And so then you took it upon your self to find Tom?

25 A. I knew Tom was meeting in the library with the food

1 remember if it was -- I can't remember Tina's last name.

2 Tina and Kathy Downs had the biohazard clean up, to clean
3 up the blood from the floor and get that cleaned up.

4 Q. Tina and Kathy Downs are employed by whom?

5 A. Gwinn Area Cleaning and Maintenance.

6 Q. So they're not regulars that are assigned to the high
7 school?

8 A. Kathy is. Tina, at that time, I believe, would have been
9 assigned to Gilbert.

10 Q. In either event, they're there already to clean up the
11 blood?

12 A. Correct.

13 Q. And who was assembled to affix the panels?

14 A. At that point, Tracy Belusar and Dylan Hart were in the
15 gym. I don't know when they got there because I stayed
16 outside until everybody left. But upon going back into
17 the gym, I believe Kristy Gollakner was still in there,
18 too, with gloves on helping clean up. I think Chris
19 was -- Oh, excuse me. Chris Norman was gone. I believe
20 the only one that was still in there was Kristy
21 Gollakner.

22 Q. Whose direction was it to clean up the blood and secure
23 the panels?

24 A. I believe the blood was being cleaned up when I got back
25 in there just from a biohazard standpoint. I believe

1 that that was the first thing people were trying to do,
2 was eliminate the biohazard from the floor.

3 As far as reattaching the stage cover, at that point, I
4 couldn't tell you if anybody told me to do that or if we
5 just started to put them back in place.

6 Q. So you, Stacey --

7 A. Tracy.

8 Q. Sorry again.

9 You, Tracy, and Dylan attached the panels?

10 A. Correct.

11 Q. Do you attach merely at the end points?

12 A. No. The metal angle iron was bolted to the floor, the
13 front panels were then assembled, and at that point I
14 don't believe the center support in the back was
15 attached, because we didn't have the ladder yet.

16 Q. So if I understand how it works, is that you have to be
17 behind the panel to attach the ends to the side alcove
18 walls?

19 A. No, that is not correct.

20 Q. Where are the attachment points?

21 A. The attachment points for the front panels on the end are
22 on the outside face (gesturing).

23 Q. Very good. Thank you. And so those were attached?

24 A. Correct.

25 Q. The base was kicked up to the ...

1 practice could be --

2 Q. You can't have kids in the gymnasium watching
3 cheerleading practice? You find that to be unreasonable?

4 A. I find it to be a risk.

5 Q. A risk for three little girls to watch cheerleaders;
6 that's unreasonable?

7 A. I didn't use the word "unreasonable."

8 Q. Yeah, you think it's a risk?

9 A. Yes, I would view that as a risk.

10 Q. Okay. Stacey Filizetti sure didn't know that you and
11 Tracy Belusar were going to be moving in two large panels
12 that day, were they [sic]?

13 A. Correct. And we didn't --

14 Q. There wasn't a public announcement that, "We're
15 undertaking work in the gymnasium," that, "We're going to
16 be doing this activity, be aware;" that didn't happen?

17 A. Correct.

18 Q. In fact, there was a scheduled time for the cheerleaders
19 to be in that gymnasium from 8:00 a.m. to 11:00 a.m., and
20 that was scheduled, wasn't it?

21 A. Scheduled with the athletic director; not communicated by
22 the athletic director. Correct.

23 Q. Well, that's -- He's administration, isn't he?

24 A. Correct.

25 Q. You're administration, aren't you?

1 A. Correct.

2 Q. Okay. So it was planned.

3 This activity that you took on with Ms. Belusar didn't
4 need to be done at that time, right?

5 A. Correct.

6 Q. And you knew teenagers were in the gymnasium undertaking
7 a physical activity training, true?

8 A. Correct, 85 feet away from --

9 Q. Oh, let's not get into 85 feet.

10 Because you don't know what cheerleading practice they
11 do, do you?

12 A. No. But when they are on --

13 Q. Okay. You don't know if during some point in time during
14 the cheerleading practice, the coach is going to say,
15 "Okay, let's run laps;" you don't know that, do you?

16 A. No.

17 Q. Do cheerleaders run laps?

18 A. I don't know.

19 Q. Okay. Do cheerleaders run lines?

20 You know what lines are. You played basketball.

21 A. I don't know.

22 Q. You know what lines are, don't you?

23 A. Yes, I know what lines are.

24 Q. And you don't know if part of cheerleading conditioning
25 is that they run lines or do any other physical activity?

1 A. No. When we walked in the gym, they were practicing on
2 the blue mats where I assumed they were going to stay.

3 Q. Yeah. But you know what the term about assumptions are,
4 so ...

5 A. Correct.

6 Q. You could have very easily, upon seeing children, i.e.,
7 teenagers -- I don't know if they're freshman to seniors,
8 but children in the gymnasium doing a physical
9 activity -- you could have said, "Oh, now is not a good
10 time. Let's bring them back."

11 A. Correct.

12 Q. Okay. You didn't do that?

13 A. No. I believed --

14 Q. And you didn't do that even after you had dropped off the
15 first panel and positioned it against the wall, and said,
16 "You know what? This isn't stable enough. I got to kick
17 it out to make it a little more stable;" you didn't do
18 that either at that point in time?

19 A. No. I believed the cheerleaders were in a location with
20 their coach that they were safe.

21 Q. At that point in time. But you don't know what they're
22 going to do in the practice.

23 They have every right, wouldn't you agree, to run around
24 the gymnasium, run sprints, do whatever they need to do?

25 A. Correct. And I was under the assumption that if they

1 were going to be doing that, they saw us move two
2 6-foot-by-10-foot panels.

3 Q. Again, but you've already told me there was no verbal
4 communication back and forth --

5 A. Correct.

6 Q. -- and you never had any physical hand waving back and
7 forth.

8 So you just made an assumption that people that were
9 engaged in an activity, which you described to be
10 stunting, where they have to have spotters and they have
11 to have people lifting, were going to miraculously, out
12 of their peripheral vision, see you guys doing something
13 for a moment as you wheel something through and then
14 endeavored some more activities down in the dark side of
15 the gym behind them, true?

16 All that's a true statement, isn't it?

17 A. Yes.

18 Q. The person that had the best knowledge of the
19 circumstances and the risk of the circumstances and the
20 activity that was going on that day was you, true?

21 A. No.

22 Q. The only person else it could be is Tracy Belusar.

23 A. It couldn't be the cheerleading coach?

24 Q. How in the world does she know anything about those
25 panels? She didn't lift them. She didn't try to kick

1 them. She didn't do any of the above.

2 How in the world would she know about the risks
3 associated with those objects being moved in?

4 A. What I observed was cheerleaders practicing with who I
5 assumed to be the coach on blue mats on the other end of
6 the gym.

7 Q. Okay. So you just don't want to say that either you or
8 Tracy were the people that were the most knowledgeable of
9 the situation, and accept the responsibility of the risks
10 associated with a task that you were performing.

11 And you're trying to say that a coach, who you assumed to
12 be a coach, whose responsibility it is -- And her
13 responsibility is to supervise teenagers that are
14 participating in stunts, itself an activity that needs to
15 be spotted. That's her job, is to watch those teenagers.
16 You're trying to say that she is now equally
17 knowledgeable about the tasks that you and Tracy are
18 supposed to be doing that's your responsibility; is that
19 where your testimony is?

20 A. There was a lot there. I ...

21 MR. RYAN: If you can't answer the question the
22 way it's framed, then just --

23 THE WITNESS: I can't answer that question the
24 way ...

25 MR. JANES: That's fine.

1 BY MR. JANES:

2 Q. You would agree with me, though, very simply, had
3 somebody responded to Darren's request for installation
4 in May, this wouldn't have happened in September, true?

5 A. True.

6 Q. You would agree with me that had somebody responded to
7 Rob Soyring's request for installation in May, that this
8 wouldn't have happened in September?

9 A. True.

10 Q. You would agree with me that had you, on or about
11 August 24th, when you realized the work order had not
12 been completed as posted in May, had taken about activity
13 to get it done at that point in time, this wouldn't have
14 happened in September?

15 A. True.

16 Q. You would agree with me that on September 2nd, when Rob
17 Soyring sends you an e-mail at 10:11 a.m., that had you
18 completed that task of reinstallation of the stage wall
19 cover at some point in time on the 2nd of September, this
20 wouldn't have happened on the 3rd, true?

21 A. True.

22 Q. You would agree with me that had you walked into the
23 gymnasium before you started to move the walls in and saw
24 the cheerleading practice underway, you would have paused
25 and said, "Now is not a good time"?

1 A. That is probably a true statement.

2 Q. And that had you done that, you would have waited, and
3 you would have done it at a point in time when you knew
4 the gym was not in use?

5 A. That is a true statement.

6 Q. And the accident wouldn't have happened?

7 A. Correct.

8 Q. You know that even assuming that it's likely that when
9 you brought that first panel in, and you verbalized to
10 the cheerleading squad and the person you assumed to be
11 the coach, "Hey, we're working on this end, stay down
12 there away from this work area," this accident wouldn't
13 have happened?

14 A. That's a possibility, yes.

15 Q. It's likely, true?

16 A. Likely, yes.

17 Q. You would agree with me that when you brought the second
18 panel in, had you announced to the cheerleaders and the
19 person you assumed to be the coach, "Hey, we have just
20 tilted two panels up at this end of the gym, and we're
21 going to go get some brackets to affix them, stay away,"
22 this accident wouldn't have happened?

23 A. That is likely, yes. It likely would have prevented the
24 accident.

25 Q. But all those things never happened, true?

1 A. Correct.

2 Q. Would you agree with me that that, in the words of Tracy
3 Belusar, is horrible, horrible negligence?

4 A. I would not.

5 Q. You would not?

6 A. No.

7 MR. JANES: I have nothing further. Thank you.

8 MR. RYAN: Just a couple of follow-ups.

9 EXAMINATION

10 BY MR. RYAN:

11 Q. A.J., if there had been no children in the gym that
12 morning, would the accident have happened?

13 MR. JANES: Objection, form.

14 MR. RYAN: You can answer.

15 THE WITNESS: No.

16 BY MR. RYAN:

17 Q. If the children had been supervised and not allowed to
18 play under the spotlight in the dark end of the gym,
19 would the accident have happened?

20 MR. JANES: Objection, form.

21 THE WITNESS: No.

22 BY MR. RYAN:

23 Q. Were there children in the dark end of the gym when you
24 took the panels in?

25 MR. JANES: Objection, form, foundation.

Page 149

August Emails Regarding Practice and Custodial Schedule

Subject: Fw: Practice vs. Custodial Schedule: Week 8/24
Date: Wednesday, May 18, 2016 at 12:11:29 PM Eastern Daylight Time
From: Stacey Filizetti
To: J. Paul Janes, Amanda Guest

On Thursday, August 20, 2015 2:52 PM, Rob Soyring <rsoyring@gwinn.k12.mi.us> wrote:

Bob,

I've taken some time to review our practice schedule requests for next week and the early mornings will be the best time again to clean the locker rooms because the majority of our high traffic practices move into the afternoon or early evening (see below)...

Cheerleading: 8a - 11a
Tennis: Matches on-site Monday, Tuesday and Wednesday (11a)
Varsity Volleyball: 12-3:30p
MS Girls Basketball: 3:30p - 5:30p
JV Volleyball: 6-8:30p
JV/Varsity Football: Either 4-7p or 3-6p

--
Rob Soyring
Gwinn Area Community Schools
Athletic Director

From: Rob Soyring <rsoyring@gwinn.k12.mi.us>
Sent: Friday, August 28, 2015 8:29 AM
To: clredfea@nmu.edu; Amy Luoma; Ben Olsen; Bill Hill; Bryce Hattamer; darcia mattson; Darren Sinnaeve; dion brown; Hillcoach@aol.com; Jim Finkbeiner; Jim Morris; Jim Morris; Kathy Morris; LaRocko; Stacey Filizetti; Stephanie Jean Bahrman; Toni Hantz; Kristen LaRock
Cc: HS Custodial; Vicki Nelson; Jane Flourre; Nancy Machalk; Barbie Ward-Thomas; Brian Rice
Subject: Practice Schedule for Week 8/31

- MS Football - Monday thru Friday: 3:30p-5:30/6:00p
- JV Football - Tuesday & Wednesday (3:00-6:00p) & Friday (10:00a-12:00p)
- V Football - Monday thru Friday: 4:00-6:30/7:00p (unless game scheduled)
- JV Volleyball - Monday thru Friday: 6:00 or 6:30p-8:30p (unless game scheduled)
- V Volleyball - Monday thru Friday: 12:00p-3:30p (unless game scheduled)
- Girls Tennis - Monday: 10a-3p
- Cheerleading - Tuesday, Wednesday & Thursday: 8:00a-11:00a
- Cross Country - Monday thru Friday: 8:30a-10:30a (unless meet scheduled)
- MS Girls Basketball - Mon, Wed, Thur, Fri (3:30p-5:30p), Tuesday (1:30p-3:30p)

*Similar
to B19
email from
Rob w/
Schedule*

--
Rob Soyring
Gwinn Area Community Schools
Athletic Director

Forsyth Police Department Case Report

**FORD - FORSYTH POLICE
DEPARTMENT**
Case Report



Case No. 1584100440
Case Status Not a Crime/Other Service
Report Date/Time: 9/3/2015 10:15:00 AM
Reporting Officer: Mills, Stephen

FILE CLASS/OFFENSE:

97006 - Other Non-Criminal Accidents - All Other

NATURE OF INCIDENT:

9954 - 99009 - EMS Assist - Non-Criminal / Filizetti / GHS / Kjellin / Mills / Warchock

3

OCCURRED ON: 9/3/2015 10:15:00 AM
(and Between)

VENUE: Gwinn High School Gwinn, MI 49841

VICTIM: FILIZETTI, Amarah Elaine		VICTIM OF: 9937 - 97006 - Other Non-Criminal Accidents - All Other	
		VICTIM TYPE: Individual	
RACE: White	DOB:	AGE: 04	
HGT:	SEX: Female	JUV: Y - Yes	
EYES:	WGT:	HAIR:	
SSN:	ETH:	Circumstances:	
ADDRESS INFORMATION:	DLN:	DL State:	
H -			
Phone Information:		Emails:	
M - Mobile:			
NOTES:			

WITNESS: Kunde, Makayla Marie			
RACE: White	DOB:	AGE: 16	
HGT:	SEX: Female	JUV: Y - Yes	
EYES:	WGT:	HAIR:	
SSN:	ETH:	Circumstances:	
ADDRESS INFORMATION:	DLN:	DL State:	
H -			
Phone Information:		Emails:	
M - Mobile:			
NOTES:			

WITNESS: Dachs, Savannah Marie			
RACE: White	DOB:	AGE: 17	
HGT:	SEX: Female	JUV: Y - Yes	
EYES:	WGT:	HAIR:	
SSN:	ETH:	Circumstances:	
ADDRESS INFORMATION:	DLN:	DL State:	
H - 1			
Phone Information:		Emails:	
M - Mobile:			
NOTES:			

WITNESS: Flourre, Sydney Lauren			
RACE: White	DOB:	AGE: 15	
HGT:	SEX: Female	JUV: Y - Yes	
EYES:	WGT:	HAIR:	
SSN:	ETH:	Circumstances:	
	DLN:	DL State:	

RECEIVED by MSC 9/24/2021 12:22:30 PM

ADDRESS INFORMATION:

H - Home:

Phone Information:

Emails:

H - Home:

TES:

WITNESS: Shelafoe, Kimber Ann

RACE: White

HGT:

EYES:

SSN:

DOB:

SEX: Female

WGT:

ETH:

DLN:

AGE: 14

JUV: Y - Yes

HAIR:

Circumstances:

DL State:

ADDRESS INFORMATION:

H - Home:

Phone Information:

Emails:

M - Mobile:

NOTES:

WITNESS: Harnick, Cassandra Rita

RACE: White

HGT:

EYES:

SSN:

DOB:

SEX: Female

WGT:

ETH:

DLN:

AGE: 15

JUV: Y - Yes

HAIR:

Circumstances:

DL State:

ADDRESS INFORMATION:

H - Home:

Phone Information:

Emails:

M - Mobile:

TES:

WITNESS: Hart, Dylan Phillip Johnson

RACE: White

HGT:

EYES:

SSN:

DOB:

SEX: Male

WGT:

ETH:

DLN:

AGE: 18

JUV: N - No

HAIR:

Circumstances:

DL State:

ADDRESS INFORMATION:

H - Home:

Phone Information:

Emails:

M - Mobile:

NOTES:

WITNESS: GOLLAKNER, Kristy Kay

RACE: White

HGT:

EYES:

SSN:

DOB:

SEX: Female

WGT:

ETH:

DLN:

AGE: 38

JUV: N - No

HAIR:

Circumstances:

DL State:

ADDRESS INFORMATION:

H - Home:

Phone Information:

Emails:

H - Home:

TES:

WITNESS: Filizetti, Anthony Joseph

RACE: Unknown

DOB:

SEX: Male

AGE: 34

JUV: N - No

HGT: WGT: HAIR:
 EYES: ETH: Circumstances:
 SSN: DLN: DL State:
 ADDRESS INFORMATION:
 H - :a
 Phone Information: Emails:
 H - Home:
 NOTES:

WITNESS: STANKOWSKI, Dakota
 RACE: White DOB: AGE: 16
 SEX: Female JUV: Y - Yes
 HGT: WGT: HAIR:
 EYES: ETH: Circumstances:
 SSN: DLN: DL State:
 ADDRESS INFORMATION:
 H - Home: 141
 Phone Information: Emails:
 H - Home:
 M - Mobile:
 NOTES: Gwinn High School Cheerleader.
 Mother: Lisa STANKOWSKI

WITNESS: HOHMAN, Claire Marie
 RACE: White DOB: AGE: 15
 SEX: Female JUV: Y - Yes
 HGT: WGT: HAIR:
 EYES: ETH: Circumstances:
 SSN: DLN: DL State:
 ADDRESS INFORMATION:
 H - Home:
 Phone Information: Emails:
 H - Home:
 NOTES: Gwinn High School Cheerleader
 Mother: Stacy HOHMAN

WITNESS: Melka, Amanda Rae
 RACE: White DOB: AGE:
 SEX: Female JUV:
 HGT: WGT: HAIR:
 EYES: ETH: Circumstances:
 SSN: DLN: DL State:
 ADDRESS INFORMATION:
 W - Work:
 Phone Information: Emails:
 W - Work:
 NOTES:

WITNESS: Rice, Brian Todd
 RACE: White DOB: AGE: 41
 SEX: Male JUV: N - No
 HGT: 5' 11" WGT: HAIR: Brown
 EYES: Blue ETH: Circumstances:
 SSN: DLN: DL State: Michigan

EYES: WGT: HAIR: Circumstances:
 SSN: ETH: DLN: DL State:
 ADDRESS INFORMATION:
 H - I
 Phone Information: Emails:
 H - Home:
 NOTES:

WITNESS: Norman, Christine
 RACE: DOB: AGE:
 HGT: SEX: JUV:
 EYES: WGT: HAIR:
 SSN: ETH: Circumstances:
 DLN: DL State:
 ADDRESS INFORMATION:
 W - Work:
 Phone Information: Emails:
 H - Home:
 NOTES:

WITNESS: Olson, Ben
 RACE: White DOB: AGE:
 HGT: SEX: Male JUV:
 EYES: WGT: HAIR:
 SSN: ETH: Circumstances:
 DLN: DL State:
 ADDRESS INFORMATION:
 W - Work:
 Phone Information: Emails:
 W - Work:
 NOTES:

WITNESS: Belusar, Tracy Lynn
 RACE: White DOB: AGE: 50
 HGT: SEX: Female JUV: N - No
 EYES: WGT: HAIR:
 SSN: ETH: Circumstances:
 DLN: DL State:
 ADDRESS INFORMATION:
 H - Home:
 Phone Information: Emails:
 M - Mobile:
 NOTES:

OTHERS: FILIZETTI, Wayne ENTITY TYPE Father of Juvenile
 Ward
 ADDRESS INFORMATION:
 H - Home:
 Phone Information: Emails:
 M - Mobile:
 NOTES:

OTHERS: Filizetti, Stacey ENTITY TYPE Mother of Juvenile
 Melissa

ADDRESS INFORMATION:

H - Home

Phone Information:

Emails:

NOTES:

NARRATIVE:

fopd-36978 - Kjellin, Brian
9/3/2015 4:28:29 PM

NATURE OF COMPLAINT:

Officer Mills and I were dispatched to 50 W M-35 in regards to a medical emergency. We were advised by Dispatch that a four year old child was injured and unresponsive.

Subsequently, four year old, Amarah Elaine FILIZETTI was transported to MGH UP Health Systems by Forsyth EMS and UP Health Systems EMS. As of 1600 Hrs, Amarah was listed in extreme critical condition. Amarah was flown to the University of Michigan Hospital in Ann Arbor. At 0630 Hrs on 09/04/2015 we were informed that Amarah Elaine FILIZETTI had succumb to her injuries sustained from this incident.

The following information was obtained.

DISPATCH:

At 1020 Hrs, Officer Mills and I were called to the Gwinn High School in regards to a four year old child who was injured and unresponsive. The child was identified as, Amarah Elaine FILIZETTI DOB:

ARRIVAL TO SCENE:

I arrived to the scene, I observed Amarah on the ground, there was a significant amount of blood around her on the floor. I observed Chris NORMAN whom works for the Gwinn school system and is also a certified Emergency Medical Technician and a nurse who was at the school at the time of the incident. They were providing initial care to Amarah. Moments after my arrival, Forsyth EMS arrived with the following crew:

- EMT-B Gaylord Hamm
- AEMT - Peter Girin hingelli
- EMT - B Missy Copley

Forsyth Township Fire Department, Lieutenant Jacob ROLPH had also arrived on scene to assist.

MSP Trooper Girard # 8117 and Officer Mills # 8411 arrived on scene at about the same time as EMS.

INITIAL INFORMATION:

While at the scene, we were advised that some type of partition wall had somehow fallen on Amarah.

TRANSPORT TO MGH UP Health Systems:

Amarah was transported by Forsyth Township EMS Service in Unit # 101. Forsyth Township EMS met with UP Health Systems EMS on M-553 near M-94. Myself and MSP Trooper Girard provided an escort for EMS directly to the hospital. MSP, Marquette City Police, Marquette County Sheriff's Office and NMU Public Safety provided traffic control at each intersection to allow the ambulance a direct path to the hospital.

I met with Amarah's parents at the hospital.

- Wayne FILIZETTI
- Stacey FILIZETTI

I made contact with Chief Warchock and advised him of the situation. Chief Warchock arrived at the hospital and also met with Wayne and Stacey FILIZETTI.

SCENE:

Officer Mills returned to the scene of the incident and began making contact with potential witnesses. He advised that the scene had been cleaned up and the partition wall had been screwed and secured into place.

Chief Warchock and I left UP Health Systems and returned to the Gwinn High School.

ACTIONS TAKEN:

I am assigned as the department evidence technician began documenting the scene of the incident while Chief WARCHOCK and Officer Mills made contact with witnesses and school staff. The following items were completed at the scene:

- Photo documentation
- Measurements (Partition Wall)

ITEM OF NOTE:

Prior to are arrival, school staff had cleaned the scene and secured the partition wall into place. On the floor in front of the wall were two large wood sections. These sections were not present at the time of the incident. The wood panels are the top portion of the wall, they were placed there after the incident, and prior to Officer Mills return to secure the scene and contact witnesses.

PHOTOS:

On 09/03/2015 I took 47 photographs of the scene. (See attached digital storage disk).

MEASUREMENTS: (See attached diagram)

The partition wall: The makeshift wall is located on the north end of the Gwinn High School gymnasium. The wall is designed to cover an opening behind the basketball hoop which contains a stage for graduations. The wall is in two sections. Each section is affixed by a bracket and four bolts on each end and a center bracket where the two walls come together in the center. A wood cover is then placed over the top.

Attached to the wall are ten safety pads to protect players. The safety pads are 24" in width.

The portion of the wall which fell on Amarah is labeled "Section 2" on the diagram. The dimensions of that section of the wall are as follows:

- Height - 72"
- Width - 10"
- Length - 145 3/8 "
- Weight - 325 pounds (Weighed by Michigan State Police motor carrier division) 09/04/2015

VIDEO:

I requested that Officer Mills do a walk around of the entire gymnasium with his Digital Ally body cam.

