

STATE OF MICHIGAN
IN THE SUPREME COURT

MICHAEL A. RAY and JACQUELINE
M. RAY, as co-conservators of the
Estate of KERSCH RAY, a minor,

MSC # 152723

Plaintiffs-Appellees ,

COA # 322766

vs.

LC # 12-001337-NI

ERIC SWAGER,

Defendant-Appellant.

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**DEFENDANT’S RESPONSE BRIEF IN OPPOSITION TO
PLAINTIFF’S LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....iii

STATEMENT IDENTIFYING OPINION APPEALED FROM, INTRODUCTION, AND RELIEF SOUGHT1

QUESTION PRESENTED.....5

FACTS.....6

 1. The Parties.....6

 2. Cross-Country Running at Chelsea High School.....7

 3. Plaintiff was Struck by a Car Driven by Defendant Platt9

 4. The Lower Courts’ Opinions14

STANDARD OF REVIEW.....15

LAW AND ANALYSIS.....16

 1. Plaintiff’s Lawsuit Against Coach Swager is Barred by Governmental Immunity16

 a. Coach Swager was not “the” Proximate Cause of Plaintiff’s Injury17

 b. Had the Court of Appeals Considered the Issue of Gross Negligence, the Same Result Would Have Been Reached.....27

RELIEF REQUESTED36

INDEX OF AUTHORITIES

<i>B&B Investment Group v County of Oakland</i> 2000 Mich App LEXIS 2754 (2000)	28
<i>Beals v Michigan</i> , No. 149901 497 Mich 363; ___ NW2d ___ (2015)	3,5,16,19,20,26
<i>Bevelyn Fisher v Southfield Pub Schs</i> 2010 Mich App LEXIS 65 (Mich Ct App Jan 12, 2010)	35
<i>Booth v Lockett</i> 2011 Mich App LEXIS 1133 (2011)	22,25
<i>Cassibo v Bodwin</i> 149 Mich App 474; 386 NW2d 559 (1986)	22
<i>Gray v Cry</i> 2011 Mich App LEXIS 1605 (Mich Ct App Sept. 20, 2011)	21,25
<i>Hiar v Strong</i> No 274247, 2007 Mich App LEXIS 1183 (2007)	31,32
<i>Hughes v Dep't of Env'tl Quality</i> 2014 Mich App LEXIS 250 (Mich Ct App 2014).....	12
<i>Jackson v Saginaw County</i> 458 Mich 141; 580 NW2d 870 (1998)	28
<i>Kruger v White Lake Township</i> 250 Mich App 622, 648 NW2d 660 (2002)	23,25
<i>Maiden v Rozwood</i> 461 Mich 109 (1999)	28
<i>Malone v Vining</i> 313 Mich 315, 21 NW2d 144 (1946)	1
<i>Pearce v Rodell</i> 283 Mich 19, 276 NW 883 (1937)	1

<i>People v Petrella</i> 124 Mich App 745; 336 NW2d 761 (1983)	12
<i>People v Sommerville</i> 100 Mich App 470; 299 NW2d 387 (1980)	12
<i>Perry v McCahill</i> 467 Mich 945, 656 NW2d 525 (2003), reh'g 2002 Mich App LEXIS 663 (Mich App 2002)	29,30,34
<i>Poppen v Tovey</i> 256 Mich App 351; 664 NW2d 269 (2003)	35
<i>Reaume v Jefferson Middle School</i> 2006 Mich App LEXIS 2517 (2006)	17,18,19,20,25
<i>Reaume v Jefferson Middle School</i> 477 Mich 1109; 729 NW2d 840 (2007)	17,18,19,20,25
<i>Richardson v Rockwood Ctr, LLC</i> 275 Mich App 244 (2007)	32
<i>Robinson v City of Detroit</i> 462 Mich 439 (2000)	3,17,23
<i>Smith v Jones</i> 246 Mich App 270 (2001)	17
<i>Tarlea v Crabtree</i> 263 Mich App 80; 687 NW2d 333 (2004)	16,28,29
<i>Vermilya v Dunham</i> 195 Mich App 79; 489 NW2d 496 (1991)	30,31
<i>Watts v Nevils</i> 2007 Mich App LEXIS 2167 (2007)	23,25
<i>White v Roseville Schools</i> No 307710 (2013)	4