IDENTIFICATION:

I marked partition wall #2 with a permanent black marker. The wall was marked on top in three separate locations with my initials and the date for later analysis of the wall. Officer Mills obtained a video for me of the identification markings.

FURTHER INFORMATION:

The wall and exact incident location had not been marked at the time of the incident. The area was cleaned prior to our return to the Gwinn High School gym. Upon further inspection of the wall, on the yellow safety panel #2 (From left to right) I observed two small blood stains. The location was marked on the wall with blue tape in the photographs. The blood located on the wall corresponds with the approximate location of where Amarah was on the floor upon my arrival if you placed the wall flat on the ground. The location is also marked on the floor with blue tape.

ADDITIONAL INFORMATION:

Upon completion, I conducted two interviews with members of the Gwinn High School cheerleading squad. The cheerleaders were practicing on the opposite (South) end of the gym (referenced by the blue mats on the floor in the photographs). The interviews were conducted separately in a room in the library.

The following interviews are as follows;

INTERVIEW WITNESS - Dakota STANKOWSKI:

On 09/03/2015, I met with STANKOWSKI in a secure room in the library, STANKOWSKI'S mother, Lisa was present during the interview. STANKOWSKI advised me that she is a member of the cheerleading squad and is coached by Stacey FILIZETTI. STANKOWSKI stated that on 09/03/2015 the squad was scheduled to practice in the gym from 0800 hrs to 1100 hrs.

STANKOWSKI stated that at the beginning of practice Stacey FILIZETTI's kids, (three triplet girls) were not with her. STANKOWSKI stated that at some point during the practice, Stacey received a text message from her husband. STANKOWSKI advised me that a short time later, FILIZETTI's girls were dropped off and were in the gym.

I asked STANKOWSKI if at some time during the practice if she had observed anyone bring in some sections of a wall. STANKOWSKI advised that she did remember seeing some people bring in the wall, she did not know who the people were.

I asked STANKOWSKI if either of the people she saw made any mention to the cheerleading squad that the wall was up but not secure, STANKOWSKI stated that they did not. STANKOWSKI informed me that FILIZETTI's three girls were playing in the gym and they continued with practice. STANKOWSKI stated that she suddenly heard a very loud banging noise, she advised that she looked over but did not immediately know what occurred. STANKOWSKI stated that she then saw one of the girls under the section of the wall.

STANKOWSKI advised that her coach, Stacey FILIZETTI ran over and attempted to pick the wall up off of Amarah. STANKOWSKI stated that she saw Stacey struggling with the wall, she called for help. STANKOWSKI advised that she and other members of the squad ran over and helped lift the wall off of Amarah. STANKOWSKI stated that once they lifted the wall off, she saw Amarah on the floor with blood on her. STANKOWSKI stated that she ran to get help and called 9-1-1.

I asked STANKOWSKI if she observed the wall fall on to Amarah FILIZETTI, she advised that she did not.

INTERVIEW WITNESS - Claire Marie HOHMAN:

I spoke with HOHMAN in the Gwinn High School library in a private room on 09/03/2015. HOHMAN'S mother, Stacy was present during the interview. HOHMAN is a member of the cheerleading squad and was present in the gym on the day of this incident.

I asked HOHMAN to provide any details she could. HOHMAN stated that the squad was practicing from 0800 to 1100. HOHMAN stated that the cheerleading coach's daughters were in the gym playing. HOHMAN stated that at some point during the practice she heard a loud "Thud", as she described it. HOHMAN stated that she could see that the wall had fallen on one of the girls. HOHMAN advised that the coach, Stacey FILIZETTI ran over to the the wall and tried to lift it off.

HOHMAN stated that several members of the squad ran over and helped lift the wall off of the girl. Once the wall was off, HOHMAN stated that she could see it was Amarah and that she was bleeding from the head. HOHMAN stated that she ran and yelled for help. HOHMAN stated that several staff members began helping Amarah.

I asked HOHMAN if she saw who had brought the walls out, HOHMAN stated that she did not remember seeing the walls being brought out. HOHMAN stated that she did observe the girls playing over in that area. I asked Claire if she actually saw the incident occur, she advised that she did not.

CONTACT - Stacy HOHMAN:

Stacy HOHMAN the mother of cheerleader, Claire HOHMAN advised that she had been attending a meeting at the school when she heard yelling that "someone was hurt". Stacy stated that she came into the gym and observed Stacy FILIZETTI tending to her daughter Amarah who appeared to be injured. Stacy stated that the wall was off of Amarah by the time she came into the gym.

NARRATIVE:

fopd-43922 - Mills, Stephen
9/3/2015 6:34:22 PM
INCIDENT:

Kjellin and I were dispatched to the Gwinn High School in response to an unconscious 4 year old. While enroute I was advised by dispatch that the Juvenile was not breathing. The following information was gathered from speaking to the witnesses present when the accident took place.

CONTACT WITNESS - Dylan Hart:

Hart stated that the Safety Partitions that fell on top of Amarah Filizetti were transported into the room by Anthony Filizetti and Tracy Belusar. Hart stated that he was in the bathroom down the hall from the gymnasium when he heard a scream. Hart stated that he stuck his head out into the hallway and he heard additional screams and saw people running out of the gymnasium and he started toward that area. Hart stated that as he entered the gymnasium he was told by one of the students, Beau McCarthy, that "The thing behind the backboard fell on her (Amarah Filizetti), there's blood everywhere." Hart stated that he went into the locker room area and gave the other people attempting to help Amarah the materials they needed from the med bags.

CONTACT WITNESS – Anthony Filizetti:

Filizetti stated that he and Tracy Belusar moved the safety partitions into the gym area and leaned them against the wall in preparation for them to be installed at approximately 0945 hours. Filizetti stated that Belusar was supposed to go and get the brackets to install the safety partition and he returned to his office. Filizetti stated that approximately 30 minutes later he was alerted that an accident had taken place in the school gym when he heard screaming coming from that area and approached to see what happened. Filizetti stated that when he entered the room the partition had already been lifted from Amara Filizetti and she was in her mother's, Stacy Filizetti's arms.

Filizetti stated that the two halves of the partitions were leaned against the walls at an angle at the approximate location that they were to be installed. The base of the Partitions were approximately 1 foot away from the point where the top of the partitions leaned against the wall. The middle part of the partition angled in toward the storage area that the partitions would cover.

CONTACT WITNESS – Kristy Gollakner:

Gollakner stated that she did not witness the partition fall on the Amarah Filizetti, or the partition being removed from her. Gollakner stated when she entered she observed Amarah Filizetti in Stacey Filizetti's arms.

CONTACT WITNESS – Makayla Kunde:

Kunde stated that she observed the entire incident take place. Kunde stated that Amarah Filizetti and her sister were playing under the spotlight near where the partitions were leaned. Kunde stated that Amarah Filizetti's sister leaned against the partition on the right near the middle where it met with the Left partition. Kunde stated that as Amarah Filizetti's sister leaned against the partition it started to fall, and she reacted by running to get out of the way. Kunde stated that Amarah Filizetti turned around as the partition was falling and put her hands out as if to catch it before it fell on her. Kunde stated that all of the cheerleaders and Stacey Filizetti rushed over and lifted the partition off of Amarah Filizetti. Kunde stated that she accompanied Stacey Filizetti's other two minor children from the room.

CONTACT WITNESS – Savannah Dachs:

Dachs stated that she did not see the partition fall onto Amarah Filizetti but did help remove the partition with the assistance of Stacey Filizetti and the other cheerleaders.

CONTACT WITNESS - Sydney Flourre:

Flourre stated that she did not see the partition fall onto Amarah Filizetti but did help remove the partition with the assistance of Stacey Filizetti and the other cheerleaders.

CONTACT WITNESS – Kimber Shelafoe:

Shelafoe stated that she did not see the partition fall onto Amarah Filizetti but did help remove the partition with the assistance of Stacey Filizetti and the other cheerleaders.

CONTACT WITNESS – Cassandra Harnick:

Harnick stated that she did not see the partition fall onto Amarah Filizetti but did help remove the partition with the assistance of Stacey Filizetti and the other cheerleaders.

Respectfully,

Stephen Mills, Police Officer
Forsyth Township Police Department

NARRATIVE:

fopd-23228 - Warchock, Gordon
9/6/2015 1:24:29 PM

NATURE OF COMPLAINT:

The investigation into the death of Amarah Filizetti that occurred in the Gwinn High School Gymnasium on Thursday, September 3, 2015.

INVESTIGATION:

Undersigned conducted numerous interviews in the above matter with individuals who were present that day. Some of the individuals were in the gymnasium when the incident occurred while others responded to the accident after it occurred. The following information was obtained:

INTERVIEW: Amanda Melka (RN for the Teen Clinic)

- Melka was in the Teen Clinic at the time.
- Someone came into the clinic and advised her there had been an accident.
- She was not sure who that was.
- This person was not able to tell Melka what had actually happened.
- Melka ran to the Gym.
- When she arrived she found the mother of the victim was holding the child up across her lap.
- There was a lot of blood coming from the victim's mouth and nose.
- Mom stated that it fell on the child.
- The partition was already leaning back up against the wall.
- The victim was breathing at the time.
- She was not crying, blinking, or talking.
- The victim did have a pulse, lung sounds she heard with a stethoscope, and a heartbeat.
- The victim was limp and her breathing was labored with long pauses.
- A bus driver who is an EMT held the position of C spine.
- They gave her bag respirations.
- The gym teacher ran and got the Pulse Oximeter for monitoring her heart and breathing.
- EMS then arrived.
- Mrs. Gallagher was present also.

INTERVIEW GHS EMPLOYEE - Brian Todd Rice:

- Rice was working in his office.
- He had come out to the main office when someone said there was something going on in the gym and someone was hurt.
- He ran to the gym.
- He passed Vicki Nelson who was running to the office and she was repeating #'s.
- When he got there, teachers were looking into the gym and there were people working on the girl.
- They were Christy Glockner and Chris Norman.
- He observed that the wall was already standing back up.
- He received different reports on what happened from the partition fell on her to she fell off the partition.
- He went outside to direct in the ambulance.
- The cross country team was assembled outside.
- He heard that two of the team members had seen what happened.
- He checked on them to see if they were ok.
- They were a Beau Tyler and Jacob Karupski.

INTERVIEW SUPERINTENDENT -Tom Jayne:

- Jane came to the gym when he received the word of what happened.
- The wall had already been lifted off of the victim and people were caring for her.

INTERVIEW WITNESS - SAMANTHA LEA HEINZ:

- Heinz was at cheerleading practice.
- They were working on their stunting.
- He heard a big thud.
- The coach's girls had been playing in the area of the accident.
- The coach ran over to the area.
- Heinz didn't realize someone was under the partition.
- Coach tried to lift the partition but couldn't.

- All of the cheerleaders then ran over and pulled off the wall.
- She saw Amara lying on the ground with a lot of blood around her.
- She was not moving.
- The Safety Matt side of the partition fell on her.
- Coach then screamed to call 911.
- Heinz then called but had to hand the phone to Mrs. Anderson because she was having trouble speaking.
- Heinz stated that all she saw before the accident was the girls running around playing.

INTERVIEW CROSS COUNTRY ATHLETE - Beau McCarthy:

- McCarthy stated that he was in the gym with teammate Jacob.
- They were sitting up top on the sports deck.
- He heard a crash.
- He looked and saw that a partition had fell.
- The cheerleading Coach ran over to the partition.
- She tried to lift it but was unable.
- All of the students then helped.
- McCarthy then ran for help.
- There were teachers coming out of the cafeteria at the time and he told them.
- He guessed she was under the wall maybe 20 seconds.
- He did not know her injuries but saw a lot of blood on the ground around the victim.

INTERVIEW CROSS COUNTRY ATHLETE - JACOB MICHAEL PORUBSKY:

- He was sitting with Beau on the sports deck.
- Heard the partition fall.
- The mom ran over but she could not lift the partition.
- They then ran over to help but the wall was off by the time they got to it.
- He ran for help.
- Porubsky did not know why it fell.
- The girls were playing by it.
- The other girl stayed by her mother.
- There was a lot of blood around the victim.
- Porubsky could not describe how the partitions were sitting or positioned before the accident.
- He didn't see them brought in.

INTERVIEW CHEERLEADER - SYDNEY MCNEILL:

- She was at cheerleading practice and they were working on their stunting.
- She saw the mat starting to fall.
- She saw the mat fall on the victim.
- Coach ran over to her and she yelled for help.
- They all then ran over and lifted the partition off of the victim.
- There was blood and one girl called 911.
- McNeill and Kunde took the coaches other daughters to another room.
- All she remembered was that the girls were playing in the area of the accident.
- The wall falling was what caught her attention.
- The victim was under the wall and the other girl was standing about 10' away.
- McNeill didn't think that the victim saw the wall falling.
- When McNeill looked over the wall was already falling.
- She didn't think that the victim knew it was falling.
- The gym had proper lighting.
- They had been practicing for about a 1/2 hour.
- She saw the people, 2 janitors maybe, bring in and unload the wall.
- She thought they were both men.
- The triplets weren't there when the first partition was brought in but were when they brought in the second.
- 10 minutes may have passed from the time they unloaded the partition to the time of the accident.
- She never saw the girls touch the wall.
- She believes the men who brought in the walls went to get tools to hang them up.

INTERVIEW BUS DRIVER - CHRISTINE NORMAN:

- Norman was coming out of the office where he had been working on the bus runs.
- She walked out the front office door and Vicki Nelson was yelling about an accident.
- She ran to the gym and yelled to call 911.
- She went into the gym and the victim was on the floor.
- The school nurse was there.
- The victim was on the floor.
- She is an EMT and she started to check the victim's airway.
- Christy Gollackner was keeping the airway clear.
- The victim was bleeding profusely.
- It was all an arterial bleed according to Norman.
- The victim was breathing but it was agonal? Breathing and she knew they had to support her breathing.
- They used a BVM that was already there. (bag valve mask)
- She also had a spo2 device on her finger.
- She noticed that it showed a 49 for the victim where it should have been a 100.
- Lots of blood was around the victim.
- They then transported her.

INTERVIEW SCHOOL EMPLOYEE - Terri Lynn Larson:

- She heard of the accident went to the gym and the victim was down.
- She saw the people tending to her rolling her to her side from her back she thought.
- The victim was bleeding.
- She heard them ask Ben Olson to get a medical device.
- She then helped remove the cheerleading stuff so the girls didn't have to go back into the gym.

INTERVIEW SCHOOL EMPLOYEE - Ben Olson:

- Olson was in a professional development training in the cafeteria with other teachers.
- The cheerleaders were practicing in the gym.
- 10:20 to 10:30 he heard the girls yelling for help.
- All of the teachers got up.
- He knew where the first aid kit was so he went for it.
- The school nurse, Christy Gollackner, and the mom had the victim.
- He was asked to get the finger pulse from the clinic so he ran and got it.
- When he got back he was told they needed an oxygen mask so he went back to the clinic but they couldn't find one.
- When he got back to the scene they already had one.
- There was about 13 people attending to the victim, the kids were out in the hallway with the victim's sisters.

INVESTIGATION CONTINUED:

On 09-04-15, undersigned requested the help of Motor Carrier Officer Blake Aho. Aho came to the Gwinn High School to assist undersigned in acquiring the weight of the partition that fell on the victim. School staff was present along with the attorney, Jacob Lynch, for the schools Insurance carrier. Anthony Filizetti, one of the individuals who had originally moved the partition into the gymnasium, was present and was taking part in unbolting the partition from the wall.

After the partition was removed, the partition was placed on the scales used by the motor carrier officer. Officer Blake Aho advised undersigned that the wall weighs approximately 325 lbs. Filizetti then attempted to recreate how they had left the partitions propped against the wall.

When Filizetti was done recreating this, undersigned tried to see if the wall could be easily pulled over. It could not the way it was positioned against the wall. However, if the partition was standing more perpendicular to the floor, it would have been easier for the partition to have fallen or been pulled over. Undersigned noticed when I tried to hold the partition straight up and down, the partition would not stay and wanted to fall forward on its own.

Digital pictures were taken of this process.

EVIDENCE:

DIGITAL PICTURES.

STATUS: OPEN FOR COMPLETION OF INTERVIEWS AND SUPPLEMENTAL REPORTS.

RESPECTULLY,
Chief Gordon J. Warchock

NARRATIVE:

fopd-43922 - Mills, Stephen

9/7/2015 10:30:52 AM

CONTACT WITNESS - Tracy Belusar:

On 09/07/2015 I made contact with Tracy Belusar at the Gwinn High School to speak with her about the incident that occurred in the gym on 09/03/2015. Belusar stated that she was preparing to head out to K.I. Sawyer (Elementary) to fix a sink. Belusar stated that she was stopped by Anthony Filizetti and told there were some things that he needed her to take care of at the school. Belusar stated that she asked Anthony Filizetti if these things could wait and he said that they could not. Belusar stated that Anthony Filizetti showed her a few things that needed to be fixed and then informed her that they needed to move two Partitions (safety partitions) to the gym and put them up. Belusar stated that the Partitions had been against the wall in the hallway and before that were against the wall in the gym and that "they just leave these things leaning all over". Belusar stated that she told Anthony Filizetti that the walls were too big for them to move and that she "Bitched" the entire time they moved them, but that they were able to move them into the gym. Belusar stated that while moving the partitions she stated "Man this is wrong, these things are heavy, I dont like this". Belusar stated that the time that they started moving the partitions was very close to the time that she was supposed to get off of work. Belusar stated that when She and Anthony Filizetti moved the partitions into the gymnasium, the side that they put them on was unlit at that time and the cheerleaders were using the other side.

Belusar said that she believed there should have been some type of caution tape or something put up but that she didn't state this out loud to Anthony Filizetti. Belusar stated that she told Anthony Filizetti that she would go and get the brackets to attach the walls and Anthony Filizetti left as well. Belusar stated that she went and got the brackets to attach the partitions and put them in the gym next to the partitions and while doing so she stopped in the office of that athletic director letting him know that she would need help putting the partitions in place. Belusar then stated she left the gym again and stopped Dylan Hart and told him she would need him to help her with putting up the partition. Belusar stated that she then proceeded to the Superintendent's office to inform him that she would need to stay over to put up the wall as requested and that she would need additional help. Belusar stated that somewhere within that 20-30 minute time frame "children showed up". Belusar stated that she was in the Superintendent's office when she heard screaming coming from the area of the gym. Belusar stated she instantly knew what had happened and she ran down the hall yelling "the wall fell didn't it". Belusar stated "They shouldn't have been propped against the wall. That may be how they do things here, I'm a safety officer at a hospital and this is not what you do. Belusar stated that everyone believes it's an accident but it was "not an accident" but was "Horrible Horrible negligence" and "that's what I'm going to live with"

Respectfully,

Stephen Mills, Police Officer
Forsyth Township Police Department

NARRATIVE:

fopd-43922 - Mills, Stephen

9/21/2015 1:19:00 PM

CONTACT SUBJECT - Stacey Filizetti:

I made contact with Stacey Filizetti at my officer on 09/16/2015 at 2030 hours to get her statement regarding the incident in the gym. Stacey Filizetti stated that she started practice in the gym at approximately 8 am on 09/03/2015. Stacey Filizetti stated at the time she arrived at the gym, the side where the accident took place was unlighted. Stacey Filizetti stated that she received a text from her husband stating that he had a meeting at 10 am and she decided to "make it easier" on him and pick up "the girls". Stacey Filizetti stated that she and her three daughters returned to the gym at approximately 0915 hours on that day.

Stacey Filizetti stated that the girls stayed around her playing initially but when the cheerleader began to "stunt" she asked them to go on the other side and play for everyone's safety. Stacey Filizetti stated that the girls knew the rules of playing in the gym. Stacey Filizetti stated that they knew to stay on the gym floor and not to climb on anything. Stacey Filizetti stated that they would often stand where the incident took place and dance and sing under the spotlight there, which they did in this instance. Stacey Filizetti stated she believed the girls turned on the spotlight because they normally did.

Stacey Filizetti stated that 10 minutes later she heard a loud bang and saw the partition on the ground. Stacey Filizetti then saw Amarah Filizetti's small blue dress under the partition. Stacey Filizetti stated she attempted to remove the partition herself but she was unable because it was too heavy and she asked for help. Stacey Filizetti stated that it took about 6 cheerleaders to remove the partition from Amarah Filizetti. Stacey Filizetti stated that once the partition was removed Amarah was already laying in a pool of blood.

Respectfully,

Stephen Mills
Police Officer
Forsyth Township Police Department

PROPERTY:

ITEM NO: STATUS: Evidence (Including Other Seized Property And Tools)

PROPERTY TYPE: Evidence

RECOVERED BY:

RECOVERED DATE/TIME:

PROPERTY DESCRIPTION: digital pictures

DRUG QUANTITY/MEASURE: /

COUNT: 1

VALUE:

COLOR:

MANUFACTURER:

MODEL:

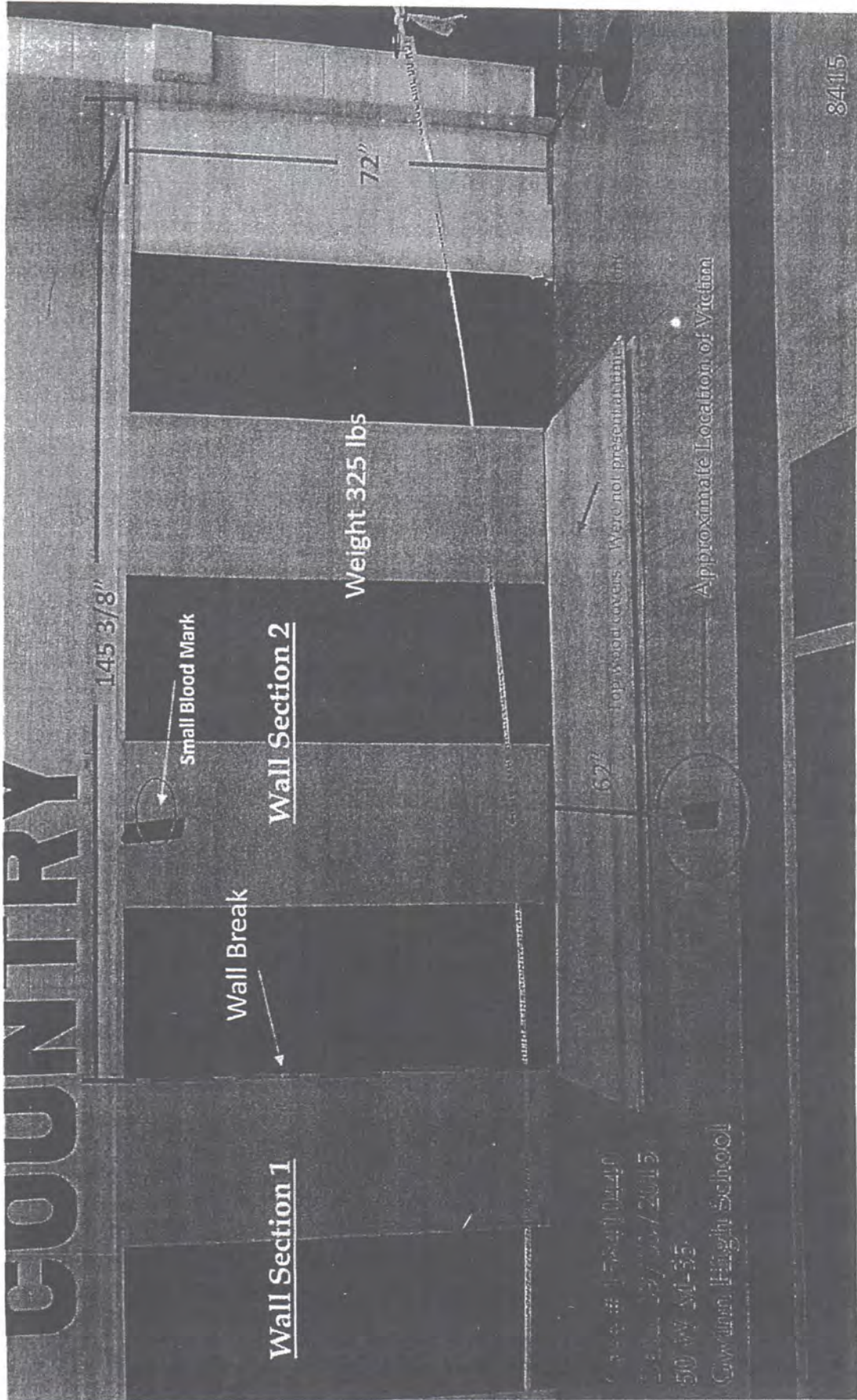
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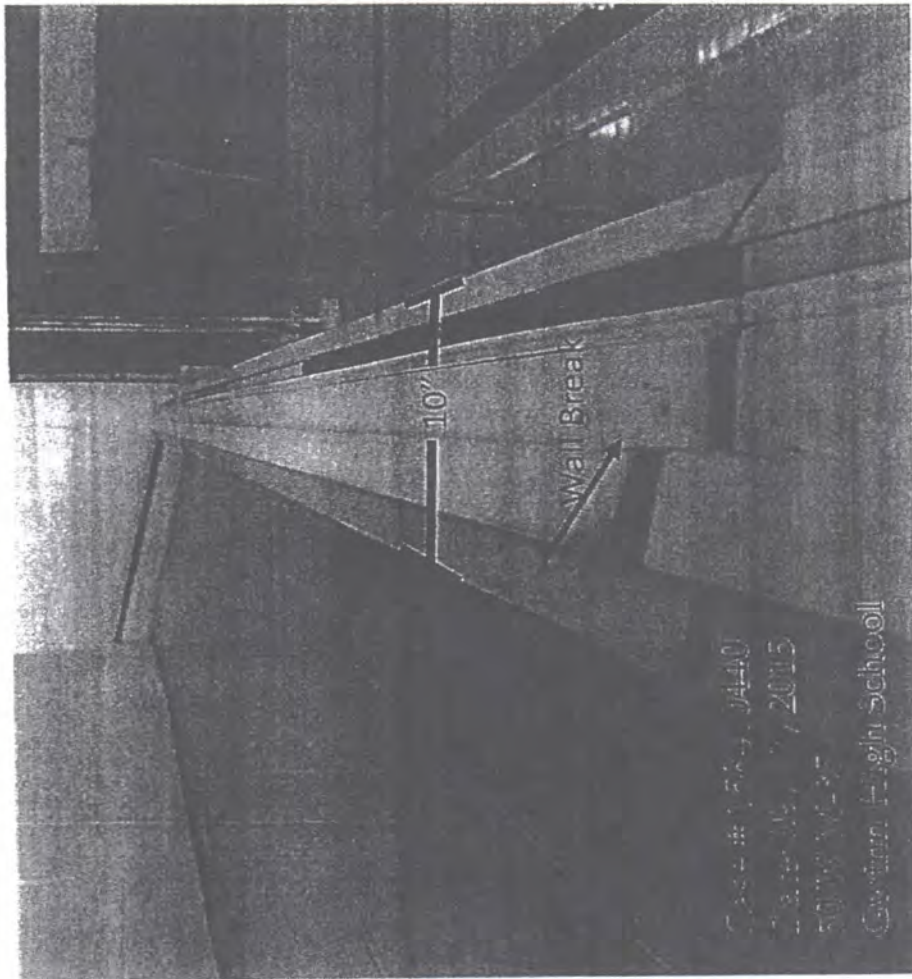
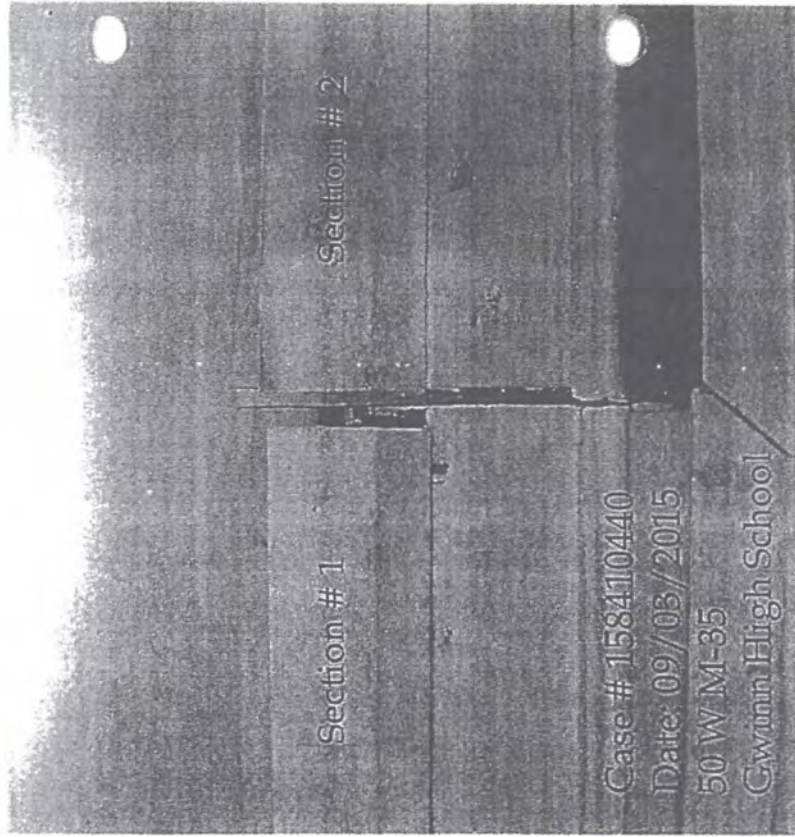
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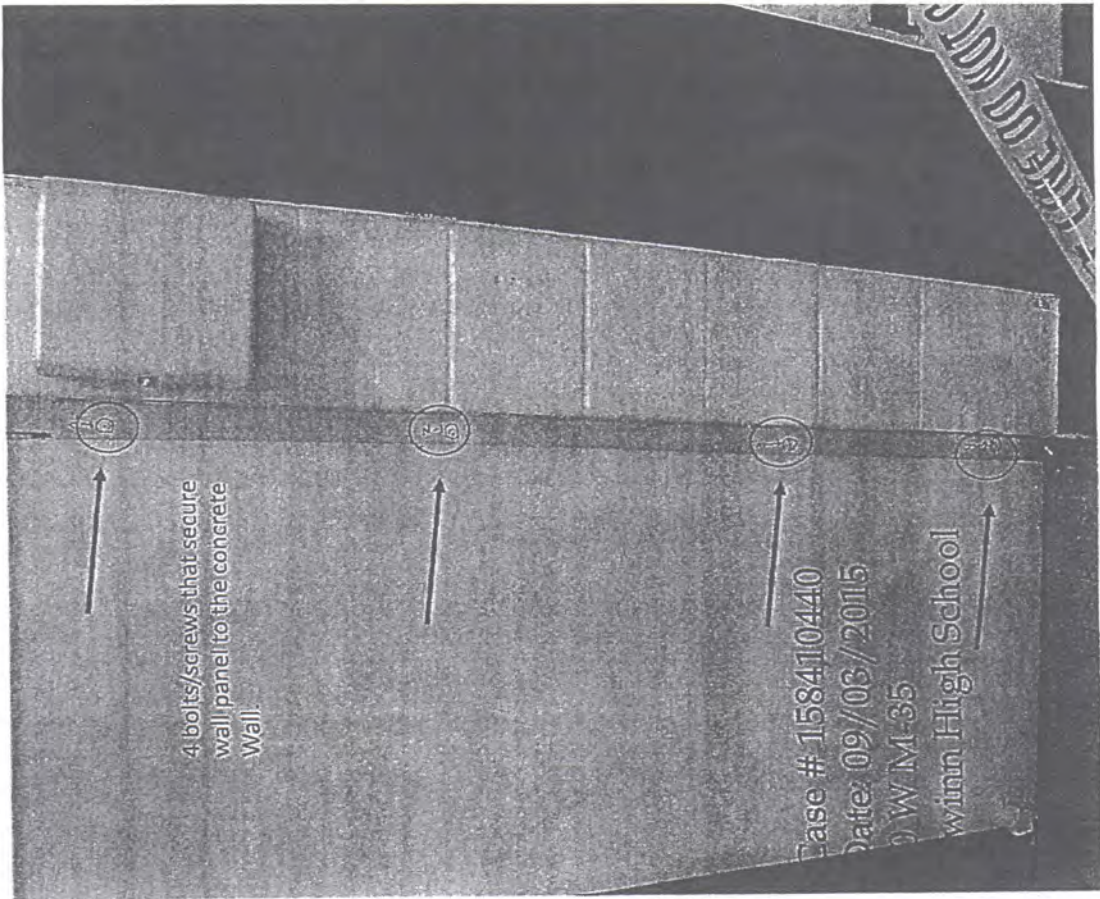
VEHICLE DESCRIPTION:

NOTES:

RECEIVED by MSC 9/24/2021 12:22:30 PM







Thomas Jayne
Selected Pages of
Deposition Transcript

Wayne, Stacey, Laila and Melissa Filizetti
v.
Gwinn Area Community Schools, et.al.
v.
Gwin Area Cleaning and Maintenance, Inc.

Case No. 16-54781-NO

Transcript of the Testimony of
Thomas Jayne

May 10, 2018



Rutkowski Court Reporting, LLC

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Marquette, Michigan 49855

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1 Q. Yes.

2 A. In what subject? Or just --

3 Q. A whole array of subjects.

4 A. Well, there's a litany of laws that we have to -- that
5 the legislature passes and stuff. Yes, there are --
6 there are -- I don't know, I guess I lost you -- your
7 original question. I'm sorry.

8 Q. The Michigan State Board of Education from time to time
9 issues what are called model policies to be implemented
10 within schools within the state of Michigan; you're aware
11 of that fact?

12 A. Yeah. One that comes -- There's, like, curriculum.
13 A lot of it is curriculum-related, like, you know, like,
14 each kid should have, I think, 155 minutes of PE a week
15 or something like that. Or, you know, there's reading
16 laws. There's -- Yeah, there's a litany of things.

17 Q. Well, it's funny you should mention the PE. Because in
18 2012 -- November of 2012, the State Board of Education
19 did issue a model policy on quality physical education
20 and physical activities in schools. And within that it
21 does say "Opportunity to Learn." "Offers instructional
22 periods totaling 150 minutes per week at elementary, and
23 225 minutes per week at secondary level."

24 So you're familiar with this policy then?

25 A. Right. It's a health and PE policy. It's a

1 recommendation. They didn't want schools eliminating PE
2 because they were eliminating arts and stuff as
3 cost-cutting measures, and it was one of the
4 implementations.

5 Q. As the superintendent of this school district at Gwinn
6 Elementary, this policy would have been adhered to
7 because that's what the State mandated, true?

8 A. Right. Yeah. We -- For the school I was in at that
9 time. Or yeah, carrying forward, it has not changed.
10 You have to provide a certain amount of PE minutes.

11 Q. Yeah. I want you to grab Exhibit 121 so you can make
12 sure you're familiar with the section that I want to draw
13 your attention to.

14 MR. SHERIDAN: I'll just take two minutes.
15 I'll make a call to my witness. I don't think we're
16 going to be starting her at 1:00 o'clock, given we
17 haven't done Jane yet.

18 (At 12:06 p.m., discussion off the record)

19 (At 12:09 p.m., back on the record)

20 BY MR. JANES:

21 Q. You've received the model policy that I'm referring to
22 entitled "Model Policy on Quality Physical Education and
23 Physical Activities in Schools" issued by the Michigan
24 Board of Education on November 20th, 2012. You've
25 reviewed that, right?

1 A. Correct.

2 Q. What's your general understanding of why the State Board
3 of Education issues these policies?

4 A. In this instance, it's so students aren't bereft of the
5 opportunity to have physical activity. Schools were
6 cutting what we call "specials" like music, art, PE in
7 order to save money, and the State Board said, "No, you
8 can't do that because we need physical education." In
9 this instance, this policy is part of a well-balanced
10 student's education and actually enhances teaching and
11 learning. So it's a blanket policy making sure that we
12 meet those needs of the students in the physical fitness
13 aspect.

14 Q. In other words, this is what the State has prescribed to
15 be the minimum --

16 A. Absolutely, this is the minimum.

17 Q. -- associated with physical education and physical
18 activities in schools?

19 A. Correct.

20 Q. So the school district can rise above this bar and offer
21 more and do more than what's provided for within this
22 entire policy, but as it relates to you can't go below
23 this bar, this is the minimum, true?

24 A. In my understanding, yes, it can go above, but not below.

25 Q. Okay. And under the "Opportunity to Learn" section on

1 Page 2 of it, there's a bullet point that starts off,
2 "Provides and properly maintains safe and adequate
3 spaces, facilities, equipment, and supplies necessary to
4 achieve the objectives of the physical education
5 program." You agree with that as a minimum requirement
6 as provided for within this policy, true?

7 A. True.

8 Q. Then it goes on underneath that to say, "It is further
9 recommended that the regular safety and hazard
10 assessments of gymnasiums, playgrounds, athletic fields,
11 and sports-related equipment shall be conducted."

12 So the State wants the schools to have regular
13 safety and hazard assessments of gymnasiums, true?

14 A. Well, it's recommended that you do. It doesn't say you
15 have to.

16 Q. And then it says, "Identified hazards shall be repaired
17 before use by students, staff, or community members."
18 Do you agree with that?

19 A. That's written, yes.

20 Q. And that one is mandatory, "Identified hazards shall be
21 repaired before further use by students, staff, or
22 community members," true?

23 A. That's what it says, "shall be."

24 Q. In this case, we are aware that Gwinn Area Schools'
25 athletic director, basketball coach, PE instructor, and

1 the acting superintendent were made aware of a safety
2 hazard within the gymnasium, but yet allowed its further
3 use by students, staff, and community members. Their
4 conduct violates this policy, true?

5 MR. RYAN: Objection, form, foundation,
6 speculation, calls for a legal conclusion, beyond the
7 competency of the witness.

8 THE WITNESS: As this is written, I would say
9 Gwinn identified in 2015 -- prior to September 3rd, 2015,
10 identified the fact that the stage cover partitions may
11 have presented a hazard, but it was not acted upon
12 until -- it was not acted upon immediately. There was
13 over a three-month lag before the perceived hazard was
14 taken care of.

15 BY MR. JANES:

16 Q. Okay. And during that three months, there's no question
17 about it, the gymnasium was authorized for use by
18 students, staff, and community members?

19 A. Yes, there was people in there. Yes.

20 Q. So what the school district's employees should have done,
21 the acting superintendent or the athletic director in
22 charge of athletic facilities, was to cease use of the
23 gymnasium until the identified hazard was repaired before
24 allowing students, staff, or community members back in,
25 true?

1 A. I don't know about the whole gym, but perhaps that
2 section of the gym. Like, the upstairs is where our
3 weight room is.

4 Q. Sure.

5 A. I mean, that didn't present that. But perhaps that
6 aspect or end of the gym could have been taped off or
7 barricaded off in a safe fashion, in hindsight looking
8 back.

9 Q. Not in hindsight. That's what is dictated by this
10 policy, is that when an identified hazard -- when a
11 hazard is identified, the space, i.e., the gymnasium,
12 shall not be used by students, staff, or community
13 members. Let's not mince words. It's not hindsight.
14 That's what it says?

15 A. And I believe you just showed me where it says it shall
16 not be used. "Identified hazards shall be repaired
17 before further use ..." Okay, I see where you're getting
18 that. Okay.

19 Q. You agree with my statement, true?

20 A. Well, it's in writing. Yes.

21 Q. So all this idea about whether or not A.J. Filizetti and
22 Tracy Belusar acted reasonably or not reasonably to bring
23 in panels during a cheerleading practice, all that would
24 have been alleviated had the school district simply
25 followed this model policy and the mandates thereof,

1 true?

2 A. Yes, I would hope so. Yeah. I mean, it was identified
3 as something needing to be done, it looks like, the end
4 of May -- was it May 26, 2015, off the top of my head, by
5 Darren Sinnaeve -- and it was not until September 3rd,
6 2015.

7 Q. And there was administrators who were aware of it, and
8 you expect are aware of this policy and didn't follow
9 through?

10 A. Once again, I can't speak if they were 100 percent aware
11 of that policy, all of them, if it was ever showed to
12 them or they were aware of it or even Karen. But as a
13 superintendent, she was a superintendent of another
14 district, of North Star Academy, so ...

15 Q. And you would think your AD would be aware of this State
16 of Michigan Board of Education's Model Policy on Physical
17 Education and Physical Activities?

18 A. Maybe, maybe not. Because, you know -- I think a teacher
19 might more so than the AD, because the AD is not in the
20 teaching and learning per se day-to-day.

21 Q. All I know is that Mr. Sinnaeve, the teacher, had brought
22 it to the attention of his superior, the AD, and the AD
23 brought it to the attention of his superior, the
24 superintendent, and not one of them in that line of
25 command followed this policy.

1 A. Or the principal.

2 Q. And the principal too. Yeah, you're right. Sorry.

3 A. He was cc'd, I believe, on it, right --

4 Q. Yep.

5 A. -- Mr. Luokkala was?

6 Q. Yep, you're right.

7 A. I wish it would have been, you know, for everybody,
8 especially Wayne and Stacey and Amarah and the girls.

9 MR. JANES: I have nothing further, Tom.

10 Thank you for your time. Oh, I do. I'm sorry. It's
11 somewhat tangentially.

12 BY MR. JANES:

13 Q. I sent to you on August 31st, 2017 by e-mail and by
14 Federal Express an employer's report of injury claim on
15 behalf of Stacey; did you get that?

16 A. Yeah, I believe -- I don't know, I'd have to see it.
17 Can I see it?

18 Q. Sure.

19 A. So Pete was cc'd on it. I believe you would have
20 probably shared this. I believe I would have this in the
21 file, yeah.

22 Q. What did you do with it?

23 A. Given it to, probably, Lindsey or the person that works
24 with workmen's comp.

25 Q. Okay.

Robert Soyring
Selected Pages of May 9, 2018
Deposition Transcript

Wayne, Stacey, Laila and Melissa Filizetti
v.
Gwinn Area Community Schools, et.al.
v.
Gwin Area Cleaning and Maintenance, Inc.

Case No. 16-54781-NO

Transcript of the Testimony of
Robert Soyring

May 9, 2018



Rutkowski Court Reporting, LLC

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1 assessments of gymnasiums, playgrounds, athletic fields,
2 and sports-related equipment shall be conducted."

3 A. Yes.

4 Q. You agree that that has a need to occur to achieve a safe
5 environment for your athletes, true?

6 A. Yes.

7 Q. Okay. And as part of that, you're supposed to identify
8 hazards, true?

9 A. Yes.

10 Q. Okay. And then, "Identified hazards shall be repaired
11 before further use by students, staff, or community
12 members." You agree with that policy statement too,
13 don't you?

14 A. Yes.

15 Q. And that, "Any hazard reports shall be kept on file for
16 an amount of time as determined by the district." You
17 would like to achieve that, but so far you haven't gotten
18 that last part down right, have you?

19 A. What are you referencing?

20 Q. When you identify a hazard as part of your inspection,
21 you might not keep a file on that forever?

22 A. Wouldn't SchoolDude's technology keep that on file until
23 closed out?

24 Q. Okay. The long and short of it, though, is that the
25 State's model policy as it relates to physical education

1 and physical activities as promulgated in November of
2 2012 was that identified hazards must be repaired before
3 the space and facility is used again by students, staff,
4 or community members?

5 A. Yes. Are you referring to that stanza --

6 Q. Yes.

7 A. -- or are you paraphrasing? Either way, I see the gist
8 of it right there, yes.

9 Q. And you would agree with me that the decisions that you
10 allowed to occur in August and September of 2015, as it
11 relates to the identified hazard of not having the gym
12 wall enclosure erected, you violated this policy by
13 allowing physical activities to resume or actually
14 continue throughout?

15 A. Quite honestly, Paul, I feel I would have violated it if
16 I wouldn't have asked for the SchoolDude order to move
17 forward. I feel I would have violated it if I wouldn't
18 have followed up to question my supervisor, Karen
19 Anderson. And I feel I would have violated it if I still
20 would have, however many days, sat on my hands and not
21 asked the next gentleman, A.J. Filizetti. I feel I made
22 an attempt to three different sources to say, "Folks,
23 what are we going to do about this?" I never once sat on
24 my hands and never spoke up. I spoke up three different
25 times to three different people.

1 A. I would say yes.

2 Q. As the athletic director in charge of the gym, those
3 people didn't get it done?

4 A. I would say yes.

5 Q. Yeah. I understand your statement a moment ago about it
6 not being a priority to others, given the inaction;
7 that's what you're alluding to, correct?

8 A. Yeah, I believe so. Yeah. Yes.

9 Q. But I want to be crystal clear on the record.

10 You knew as the athletic director it was a high
11 priority, because you described it as a terribly unsafe
12 condition, correct?

13 A. Yes. And I used "terribly unsafe condition" in that
14 third reference to a third person, and I sit here feeling
15 that that was my moment of frustration where I was trying
16 to say, "Where are we going with this?"

17 Q. But a terribly unsafe condition in your gymnasium as the
18 athletic director stood in place from May 26 until
19 September 3?

20 A. That's fact.

21 Q. That's on your watch as the AD?

22 A. That's fact.

23 Q. Yeah. Looking at Exhibit -- I'm just about done --
24 Exhibit 104 that we had marked previously.

25 A. Like, in the manual, or --

September 2, 2015
Email Regarding "Athletic
Maintenance Needs"

Vicki Nelson
Selected Pages of
Deposition Transcript

Wayne, Stacey, Laila and Melissa Filizetti
v.
Gwinn Area Community Schools, et.al.
v.
Gwin Area Cleaning and Maintenance, Inc.

Case No. 16-54781-NO

Transcript of the Testimony of
Vicki Nelson

June 8, 2018



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1 If you don't understand my question, please tell me
2 that you don't understand the question and I'll rephrase
3 it, and hopefully you could understand the question and
4 provide me an informed answer. Okay?

5 A. Okay.

6 Q. If you don't recall events that we may be speaking about
7 due to the passage of time, it's appropriate to say that
8 you don't recall something. Okay?

9 A. Okay.

10 Q. Also, if I ask you a question and the information I seek
11 is something that was never in your knowledge, in other
12 words, you didn't ever have an understanding of it,
13 please tell me that you don't know, because I'd rather
14 you tell me you don't know about something than try to
15 speculate or guess. Okay?

16 A. Okay.

17 Q. What is your position with the Gwinn Area Schools?

18 A. I am accounts payable, and I do various other duties as
19 assigned. You know, if people are out, I might do some
20 stuff in payroll, do some stuff for Jane Flourre, the
21 administrative assistant. I also have coached here for
22 20-plus years, and I condition -- or used to condition
23 the athletes for volleyball and basketball.

24 Q. So if you were to hand out a business card to somebody,
25 would your business card say, "Accounts Payable,

1 A. Okay. I just wanted to make sure.

2 Q. Okay.

3 A. No. And that is very upsetting to me.

4 Q. But you do conditioning in the gym?

5 A. I used every -- From that Wednesday until September 2nd,
6 I used that gym every morning. I used every wall in that
7 gym. I used the stairs, both sets. I had the girls
8 running. I had them up on the mezzanine. There really
9 wasn't -- I went through all of my workouts, everything I
10 had set up for those girls, our relays. We were in that
11 area constantly.

12 Q. And your familiarity of watching Stacey Filizetti do
13 cheer coaching years ago, you're aware that she does
14 conditioning with her cheerleaders too, right?

15 A. Yes. That was one of the big things that we both had in
16 common with regards to cheerleading.

17 Q. So based on your review of how she coached years ago, did
18 she, like yourself, utilize the entire gym for her cheer
19 practices?

20 A. In response to conditioning, yes. Because the girls
21 would be running that perimeter of the gym, so they knew
22 that they had to run around the out-of-bounds line, just
23 like you would in gym class, just like kids do every day
24 in America.

25 Q. After the tragedy involving Amarah Filizetti, did you

1 speak to any coach within the Gwinn Area athletic
2 department who was told by Mr. Soyring that there had
3 been a terrible safety hazard existing within the gym?

4 A. I only know that the volleyball coaches didn't know.
5 They were the ones I talked to, because I called them to
6 tell them I couldn't come back in this season. And they
7 didn't know -- They asked me what happened, and I said,
8 "I just don't know yet."

9 Q. But you're aware from your communications with them,
10 Mr. Soyring had never communicated to them he had
11 perceived a terrible safety hazard existing within the
12 gym?

13 A. No, he did not.

14 Q. Did anybody at any point in time, because you are one of
15 the, you know, longstanding stable people within the
16 district, come up to you after Amarah Filizetti's
17 accident and say to you, "Yeah, we knew about that safety
18 hazard, and we just never got around to doing it, fixing
19 it"?