Zeppa v Diebel
57 Mich App 462, 226 NW2d 523 (1975)1,2

Statutes

MCL 257.613.....33,35

MCL 691.1401-.141916

MCL 691.14073,5,16,17,19,28

Rules

MCR 7.302(B)6

MCR 7.305(B).....15

**STATEMENT IDENTIFYING OPINION APPEALED FROM,
INTRODUCTION, AND RELIEF SOUGHT**

In this case, Plaintiff sued his high school cross country coach after Plaintiff ran into a road and was struck by a car driven by another defendant.¹ The Court of Appeals held that Plaintiff's suit against his high school coach was barred by governmental immunity because the coach was not "the proximate cause" of injury. Specifically, the Court of Appeals held that Plaintiff was "the" proximate cause of his own injury because he

entered the road under his own power and he was then struck by a moving vehicle driven by someone other than [Defendant Ray]. Had [Plaintiff] himself verified that it was safe to enter the roadway, as did many of his fellow teammates, the accident would not have occurred. [Opinion at 4.]

Even absent governmental immunity, the Court of Appeals' Opinion comports with more than sixty years of commonsense jurisprudence. As this Court has explained:

a pedestrian, before crossing a street or highway, must (1) make proper observation as to approaching traffic, (2) observe approaching traffic and form a judgment as to its distance away and its speed, (3) continue his observations while crossing the street or highway, and (4) exercise that degree of care and caution which an ordinarily careful and prudent person would exercise under like circumstances.

Malone v Vining, 313 Mich 315, 321, 21 NW2d 144, 146-47 (1946)(citing *Pearce v Rodell*, 283 Mich 19, 37, 276 NW 883, 890 (1937)); see also *Zeppa v Diebel*, 57

¹ Plaintiff settled his claims with Defendant-driver for a substantial sum.

Mich App 462, 467, 226 NW2d 523, 525 (1975). Had Plaintiff undertaken these basic obligations on his own behalf, there is no question that he would not have been injured.

Despite the above, Plaintiff continues to argue that Coach Swager's decision to cross a street ahead of Plaintiff somehow excused Plaintiff's individual responsibility to stop, look, and listen when Plaintiff reached the same intersection a considerable distance behind Coach Swager and his teammates. Plaintiff is ignoring the fact that his teammates who reached the same intersection before Plaintiff independently looked both ways and determined it was safe for them to cross before they entered the intersection. Had Plaintiff acted like his peers, he would have looked and listened and seen what was clearly visible that quiet morning . . . headlights and the sight and sound of a car approaching as it accelerated into the intersection through a yellow light. Plaintiff, through his own volition, stepped directly in front of a moving car that was there to be seen.

While Plaintiff wants to suggest that he simply "modeled" Coach Swager or followed his lead, the undisputed testimony is that Coach Swager crossed at a different time and under different circumstances than Plaintiff. As any runner or pedestrian knows, just because it is safe to cross a street at 7:03 am does not mean the same street will be safe to cross at 7:04 am. Conditions are constantly changing and runners must look both ways before crossing streets. As another student

pointedly observed, just because one person crosses a street does not mean that others should blindly follow. Plaintiff was not forced to blindly run into a road; he made a decision to do so and this was the one most immediate, efficient and direct cause preceding” his injury. *Robinson v City of Detroit*, 462 Mich 439, 459 (2000).

The Court of Appeals correctly ruled that Plaintiff’s lawsuit against Coach Swager was barred by governmental immunity because a school employee can only be liable for tortious injuries if he is both (1) grossly negligent and (2) “the” proximate cause of the injury. MCL 691.1407. In the present lawsuit, “the” proximate cause was Plaintiff’s decision to enter an intersection while there was vehicular traffic present. The Court of Appeals found it unnecessary to decide the issue of “gross negligence.”

In his application, Plaintiff makes several arguments as to why this matter should be reviewed by this Court. First, Plaintiff argues that *Robinson v City of Detroit*, 462 Mich 439, 459 (2000), which was most recently affirmed in *Beals v Michigan*, No. 149901, 497 Mich 363; ___ NW2d ___ (2015), was wrongly decided. In effect, Plaintiff is asking this Court to ignore *stare decisis* and the plain and unambiguous language of the Government Tort Liability Act. If Plaintiff were correct that *Robinson* was wrongly decided, this Court could have corrected this result just months ago when it decided *Beals*. This Court correctly noted that the

legislature stated “the proximate cause” and that this choice of language has meaning. The GTLA is plain and unambiguous. Plaintiff argues that the Court of Appeals should have followed *White v Roseville Schools*, No 307710 (2013)(unpublished). Plaintiff is wrong for multiple reasons, such as: (1) *White* is an unpublished court of appeals case that has *never* been cited by a subsequent appellate court; and (2) *White* is distinguishable from the present matter in all material aspects (it involved a student being taught to use a table saw without a safety guard, not a teenager crossing the street). Lastly, Plaintiff argues that leave should be granted because the Court of Appeal’s decision was wrongly decided and “future panels of the Court will likely look to this opinion” when deciding other governmental immunity cases. This argument is misplaced because the Court of Appeals did not err. Additionally, the Court of Appeals issued an unpublished decision, which is not binding on any court. Leave to Appeal should be denied because Plaintiff has not presented any appropriate grounds for review.

QUESTION PRESENTED

The Michigan Government Tort Liability Act provides that a public high school coach has immunity from negligence suits unless his conduct was both (1) grossly negligent and (2) “the” proximate cause of injury. MCL 691.1407. In this lawsuit, Plaintiff was injured during a cross county running practice when he ran across a street without stopping, looking, and listening for traffic and was struck by a car. The undisputed testimony is that Plaintiff’s teammates reached the same intersection some distance ahead of Plaintiff. Plaintiff’s teammates, and Coach Swager, testified that they looked both ways and determined it was safe for them to cross *at that time*. Plaintiff’s lawsuit argues that Coach Swager’s decision to cross a street ahead of Plaintiff excused Plaintiff’s individual responsibility to stop, look, and listen when Plaintiff reached the same intersection a considerable distance behind the lead runners. Plaintiff also argues that his High School Cross Country Coach was the one most immediate cause of injury and not the plaintiff or the driver of the car that struck Plaintiff (who entered into a substantial settlement agreement with Plaintiff). The Court of Appeals held that Coach Swager was not “the” proximate cause of Plaintiff’s injury. Should this Court grant leave to appeal when: (1) the Court of Appeals reached the right conclusion, (2) this Court just recently decided a similar case involving governmental immunity in *Beals v Michigan*, No. 149901, 497 Mich 363; ___ NW2d ___ (2015), and (3) Plaintiff has

not demonstrated any “grounds” for appeal under MCR 7.302(B).

FACTS

1. THE PARTIES

Plaintiff Kersch Ray is currently a student at Chelsea High School. During the 2011/2012 school year, Plaintiff was a member of the Chelsea High School Cross-Country Team. Prior to joining the cross-country team, Plaintiff was an experienced runner. (Exhibit 3: M. Ray’s Dep at 17-19; Exhibit 4: J. Ray Dep at 9-10.) Also, prior to joining his high school team, Plaintiff would compete in community road races “at least twice a month.” (Exhibit 3: M. Ray Dep. at 17). Plaintiff’s parents encouraged Plaintiff to “run on his own” around town. (*Id* at 19.) Plaintiff’s parents both testified that Kersch Ray was an experienced runner. (*Id*) In addition, prior to the accident, Plaintiff would ride his bike alone along a busy road two miles to his friend’s house. (*Id* at 30-32.) Once at his friend’s house, Plaintiff’s parents allowed him to ride motorcycles unsupervised. (*Id*) Plaintiff—who was capable of riding motorcycles, biking on city streets, and running on streets on his own—knew to be aware of the constant changes in traffic.

Defendant Eric Swager has been a math and physics teacher at Chelsea High School for 20+ years. (Exhibit 5: Swager’s Dep. at 11-12.) Mr. Swager has also coached cross-country running at Chelsea High School for approximately 20 years. (*Id* at 12.) Under Mr. Swager’s stewardship, the cross-country program has grown

and become successful. For example, this year, Chelsea High School was 6th overall in Michigan (there are more than 600 school districts in Michigan).