20 A. No. The only statement that was made was that Friday
21 morning, September 3rd, when A.J. Filizetti said,
22 "It was dark in there. If I had known" -- "I would have
23 never left it in there if I had known anyone was going to
24 be in that gym."

25 Q. You said Friday morning, September 3rd?

1 A. Yes.

2 Q. Would that have been September 4th?

3 A. I'm sorry, September 4th, yes.

4 Q. And A.J. Filizetti communicated that statement to whom?

5 A. He communicated it to Ron Lauren, our board president,
6 Tom Jayne, and he was standing off to the left of my
7 desk.

8 Q. And what was the response of those two individuals back
9 to Mr. Filizetti?

10 A. Ron Lauren said, "Don't worry, A.J., it's not your fault.
11 You couldn't have known." And Tom said, "Please don't
12 blame yourself. You couldn't have known that people were
13 going to be in there."

14 And I didn't know what he was talking about. I
15 just knew -- That statement stuck with me because I came
16 in that Friday because I needed answers. I needed to
17 know, could I possibly ever go back in that gym and feel
18 safe with someone else's children.

19 Q. Okay. Well, I'm going to explore that conversation with
20 you a little bit more, because -- Can you give me his
21 words again, I'm sorry, that he said?

22 MR. RYAN: Object, unless the witness can
23 clarify that it's an exact quote.

24 THE WITNESS: It is. I wrote it down that day.
25 I can get the paper for you. I've carried it around in

1 my purse since that day.

2 MR. RYAN: Okay.

3 BY MR. JANES:

4 Q. Okay. Can you tell me his words? If you need to get
5 your purse, you can go right ahead.

6 A. I'll grab that just to make sure that it's quoted.

7 (At 2:42 p.m., brief pause)

8 (At 2:43 p.m., back on the record)

9 THE WITNESS: On the morning on Friday,
10 September 4th, I wrote, "The gym was dark. Had I known
11 people would be in there, I would never have left it
12 there." And that is a quote.

13 BY MR. JANES:

14 Q. Would you object if the court reporter would mark that as
15 an exhibit?

16 A. No, I don't. I have initials on there of "TJ" for Tom
17 Jayne, "A" for A.J., and "RL" for Ron Lauren.

18 THE COURT REPORTER: Would you like me to tape
19 this onto a big piece of paper and mark that big piece of
20 paper? Because this is a little Post-it note.

21 MR. RYAN: That makes sense.

22 MR. JANES: However you think is best. I'll
23 defer to you.

24 THE COURT REPORTER: Okay. I'll do that after
25 the dep. So I'll mark this as 134.

1 MR. JANES: Thank you.

2 BY MR. JANES:

3 Q. After hearing Mr. Filizetti make that statement to those
4 administrators, did you have a private conversation with
5 any of them about what he had said?

6 A. No. I, for myself, I just wanted to listen and just try
7 to gather some information and make sense of what
8 happened. And so when he said that and he was so
9 distraught, I just thought, what is going on here?
10 Because the day before, on September 3rd, I came into
11 work about 7:10. And at around 7:34 a.m., my office --
12 my desk looks directly down to the gym doors, and I saw
13 A.J. with this big structure. He was in shorts and a
14 T-shirt.

15 MR. JANES: For some reason you're blanking in
16 and out. I don't know what that is and why. Okay.

17 THE WITNESS: Is it working?

18 BY MR. JANES:

19 Q. I heard that you saw A.J. at 7:34?

20 A. It was around 7:34, and I want an exact time put on that.
21 And I looked down the hall from my desk, and A.J. was
22 coming around the corner from the art room where he had
23 this big thing, which, after the fact, it was identically
24 shaped like that wall. He must have had wheels or
25 something on there, but he was laboring to push it.

1 There was a person on the front of it. And I turned to
2 the payroll person and I said, "What the hell is he
3 doing? We have auditors coming here today. He was hired
4 as our director of finance and human resources, not as
5 our maintenance person." And that is a quote.

6 Q. And who's the payroll person you made that statement to?

7 A. Terri Brintlinger.

8 MR. JANES: Oh, crap. I've got to get a power
9 cord. I'll be right back.

10 (At 2:46 p.m., brief pause)

11 (Deposition Exhibit No. 134 marked for
12 identification)

13 (At 2:48 p.m., back on the record)

14 MR. JANES: We're back.

15 BY MR. JANES:

16 Q. You said that when you saw him pushing this object, at
17 the time you did not understand what it was?

18 A. Correct.

19 Q. But subsequently becoming aware of the panels within the
20 gym wall stage cover, you put the two together?

21 A. I started to put it together a little bit after that
22 statement on Friday, that I knew it had something to do
23 with when I saw him that previous morning. And I would
24 say it was probably a week later when I started
25 realizing, like, what exactly this structure was.

1 Q. Okay. When you made the statement to Terri, what did she
2 say to you?

3 A. She just shook her head and went into her office.

4 Q. Did you see Mr. Filizetti and the second person at any
5 point in time thereafter that day?

6 A. Shortly after they went in there, and I want to say it
7 was about 15 to 20 minutes, he came back up into the
8 office and he was soaked in sweat. And I said, "You know
9 the auditors are going to be here?" And he goes, "Yep.
10 I'm going to go home and shower and change."

11 MR. JANES: Can you try your best to keep close
12 to the microphone?

13 THE WITNESS: Yes.

14 MR. JANES: I think that may be our problem.

15 THE WITNESS: Where is the microphone?

16 THE COURT REPORTER: Hold on one second.

17 (At 2:49 p.m., discussion off the record)

18 (At 2:51 p.m., back on the record)

19 THE WITNESS: Okay. So can you hear better?

20 MR. JANES: Yes, much, much better, actually.

21 BY MR. JANES:

22 Q. The second person that you saw, could you tell who that
23 person was?

24 A. Honestly, when I first saw them, I thought it was a man.
25 But when I first met Tracy Belusar, I thought she was a

1 man, and I really don't want her to know that. But yes,
2 it was her.

3 Q. Okay. A.J. sort of has a defined shape to himself, so
4 he's pretty recognizable?

5 A. Well, and I've known A.J. since he was three, so I know
6 A.J., yes.

7 Q. When he comes back in the office, you said, after -- I'm
8 getting the sequence down.

9 You're there in your office with Terri. You see
10 A.J. and Tracy moving the object down towards the
11 gymnasium?

12 A. They came around the corner, and I saw them right outside
13 the first set of gym doors.

14 Q. And did you see them enter the gymnasium with the panel
15 or not?

16 A. They started to guide it in, and then I took a phone
17 call.

18 Q. Okay.

19 A. And it was gone. It was gone out of the hallway, so ...

20 Q. Okay. After the phone call, between leave- -- taking the
21 phone call, did you ever see the two of them doing
22 anything else down at the gymnasium before he comes back
23 20 minutes later covered in sweat?

24 A. No. I could only see to -- I could see to the gymnasium
25 doors. I could see the hallway. I have a perfect view

1 of the hallway outside of the gym area.

2 Q. Okay. My question was, is after taking -- You take your
3 attention away from them to have one panel or an object
4 into the gymnasium. You take the call. And then you
5 said that 20 minutes later, you encounter A.J., and he's
6 coming into the office covered in sweat?

7 A. It was about 15 to 20 minutes, yes.

8 Q. My question was, did you, after taking this call, observe
9 any other activity that A.J. or anybody else may have
10 been in about moving panels or objects into the gymnasium
11 before you saw him?

12 A. No, I did not.

13 Q. When he comes in covered in sweat, your communication is,
14 "What are you doing, we have auditors coming in," or
15 words to that effect?

16 A. No, I said -- No, I just said, "We have auditors coming,
17 you know." And he said, "Yes, I'm going to go home and
18 shower and change" -- or, "I'm going to go and shower and
19 change." He didn't say "home." He said, "I'm going to
20 go and shower and change."

21 Q. Can you describe what clothes he was wearing at that
22 point in time when he was covered in sweat?

23 A. He was wearing a big pair of basketball shorts and a
24 T-shirt.

25 Q. So not work clothes?

1 A. No, he was not in work clothes.

2 Q. And when was the next time you see him that day?

3 A. I saw him speaking to the auditors soon after they got to
4 our office. And I don't know the exact time that the
5 auditors arrived. It was in the morning.

6 Q. Can you give me the hour? Would it have been between the
7 8:00 and 9:00 o'clock hour, 9:00 and 10:00 o'clock hour,
8 10:00 and 11:00 o'clock hour? How would it have been?

9 A. Yes, they usually always arrive between 8:00 and 9:00.

10 Q. And where did A.J. and the auditors meet?

11 A. Right here in the board room.

12 Q. Did you, as accounts payable, have any involvement in
13 that meeting?

14 A. No, I was in and out with Kathryn Pelton, the head
15 auditor. I would come in and out to give information to
16 them.

17 Q. Did there come a point in time where A.J. left that
18 meeting?

19 A. He was in and out. So he could have been back in the
20 superintendent's office, he could have gone out the back
21 door of our office and down. At one point I heard him in
22 the hallway say, "I'm going to go check on the teacher
23 inservice."

24 Q. Did he ever communicate to you that morning that he had
25 to move objects because Mr. Soyring had asked him to do

1 to let her know that I wasn't going to be in the gym that
2 morning. Because I had been in there every single
3 morning from the start of the fall sports season. And as
4 cheerleading coaches, that gym is a rare commodity for us
5 to be able to use. So I wanted to let her know because
6 it's just always a bonus if you can go in there.

7 BY MR. JANES:

8 Q. Okay. You seem to be very definitive on the time.

9 Could you be mistaken about witnessing
10 Mr. Filizetti and Ms. Belusar moving what you believe to
11 be a wall panel at or approximately 7:34 to 7:35, about
12 that time?

13 A. No, I am 100 percent positive on that.

14 Q. Did you ever speak with Terri about that after the events
15 with Amarah?

16 A. No, because she was just passing through from the board
17 room and crossed in front of my desk to her office.

18 Q. Did you ever talk to anybody within the school about what
19 you had observed that morning?

20 A. Yes.

21 Q. Who?

22 A. Jane. It wasn't a -- It was just a conversation on,
23 "I saw him moving something that morning." My
24 conversation with her was -- it was after his statement
25 and when I was starting to piece some of this stuff

Stacey Filizetti
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Case No. 16-54781-NO

Transcript of the Testimony of
Stacey Melissa Filizetti

December 14, 2017



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1 A. I feel like I remember longer, but four seasons can feel
2 like longer, I suppose.

3 Q. Yeah. Okay, it was four back then?

4 When you say "seasons," fall and spring, fall and
5 spring?

6 A. Correct.

7 Q. Okay. So two calendar years; four seasons in those two
8 years?

9 A. Yeah.

10 Q. Okay. Back then, was Vicki Nelson the varsity cheer
11 coach?

12 A. I think I became the varsity cheer coach.

13 Q. Okay. At that time?

14 A. I believe so.

15 Q. So did you do both JV and varsity?

16 A. At some points, yes.

17 Q. Okay. And then you got away from it for a time until the
18 spring of 2015 --

19 A. Correct.

20 Q. -- or summer of 2015, I'm sorry, correct?

21 A. Correct.

22 Q. Was that because of the demands of being a mom and
23 raising kids and those kinds of considerations, plus you
24 had triplets in 2010, right?

25 A. Correct.

1 spotlight on themselves to play under the light -- is
2 that what they were doing?

3 A. Yes.

4 Q. (Continuing) -- would you be able to see them in the
5 spotlight area as opposed to in the light of the entire
6 gym being lit? In other words, was it darkened down
7 there when the girls played there?

8 A. I don't recall it being darkened while they were playing.

9 Q. Okay. When you sent the girls down there to play, that
10 is the area you told them to go play in, correct?

11 A. That's -- Yeah. They called it their "spotlight area."

12 Q. Their "spotlight area."

13 And so is it your recollection that the lights were
14 on in the entire gym at that point?

15 A. I believe so.

16 Q. Okay. Did you, during that 45 minutes between 9:15 and
17 about 10:00 o'clock, observe two people, you may not have
18 known who they were -- we now know A.J. Filizetti and
19 Tracy Belusar -- wheeling in two of these black and white
20 striped padded 10 foot long, 5 foot high panels that were
21 taken directly across from the cheerleaders all the way
22 down the side of the gym to the other end where the
23 spotlight was?

24 A. I never saw that.

25 Q. You never saw that at all?

1 A. No.

2 Q. Did you ever see Tracy Belusar -- Do you know who she is
3 now or not?

4 A. I wouldn't recognize her if I ran into her.

5 Q. Yeah. Okay. But did you ever see another person
6 bring -- after these two trips you didn't see -- bring in
7 these brackets?

8 A. I saw nobody.

9 Q. You saw nobody.

10 When you looked down to the other end of the gym
11 and before you sent the girls down there, did you notice
12 these two panels with black and yellow and white stripes
13 standing?

14 A. I did not.

15 (Brief pause)

16 BY MR. RYAN:

17 Q. Okay. Do you need some Kleenex?

18 A. Thank you.

19 Q. Do you want to take a break, or are you okay?

20 A. Keep plugging.

21 Q. Okay. If you need a break, we'll do that, okay?

22 MR. JANES: I may just interject at some point
23 in time --

24 MR. RYAN: Yeah.

25 MR. JANES: -- and say, "Hey, we've got to take

1 Q. Okay. But that would be your normal practice approach?

2 A. They always started with that before. They had to do an
3 X amount before they could actually execute a stunt.

4 Q. So what would your normal practice routine at that point
5 be? You started at 8:00 o'clock?

6 A. Correct.

7 Q. So what would that be?

8 A. They would do their -- They would run their laps around
9 the gym, do their warmup, some stretches. I focused a
10 lot on them doing their arm drills for their arm
11 placement, arm control, they would have to do some of
12 those. And then they reviewed all their cheers, fight
13 song, dances, and they did them until they showed
14 progress, and then their reward was to be able to stunt.
15 If they showed progress, they were rewarded with stunting
16 at the end of practice.

17 Q. Now, tell me what stunting really is. How does it work?
18 I've seen it a little bit, but I haven't paid a lot of
19 attention.

20 A. That depends on what you're asking.

21 Q. Just describe it as you understand it and would have been
22 dealing with with those girls at that point.

23 A. At that point, that would have been -- We were focusing
24 on elevators. That's where two bases and a spot lift the
25 flier to chest/shoulder-length level, and then to execute

1 Q. Okay. So at about ten after 10:00, or something like
2 that, is that when you would have heard the wall --

3 A. Correct.

4 Q. -- heard the panel? Yeah. All right.

5 So what did you do when that happened?

6 A. I ran over to her.

7 Q. And got help lifting the wall, as I understand it,
8 correct?

9 A. Correct.

10 Q. And then you were in the gym with Amarah for how long,
11 15, 20 minutes; do you think that's accurate?

12 A. I would have to believe somebody else over what I felt.
13 It felt like a lifetime for me.

14 Q. I'm sure. I'm sure. Did you accompany Amarah back to
15 Marquette General?

16 A. Of course.

17 Q. And then once there, they treated her, attempted to
18 repair the carotid artery, as I understand it?

19 A. Correct.

20 Q. And she ultimately got stabilized after a second time
21 back to the hospital; is that right? Did you start to go
22 to the airport and come back the first time?

23 A. Yes. I watched her crash in the ambulance.

24 Q. And then you went back to the hospital, she was
25 stabilized, and then you went down, as I understand it --

1 A. It depended on the practice. But they would get their
2 drink, bathroom break, they could do their phone calls,
3 they could congregate, they could run to Subway. You
4 know, this was -- that was meant to be their time, their
5 break from -- to get away from coach.

6 Q. What are there, six girls, eight girls?

7 A. I had eleven, and two had just quit.

8 Q. Okay. So nine. Out of those nine girls, was there one
9 or two that were kind of left, "Hey, during break, you
10 guys kind of" -- "you're in charge of the other girls,"
11 or not?

12 A. I hadn't assigned captains, but I had a really good group
13 of girls that -- There was a couple that they just --
14 they were the leaders of the group. I didn't need to
15 establish it.

16 Q. Natural leaders?

17 A. They were. They were all very good.

18 Q. And what were the names of those couple of girls?

19 A. That would be Sydney Flourre and Makayla were the ones --
20 well, and Sam. I felt that those were -- you know, those
21 were the ones that the younger girls looked up to.

22 Q. What was Makayla's last name?

23 A. Kunde.

24 Q. And Sam, what's Sam's last name?

25 A. Heinz.

Michigan State Board of
Education Model Policy on
Quality Physical Education
and Physical Activity in
Schools

**MICHIGAN
STATE BOARD OF EDUCATION**

**MODEL POLICY ON QUALITY PHYSICAL EDUCATION
AND PHYSICAL ACTIVITY IN SCHOOLS**

The State Board of Education (SBE) recommends that all public schools offer physical education opportunities that include the components of a quality physical education program. It is the unique role of quality physical education programs to provide opportunities for children to understand the importance of physical activity and to acquire skills to combat a sedentary lifestyle.

A quality physical education program addresses four critical issues: curriculum, instruction, assessment, and an opportunity to learn. It should include the following:

Curriculum

- Aligns with the Michigan K-12 *Physical Education Content Standards and Benchmarks*.
- Equips students with the knowledge, skills, and attitudes necessary for lifelong physical activity.
- Influences personal and social skill development.

Instruction

- Is taught by a certified and endorsed physical education teacher trained in best practice physical education methods.
- Aligns curriculum, instruction, and assessment.
- Engages students in curriculum choices that prepare them for a wide variety of lifetime activities.
- Keeps students involved in purposeful activity for a majority of the class period.
- Builds student confidence and competence in physical abilities.
- Promotes physical activity outside of school.
- Meets the needs of all students, regardless of their cognitive, physical, or athletic ability.

Assessment

- Establishes program assessment and completes regularly to ensure it continues to meet the needs of the students.
- Assesses students regularly for attainment of physical education learning objectives.
- Includes course grades for physical education in calculations of grade point average, class rank, and academic recognition programs, such as honor roll, in the same manner as other subject areas.

Ex 121

- Includes communication to families regarding a student's current level of performance and suggested activities to increase performance outside of school.

Opportunity to Learn

- Offers instructional periods totalling 150 minutes per week at the elementary level and 225 minutes per week at the secondary level (middle and high school), for students of all abilities, including those with disabilities, and those in alternative education programs.
- Prohibits exemptions or substitutions:
 - K-8 students are not allowed to waive or opt out of physical education, nor are they allowed to receive credit by alternative means.
 - For grades 9-12, substitutions are allowed only after a student has shown proficiency in the standards per the Michigan Merit Curriculum Guidelines for graduation.
- Has a teacher to student ratio consistent with those of other subject areas and/or classrooms.
- Provides facilities to implement the curriculum for the number of students served.
- Has enough functional equipment for each student to actively participate.
- Provides and properly maintains safe and adequate spaces, facilities, equipment, and supplies necessary to achieve the objectives of the physical education program.
 - It is further recommended that regular safety and hazard assessments of gymnasiums, playgrounds, athletic fields, and sports-related equipment shall be conducted. Identified hazards shall be repaired before further use by students, staff, or community members. Any hazard reports shall be kept on file for an amount of time as determined by the district.

The SBE recommends that all public schools offer daily opportunities for physical activity, both structured and unstructured, apart from the physical education program, for all students K-12. There are a number of ways for schools to ensure that students get adequate physical activity to positively affect their health and academic performance:

- Offer at least 30 minutes of moderate to vigorous physical activity during the school day, outside of the physical education class.
 - This includes at least 20 minutes of scheduled recess and/or daily periods of physical activity breaks incorporated throughout the day for all grades.
- Physical activity, including recess, may not be denied or used for disciplinary reasons, or to make up lessons or class work.
- All teachers should be trained in how to integrate physical activity into their classrooms.
- Limit sedentary time to less than 2 hours at one time.
- Recess before lunch is strongly encouraged.
- Interscholastic or intramural programs:

- A diverse selection of competitive and non-competitive, structured and unstructured, extracurricular physical activities shall be offered at no cost to students' families to the extent that staffing, facilities, transportation, and other resources permit.
- Students and their families shall be involved in the planning, organization, and administration of the extracurricular activities program.
- Encouraging Active Commuting to/from School - Students and staff members will be encouraged and supported to safely walk or bike to school as often as possible.
- Encouraging Out-of-School Time Activity – For every 3 hours a program operates, at least 20 minutes of moderate, vigorous physical activity must be provided.
- Encouraging Joint Use Agreements – Schools and districts are encouraged to establish joint use agreements with local government agencies to allow use of school facilities for physical activity and other community programs.

Adopted November 20, 2012

Unpublished Opinion:
Estate of Tschirhart v City of Troy, No.
345411, 2019 Mich App LEXIS 8036
(December 17, 2019)

A Neutral

As of: October 7, 2020 3:42 PM Z

Estate of Tschirhart v. City of Troy

Court of Appeals of Michigan

December 17, 2019, Decided

No. 345411, No. 345715

Reporter

2019 Mich. App. LEXIS 8036 *; 2019 WL 6888653

ESTATE OF SHAUN M. TSCHIRHART, by DEBORAH TSCHIRHART, Personal Representative, Plaintiff-Appellee, v CITY OF TROY, ALEXANDER YARBROUGH, NICHOLAS YARBROUGH, MARY ALLEMAN, and ALEXIS CALHOUN, Defendants-Appellants, and SUSAN O'CONNOR, Defendant. ESTATE OF SHAUN M. TSCHIRHART, by DEBORAH TSCHIRHART, Personal Representative, Plaintiff-Appellee, v CITY OF TROY, ALEXANDER YARBROUGH, NICHOLAS YARBROUGH, MARY ALLEMAN, and ALEXIS CALHOUN, Defendants, and SUSAN O'CONNOR, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Subsequent History: Leave to appeal denied by *Tschirhart v. City of Troy*, 2020 Mich. LEXIS 1229 (Mich., July 22, 2020)

Prior History: [*1] Oakland Circuit Court. LC No. 2018-165013-NO.

Core Terms

proximate, drowning, pool, lifeguard's, swim, discovery,

intervene, seizures, swimmer, causation, rescue, premature, grossly

Judges: Before: FORT HOOD, P.J., and SERVITTO and BOONSTRA, JJ.

Opinion

PER CURIAM.

Defendants appeal as of right the trial court's orders denying their motions for summary disposition pursuant under *MCR 2.116(C)(7)* (governmental immunity) and *(C)(8)* (failure to state a claim for relief) in this wrongful-death action arising from a drowning death in a public swimming pool. We reverse and remand for further proceedings.

I. FACTS AND PROCEEDINGS

This action arises from the drowning death of plaintiff's 32-year-old disabled son in a swimming pool at the Troy Community Center, a facility operated by defendant city of Troy. The decedent, who had a history of epilepsy, was a participant in the Friendship Club, a recreational program for disabled adults provided by the city of Troy. He was participating in a Friendship Club swimming outing when he drowned. Defendants Alexander Yarbrough and Nicholas Yarbrough were lifeguards on duty at the time of the decedent's death. Defendant Alexis Calhoun was the pool manager. Defendants Susan O'Connor and Mary Alleman were employed as Friendship Club attendants.

Plaintiff's complaint alleges that the decedent submerged himself in the pool and [*2] likely suffered an epileptic seizure. He was under water for

approximately 50 seconds before anyone noticed that he was in danger. When Alleman saw that the decedent was in danger, she poked him with a Styrofoam tube, but he failed to respond. Alleman then entered the water and the decedent was eventually removed from the pool. According to plaintiff, approximately 90 seconds elapsed before defendants Alexander Yarbrough, Nicholas Yarbrough, and Alexis Calhoun initiated cardiopulmonary resuscitation (CPR). The decedent was transported by ambulance to the hospital where he was pronounced dead. The medical examiner determined that the decedent's cause of death was "drowning due to epileptic seizures disorder."

Plaintiff brought this action for wrongful death, alleging that defendants were grossly negligent in failing to supervise the decedent and timely intervene when he failed to resurface. Defendants city of Troy, the Yarbroughs, Alleman, and Calhoun moved for summary disposition under MCR 2.116(C)(7) and (8), alleging that they were entitled to immunity under the governmental tort liability act (GTLA), MCL 691.1401 et seq., and that plaintiff failed to plead facts in avoidance of immunity. Defendant O'Connor filed a separate [*3] motion for summary disposition under subrule (C)(7). Plaintiff argued in response that summary disposition was premature because discovery had not been conducted. The trial court agreed and denied defendants' motions. Defendants City of Troy, the Yarbroughs, Alleman, and Calhoun appeal as of right in Docket No. 345411, and defendant O'Connor appeals as of right in Docket No. 345715.