Defendant Scott Platt is the owner and driver of a vehicle that struck and injured Plaintiff while he was jogging across a street during a cross-country practice. In his Complaint, Plaintiff alleged that Defendant Scott Platt was negligent in the operation of his car and in striking Plaintiff with his car. In Plaintiff's Complaint, Plaintiff admitted that Driver Platt drove carelessly and heedlessly in willful disregard of the rights and safety of Plaintiff. Plaintiff also admitted that Driver Platt drove carelessly and recklessly at a speed that was greater than would permit him to bring a vehicle to a stop within an assured clear distance ahead where a pedestrian was in a crosswalk. Plaintiff also admitted that Plaintiff failed to yield to pedestrians already in a crosswalk. (Complaint at ¶¶ 41a-41g.) Plaintiff even admitted that Driver Platt was "the direct and proximate" of his injuries. (Id at ¶ 44)(emphasis added). As such, this is a lawsuit where Plaintiff admitted that another person (Driver Platt) was "the" cause of injury. But for Driver Platt striking Plaintiff with his car after Plaintiff ran into the street of his own free will, we have no injury and, therefore, no lawsuit.

2. CROSS-COUNTRY RUNNING AT CHELSEA HIGH SCHOOL

Cross-country is a sport where individuals run on "open-air" courses over varying terrain. In Michigan high school athletics, a course is typically 5

kilometers, and frequently includes surfaces of grass, earth, gravel, and pavement; the courses also involve up-hills, down-hills, and level terrain. Cross-country differs from track, which takes place on a uniform and contained track surface. As Coach Swager explained, runners frequently need to negotiate everyday obstacles, such as crossing driveways and roads while running. (Exhibit 5: Swager's Dep at 19 & 80.)

Cross-country running is in essence an individual sport. The Cross Country team at Chelsea High School has between 20-30 participants of varying abilities. (Exhibit 5: Swager's Dep at 19-20.) While obvious, some runners are faster, and some runners are slower. (*Id* at 80)(Explaining composition of team to include "the state champion . . . , slow guys. . . , [and] all sorts of different guys). Because of varying speeds, the team "spreads out" during practice runs. (*Id* at 73.) A former teammate of Plaintiff explained that, during cross country practice, it was typical for runners to be 200 yards apart from each other due to running at varying paces. (Exhibit 6: Miller's Dep. at 28).

Coach Swager said one of his primary goals coaching cross-country "is to develop life-long runners" because running is a healthy and beneficial avocation. (Exhibit 5: Swager's Dep. at 22.) A corollary to the above goal is that Coach Swager strives to create intelligent runners who will make wise decisions and continue to enjoy running. (*Id* at 43-44.)

Coach Swager also established rules to make the sport safer for students. For example, he advised students to wear reflective and/or light colored clothing to increase visibility. (Exhibit 5: Swager's Dep at 187; Exhibit 7: Cook's Dep at 21.) He explained that most running shoes and most running clothing have reflective material. (Exhibit 5: Swager's Dep. at 113.) He also testified that, "[w]hen a group of 20 people are running together with reflective shoes, they are highly visible on a roadway." (Exhibit 8: Answer to RTA ¶ 5.) Additionally, Coach Swager prohibited students from listening to iPods or music to prevent distraction; he prohibited runners from running two abreast when on roads with cars and taught students what side of the road to run on in different scenarios. (Exhibit 9: Proegler's Dep. at 21; Exhibit 10: Henschel's Dep at 23.) Additionally, while obvious to high school aged students, Coach Swager would constantly remind runners to always look both ways before crossing a street. (Exhibit 5: Swager's Dep at 146.)

3. PLAINTIFF WAS STRUCK BY A CAR DRIVEN BY DEFENDANT PLATT

On September 2, 2011, the cross-country team met before school for practice. (Compl ¶ 12.) The testimony establishes that the team was doing a warm-up run to a location referred to as Luick Drive. *See, e.g.*, (Exhibit 6: Miller's Dep at 9-10.) Once the team arrived at Luick drive, the plan was to complete a timed one-mile run. (*Id*)

During the warm-up run, a portion of the team reached the intersection of

Freer Road and Old U.S. 12. This intersection is in a rural area outside the village of Chelsea. At this early hour, there was virtually no traffic present. Coach Swager was towards the back of this group of runners at the intersection. (Swager's Dep. at 66.) After stopping at a traffic light, multiple students and Coach Swager looked both ways, determined that it was safe to cross, and proceeded safely across the intersection. For example, the following testimony has been established during the course of this litigation:

- **Student Charles Miller:** Testified that he looked both ways, did not see any cars coming, and decided to cross. Student Miller testified that he looked both ways and determined that he had more than enough time to cross safely. (Exhibit 6: Miller's Dep at 15 & 26-27.)
- **Student Stuart Cook:** Testified that he "looked both ways before crossing" and the runners with him "decided it would be safe enough to cross the street." (Exhibit 7: Cook's Dep. at 14.)
- **Student Miles Fischer:** Testified that he "looked both ways" and the only car was "way off in the distance." (Exhibit 11: Fischer's Dep at 13.)
- **Student Mitchell Henschel:** Testified that he "look[ed] both ways" and determined it was safe to cross. (Exhibit 10: Henschel's Dep at 12.)
- **Student Matt Proegler:** Testified that he determined that it was safe to cross. (Exhibit 9: Proegler's Dep. at 15 & 27.)
- **Student Adam Bowersox:** Testified that looked both ways and determined it was safe to cross and did, in fact, cross safely. (Exhibit 12: Bowersox's Dep at 11.)
- **Student Jack Baylis:** Testified that he saw a car in the distance and believed he had time to cross safely and did so. (Exhibit 13: Baylis Dep. at 17.)

- **Student David Trimas:** Testified that he looked both ways and believed it was safe to cross and did so. (Exhibit 14: Trimas’ Dep. at 13 & 16.)
- **Coach Eric Swager:** Testified that he and “some runners . . . came up to the street . . . [t]here was no traffic, and we crossed because it was safe.” (Exhibit 5: Swager’s Dep at 51.)

As the above testimony shows, multiple persons looked both ways and independently determined it was safe to cross the street and, in fact, **every runner with Coach Swager safely crossed the street and proceeded on their run without incident.** (*Id* at 98.) Plaintiff—arguing that Coach Swager “ordered” Plaintiff to cross—represents to this Court that Plaintiff’s teammates “crossed the road, just as he did, not because they individually decided it was safe, but because they were told to do so.” (Pl’s Application at 22.) This is a knowing misstatement because Plaintiff’s teammates testified—nearly unanimously—that they *each* looked both ways before deciding to cross. *See supra* (bulleted testimony above).

After the lead runners safely crossed the street, additional students approached the intersection, including Adam Junkins and Plaintiff. Adam was in front of Plaintiff. Adam, who now lives in Connecticut, testified in this matter by way of affidavit. **Adam testified that Coach Swager never instructed him to cross the street.** (Exhibit 16: Affidavit at ¶ 6.) In fact, Adam testified that most of the team had already crossed the street when he reached the intersection. (*Id* at ¶ 7.) **Adam testified that he made the decision to cross the street on his own.** (*Id* at ¶ 8.) Importantly, **Adam confirmed that the next runner in front of him was**

about 30 yards ahead and had already crossed the street when he began to cross the street. (*Id* at ¶ 5.) When Coach Swager was asked at his deposition whether he instructed Plaintiff to cross the street when he did, he testified: “No. [Plaintiff] was not with me when we were at the light to cross, so I couldn’t have told him to cross.” (Exhibit 5: Swager’s Dep at 50-51.) This testimony confirms Mr. Junkin’s testimony that Coach Swager never told him or Plaintiff to cross the street.²

Unfortunately, Plaintiff apparently did not look both ways before entering

² In the lower courts, Plaintiff argued that another student, Adam Bowerbox, was only 1-2 meters in front of Plaintiff and that Adam Bowerbox heard Coach Swager give an Order to cross. (Pl’s Response to MSD at 6.) This is misleading. First, if Bowerbox was truly 3-6 feet in front of Plaintiff, he would have been hit by the same car that hit Plaintiff. We know this didn’t happen. Furthermore, Bowerbox said “he didn’t know” how far Plaintiff was behind him and, when asked for an estimate, he qualified his answer as a “guess.” (Pl’s Ex H at 13.) Mr. Bowerbox’s guess is not evidence.

Additionally, in an attempt to rebut Adam Junkin’s testimony, which established that Coach Swager did not “order” Plaintiff across the street, Plaintiff cited a statement allegedly attributed to student Ryan Pennington in the police report. Plaintiff argued that Ryan Pennington’s statement in the police report is an “excited utterance” and should be considered. Initially, in the police report, when Ryan Pennington was asked if Coach Swager said “let’s go,” he said he “was not sure.” This does not establish that Coach Swager said anything. Furthermore, as the Court can see from the police report attached by Plaintiff, (Pl’s Ex: P at page 40), the statement allegedly made by Mr. Pennington occurred more than 12 hours after the accident in response to questions. In Michigan, responses to questions hours after an accident are not “excited utterances.” *See People v Petrella*, 124 Mich App 745; 336 NW2d 761 (1983); *see also People v Sommerville*, 100 Mich App 470; 299 NW2d 387 (1980). Of course, “[a] trial court cannot decide a motion for summary disposition on the basis of inadmissible hearsay.” *Hughes v Dep’t of Env’tl Quality*, 2014 Mich App LEXIS 250 (Mich Ct App 2014).