II. STANDARDS OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. Pew v Mich State Univ, 307 Mich App 328, 331; 859 NW2d 246 (2014). "A defendant is entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law." Id. at 331-332. "The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence." Id. at 332, citing MCR 2.116(G)(5) and (6). "If reasonable minds could not differ on the legal effects of the facts, whether governmental immunity bars a plaintiff's claim is a question of law." Pew, 307 Mich App at 332.

Motions for summary disposition under MCR 2.116(C)(8) test "the legal sufficiency of a claim by the pleadings alone." Lawrence v Burdi, 314 Mich App 203, 211; 886 NW2d 748 (2016), quoting Averill v Dauterman, 284 Mich App 18, 21; 772 NW2d 797

(2009). A motion under subrule (C)(8) is reviewed "to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and [*4] justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true." Id., quoting Averill, 284 Mich App at 21.

III. IMMUNITY FOR CITY OF TROY

We first address defendant city of Troy's argument that it is entitled to governmental immunity regardless of any gross negligence of its employees. Plaintiff concedes this argument on appeal, and we agree with both parties that the city is immune.

MCL 691.1407(1) provides:

Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

"MCL 691.1407(1) . . . unambiguously provides immunity to a governmental agency without regard to an employee's gross negligence." Yoches v City of Dearborn, 320 Mich App 461, 476; 904 NW2d 887 (2017). MCL 691.1408(1) provides that in a civil action for negligence against a governmental employee, "the governmental agency may compromise, settle, and pay the claim before or after the commencement of a civil action." When a judgment for damages is awarded [*5] against a governmental employee, "the governmental agency may indemnify the officer, employee, or volunteer or pay, settle, or compromise the judgment." However, MCL 691.1408 "does not require imposition of vicarious liability against a governmental agency for an employee's gross negligence." Yoches, 320 Mich App at 477. Accordingly, the city of Troy is correct that it cannot be held liable for any gross negligence of its employees.

IV. IMMUNITY FOR GOVERNMENTAL EMPLOYEES

Next, we address the allegations of gross negligence on the part of the defendant employees. Again, we conclude that governmental immunity applies.

"To establish a prima facie case of negligence, plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3)

causation, and (4) damages." Finazzo v Fire Equip Co., 323 Mich App 620, 635; 918 NW2d 200 (2018). Under MCL 691.1407(2), "[g]overnmental employees are immune from liability for injuries they cause during the course of their employment if they are acting or reasonably believe they are acting within the scope of their authority, if they are engaged in the exercise or discharge of a governmental function, and if their conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Love v Detroit, 270 Mich App 563, 565; 716 NW2d 604 (2006). "Gross negligence" [*6] is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). "The determination whether a governmental employee's conduct constituted gross negligence that proximately caused the complained-of injury under MCL 691.1407 is generally a question of fact, but, if reasonable minds could not differ, a court may grant summary disposition." Briggs v Oakland Co., 276 Mich App 369, 374; 742 NW2d 136 (2007). "To be the proximate cause of an injury, the gross negligence must be 'the one most immediate, efficient, and direct cause' preceding the injury." Love, 270 Mich App at 565, quoting Robinson v Detroit, 462 Mich 439, 462; 613 NW2d 307 (2000).

A. CAUSATION

First, we conclude that, even assuming arguendo that the defendant employees' conduct constituted gross negligence, it was not the cause of the decedent's death. In Ray v Swager (On Remand), 321 Mich App 755, 758; 909 N.W.2d 917; 321 Mich. App. 755; 909 NW2d 917 (2017) (Ray II), this Court explained the framework set forth in Ray v Swager, 501 Mich 52; 903 NW2d 366 (2017) (Ray I), for determining whether an individual's conduct may be considered the cause of an injury for purposes of determining governmental immunity under MCL 691.1407(2)(c). This Court stated:

The analysis under this framework begins with determining whether the defendant's gross negligence was a cause in fact of the plaintiff's injuries. . . . Provided that a defendant's gross negligence was a factual cause, the court must then consider [*7] whether the defendant was a proximate—i.e. legal—cause by addressing foreseeability and whether the defendant may be held legally responsible for his or her conduct. . . . In addition to considering the governmental actor's conduct, it must also be decided whether there are other proximate causes of the injury. . . . Determining if there were other proximate causes

requires consideration of whether any other human actor was negligent because "only a human actor's breach of a duty can be a proximate cause." . . . "Nonhuman and natural forces" may bear on the question of foreseeability and intervening causes for purposes of analyzing proximate cause, but they can never be considered the proximate cause of a plaintiff's injuries for purposes of the GTLA. [Ray II, 321 Mich App at 759-760 (citations omitted).]

"Proximate cause is distinct from cause in fact, also known as factual causation, which requires showing that but for the defendant's actions, the plaintiff's injury would not have occurred. Courts must not conflate these two concepts." Ray I, 501 Mich at 63 (quotation marks and citations omitted).

For purposes of reviewing defendants' motion under MCR 2.116(C)(8), we must accept as true the allegations in plaintiff's complaint that the decedent was [*8] submerged under the water for approximately 50 seconds before someone noticed his situation and came to his aid, and that CPR efforts were not initiated until approximately 90 seconds after the decedent was removed from the pool. Further, defendants did not present any evidence to contradict these allegations for purposes of their motions under MCR 2.116(C)(7). Defendants argue, however, that plaintiff's theory of factual causation does not and cannot go beyond mere speculation that the decedent would not have died if the governmental employees had intervened sooner than the alleged 50 seconds between the decedent's submersion and removal from the water, and the alleged 90 seconds between his removal and initiation of CPR. Defendants also state that speculation is the only basis for plaintiff's alleged causal connection between the omission of a life jacket or other safety device and the decedent's death.

Defendants rely on Beals v Michigan, 497 Mich 363, 366-367; 871 NW2d 5 (2015), a case in which the plaintiff's decedent drowned in a swimming pool at a state residential facility for vocational training for students with disabilities. The decedent, a 19-year-old student at the facility, was an experienced swimmer. Id. at 367. The plaintiff alleged that the lifeguard [*9] on duty was grossly negligent by failing to prevent the drowning. Id. at 368. The lifeguard did not notice that the decedent swam into the deep end and failed to resurface, and there was no evidence that the decedent showed signs of distress. Id. at 367. When another student saw the decedent's body at the bottom of the pool, he and other students had to yell more than three

times to get the lifeguard's attention. *Id.* The lifeguard pulled the decedent's body from the pool and attempted to resuscitate him. *Id.* at 367.

In a reversal of this court's opinion to the contrary, our Supreme Court concluded that the lifeguard's alleged negligence was not the proximate cause of the decedent's death, stating:

Under the facts of this case, Harman's inaction does not constitute the "most immediate, efficient, and direct cause" of Beals's drowning. Harman did not cause Beals to enter the pool and swim to the deep end, an act the accomplished swimmer performed voluntarily, nor did Harman cause Beals to remain submerged in the water, which was undeniably a more direct cause of Beals's death than any inaction on the part of Harman. That we lack the reason for Beals's prolonged submersion in the water does not make that unidentified [*10] reason any less the "most immediate, efficient, and direct" cause of his death. Consequently, while Harman's failure to intervene may be counted among the myriad reasons that Beals did not survive this occurrence, it certainly was not "the proximate cause" of his death for purposes of *MCL 691.1407(2)(c)*. [*Beals*, 497 Mich at 373-374.]

In reversing this Court's opinion, the Supreme Court further explained that this Court "appear[ed] to have conflated Harman's alleged breach of duty with the proximate cause of Beal's death," leading to its erroneous conclusion that Harman's "grossly negligent conduct resulted in his failure to notice Beal's distress and respond appropriately." *Id.* at 374. The Supreme Court stated:

Stated simply, that Harman breached his duty does not necessarily entail that his inaction was the most *direct cause* of Beals's drowning. Indeed, Harman did not *cause* Beals's drowning; he merely failed to observe it happening and to attempt a rescue in response. That we can only speculate as to Beals's survival had Harman timely intervened further supports our conclusion that Harman's conduct was not the proximate cause of Beals's death. [*Id.*]

The Court analogized the case to that of a death by fire, noting:

When a fire is consuming [*11] a house, that a prudent firefighter might have slowed or stopped the fire does not automatically transform his failure to do so into the proximate cause of a death by fire.

Similarly, if a swimmer accidentally drowns, that a prudent lifeguard might have rescued the swimmer from drowning does not automatically transform his failure to do so into the proximate cause of a death by drowning. [*Id.* at 376-377.]

The Court declined to "hypothesize scenarios in which a governmental employee's failure to intervene is so 'immediate, direct, and efficient' to the injury that it breaks the existing causal connection, supersedes any other cause, and becomes 'the one most immediate, efficient, and direct cause' of the injury, [and therefore] reject[ed] the defendant's suggestion that a governmental employee's failure to intervene can *never* constitute the proximate cause of an injury." *Id.* at 377.

In *Ray I*, the Supreme Court clarified its decision in *Beals*. The Court described its analysis in *Beals* as "somewhat opaque," and clarified that *Beals* "is best understood as holding that the lifeguard could not have been 'the proximate cause' of the decedent's drowning because the plaintiff failed to show even a genuine issue of factual [*12] causation." *Ray I*, 501 Mich at 70. The Court stated that the plaintiff in *Beals* failed to offer sufficient proof that the lifeguard's breach of a duty was a but-for cause of the drowning; thus, the causal connection was mere speculation. *Ray I*, 501 Mich at 70-71. The holding in *Beals*, as clarified in *Ray I*, leaves little room for analysis of the factual cause in this case. The Supreme Court's statement that the plaintiff in *Beals* could not demonstrate that "the lifeguard's breach of a duty was a but-for cause of the drowning," *Ray I*, 501 Mich at 70-71, establishes precedent that a lifeguard's delay, even if it constitutes gross negligence, is not a cause in fact of drowning because of the inherent uncertainty of successful rescue.

We note plaintiff's argument that *Beals* is distinguishable from the instant case, in which the number of swimmers in the pool was approximately the same as the number of lifeguards and attendants. However, the ratio of swimmers to government actors does not establish that, but for the government employees' inaction, the decedent would not have drowned. Plaintiff also argues that defendants knew that the decedent was at risk of seizures. However, the decedent's risk of seizures also does not alter the factual cause analysis. [*13] On the contrary, the decedent's alleged seizure increased the uncertainty that he would have survived the drowning incident if defendants acted more quickly.

B. GROSS NEGLIGENCE

We also conclude that, to the extent that plaintiff's complaint was predicated, not on defendants' failures after the decedent entered the pool, but on their failures to prevent the drowning beforehand, plaintiffs failed to establish gross negligence. As indicated, under MCL 691.1407(2), "[g]overnmental employees are immune from liability for injuries they cause during the course of their employment if they are acting or reasonably believe they are acting within the scope of their authority, if they are engaged in the exercise or discharge of a governmental function, and if their conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Love, 270 Mich App at 565. "Gross negligence" is defined by the GTLA as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(8)(a). The plain language of the governmental immunity statute indicates that the Legislature limited employee liability to situations where the contested conduct was substantially more than negligent." Maiden v Rozwood, 461 Mich 109, 122; 597 NW2d 817 (1999). "Evidence [*14] of ordinary negligence is not enough to establish a material question of fact regarding whether a government employee was grossly negligent." Chelsea Investment Group, LLC v Chelsea, 288 Mich App 239, 265; 792 NW2d 781 (2010).

"[F]or a plaintiff to be successful in a tort action against a governmental employee, the plaintiff must prove both that (1) the governmental employee's conduct demonstrated a substantial lack of concern for whether his conduct would cause injury to the plaintiff, and (2) the alleged misconduct was *the proximate cause of the plaintiff's injury*. Tarlea v Crabtree, 263 Mich App 80, 83; 687 NW2d 333 (2004). "Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result. Id. at 90. "[S]aying that a defendant could have taken additional precautions is insufficient to find ordinary negligence, much less recklessness." Id. In Tarlea, this Court stated:

Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent.

The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular [*15] disregard for substantial risks. It is as though, if an objective observer

watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Id.*]

Plaintiff alleged seven acts or omissions that constituted gross negligence: (1) failure to exercise reasonable care; (2) failure to monitor the decedent in the pool; (3) failure to timely rescue the decedent; (4) failure to equip the decedent with safety equipment; (5) failure to exercise due care in providing life guard services; (6) failure to supervise the pool and observe that the decedent was submerged; and (7) failure to ensure that participants were able to swim. Plaintiff alleges that the decedent's epilepsy and propensity for seizures heightened defendants' duties and aggravated the severity of defendants' alleged breaches of those duties.

Defendants cite Smith v Kowalski, 223 Mich App 610; 567 NW2d 463 (1997), in which the plaintiff prison inmate ran at a high speed into a metal window frame while playing football in a courtyard on the prison grounds. He suffered a closed head injury and quadriplegia. Id. at 611-612. The plaintiff alleged that prison employees were grossly negligent for failing to enforce safety rules and failing [*16] to prevent prisoners from playing football in an unsafe courtyard without safety equipment. Id. at 612. This Court held that the plaintiff failed to establish gross negligence. The Court remarked that there was a rule against playing football in the courtyard, that the defendants actively tried to enforce the rule, and that there was no evidence that the defendants knew that a game was taking place. Id. at 617.

In the instant case, we do not believe that "an objective observer" watching the events as alleged in plaintiff's complaint "could conclude, reasonably, that the actor[s] simply did not care about the safety or welfare" of the decedent. Tarlea, 263 Mich at 90. Failure to provide the decedent with a lifejacket or other safety device does not rise to that level of gross negligence. Plaintiff did not plead facts to support a conclusion that allowing the decedent to swim without a flotation device demonstrated a substantial lack of concern for the decedent's risk of injury. Plaintiff did not plead any unusual circumstances, such as the depth of the pool, warranting use of a lifejacket by an adult swimmer. Plaintiff did not allege that the decedent was unable to swim, or that the decedent's seizures were so frequent that [*17] there was a significant likelihood that one would occur while he was in the pool.

C. AMENDMENT

Plaintiff argues that, if this Court holds that the trial court erred by denying defendants' summary disposition motions, she should be permitted the opportunity to amend her complaint. MCR 2.116(I)(5) provides that "[i]f the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." Because summary disposition was warranted under subrule (C)(7), plaintiff was not entitled as a matter of right to the opportunity to amend her pleadings. The trial court may, however, grant plaintiff leave to amend in accordance with MCR 2.118(A)(2). In this case, it is unclear whether there are other facts that could support a valid claim. Under the circumstances, we believe that remand to provide plaintiff with an opportunity to file an amended complaint is appropriate.

In sum, we conclude that plaintiff's complaint failed to allege sufficient facts that defendants' conduct constituted gross negligence that was a factual cause of the decedent's death. Accordingly, [*18] we reverse the trial court's orders denying defendants' motions for summary disposition. However, we remand to afford plaintiff an opportunity to seek leave to amend her complaint under MCR 2.118.

V. WHETHER SUMMARY DISPOSITION WAS PREMATURE

Lastly, we note the trial court's ruling that summary disposition was premature because discovery had not been conducted. The ruling was erroneous.

A trial court's decision regarding a motion for summary disposition is reviewed de novo. Pew, 307 Mich App at 331. A trial court's decision regarding discovery is reviewed for an abuse of discretion. Baker v Oakwood Hosp Corp, 239 Mich App 461, 478; 608 NW2d 823 (2000). "Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete." Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 292; 769 NW2d 234 (2009). In this case, however, defendants did not move for summary disposition under MCR 2.116(C)(10).

Defendants' motions were not based on plaintiff's inability to establish factual support for her claim, but rather on plaintiff's failure to allege sufficient facts to state a claim in avoidance of immunity. "A plaintiff filing suit against a governmental agency must initially plead

his claims in avoidance of governmental immunity. Placing this burden on the plaintiff relieves the government of the expense of discovery and trial in many cases." [*19] Odorn v Wayne Co, 482 Mich 459, 478-479; 760 NW2d 217 (2008). Accordingly, even though discovery had not been conducted, it was not premature to determine whether plaintiff's complaint sufficiently alleged a claim in avoidance of governmental immunity.

Plaintiff cites MCR 2.116(G), which governs submission of affidavits, depositions, admissions, or other documentary evidence in support of or opposition to a summary disposition motion. Plaintiff implies that summary disposition under subrule (C)(7) requires submission and analysis of documentary evidence. However, there is no prohibition in moving for summary disposition under subrule (C)(7) on the basis of the pleadings alone. MCR 2.116(G)(2) provides that "[e]xcept as to a motion based on subrule (C)(8) or (9), affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose the grounds in the motion." (Emphasis added.) The use of the term "may" is considered permissive, in contrast to the term "shall," which is considered mandatory. Manuel v Gill, 481 Mich 637, 647; 753 NW2d 48 (2008). The Supreme Court's statement in Odorn, 482 Mich at 478-479, that the plaintiff's burden of pleading facts in avoidance of governmental immunity "relieves the government of the expense of discovery and trial," supports the conclusion that summary disposition may [*20] be granted under subrule (C)(7) on the basis of the pleadings alone.

VI. CONCLUSION

As discussed above, our Supreme Court's decisions in Beals, 497 Mich 363; 871 N.W.2d 5, and Ray I, 501 Mich 52; 903 N.W.2d 366, indicate that a plaintiff claiming gross negligence from a lifeguard's untimely attempt to rescue a drowning victim generally cannot satisfy the causation element because of the uncertainty over whether a quicker rescue would have been successful. However, although these decisions would seem to foreclose any likelihood that plaintiff could successfully allege and establish a viable claim in avoidance of governmental immunity, we have determined that remand to afford plaintiff an opportunity to seek leave to amend her complaint under MCR 2.118 is appropriate.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain

jurisdiction.

/s/ Karen M. Fort Hood

/s/ Deborah A. Servitto

/s/ Mark T. Boonstra

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Unpublished Opinion:
Gray v Thorne Primary Elem Sch, No.
348996, 2020 Mich App LEXIS 5511
(August 20, 2020)



Neutral

As of: August 24, 2021 2:52 PM Z

Gray v. Thorne Primary Elem. Sch.

Court of Appeals of Michigan

August 20, 2020, Decided

No. 348996, Nos. 349022; 349436

Reporter

2020 Mich. App. LEXIS 5511 *; 2020 WL 4914662

MARKQUAN GRAY, by Guardian STAR GEE, Plaintiff-Appellee, v THORNE PRIMARY ELEMENTARY SCHOOL, Defendant-Appellant, and WESTWOOD COMMUNITY SCHOOL DISTRICT, Defendant/Cross-Plaintiff/Cross-Defendant-Appellant, and GCA SERVICES GROUP, INC., Defendant/Cross-Defendant/Cross-Plaintiff.; MARKQUAN GRAY, by Guardian STAR GEE, Plaintiff-Appellant, v THORNE PRIMARY ELEMENTARY SCHOOL, Defendant-Appellee, and WESTWOOD COMMUNITY SCHOOL DISTRICT, Defendant/Cross-Defendant/Cross-Plaintiff-Appellee, and GCA SERVICES GROUP, INC., Defendant/Cross-Plaintiff/Cross-Defendant-Appellee.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Wayne Circuit Court. LC No. 17-014299-NO. Wayne Circuit Court. LC No. 17-014299-NO.

[Gray v. Thorne Primary Elem. Sch., 2019 Mich. App. LEXIS 4659 \(Mich. Ct. App., Aug. 13, 2019\)](#)

Core Terms

mullion, screws, summary disposition, trial court, repair, doors, notice, public building, inspections, government agency, fixture, loose, top, defective condition, doorframe, common sense, realty, attachment, principles, annexed, cleaned, broken, governmental immunity, constructive notice, trier of fact, indemnification, permanent, replaced, affixed, highway

Judges: Before: GLEICHER, P.J., and STEPHENS and CAMERON, JJ.

Opinion

PER CURIAM.

Markquan Gray, a second-grader at defendant Thorne Primary Elementary School, sustained a head injury when a mullion fell on him as he and a teacher exited the building. The mullion, a vertical metal bar, separated the two main doors to the school. Here is a photo of the doorway with the mullion in place:



Markquan's guardian filed this negligence action against Thorne, the Westwood Community School District, and GCA Services Group, Inc., which supplied custodial and maintenance services to the school. Defendants brought motions for summary disposition and to strike plaintiff's expert witness, and filed cross-motions for summary disposition concerning an indemnification provision in GCA's contract. The trial court denied summary disposition to the school defendants, granted GCA summary disposition by finding that it had not been negligent, struck the expert, and granted summary disposition to GCA on its indemnification claim.

We affirm the denial of summary disposition to the school defendants, vacate the order granting summary disposition to [*2] GCA, and reverse the order striking plaintiff's expert. Because the trial court's indemnification ruling rested on its erroneous

determination that GCA was not negligent as a matter of law, we must vacate that ruling as well. We remand for further proceedings.

I. UNDERLYING FACTS

At the end of a school day, Markquan's teacher walked him and another student to an exit where two adjoining doors, separated by a vertical metal mullion, opened outward toward a parking lot. As the teacher pushed on one door's handle bar, the mullion suddenly fell away from the doorframe and struck Markquan on the head. The mullion fell because three screws failed. The screws secured a bracket uniting the top of the mullion with the doorframe. The heads of all three screws broke off, leaving just the bodies of the screws in place. The school's "building engineer" testified that the screws likely broke because they were worn and rusted; he conceded that they had "probably been in a poor condition for a very long time." Plaintiff's expert witness explained that the screws were not visible when the mullion was in place. In his view, the screws failed one at a time over an extended period, resulting in a loosening [*3] of the mullion that would have been apparent every time the doors were secured in the evening.

Years before the accident, the district replaced its unionized custodial and maintenance staff with employees supplied by defendant GCA. The parties' Custodial Services Agreement did not specifically provide for routine inspections of the school premises. A GCA representative admitted that upon discovering conditions in need of repair, GCA was obligated to complete the repair or report it to the district, which would retain a third-party contractor if necessary. The building engineer testified that the "nighttime custodian" was supposed to check on the exit doors every evening to confirm that they were locked.

Barry Walmsley, a former employee of both the district and GCA, signed an affidavit averring that he had repaired the doorframe containing the defective mullion in 2015. Walmsley asserted that he warned both David Stull (the district's Director of Operations) and Sandy Richardson, Jr. (Walmsley's GCA supervisor) two years before the incident that the mullion "was in bad enough condition that . . . the entire mullion needed to be replaced because it was in such bad decay and disrepair." [*4]¹ Walmsley's affidavit further stated that

"at least three other door frames in the district had issues with screws in the top of the door frame becoming loose" and that he had "personally repaired these doors." He continued, "These were the same types of screws in the same location that ultimately failed . . . during the incident that hurt Markquan Gray." According to Walmsley, "it was well known that these screws had a propensity to fail over time and extended use."

The complaint filed by Star Gee, Markquan's guardian, alleges that defendants breached their respective duties by failing to: correct the dangerous defect in the mullion; warn invitees of the dangers associated with the mullion; take corrective measures; maintain the premises in a reasonably safe condition; or inspect, maintain, or repair the fixture. The complaint further asserts that the school defendants did not enjoy governmental immunity because Markquan's injury was caused by a defect in a public building.

Invoking governmental immunity, the school defendants moved for summary disposition of plaintiff's claims. They contended that the public building exception did not apply because they lacked actual or constructive [*5] notice of a dangerous building condition. Alternatively, they asserted that the mullion was not permanently affixed to the building and, therefore, any defect did not come within the reach of the building exception. GCA's summary disposition argument contended that its duty of care derived solely from its contract with the district, and that it bore no independent duties to Markquan. In addition, GCA and the district both sought summary disposition of their respective cross-claims arising from a mutual indemnification provision in the Custodial Services Agreement.

GCA also filed a motion to strike plaintiff's proposed mechanical engineering and safety analysis expert, Gene Litwin. GCA asserted that Litwin's opinions were unreliable and did not satisfy the requirements for admission under [MRE 702](#) or [MCL 600.2955](#) because in answer to several questions posed by defense counsel, Litwin cited "common sense" as the basis for his

court, attorneys for GCA and the district referred to Walmsley's testimony, but did not submit the transcript for the court's review. GCA filed the transcript in this Court but because it was not part of the lower court record we will not consider it. See [Sherman v Sea Ray Boats, Inc., 251 Mich App 41, 56; 649 NW2d 783 \(2002\)](#) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

¹Walmsley was deposed after the parties completed their summary disposition briefing. At oral argument in the circuit

answers. Plaintiff responded that Litwin's expertise went beyond the knowledge of an average juror and that his use of the phrase "common sense" during his deposition merely emphasized that the dangers should have been obvious to defendants' employees.

The trial court granted GCA's motion [*6] for summary disposition of plaintiff's claim against it. Citing Walmsley's affidavit, the court reasoned that if GCA owed plaintiff a common-law duty to "inspect and provide reports," Walmsley satisfied that duty. The trial court also determined that plaintiff failed to produce evidence that GCA was responsible for "making the repair or replacing door parts." Next, the trial court denied the school defendants' motion for summary disposition. The court explained that Walmsley's affidavit created a question of fact as to whether the school defendants had notice of the defective condition. The court also concluded that that "the mullion is in fact part of the building with no function away from the building and is not a temporary object or structure." The trial court denied GCA's motion regarding its cross-claim as moot in light of its disposition of plaintiff's claim in favor of GCA. The district's motion regarding its cross-claim was likewise denied because "in granting summary disposition to GCA, the Court finds that GCA was not negligent and therefore [the district is] not entitled to indemnification from GCA." The trial court later granted the motion to strike Litwin as an expert [*7] on the basis that his testimony rested on common sense and therefore would not assist the trier of fact.

The school defendants claimed an appeal as of right involving the trial court's governmental immunity ruling, and we granted plaintiff leave to appeal the grant of summary disposition to GCA and the order striking Litwin. [Gray v Thorne Primary Elementary Sch., unpublished order of the Court of Appeals, entered August 13, 2019, 2019 Mich. App. LEXIS 4659 \(Docket No. 349022\)](#).

II. DOCKET NO. 348966-GOVERNMENTAL IMMUNITY

The school defendants challenge the trial court's denial of summary disposition on governmental immunity grounds, raising two arguments: they had neither constructive nor actual notice of the defective mullion, and the mullion was not a fixture, rendering the building exception inapplicable. We reject both contentions.

We review de novo the applicability of governmental immunity and exceptions to that immunity, [Pike v Northern Mich Univ, 327 Mich App 683, 690; 935 NW2d](#)

[86 \(2019\)](#), as well as a trial court's grant or denial of summary disposition, [Wigfall v Detroit, 504 Mich 330, 336; 934 NW2d 760 \(2019\)](#). Summary disposition is warranted under [MCR 2.116\(C\)\(7\)](#) when a claim is barred by immunity granted by law. [Liang v Liang, 328 Mich App 302, 306; 936 NW2d 710 \(2019\)](#). "If there is no factual dispute, whether a plaintiff's claim is barred under a principle set forth in [MCR 2.116\(C\)\(7\)](#) is a question of law for [*8] the court to decide." *Id.* (cleaned up).² However, "[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." [West v Gen Motors Corp, 469 Mich. 177, 183; 665 N.W.2d 468 \(2003\)](#).

A. NOTICE

The school defendants first assert that they had no knowledge of the specific "injury-producing" defect that caused plaintiff's injury. That defect, defendants insist, was the "deteriorated screws." Because no one (including Walmsley) had reported that the screws were defective before they failed, defendants contend that they lacked any notice of the problem and are therefore immune from liability. This argument misconstrues the law and evades the facts.

[Section 7 of the governmental tort liability act \(GTLA\), MCL 691.1401 et seq.](#), "generally provides immunity from tort liability to a 'governmental agency' if the agency 'is engaged in the exercise or discharge of a governmental function.'" [Pike, 327 Mich App at 691](#), quoting [MCL 691.1407\(1\)](#). [MCL 691.1406](#) sets forth the public building exception, in relevant part, as follows:

Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for [*9] bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably

²This opinion uses the new parenthetical "cleaned up" to improve readability without altering the substance of the quotation. The parenthetical indicates that nonsubstantive clutter such as brackets, alterations, internal quotation marks, and unimportant citations have been omitted from the quotation. See Metzler, *Cleaning Up Quotations*, 18 J App Pract & Process 143 (2017).

necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place.

To pierce the shield of immunity under this exception, the plaintiff must prove:

(1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time. [*Renny v Mich Dep't of Transp*, 478 Mich 490, 496; 734 NW2d 518 (2007).]

Relying principally on the Supreme Court's opinion in *Wilson v Alpena Co Rd Comm*, 474 Mich 161; 713 NW2d 717 (2006), the school defendants contend [*10] that plaintiff did not establish that they had actual or constructive notice of the defective mullion. Mere notice of a condition of disrepair, the school defendants insist, is not the same as notice of the actual injury-producing defect. Although Walmsley claimed to have notified Stull that the entire mullion was in disrepair, he did not personally know or advise the school defendants about the deteriorating internal screws. Analogizing to *Wilson*, the school defendants assert that the trial court erred by determining that a factual dispute regarding notice precludes summary disposition.

Logically, we find this argument wanting. Walmsley averred that he "specifically" notified a representative of the school defendants that "the entire mullion needed to be replaced because it was in such bad decay and disrepair," that other door frames had "issues" with loose screws, and that "it was well known that these screws had a propensity to fail over time and extended use." We are at a loss to imagine how actual notice of a defective condition could be any more definitive or detailed. Walmsley advised that the mullion needed to be replaced because it was decayed. No further information was required [*11] to satisfy the statute's notice requirement.

Furthermore, *Wilson* is inapposite. That case arose under the highway exception to governmental immunity,

not the building exception. The statutory language of the highway exception is different in an important way. The highway exception allows for recovery by "[a] person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair *and in a condition reasonably safe and fit for travel*[" *MCL 691.1402(1)* (emphasis added). The *Wilson* Court held that to successfully allege a violation of the duty imposed by the statute, a plaintiff had to specifically allege that the claimed defect rendered the road not "reasonably safe and convenient for public travel." *Wilson*, 474 Mich at 168. The Supreme Court explained:

In determining what constitutes a "defect" under the act, our inquiry is . . . informed by the "reasonably safe and convenient for public travel" language of *MCL 691.1402(1)*. In other words, an imperfection in the roadway will only rise to the level of a compensable "defect" when that *imperfection* is one which renders the highway not "reasonably safe and convenient for public travel," and [*12] the government agency is on notice of that fact. [*Id.* (emphasis in original).]

A road with bumps and that required frequent patching, the "defect" alleged in *Wilson*, did not necessarily meet that standard. *Id.* at 169. And that makes sense; many roads in Michigan have small potholes or bumps but are not necessarily unsafe for public travel. Notice of a highway defect requires more than notice of a deformity in a road, the *Wilson* Court explained.

In contrast, the statutory language governing this case imposes a duty on governmental agencies "to repair and maintain public buildings under their control when open for use by members of the public." *MCL 691.1406*. When the responsible agency breaches that duty, it may be held liable for damages "resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition." *MCL 691.1406* (emphasis added). While the condition must arise from the defendant's failure to satisfy its duty to repair and maintain the building, *Renny*, 478 Mich at 501, the plain language [*13] of the statute does not limit the exception to conditions that rendered the building unsafe for public use. Rather, liability can arise from a condition that is either dangerous or defective, as long

as the defendant had "actual or constructive knowledge of the defect." [MCL 691.1406](#).

We find nothing in *Wilson* suggesting that to avoid immunity, plaintiff had to prove that the school defendants knew or should have known of the defective screws, not just the defective mullion. Nor are we persuaded by the schools' argument that a different provision in [MCL 691.1406](#) compelled notice that the worn screws were both defective *and* dangerous. After setting forth the general requirement that a governmental agency must have had "actual or constructive knowledge of the defect" (emphasis added), the next sentence of the statute provides: "Knowledge of the dangerous *and* defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place." (Emphasis added.) This provision concerns the establishment of a *presumption* of notice. We have not applied [*14] this presumption of notice and do not hold that plaintiff is entitled to summary disposition on the question of notice. Rather, Walmsley's affidavit creates a genuine issue of fact regarding notice that a jury must resolve. The sentence cited by the school defendants is irrelevant.³

We additionally note that defendant's argument cannot be reconciled with the meaning of constructive notice. "Constructive notice is demonstrated by showing that the agency should have discovered the defect in the exercise of reasonable diligence." [Ali v Detroit, 218 Mich App 581, 586-587; 554 NW2d 384 \(1996\)](#). And in [Hill v Sears, Roebuck & Co, 492 Mich 651, 668; 822 NW2d 190 \(2012\)](#), the Supreme Court reaffirmed that:

A person is chargeable with constructive notice where, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, and does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which, if he had used such ordinary diligence, he would readily have ascertained. [Cleaned up.]

³We also reject any suggestion that a defective mullion could not render the entrance itself dangerous. As discussed below, the mullion is part and parcel of the doorframe, through which hundreds of children entered and exited the school every day. A mullion likely to fall due to disrepair presents a dangerous condition.

Walmsley's warning that the mullion was in bad shape and needed to be replaced sufficed to supply defendants with enough knowledge "to make further inquiries." Had they done [*15] so, the deteriorated screws would have been discovered. "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Banks v Exxon Mobil Corp, 477 Mich 983, 984; 725 NW2d 455 (2007)*. The trial court correctly found that a jury must determine whether the school defendants had actual or constructive notice of the defective mullion.

B. FIXTURE ANALYSIS

The school defendants also argue that the public building exception was inapplicable because the mullion was not physically part of the public building. Again, we find no merit to this assertion.

The public building exception applies only when the plaintiff's injury was caused by a "dangerous or defective condition of the building itself." [Pierce v Lansing, 265 Mich App 174, 178; 694 NW2d 65 \(2005\)](#) (cleaned up). The GTLA does not impose liability for "transitory conditions because they are not related to the permanent structure or physical integrity of the building." [Wade v Dep't of Corrections, 439 Mich 158, 168; 483 NW2d 26 \(1992\)](#). However, a dangerous or defective condition of a fixture can support a claim of liability under the public building exception. [Fane v Detroit Library Comm, 465 Mich 68, 78; 631 NW2d 678 \(2001\)](#). "An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) [*16] it was intended as a permanent accession to the realty." *Id.*

The first requirement refers to "the act of attaching or affixing personal property to real property and, as a general proposition, an object will not acquire the status of a fixture unless it is in some manner, albeit slight, attached or affixed, either actually or constructively, to the realty." [Wayne Co v William G & Virginia M Britton Trust, 454 Mich 608, 615; 563 NW2d 674 \(1997\)](#), quoting [35 Am Jur 2d, Fixtures, § 5](#), p 703. Though capable of removal, the mullion was attached to the building with a number of brackets and screws. It was therefore annexed to the real property. Moreover, "[c]onstructive annexation occurs where the item cannot be removed from the building without impairing the value of both the item and the building." [Fane, 465 Mich at 80](#). The mullion serves as the dividing post of the

double doorway; it has no value other than as a necessary adjunct to the doorframe in which it fits. In addition, the latches for the doors are affixed to the mullion, making it impossible to securely close the doors without the mullion in place. The school's entrance was designed with two side-by-side doors, separated by a mullion, and set in a single doorframe. The doors, doorframe and mullion were interconnected in such a manner that they were an integrally [*17] linked part of the building's entry system. Thus, even though the mullion was not permanently attached to the doorframe, it was at least constructively annexed to the building.

The second element of the fixture analysis considers "the relationship between the chattel and the use which is made of the realty to which the chattel is annexed." Wayne Co., 454 Mich at 618 (cleaned up). "An object introduced onto the realty may become a fixture if it is a necessary or at least a useful adjunct to the realty, considering the purposes to which the latter is devoted." Id. at 619 (cleaned up). As noted, the mullion is a component of the doorframe and is necessary to securely close the doors and restrict access to the school building. By design, the mullion is capable of temporary removal to create a wider opening, thereby making it easier to move large objects and furniture in and out of the building. This is an appropriate adaption or application to the realty.

Under the third element of the fixture analysis, we consider "the objective visible facts to determine whether intention to make the article a permanent accession to the realty exists." Id. "Intent may be inferred from the nature of the article affixed, the purpose for which [*18] it was affixed, and the manner of annexation." Id. Again, the mullion is an integral component of the doorframe, without which the doors cannot be securely closed. Despite its removable design, only one witness could recall ever seeing it removed; another witness testified that "heavy tools" were necessary to remove it. Because the mullion is annexed to the building, appropriately adapted to the building, and intended as a permanent accession to the building, it qualifies as a fixture and is deemed part of the building. Fane, 465 Mich at 78. As such, the dangerous or defective condition of the mullion could support a claim of liability under the public building exception. Id. The trial court correctly rebuffed the school defendants' fixture argument.

III. DOCKET NO. 349022-NEGLIGENT CONTRACT PERFORMANCE

Plaintiff argues that the trial court erred by summarily dismissing her claim against GCA by finding that Walmsley's report of the mullion's condition satisfied GCA's common-law duty of care. The trial court also rejected that GCA was responsible for making repairs to the door because "[p]laintiff has not provided the Court with any evidence to support" that doing so fell within GCA's duties. In so ruling, [*19] the trial court misapprehended the law and improperly invaded the province of the jury.

GCA's motion for summary disposition rested on the Supreme Court's decision in Fultz v Union-Commerce Assocs., 470 Mich. 460; 683 N.W.2d 587 (2004), in which the Court distinguished between duties that arise under a contract and those that exist under the common law. The "threshold question," the Fultz Court instructed, is "whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations." Id. at 467. Absent an independent duty, a plaintiff cannot bring a tort action "based on a contract[.]" Id.

In Loweke v Ann Arbor Ceiling & Partition Co, LLC, 489 Mich 157, 170; 809 NW2d 553 (2011) (cleaned up), the Court clarified the parameters of the "separate and distinct duty" analysis, highlighting that "a separate and distinct duty to support a cause of action in tort can arise by statute, or by a number of preexisting tort principles, including duties imposed because of a special relationship between the parties and the generally recognized common-law duty to use due care in undertakings." Answering this question "generally does not necessarily involve reading the contract" to "determine whether the plaintiff's injury was contemplated" under it. Id. at 169. The salient question is "whether any legal duty independent [*20] of the contract" exists. Id. In Clark v Dalman, 379 Mich 251, 261; 150 NW2d 755 (1967), the Supreme Court described "the basic rule of the common law, which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others."

Loweke instructs that the mere existence of a contract between GCA and the district does not preclude plaintiff from maintaining a cause of action against GCA for negligence. Rather, when GCA undertook to inspect the school's doors and to make repairs, it had a duty to use due care while providing those services.

The parties generally agreed that GCA was responsible

for and performed regular inspections of the school building and grounds. GCA also performed minor repairs, including on several doorways. At common law, "[e]very person engaged in the performance of an undertaking has a duty to use due care or to not unreasonably endanger the person or property of others." [Hill, 492 Mich at 660](#). This duty extended to the public at large, including Markquan. See [Clark, 379 Mich at 261](#). Further, it was reasonably foreseeable that having undertaken to inspect the premises for conditions in need of maintenance (and either repair or report those [*21] conditions), negligent performance of those inspections could result in injury to people within the school. Thus, GCA owed Markquan, as a member of the public and a student at the school, a duty to perform its inspections, maintenance, and repairs with due care. Consequently, to the extent the trial court ruled that GCA had no duty of care to Markquan, it erred.

Without explicitly finding that GCA owed plaintiff a duty of care, the trial court determined that Walmsley satisfied that duty by informing his supervisor that the mullion needed repair. The trial court erred in this regard as well. Despite Walmsley's disclosure of the mullion's poor condition, GCA failed to follow up by more closely inspecting it or making repairs. Given GCA's role at the school and its knowledge of Walmsley's warning, reasonable minds could differ as to whether GCA's actions were reasonable under the circumstances. Accordingly, the trial court erred by granting GCA's motion for summary disposition of plaintiff's negligence claim.

The school defendants point out in their appellate briefing that the trial court's error in granting summary disposition to GCA affected its ruling regarding the district's motion [*22] for summary disposition of its cross-claim, which the trial court denied for the sole reason that GCA was not negligent as a matter of law. The trial court also denied GCA's motion for summary disposition of its own cross-claim, finding that GCA's claim for indemnification was moot in light of its determination that GCA had no liability to plaintiff. Because a material question of fact remains regarding whether GCA was negligent, the trial court's denial of the competing motions for summary disposition must also be vacated. On remand, the trial court should address the merits of those motions in the first instance.

IV. DOCKET NO. 349436-LITWIN'S EXPERT OPINIONS

Lastly, plaintiff asserts that the trial court abused its

discretion by relegating Litwin's opinions to common sense and striking him as an expert witness. This argument has merit. Litwin's reliance on "common sense" in explanation of his answers to several questions did not render the *entirety* of his testimony inadmissible under [MRE 702](#). The trial court abused its discretion by holding that because some of Litwin's opinions fell outside the realm of "specialized knowledge," the balance of his testimony required exclusion.

We review for [*23] an abuse of discretion a trial court's decision to exclude evidence. [Elher v Misra, 499 Mich 11, 21; 878 NW2d 790 \(2016\)](#). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Id.* (cleaned up). Questions of law underlying an evidentiary ruling are reviewed de novo. *Id.*

[MRE 702](#) addresses the admissibility of expert testimony:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule, like its federal counterpart in [FRE 702](#), was drafted to incorporate the standards of reliability described by the United States Supreme Court in [Daubert v Merrell Dow Pharms., Inc., 509 U.S. 579; 113 S. Ct. 2786; 125 L. Ed. 2d 469 \(1993\)](#). [Edry v Adelman, 486 Mich 634, 639; 786 NW2d 567 \(2010\)](#). Under [MRE 702](#), the trial court's role is that of a gatekeeper, and it may admit expert testimony if the evidence meets the requisite standards of reliability. [Gilbert v DaimlerChrysler Corp, 470 Mich 749, 782; 685 NW2d 391 \(2004\)](#).

The trial court's [*24] ruling focused exclusively on one aspect of [MRE 702](#): whether Litwin's testimony would assist the trier of fact. The court did not rule on any other aspect of [MRE 702](#), including whether Litwin's opinions qualified as reliable. Accordingly, we confine our analysis to the ground for exclusion relied on by the trial court.

This case involves the manner in which a mullion failed and gave way. Few jurors likely know what a mullion is, the purposes it serves, or the manner in which it is attached to a building. It is not intuitively obvious that the mullion that fell on Markquan was defective or dangerous, or that the defect was discoverable on reasonable inspection. Similarly, it is not intuitively obvious that the three screws failed over time rather than in sequence. These factual matters fall outside the realm of common knowledge and experience, meaning that expert testimony addressing them is potentially admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue," and meets the other requirements of [MRE 702](#).

Litwin is a mechanical engineer. He explained that mechanical engineering "deals with how objects respond to physical loading of a bend, break, twist [*25] to form, that sort of thing. And then mechanical engineering uses that knowledge to design and build various sorts of physical structures." According to Litwin, the discipline involves "engineering principles including physics," "[m]athematical sciences," "[d]esign and analysis," and the manufacture and maintenance of mechanical systems. Litwin inspected the mullion after it had been repaired, and reviewed the evidence surrounding its failure. He prepared a detailed report outlining various measurements of the mullion and doors, and describing the manner in which the mullion was attached to the doorframe. Litwin concluded that the accident occurred because "three vertical screws" became detached, "thereby allowing the mullion along with its upper mullion attachment bracket to fall."

Defendants have not contested that three screws broke, leading to the collapse of the mullion. Rather, the dispute in this case largely centers on whether the defect in the mullion was detectable before it fell, and if so, who should have detected it.

Litwin's report included a numbered "analysis" including the following opinions and observations:

11. At issue is how easy, or difficult, would it have been [*26] to detect this problem prior to the accident.
12. As noted above, the three attachment screws at issue are not visible when the mullion is in place.
13. It is not plausible that all three of the attachment screws failed suddenly and simultaneously. Instead, they would have broken one at a time over an extended time period.
14. Once two of the vertical screws were broken the

mullion top would pivot easily about the remaining top screw.

15. GCA had the task of checking and securing the school's exterior doors at the end of each day.

16. The GCA employee who checked and secured these doors at the end of each day would surely be able to easily detect the change in the secureness of the mullion especially after two of the three screws had broken.

At his deposition, Litwin summarized his global opinion in this case as follows:

One, from an engineering standpoint I think we all understand that the - - I'll call it the last failure or the catastrophic in to this mullion when it fell and struck the child, there are three vertical screws which attach - - I don't know that we have a good name for the part, but there is a part up at the top of the mullion, not the mullion itself, a part that attaches to [*27] the header across the doorway. And that it was found right after the accident that all three of those screws were broken off allowing that nameless part to come loose allowing the mullion to come out.

From an engineering standpoint one of my conclusions is that it is not plausible with all three of these screws broke at the same time. It's also one of my I'll call it engineering opinions, that one screw would be enough to keep the mullion from falling out; but that one screw would allow that - - again, that nameless piece up at the top to pivot. And if it could pivot about the single attachment point, then that would provide looseness to the mullion.

Litwin again opined that the mullion likely was loose before it fell. When asked how he could be certain of that, Litwin responded:

The only thing that I will say - - and again, it's not from testimony, just from an engineering understanding.

For the mullion to come out as it did on the day of the accident, it has to be detached at both the top and the bottom, okay. And putting aside for now which would have come first, it would seem that whichever - - let's just say it came loose at the top first, okay. I'm sorry, let me not use the word [*28] loose. Let me say that hopefully more clearly.

If it came detached at the top but still was attached at the bottom, then the mullion would be loose until it completely fell out. Or if the sequence goes the other way. If it came detached at the base before it

became detached at the top, then it would be loose prior to the catastrophic accident.

In testing Litwin's opinion, defense counsel inquired about the fact that the shafts of the broken screws were not recovered after the accident. Litwin explained as follows the reason that the absence of the shafts didn't impact his opinion:

A. The testimony is and what makes sense from an engineering standpoint is the - - I'll call it the shaft of the screws, the remainder of the screws, that parts that didn't have to - - that didn't break off remained where they had been. And that in order to reattach the - - I keep calling it the nameless piece that had fallen off.

Q. Sure.

A. We can figure out which one it was, but one of the GCA people took a drill and drilled them out. Basically destroyed them in order to put a new screw in, so they weren't recovered and they didn't disappear. They were destroyed in the immediate post-accident repair.

The cross-examination [*29] also tested Litwin's opinion that the mullion must have felt loose before it fell. One witness employed at the school denied detecting any such weakness. When confronted with that testimony Litwin retorted: "[I]t's not plausible to me from an engineering standpoint that all three of those bolts broke at once. And that one would have held it in place from failing, but would have allowed motion." He further explained that one of the screws had to have been intact just before the mullion fell:

A. Wait. I think from an engineering standpoint I think we know that at least one of them was in tact.

Q. What do you mean in tact?

A. Not broken off. At least one of those three screws, I don't know which one of them, had its head still on shortly before the accident.

Q. What is your support for that?

A. I'm sorry?

Q. What is your support for that statement?

A. My support for that is that the top of the mullion would not stay in place if all three of those were broken.

Q. Right. But while that may be true, my question is: What is your support for your statement that one screw remained intact while the other two didn't? In other words, was there some testimony from some witness that said that the mullion [*30] was observed to be pivoting the way you described in your report?

A. No. What I'm saying is my basis for that is simply an engineering understanding of physically what would occur as opposed to testimony from any witnesses.

Q. Well, let me ask you this in the form of a hypothetical just so that I understand what you're saying.

A. Sure.

Q. Hypothetically if three screws are installed at the same time.

A. Yes.

Q. They are the same type, size and kind of screw and they are installed in this application. At least hypothetically they are going to be exposed to the same forces, the same pressure and the same elements over years.

A. No.

Q. That's not true?

A. I'm interrupting you, but the answer is no.

Q. Why not?

A. Because it depends on the - - let's see, how they share the load. And how they share and distribute the load depends on a number of things.

It can depend on how among other things if - - I'll just say let's suppose one is real tight and the other two are loose.

Q. Fair enough.

A. You can pick it any way you want. That's one of the ways. There are other ways that they can share the load unequally, but your turn.

Litwin expanded on that opinion during the next series of questions.

In answer to [*31] other questions, Litwin did not cite supporting engineering principles, but posited that opinions flowed from "common sense." Specifically, he

cited common sense as his reasoning that (1) the mullion was not removed often or for significant lengths of time; (2) GCA should have documented past repairs on the mullion; (3) GCA should have recognized it needed to follow up or take addition steps concerning the mullion; (4) GCA's duties at the school were not triggered only when something broke; (5) Walmsley's single report to the district was insufficient to satisfy GCA's duties; (6) defendants all shared responsibility for plaintiff's injury; and (7) GCA's contractual duty to perform high-level inspections on a monthly basis required a "more intimate inspection" of issues concerning safety.

The trial court struck Litwin as an expert after determining that his testimony "appears to be based only on common[]sense," and therefore would not be helpful to the trier of fact. However, as the above summary of his testimony reveals, a significant portion of Litwin's testimony was premised on engineering principles and his engineering expertise. Testimony resting on Litwin's engineering expertise [*32] was not inadmissible because other testimony—provided in answers to questions posed on cross-examination—rested on common sense. Litwin's opinions regarding the method and mechanics of the mullion's failure indisputably fall outside the ken of the average juror, and within the skillset of a mechanical engineer. Furthermore, [MRE 702](#) does not require confining expert testimony to areas beyond a juror's expertise. Even when jurors are likely to bring common-sense ideas and opinions to a question, an expert may have specialized knowledge bearing on the issue that would also be helpful to a considered and complete analysis. See [Linkstrom v Golden T Farms, 883 F2d 269, 270 \(CA 3, 1989\)](#).

A trial court's gatekeeping inquiry is context and case-specific and should focus on the *all* of the challenged evidence before it, not just snippets or isolated segments. See [Lenawee Co v Wagley, 301 Mich App 134, 164; 836 NW2d 193 \(2013\)](#). The touchstone is whether Litwin possesses "technical or other specialized knowledge" that "will assist the trier of fact[.]" To the extent Litwin offers expert testimony consistent with those requirements, it is admissible despite that other aspects of his testimony may not be. The trial court abused its discretion in finding otherwise.

V. CONCLUSION

In Docket No. 348996, we affirm the trial court's [*33] denial of the school defendants' motion for summary

disposition of plaintiff's claim. In Docket No. 349436, we reverse the trial court's order granting GCA's motion to strike Litwin as an expert.

In Docket No. 349022, we vacate the trial court's grant of summary disposition in favor of GCA, as well as its denial of the cross-motions concerning GCA's and the district's indemnity claims, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Cynthia Diane Stephens

/s/ Thomas C. Cameron

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Unpublished Opinion:
Brewer v City of Wyandotte, No. 257395,
2006 Mich App LEXIS 613 (March 9,
2006)

Brewer v. City of Wyandotte

Court of Appeals of Michigan

March 9, 2006, Decided

No. 257395

Reporter

2006 Mich. App. LEXIS 613 *; 2006 WL 572396

MARK A. BREWER and TAMMY J. BREWER,
Plaintiffs-Appellees, v CITY OF WYANDOTTE and JIM
KNOPP, Defendants-Appellants.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Wayne Circuit Court. LC No. 03-309462-NO.

Disposition: Affirmed.

Core Terms

guardrails, public building, bleachers, fixtures, realty, government agency, removal, arena, governmental immunity, summary disposition, permanence, purposes, rails, reasonable period, alleged defect, instant case, occasional, structures, interior, invoking, falling, retract, terrace, scout, ramp, walk

Judges: Before: Cooper, P.J., and Jansen and Markey, JJ.

Opinion

PER CURIAM.

Defendant City of Wyandotte ¹ appeals as of right from the circuit court's order denying its motion for summary disposition predicated on governmental immunity. We affirm. This appeal is being decided without oral

argument in accordance with [MCR 7.214\(E\)](#).

Plaintiff Mark Brewer, a scout leader, accompanied some scouts to an event at Yack Arenain Wyandotte. Brewer grabbed a guardrail while attempting to hop or climb over it, but the rail moved, causing him to lose his balance and [*2] fall. Plaintiffs filed suit alleging negligence and invoking the public building exception to governmental immunity, [MCL 691.1406](#). Defendant moved for summary disposition on the basis that the guardrail in question was not part of the public building. The circuit court agreed with plaintiffs, and denied defendant's motion.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. [Ardt v Titan Ins Co, 233 Mich. App. 685, 688; 593 N.W.2d 215 \(1999\)](#). When deciding a motion under [MCR 2.116\(C\)\(7\)](#) (immunity granted by law), the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. [Amburgey v Sauder, 238 Mich. App. 228, 231; 605 N.W.2d 84 \(1999\)](#).

Governmental agencies have general immunity from tort liability for actions taken in furtherance of governmental functions. [MCL 691.1407](#). Several exceptions exist, however, including [*3] an exception regarding the maintenance of public buildings. [MCL 691.1406](#). The general statutory immunity is broad in scope, and the exceptions are to be narrowly construed. [Ross v Consumers Power Co \(On Rehearing\), 420 Mich. 567, 618; 363 N.W.2d 641 \(1984\)](#). To come within the narrow confines of the public building exception, a plaintiff must prove that

(1) a governmental agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the

¹Defendant Jim Knopp was dismissed from this case by stipulation and is not participating in this appeal; therefore, the unqualified use of the singular "defendant" in this opinion will refer exclusively to the city.

governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. [*Kerbersky v Northern Mich. Univ*, 458 Mich. 525, 529;

582 N.W.2d 828 (1998) (emphasis omitted).]

The instant case concerns the third of these elements.

For purposes of the public building exception, "[a] temporary object or [*4] structure is normally not part of a building," e.g., "scaffolding attached to a building only for the period necessary to complete construction." *Fane v Detroit Library Comm*, 465 Mich. 68, 78 n 11; 631 NW2d 678 (2001). But "a dangerous or defective fixture can support a claim of liability under the public building exception." *Id.* at 78. An object qualifies as a fixture "if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty." *Id.*

Defendant argues that the guardrail here at issue is not a fixture, relying in part on *Fane, supra*. However, *Fane* concerned structures lying outside the four walls of a public building, *id.* at 70, while the instant case indisputably concerns an object or item within the arena building. Moreover, even for outside structures, a fixtures analysis is not always appropriate. *Id.* at 78-79. The Supreme Court explained in *Fane* that although a terrace attached to the outside of a building comprises a part of the building itself because it is physically connected [*5] to the building and not intended to be removed, a fixtures analysis is not appropriate if the terrace has no existence apart from the building. *Id.* at 79. The Supreme Court distinguished that a portable access ramp that is not physically attached to a building and could be easily removed is not part of the building, and that because the ramp has a possible existence apart from that particular application, a fixtures analysis is appropriate. *Id.*

Defendant Jim Knopp, Wyandotte's recreation superintendent, testified in his deposition that the guardrails separate the aisle or walkway at the bottom of the retractable bleachers from the arena surface. According to Knopp, the rails serve to "help keep the people from falling off . . . on the walk way, so to speak, so that they don't fall off . . . like when they're coming down out of the bleachers or walking. So they don't fall

off or fall into the glass per se during a hockey game," and also to provide stability for those passing by. Knopp added that although the guardrails are designed for ready removal, they need not be removed in order to retract the bleachers fully . Knopp estimated that the rails were removed [*6] and replaced five or six times a year.

The evidence in this case thus reflects that the guardrails in question are designed for ready removal, but no indication exists that, once removed, the guardrails have some independent existence. Because the guardrails have no existence apart from their positioning as part of the arena bleachers, a fixtures analysis does not apply. Plaintiffs emphasize that the guardrails in question can be removed, but the fact that defendant finds it expedient to remove those guardrails occasionally does not by itself mean that they lack the permanence required to establish that they are an integral part of the building's interior. The removals described by Knopp include only occasional removals for purposes of maintenance and inspection, or to reconfigure the interior of the building itself to accommodate the various events hosted therein.

In summary, there is no dispute that the bleachers themselves are permanently affixed as part of the arena realty. Because the guardrails in question are designed to attach securely to those bleachers, despite their ready removability, for the purpose of protecting patrons at the front of the bleachers from falling, we [*7] conclude that the trial court did not err in regarding those rails as part of the realty for purposes of invoking the public building exception to governmental immunity.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Jane E. Markey

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Unpublished Opinion:

Sondreal v Bishop Int'l Airport Auth, No. 250956, 2005 Mich App LEXIS 687 (March 15, 2005)



Cited

As of: August 24, 2021 2:54 PM Z

SONDREAL v. BISHOP INT'L AIRPORT AUTH.

Court of Appeals of Michigan

March 15, 2005, Decided

No. 250956

Reporter

2005 Mich. App. LEXIS 687 *; 2005 WL 599752

PATSY SONDREAL and JAMES SONDREAL,
Plaintiffs-Appellees, v BISHOP INTERNATIONAL
AIRPORT AUTHORITY, Defendant-Appellant, and
FLINT AIR SERVICES, INC., Defendant.

Notice: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: Genesee Circuit Court. LC No. 02-074334-NO.

Disposition: Affirmed.

Core Terms

jetway, stairs, public building, passengers, open to the public, terminal, governmental immunity, government agency, fixture, realty, trial court, employees

Judges: Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

Opinion

PER CURIAM.

Defendant Bishop International Airport Authority appeals as of right from an order denying its motion for summary disposition under [MCR 2.116\(C\)\(7\)](#), based on governmental immunity. We affirm. We decide this case without oral argument pursuant to [MCR 7.214\(E\)](#).

I. Basic Facts And Procedural History

Bishop is a governmental agency that operates the international airport located in Flint, Michigan. Flint Air Services has a lease agreement with Bishop to provide

"fixed base operation" services to FunJet Airlines, including the loading and unloading of passengers.

Plaintiff Patsy Sondreal ¹ was a passenger on FunJet Airlines. When Sondreal's flight arrived in Flint on the evening of January 17, 2001, the "jetway" (also referred to as the "jet bridge" or the "passenger boarding bridge") was malfunctioning and could not be connected to the airplane. [*2] Accordingly, employees of Flint Air instructed the passengers to deplane by the rear emergency stairs, walk around the plane and across the tarmac, climb the service stairs on the outside of the jetway, go through a door at the top, walk through the jetway, and enter the terminal. Sondreal slipped and fell on the first rung of the service stairs to the jetway, which she alleges was 12 to 14 inches above the ground, and suffered leg, knee, ankle, and back injuries.

The Sondreals filed a complaint against Bishop, alleging that the jetway service stairs were part of a public building under Bishop's control, and therefore fell under an exception to governmental immunity. The Sondreals alleged that the stairs were defective due to their height and inadequate illumination, that Bishop had actual or constructive knowledge of the defect, and that Bishop failed in its duty to repair it within a reasonable [*3] time, causing her multiple injuries. James Sondreal alleged a claim for loss of consortium.

Bishop filed a motion for summary disposition under [MCR 2.116\(C\)\(7\)](#), alleging that the public building exception did not apply because the jetway and its service stairs are not part of a public building and are not in an area that is open to the public. The Sondreals responded that the jetway is part of the building, and that Sondreal and her fellow passengers, all of whom were members of the public, were specifically instructed to use the service stairs to enter the terminal building.

¹ Because James Sondreal's claim is derivative, this opinion uses the surname "Sondreal" to refer to Patsy Sondreal only.

Jetways provide access from the plane to the terminal building and vice versa. Jetways extend in and out from the building, move up and down to meet different sized planes, and swing from side to side. The jetway is bolted to the building, but it can be detached and removed. The opening from the jetway into the building has no stairs or other outside access, and it appears to be located at least at second-story height.

The service stairs are bolted to the outside of the jetway, at the end section that connects to the aircraft. The stairs are on casters and move with the jetway. The service [*4] stairs are intended for use by specially authorized airport and airline employees, and by emergency personnel as needed, not for passengers. The door at the top of the service stairs is kept locked and alarmed.

A Flint Air ground crew employee testified that he had allowed passengers to use the service stairs on three or four other occasions when the jetway had malfunctioned and never had any problems, and had never been told he could not do so. However, Bishop's director of maintenance asserted that the aircraft operating area is closed to the public and that any passengers allowed there would need to have a "close distance escort."

After a hearing, the trial court found that, while there was no question that Bishop was a government agency and that the terminal was a public building, there were questions of fact concerning whether the stairs were part of the building and whether they were defective. The trial court noted that "even if there is an . . . area not open to the public but it is a public building, then the public building exception to governmental immunity still applies." The trial court found that there were also questions of fact concerning whether the building was [*5] defective, whether the stairs were open to the public, and whether they were open to the public in this particular instance. The trial court denied Bishop's motion. This appeal followed.

II. Governmental Immunity

A. Standard Of Review

We review de novo a trial court's decision to grant a motion for summary disposition under [MCR 2.116\(C\)\(7\)](#) to determine whether the moving party was entitled to judgment as a matter of law.² Whether a governmental

agency is immune from suit is a question of law that we also review de novo.³

B. Legal Standards

When reviewing a trial court's decision under [MCR 2.116\(C\)\(7\)](#), this Court must accept all well pleaded allegations as true, unless contradicted by other evidence, and construe them in favor of the nonmoving party.⁴ In determining whether [*6] there is a genuine issue of material fact, the court must consider the affidavits, depositions, admissions, and any other documentary evidence submitted by the parties.⁵ If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the issue whether a claim is barred by governmental immunity is a question of law.⁶

C. The Public Building Exception

[MCL 691.1406](#) provides, in pertinent part:

*Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if the governmental agency had actual or constructive knowledge of the [*7] defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place. [Emphasis added.]*

In order to be covered by the public building exception, an injury "must be occasioned by the dangerous or defective condition of the building itself."⁷ "As long as

² [Maiden v Rozwood, 461 Mich. 109, 118; 597 N.W.2d 817 \(1999\)](#).

³ [Mack v Detroit, 467 Mich. 186, 193; 649 N.W.2d 47 \(2002\)](#).

⁴ [Maiden, supra at 119](#).

⁵ [MCR 2.116\(G\)\(5\); Maiden, supra at 119](#).

⁶ [Maiden, supra at 122](#).

⁷ [Reardon v Dep't of Mental Health, 430 Mich. 398, 410; 424](#)

the danger of injury is presented by a physical condition of the building, it little matters that the condition arose because of improper design, faulty construction, or absence of safety devices."⁸

The Supreme Court has "consistently held that [*8] items which are found to be fixtures are considered to be part of the realty to which they are connected."⁹ "Whether an object is a fixture depends on the particular facts of each case, . . . and is to be determined by applying three factors."¹⁰ Those factors are:

[1] annexation to the realty, either actual or constructive; [2] adaptation or application to the use or purpose to which that part of the realty to which it is connected is appropriated; and [3] intention to make the article a permanent accession to the freehold.¹¹

In *Wayne Co v Britton Trust*, the Supreme Court stated that [*9] "an object will not acquire the status of a fixture unless it is in some manner or means, albeit slight, attached or affixed, actually or constructively, to the realty."¹² "Constructive annexation occurs where the item cannot be removed from the building without impairing the value of both the item and the building."¹³ Thus, items that are part of or accessory to machines or equipment that are attached to the realty--such that one cannot readily be used without the other--are considered to be constructively attached to the realty and, therefore, are fixtures.¹⁴

In the present case, the jetway is bolted to the terminal

[N.W.2d 248 \(1988\)](#).

⁸ *Id.*

⁹ [Velmer v Baraga Area Schools, 430 Mich. 385, 394; 424 N.W.2d 770 \(1988\)](#).

¹⁰ *Id.*

¹¹ *Id.*, quoting [Peninsular Stove Co v Young, 247 Mich. 580, 582; 226 NW 225 \(1929\)](#). See also [Fane v Detroit Library Comm, 465 Mich. 68, 78; 631 N.W.2d 678 \(2001\)](#), decided with *Cox v Univ of Mich. Bd of Regents*.

¹² [Wayne Co v Britton Trust, 454 Mich. 608, 615; 563 N.W.2d 674 \(1997\)](#). This condemnation case was cited with approval in [Fane, supra at 78](#).

¹³ *Cox, supra* at 80.

¹⁴ [Wayne Co, supra at 616-618](#).

building, and the service stairs are bolted to the jetway. It is undisputed that the jetway is the only [*10] safe and direct means of egress and ingress between an aircraft and the terminal for both passengers and employees. Without the service stairs, there is no ready access to the tarmac in the event of a jetway malfunction, and no direct access to the jetway by ground crew employees. While the jetway can be unbolted and removed, and its front portion is on wheels, it is clearly intended to remain in place. Indeed, if the jetway is removed, an opening would remain on the side of the building that would need to be barricaded, and would presumably impair the value of the building.

We conclude that the jetway and its service stairs are a fixture of a public building and, therefore, are part of the building. It is apparent that the jetway is actually attached to realty and that the service stairs are constructively attached. Further, the jetway is narrowly adapted to the use for which it is intended, and for which airport terminal gates are intended, namely, the loading and unloading of passengers. Lastly, the jetway is intended to be a permanent accession to the building. The fact that the jetway can be unbolted and removed, and used elsewhere, does not deprive it of its character as a fixture.

[*11] D. Open To The Public

We next address Bishop's argument that the public building exception is not applicable because the area where Sondreal fell is not open to the public. "To determine whether a building is open for use by members of the public, the nature of a building and its use must be evaluated."¹⁵ "If the government has restricted entry to the building to those persons who are qualified on the basis of some individualized, limiting criteria of the government's creation, the building is *not* open to the public."¹⁶ "Such limiting criteria would *not* include universal requirements such as *possession of a ticket . . .*"¹⁷ But even "where access to part of a building is limited, the public building exception may still apply *if* the building remains open for use by members

¹⁵ [Maskery v Univ of Mich. Bd of Regents, 468 Mich. 609, 618; 664 N.W.2d 165 \(2003\)](#).

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* at n 8 (emphasis added).

of the public." ¹⁸

[*12] In *Kerbersky v Northern Michigan Univ.*, ¹⁹ the Michigan Supreme Court found that the public building exception applied even though the plaintiff, a construction worker, was injured in a section of the building that was closed for renovations, while the rest of the building remained open to the public. The Court in *Kerbersky* also expressly overruled *Putnam v Wayne County Community College (After Remand)*, ²⁰ [*13] a case in which this Court held that the public building exception did not apply where the area from which the plaintiff fell, a catwalk, was not open to the general public. The Court in *Kerbersky* stated that the plaintiff should have been allowed to invoke the public building exception because the auditorium itself was open to the public. ²¹ In both *Kerbersky* and *Putnam*, the plaintiffs were authorized to be in the areas where they were injured. ²²

In this case, even if only ticketed passengers (and employees) are permitted in the terminal area, the building itself was open to the public. Further, although the jetway service stairs were not generally open to the public, it is undisputed that Sondreal and her fellow passengers were expressly authorized to be there at the time of injury. Therefore, Sondreal's injury occurred in a public building.

For these reasons, the trial court correctly concluded that the Sondreals were not foreclosed from relying on the public building exception to governmental immunity. Accordingly, Bishop's motion for summary disposition was properly denied.

Affirmed.

/s/ Michael J. Talbot

/s/ William C. Whitbeck

/s/ Kathleen Jansen

¹⁸ *Id.* at n 9 (emphasis added).

¹⁹ [Kerbersky v Northern Michigan Univ.](#), 458 Mich. 525, 526-527; 582 N.W.2d 828 (1998).

²⁰ [Putnam v Wayne County Community College \(After Remand\)](#), 189 Mich. App. 557, 558-559; 473 N.W.2d 711 (1991).

²¹ *Id.* at 535-536.

²² See [Kerbersky](#), *supra* at 527-528; [Putnam](#), *supra* at 558-559.

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Unpublished Opinion:
Williams v Grand Ledge High School, No.
321261, 2015 Mich App LEXIS 1330
(June 30, 2015)



Cited

As of: August 24, 2021 2:54 PM Z

Williams v. Grand Ledge High Sch.

Court of Appeals of Michigan

June 30, 2015, Decided

No. 321261

Reporter

2015 Mich. App. LEXIS 1330 *

SHERRY WILLIAMS, as Next Friend for VICTORIA WILLIAMS, a Minor, Plaintiff-Appellant, v GRAND LEDGE HIGH SCHOOL and GRAND LEDGE PUBLIC SCHOOLS, Defendants-Appellees.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Eaton Circuit Court. LC No. 13-000163-NO.

Core Terms

risers, repair, railing, installed, fixture, choir, gross negligence, public building, government agency, public-building, design defect, failure to maintain, governmental immunity, guardrail, trial court, deposition, amend, feet, summary disposition, plaintiff's claim, high school, allegations, placement, futile, Ledge, floor, loose, electrical, quotation, annexed

Judges: Before: RIORDAN, P.J., and DONOFRIO and BECKERING, JJ.

Opinion

PER CURIAM.

In this personal injury action arising out of a fall that occurred in a high school, plaintiff, Sherry Williams, as next of friend for her daughter, Victoria Williams,¹ a minor, appeals by right the trial court's order granting summary disposition to defendants, Grand Ledge High

School and Grand Ledge Public Schools, based on governmental immunity. The trial court's order also denied plaintiff's motion for leave to amend her complaint to add a claim for gross negligence against Grand Ledge High School principal Steven Gabriel. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

On or about October 10, 2011, Victoria was a 14-year-old freshman at Grand Ledge High School. During choir class, Victoria sat in the back row of chairs situated on the top level of platform risers located in the middle of the choir room. At the time of the accident, the back ledge of the upper riser was equipped with a two-inch "lip," presumably to stop chairs from sliding off. The risers were otherwise freestanding, [*2] with no guardrails. Victoria and her classmates rose to their feet to participate in warm-up exercises. After approximately five minutes, Victoria and her classmates sat down, at the direction of Sheri Tulloch, the choir teacher. When Victoria sat down, her chair fell backward off the risers, causing her to fall.²

On February 4, 2013, plaintiff filed a complaint and named Grand Ledge High School and Grand Ledge Public School as defendants responsible for Victoria's injuries arising out of the incident. The complaint alleges that Victoria injured her head and back in the fall when she hit a "set piece" from a play that had been stored behind the risers. Plaintiff contended that defendants were negligent for failing to maintain and repair a public building in contravention of [MCL 691.1406](#), due to the lack of a guardrail on the back of the riser. [*3]

² Although Victoria testified in her deposition that her chair fell backward because "one leg was off the edge of the riser," causing her to fall when she sat down, she also testified that she does not actually remember actually falling, and that she was told what happened by others. Her last memory was when she was walking up the risers before warm-up exercises.

¹ This opinion will refer to Sherry as "plaintiff" and will refer to Victoria by first name.

The horseshoe-shaped risers are over 32 feet long, 16 feet wide, and 2 feet tall. Each of the three levels of the risers is approximately 3 feet deep. Comprised of various sections that are bolted and clamped together, they were installed in the choir room in approximately 1995 or 1996, when additions were made to the school. The risers are not bolted to the floor. Ronald Hicks, a custodian at the high school, testified in his deposition that the risers had been disassembled two or three times, but they had never been moved from the choir room. Hicks also testified that maintenance staff moved the risers, albeit infrequently, within the choir room when they refinished the floor. The risers are large, so in order to move them, maintenance staff dampened the floor around the risers by mopping it, and then slid the risers. Dale Harlow, another custodian, testified that he had never taken apart the risers during his employment. He recalled that he had occasionally been asked to readjust clamps that held the sections together and to tighten the connections between the sections. He had never observed the risers separated into individual sections, and, as far as he knew, the risers remained [*4] in the same spot in the choir room.

Tulloch, the choir director, testified in her deposition that she had observed three other students fall from the risers in the three years prior to the fall in question, at least two of whom fell off the back. The record does not contain evidence as to the cause of those falls.³ None of the other students who fell were injured, although one suffered some bruising. In "the spring before [Victoria] fell," Tulloch testified that she made a request for a railing on along the back row of the risers. She was unsure "how many times" she requested railings, or if she made any other requests for railings. In his deposition, Gabriel recalled receiving an email from Tulloch regarding getting railings after a student had fallen. The record only reveals that Gabriel was aware of one student falling prior to the incident involving Victoria. Gabriel testified that in response to the request, he told Tulloch that they should "[l]ook at what the options are and [to] let [him] know what's out there, and we can go from there."

On September 20, 2011, before Victoria's fall, Tulloch sent an e-mail [*5] to Gabriel and school superintendent, Dr. Brian Metcalf, among others. Therein, Tulloch addressed some general concerns about her choir room and she raised an issue with

regard to the risers. Tulloch did not mention the lack of a railing, but requested that the risers be "realigned and secured" because the "kids hate sitting in certain areas for fear that their chair is going to slip in the cracks." Gabriel replied to the e-mail the same day, noting that, in his opinion, the "bigger safety issue" with the risers was the lack of a railing at the top tier. Gabriel mentioned that he had discussed the issue with Tulloch before, and that she had promised to give him an estimate of how much it would cost to install the railing. Gabriel's response provides, in pertinent part:

As for the risers, I will have the custodial/maintenance crew look into the needed adjustments. As you and I discussed, the bigger safety issue is the lack of a railing al[ong the] top tier. You were going to get a quote for a railing system to me. Please do so. I would like to get that taken care of asap.

Gabriel testified in his deposition that he raised the issue of the railing because another student had previously [*6] fallen; at the time of his deposition, he did not recall the year that the other student had fallen.

After receiving Gabriel's reply, Metcalf sent Gabriel an e-mail asking "[a]re the risers a safety concern that would warrant a directive from you that they should not be used until the railing is installed?" The record does not contain a response from Gabriel. However, the e-mail chain contains a response from Metcalf to Gabriel in which Metcalf simply replied "Thanks Steve!!" The same day Gabriel asked for a price quote, Tulloch forwarded to him a customer quotation from Wenger Corporation for the purchase of guardrails.

Shortly after Victoria's fall, defendants installed guardrails on the back of the risers. An invoice from Wenger Corporation shows that the guardrails were ordered on October 11, 2011, and shipped on October 13, 2011. According to Gabriel's deposition testimony, a "request" for the railings "had been put in just a week or two prior to the accident" involving Victoria.

Following discovery, defendants moved for summary disposition, contending that they were entitled to governmental immunity. They argued that plaintiff could not maintain a claim under [MCL 691.1406](#), the public-building exception, [*7] because the risers were not fixtures, and because any claim by plaintiff amounted to a design-defect claim, which was not actionable under the exception. Plaintiff responded, arguing that her claim was viable under the public-building exception. She also sought leave to amend her complaint to add a claim

³The record contains only excerpts of the deposition transcripts in this matter.

against Gabriel for gross negligence.

The trial court granted summary disposition to defendants, finding that the risers did not constitute fixtures; thus, they were not "of a public building." In addition, the trial court found that even if the risers were fixtures, plaintiff's complaint alleged a design defect, not a failure to maintain or repair, meaning that her claim was not actionable under the public-building exception. Finally, the trial court denied plaintiff's motion for leave to amend her complaint, finding that the facts did not support a claim for gross negligence, and that amendment would be futile.

II. SUMMARY DISPOSITION

We review de novo the trial court's grant of summary disposition. *Henderson v Dep't of Treasury*, 307 Mich App 1, 8; 858 NW2d 733 (2014). "A defendant is entitled to summary disposition under *MCR 2.116(C)(7)* if the plaintiff's claims are barred because of immunity granted by law." *Pew v Mich State Univ*, 307 Mich App 328, 331-332; 859 NW2d 246 (2014). Defendants, as the moving parties, bore the burden to [*8] support their motion for summary disposition with affidavits, depositions, and other documentary evidence. 307 Mich App. at 332, citing *MCR 2.116(G)(5), (6)*. "To survive a *(C)(7)* motion based on governmental immunity, a plaintiff must allege facts justifying the application of an exception to governmental immunity. In reviewing a *(C)(7)* motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011) (citation and quotation marks omitted). "If reasonable minds could not differ on the legal effects of the facts, whether governmental immunity bars a plaintiff's claim is a question of law." *Pew*, 307 Mich App at 332.

A. GOVERNMENTAL IMMUNITY

There is no dispute that defendants are governmental agencies. "Generally, the governmental immunity act provides broad immunity from tort liability to governmental agencies, officials, or employees who exercise or discharge a governmental function." *Pew*, 307 Mich App at 332. See also *MCL 691.1407(1)*. The operation of a public school is a governmental function." *Stringwell v Ann Arbor Pub Sch Dist*, 262 Mich App 709, 712; 686 NW2d 825 (2004). Therefore, defendants are entitled to governmental immunity, unless an exception applies.

We strictly construe exceptions to the Governmental

Tort Liability Act (GTLA). *Tellin*, 291 Mich App at 699. Plaintiff alleges that *MCL 691.1406*, the public-building exception, applies [*9] in this case and allows her to pursue a claim against defendants. In order to bring suit under the public-building exception, a plaintiff must establish:

- (1) a governmental agency is involved, (2) the public building in question is open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable amount of time. [*Renny v Dep't of Transp*, 478 Mich 490, 496; 734 NW2d 518 (2007).]

The parties only dispute two aspects of the public-building exception: (1) whether the risers were a condition "of the public building itself," i.e., whether they could be considered fixtures; and (2) whether defendants failed to maintain or repair a dangerous condition, such that plaintiff's claim would be actionable, or whether the dangerous condition alleged was a design defect in the risers, such that plaintiff's claim would not be actionable.

B. WHETHER THE RISERS WERE FIXTURES

To establish the applicability of the public-building exception, "the alleged defect must be a defect of the building itself and not merely a transient condition [*10]" *Johnson v. City of Detroit*, 457 Mich 695, 703-704; 579 NW2d 895 (1998) (citation omitted). Fixtures attached to the public building are considered to be "of the building itself" and can support a claim under the public-building exception. *Fane v Detroit Library Comm*, 465 Mich 68, 77; 465 Mich. 68; 631 NW2d 678 (2001). "Fixtures are considered part of a public building if: (1) they are annexed to the realty, whether the annexation is actual or constructive, (2) their adaptation or application to the realty being used is appropriate, and (3) there is an intention to make the articles a permanent accession to the realty." *Carmack v Macomb Co Community College*, 199 Mich App 544, 547; 502 NW2d 746 (1993). "The controlling intention regarding whether an object has become a fixture of the realty is manifested by the objective, visible facts." *Id.* (citation and quotation marks omitted). Annexation to the realty may be actual, meaning that the item is permanently affixed to the building in some fashion, or constructive. *Fane*, 465 Mich at 79-80. "Constructive annexation

occurs where the item cannot be removed from the building without impairing the value of both the item and the building." [465 Mich. at 80](#).

Accepting as true all well-pleaded allegations in plaintiff's complaint and construing them in her favor, we find the trial court erred when it determined that the choir risers were not fixtures. [*11] While it is undisputed that the risers were not actually attached to the floor, the objective, visible facts show that the controlling intention was that the risers were to be fixtures. See [Carmack, 199 Mich App at 547](#). The risers' size, permanence to the choir room, and function are revealing in that regard. Concerning the risers' size, and as noted above, they were over 32 feet long, 16 feet wide, and 2 feet high. It is axiomatic that an item of such size would not be easily moveable. And, in this case, the risers were, for an overwhelming majority of their 15-year existence, stationary. Even when they were moved, they were only moved within the choir room and the infrequent moves were only accomplished through significant effort, i.e., wetting/lubricating the floor and requiring three individuals to push them along the wet surface. This is in significant contrast to nonstationary items such as library chairs, ping-pong tables, and mattresses, which our Courts have rejected as being fixtures. See [Velmer v Baraga Area Sch, 430 Mich 385, 396; 424 NW2d 770 \(1988\)](#) (examining various cases and contemplating that a milling machine in a high school shop classroom could be constructively attached to the building by its weight); Cf. [Carmack, 199 Mich App at 547](#) (finding that gymnastic equipment was not a fixture [*12] when it was "easily removable and was removed on an almost daily basis"). Rather, the record evidence, when viewed in a light most favorable to plaintiff, demonstrates that the risers functioned as a permanent fixture of the choir room, and that they were not intended to be removed. See [Velmer, 430 Mich at 394, 396](#) (opining that the sheer size and weight of an item could make it a fixture for purposes of the public-building exception). Removing such a large item from the choir room would have impaired both the value of the building and the risers. See [Fane, 465 Mich at 80](#). The risers would have been largely useless apart from the building, given their size and function, and the building — in particular, the choir room—would not have had the same utility as it had when the risers were installed therein. As such, the risers were constructively annexed to the public building. See [Caron v Cranbrook Ed Community, 298 Mich App 629, 632, 644; 828 NW2d 99 \(2012\)](#) (finding, albeit for purposes of [MCL](#)

[600.5839](#),⁴ that a "T-shaped, three-part portable room partition" that sat on wheels in an art classroom was "constructively annexed" to the classroom, given the size and permanent location of the partition in the art classroom).

C. DUTY TO MAINTAIN OR REPAIR

The remaining inquiry concerns whether this case involved a failure to repair or maintain the risers, or whether it involved a claim for a defect in the design of the risers — the installed fixture. The public-building exception imposes on governmental agencies a duty to repair and maintain public buildings under their control when those buildings are open to the public; the exception does not impose liability for a design defect. [Renny, 478 Mich at 505](#). Before our Supreme Court's decision in *Renny*, the issue of whether a design defect gave rise to liability under the public-building exception caused our courts "considerable difficulty." [478 Mich. at 499](#) (citation and quotation omitted). In *Renny*, our Supreme Court examined the plain language of [MCL 691.1406](#). The statute provides, in part, that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." [MCL 691.1406](#). As noted in [Renny, 478 Mich at 500](#), "[t]his sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings." The Court in *Renny* explained that the plain and ordinary meaning of the terms "repair [*14] and maintain" did not encompass a duty to design or redesign a public building in a particular manner. *Id.*

"Design" is defined as to conceive; invent; contrive. By contrast, "repair" means to restore to sound condition after damage or injury. Similarly, "maintain" means to keep up or to preserve. Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. "Design" refers to the initial conception of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception.

⁴ [MCL 600.5839](#) concerns actions against architects and other professionals "arising out of the defective or unsafe condition [*13] of an improvement to real property" (Emphasis added).

[[478 Mich. at 500-501](#) (citations and quotation marks omitted).]

"Therefore, to avoid governmental immunity, a plaintiff must assert a claim that the defective condition was the result of a failure to repair or maintain." [Tellin, 291 Mich App at 700](#).

In *Tellin*, this Court undertook the task of explaining the difference between "design defects" and "repair and maintenance," noting that "the *Renny* Court did not explain where the [*15] line between the two concepts should be drawn." [291 Mich App. at 703](#). With regard to that line, this Court explained:

A design defect would appear to consist of a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose. . . .

In contrast, a failure to repair or maintain appears to consist of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed. Reparative or preventative measures may also supplement the existing structure to preserve the existing design. An action could initially be a design decision, but subsequent improper installation, malfunction, deterioration, or instability could later transform this decision into a failure to repair or maintain. [[291 Mich App. at 705-706](#).]

As an example of an action that initially began as a design decision, but subsequently became an improper installation, the panel in *Tellin* examined the facts of *Collins v Oakland Co Comm College*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 2009 (Docket No. 282351), a case where the plaintiff alleged that the placement of an electrical socket [*16] on the floor caused her to fall. See [291 Mich App. at 706](#). In *Collins*, unpub op at 3, this Court held that plaintiff's claim "amounts to nothing more than the assertion that the electrical socket was not properly located within [the building.] This is a claim of design defect." In [Tellin, 291 Mich App at 706](#), this Court provided the following example of a failure to maintain or repair versus a design defect, using the factual scenario of *Collins* as an illustration:

For example, if the wiring for the electrical socket in *Collins* became compromised and began electrocuting people through normal use, then a

failure to correct the problem would be a failure to repair or maintain. But tripping over the surface because of its placement is the characteristic of the design itself, and the placement would properly be a design decision.

An in-depth examination of the facts in *Tellin* is instructive in this case, given that the parties cite the case extensively. In *Tellin*, the plaintiffs alleged that they were injured when an I-beam that was designed to support the roof overhang of "the Learning Center," a government building in Forsyth Township, came loose and fell on them. [291 Mich App. at 693-694](#). The roof overhang had traditionally been supported by wooden [*17] columns, but the defendants in that case later decided to add a steel I-beam configuration to the roof overhang in order to support the existing columns. [291 Mich App. at 694-695](#). After the I-beam was installed, defendants received notice that it may have become loose. [291 Mich App. at 695-696](#). Despite this notice, defendants did not take any action. [291 Mich App. at 696](#). Thereafter, the plaintiffs were injured after the I-beam became loose and fell on them. *Id.*

This Court found that the plaintiffs' injuries arose from the failure to maintain or repair the I-beam, and not from a design defect. [291 Mich App. at 706-707](#). This Court concluded that "plaintiffs were not injured because of an inherent characteristic of the I-beam configuration when coupled with the roof overhang, such as its displacement of melting snow or ice, or the fact that its base protruded into the walkway causing patrons to trip." [291 Mich App. at 706](#). The panel explained that because the I-beam was placed to "keep up" and "preserve" the Learning Center's existing roof overhang structure, the installation of the I-beam was a preventive measure, rather than a redesign of the roof. [291 Mich App. at 706-707](#). As such, "[a]ny defective condition was not from the I-beam's inherent characteristics but from the [defendants'] failure to properly [*18] maintain the stability of this I-beam configuration." [291 Mich App. at 707](#).

Turning to the instant case, in light of existing case law, we find that plaintiff's complaint alleged a design defect in the risers, rather than a failure to maintain and/or repair the risers. Plaintiff has not alleged any facts suggesting that defendants failed to maintain or repair — that is, restore to sound condition or keep up or preserve — the risers with regard to the presence of railings. See [Renny, 478 Mich at 500-501](#). For example, there is no evidence that guardrails were ever installed on the risers and were subsequently damaged or

removed, which would lead to a situation of failure to maintain and repair. The crux of plaintiff's complaint alleged that the risers were defective or dangerous because they did not have a guardrail along the back of the top tier. All they had was a two-inch lip in that location. This sounds more in the nature of a claim that the *design* of the risers was defective. See [478 Mich. at 501](#) (explaining that the word "design" "refers to the initial concept of the building . . ."). The complaint does not allege that defendants failed to restore the risers "to sound condition after damage or injury" or that they failed to "keep up" [*19] or "preserve" the risers. See [478 Mich. at 500-501](#). In [Tellin, 291 Mich App at 705](#), this Court stated that "a failure to repair or maintain appears to consist of something caused by *extrinsic circumstances . . .*" (Emphasis added). Here, there was nothing extrinsic alleged by plaintiff; rather, plaintiff alleged that the harm was caused by a lack of railings on the risers. This is a claim of an inherent problem with the risers as conceived and constructed, rather than extrinsic circumstances, such as, for example, a railing that became loose or unstable. See *id.* The harm alleged "was a natural effect of the characteristics" of the risers' design, which would be akin to a claim for design defect, not a failure to maintain or repair. See *id.*

We note that in *Tellin*, this Court stated that a design or repair claim could arise from, among others, "a fixture that is improperly secured or otherwise improperly constructed or installed." [478 Mich. at 705-706](#) (emphasis added). In this case, the argument could be made that the risers are a fixture, and that their installation in the middle of the choir room (as compared to the back wall), with no back guardrail, was improper. However, in *Tellin*, this Court rejected this type of installation claim, distinguishing [*20] it from a failure to maintain or repair. In *Tellin*, this Court used the electrical socket from *Collins* as an example. [478 Mich. at 706](#). In *Collins*, the plaintiff tripped over an electrical socket on the floor. If the wiring in that electrical socket became compromised, the failure to correct the problem, reasoned the panel in *Tellin*, would be a failure to maintain or repair. *Id.* "But tripping over the surface *because of its placement is the characteristic of the design itself, and the placement would properly be a design decision.*" *Id.* (Emphasis added). Turning back to the instant case, any claim that the placement of the risers in the middle of the choir room without any sort of back guardrail is not the type of improper installation claim that could give rise to a claim for liability under the rationale provided in *Tellin*. See [478 Mich. at 705-706](#).

Plaintiff contends that defendants were aware, given

Tulloch's deposition testimony, that three students had fallen before Victoria fell, that the risers were dangerous, and that defendants' knowledge of the dangerous condition turned this action into a failure to maintain or repair. She argues that *Tellin* supports this position. Plaintiff's position strains the holding [*21] in *Tellin*. In [Tellin, 291 Mich App at 707](#), this Court concluded that aside from the initial placement of the I-beam, the defendants in that case "had a continuing duty to repair and maintain it if it became loose, damaged, or unstable." In contrast to remedying the situation by installing something new — which we suggested would not be a maintenance or repair issue — this Court stressed that the defendants "could have remedied the condition at issue here had they performed regular maintenance to test the stability of the I-beam structure, which would likely have disclosed any instability." *Id.* The panel continued, "[t]his failure to repair or maintain is further illustrated by the fact that the [defendants] had knowledge that this I-beam configuration was not secured." *Id.* Plaintiff's argument misconstrues this Court's holding in *Tellin*. In *Tellin*, this Court did not suggest that the defendants' knowledge of the dangerous condition made the plaintiff's claim one involving a failure to maintain or repair. Rather, the case involved a failure to maintain or repair because the I-beam *became loose* and that condition was not remedied. *Id.* In other words, defendants did not restore the I-beam to a sound condition after it became [*22] loose. The case does not stand for the proposition that plaintiff says it does.

Lastly, we note that plaintiff attempts to rely on our Supreme Court's decision in [Bush v Oscoda Area Sch., 405 Mich 716, 727-728; 275 NW2d 268 \(1979\)](#), a pre-*Renny* decision that was harshly criticized in *Renny*. In *Bush*, our Supreme Court ruled that the plaintiff in that case stated a claim within the ambit of "the defective building provision" — as the "public-building exception" was then known — by alleging that a classroom lacked necessary safety equipment. Assuming that a lack-of-safety-features claim exists post-*Renny*, such a claim does not change the analysis in this case. Essentially, plaintiff's claim is that the risers were dangerous because they lacked railings. Railings are generally installed as part of the construction of the thing on which they are placed. We see no significant difference — and plaintiff has not articulated a compelling distinction — between a claim for a lack of railings as safety features and a claim that the *design* of the risers was defective because it lacked railings. Plaintiff essentially seeks to hold defendants liable for a flaw in the design of the

risers. Although the lack of a guardrail on the back of the risers appears to have been a significant [*23] design flaw given the number of students who fell off the risers, in light of *Renny* and similar precedent, this claim is not actionable under the public-building exception. See *Renny*, [478 Mich at 505](#).⁵

III. LEAVE TO AMEND

Finally, plaintiff argues that the trial court abused its discretion when it denied her motion for leave to amend her complaint to add a claim for gross negligence against Gabriel. We review for an abuse of discretion a circuit court's decision to grant or deny leave to amend a pleading[.]" *Boylan v Fifty Eight LLC*, [289 Mich 709, 727; 808 NW2d 277 \(2010\)](#). A trial court should only deny a motion to amend a complaint for "particularized reasons," such as "the futility of amendment." [289 Mich. at 728](#). An amendment is futile if, among other reasons, "it is legally insufficient on its face" *PT Today, Inc v Comm'r of Fin & Ins Servs*, [270 Mich App 110, 143; 715 NW2d 398 \(2006\)](#). Here, [*24] the trial court denied the motion for leave to amend because it found that a claim for gross negligence against Gabriel would be futile.

As the principal of a public high school, Gabriel was an employee of a governmental agency. Pursuant to the GTLA, Gabriel was entitled to governmental immunity, provided he met certain conditions.⁶ In this regard, [MCL 691.1407\(2\)](#) provides:

Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability for an injury to a person or damage to property

⁵Although unpublished opinions are not binding upon us, we note that in *Hetherington v University of Michigan Regents*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2009 (Docket No. 282543), this Court held that "with respect to the absence of guardrails in particular, [which in *Hetherington* also pertained to risers,] we view the claim as one alleging a design defect. Guardrails are generally included as part of the construction of a building."

⁶Although not raised as an issue, this Court has held that high school principals do not qualify for executive immunity under [MCL 691.1407\(5\)](#). See *Eichhorn v Lamphere Sch Dist*, [166 Mich App 527, 539; 421 NW2d 230 \(1988\)](#).

caused by the officer, employee, or member while in the course of employment or service or caused by the volunteer while acting on behalf of a governmental agency if all of the following are met: (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.

(b) The governmental agency is engaged in the exercise or discharge of a [*25] governmental function.

(c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.

As noted, the trial court found that amendment would have been futile because the facts as alleged did not amount to gross negligence by Gabriel. The GTLA defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." [MCL 691.1407\(8\)\(a\)](#). Gross negligence refers to conduct that is "substantially more" than mere negligent conduct. [Radu v Herndon & Herndon Investigations, Inc](#), [302 Mich App 363, 383; 838 NW2d 720 \(2013\)](#) (citation and quotation marks omitted). Gross negligence "has been characterized as a willful disregard of safety measures and a singular disregard for substantial risks." [Oliver v Smith](#), [290 Mich App 678, 685; 810 NW2d 57 \(2010\)](#). "Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result." [Tarlea v Crabtree](#), [263 Mich App 80, 90; 687 NW2d 333 \(2004\)](#). Instead, gross negligence requires

almost a willful disregard of precautions or measures to attend to safety and a singular [*26] disregard for substantial risks. It is as though, if an objective observer watched the actor, he could conclude, reasonably, that the actor simply did not care about the safety or welfare of those in his charge. [*Id.*]

In reviewing the issue of gross negligence, we consider the totality of the circumstances. [Kieft v Barr](#), [391 Mich 77, 80; 214 NW2d 838 \(1974\)](#). In order to show that amendment would not have been futile, plaintiff has to show that, in the mind of an objective observer, Gabriel "simply did not care about the safety or welfare of those in his charge" and that he had a "singular disregard for substantial risks." [Tarlea](#), [263 Mich App at 90](#).

The evidence shows that Gabriel was aware that at least one student had fallen, and, at the time he became aware of the fall, Gabriel suggested to Tulloch that they look at their options for addressing the problem with the risers. Although approximately four to six months went by before Gabriel ordered the railings, much of the time period between the request and the order was in the summer, presumably when school was not in session and when the risers were not in use. And, when Tulloch raised a different concern about the risers in September 2011, Gabriel stated that the "bigger safety issue" was the lack of a railing. [*27] Gabriel indicated he wanted to get that "bigger safety issue" "taken care of asap." Gabriel testified in his deposition that he raised the issue of the railing because another student had previously fallen. In light of this evidence, we conclude that no reasonable juror could have concluded that Gabriel demonstrated a "substantial lack of concern for whether an injury results," see [MCL 691.1407\(8\)\(a\)](#), or a "willful disregard of safety measures and a singular disregard for substantial risks," see [Oliver, 290 Mich App at 685](#). Rather, Gabriel specifically acknowledged the risk on two occasions and sought to come up with ways to mitigate that risk. He even brought up the risk on his own when Tulloch brought up another issue. An objective observer, having watched Gabriel, would not conclude that he "simply did not care about the safety or welfare of those in his charge." [Tarlea, Mich App at 90](#). See also [Vermilya v Dunham, 195 Mich App 79, 83; 489 NW2d 496 \(1992\)](#) (finding that a school principal was not grossly negligent in regard to the risk posed by an un-anchored soccer goal when the principal asked a maintenance supervisor to anchor the goals, checked on the maintenance supervisor's progress, made announcements at school regarding the risks involved in playing on the soccer goals, and [*28] disciplined students who did not heed those warnings). Plaintiff contends that Gabriel could have done more; she argues he could have discontinued using the risers after Metcalf suggested as much, or he could have suggested moving the back of the risers against the wall. However, allegations that Gabriel could have done more are simply that; they are not allegations that he ignored the risk. Allegations that an actor could have done more are not, on their own, enough to establish gross negligence. See [Tarlea, 263 Mich App at 90](#). As such, amendment would be futile, and the trial court did not abuse its discretion in denying plaintiff leave to amend. See [Boylan, 289 Mich App at 728](#); [PT Today,](#)

[Inc, 270 Mich App at 143](#).⁷

Affirmed.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Jane M. Beckering

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⁷ In passing, plaintiff argues that she is entitled to an adverse inference because a purported e-mail from Gabriel to Metcalf was missing. An adverse inference permits, but does not require, the *fact-finder* to conclude that certain missing evidence would have been adverse to the opposing party. [Brenner v Kolk, 226 Mich App 149, 155; 573 NW2d 65 \(1997\)](#). Plaintiff does not explain how the adverse inference principle is applicable in the context of summary disposition. Moreover, summary disposition review already requires the evidence to be viewed in a light most favorable to the non-moving party, which in this case [*29] is plaintiff. See [Tellin, 291 Mich App at 698](#). Accordingly, it is unclear how an adverse inference, even if applicable, would affect the outcome in this case.