the intersection, by which time the car driven by Defendant Platt was approaching the intersection. Plaintiff ran in front of Platt's car and was struck by the left front of the vehicle. At Plaintiff's deposition, he testified that he has no memory of the accident or how it occurred. (Exhibit 17: K. Ray's Dep at 13.) After the accident, Coach Swager responded to Plaintiff, who was not breathing, and successfully provided CPR, which likely saved Plaintiff's life. (Exhibit 8: Swager's Dep at 132.)

After the accident, Officer Sumner took a statement from Defendant Platt. Driver Platt told the officer that he was on his way to work, that he noticed that there were some people jogging in the area, that he noticed a group crossed the road, and then another jogger crossed the road that he wasn't able to avoid (Exhibit 18: Sumner's Dep at 15.)

At his deposition, Driver Platt testified that he entered the intersection on a yellow light. When asked why he told the police officer "he looked up" and then saw the students, Driver Platt testified that, "when you drive a car, you pay attention to your light, do a lot of different things." (Exhibit 19: Platt's Dep at 37.) Driver Platt also candidly admitted that he "sped up during a yellow light." (Exhibit 19: Platt's Dep at 37.) Student Adam Bowersox testified that he "found it hard to believe that the driver didn't see the kids crossing until the time [he] heard the brakes." (Exhibit 12: Bowersox Dep at 10.) Student Bram Parkinson testified that Driver

Platt proceeded through a “yellow light.” (Exhibit 20: Parkinson’s Dep at 18.) Student Vermilye also testified that the traffic light was yellow when he was crossing. (Exhibit 21: Vermilye’s Dep at 20.) Another student, Matt Proegler, indicated that Driver Platt had to have been driving “very fast” to have struck Plaintiff. (Exhibit 9: Proegler’s Dep at 24.)³

Since the accident, Plaintiff has returned to Chelsea High School.

4. THE LOWER COURTS’ OPINIONS

The Washtenaw County Circuit Court heard Defendant’s Motion for Summary Disposition on May 28, 2014. The lower court’s order is attached as Exhibit A, which provides that the motion was denied for the reasons stated on the record. The lower court found that “this case is extremely fact laden . . . and there is no one but a jury that can make that determination.” (Exhibit A: Transcript at 22.) The lower court indicated, however, that Defendant’s motion would have been “more favorable” if the Plaintiff testified that he “saw the car coming” and still decided to cross the street. (*Id* at 9.) The trial court committed error because the operative fact is that Plaintiff did reach the intersection and entered the intersection of his own accord. Plaintiff should have stopped, looked, and listened but, for some unknown reason, he chose not to. It does not matter whether Plaintiff completely

³ Plaintiff argues that Defendant Pratt was not prosecuted and that this shows he was not negligent. (Pl’s Application at 4.) If this is true, it is also undisputed that Coach Swager was not prosecuted and, ipso facto, was also not negligent.

neglected his duty to look both ways or whether Plaintiff *did* look both ways and still decided to run into Defendant Platt's car. Students testified that the car was clearly visible and could be seen and heard.

The Court of Appeals reversed the trial court's denial of summary disposition. The Court of Appeals agreed that there were two causes more immediate than anything Coach Swager did. First, Plaintiff crossed a street without confirming he could do so safely. Second, Driver Platt, whom Plaintiff admitted was negligent and "the" proximate cause, struck Plaintiff with his car as he accelerated through a yellow light. Specifically, the Court of Appeals held that Plaintiff was "the" proximate cause of his own injury because he

entered the road under his own power and he was then struck by a moving vehicle driven by someone other than [Defendant]. Had [Plaintiff] himself verified that it was safe to enter the roadway, as did many of his fellow teammates, the accident would not have occurred. [Opinion at 4.]

The Court of Appeals further held that "there were obviously more immediate, efficient, and direct causes of Ray's injuries than Swager's oral remarks." *Id.* The Court of Appeals held that, even if Swager was partly responsible for the accident, he was not "the" proximate cause.

STANDARD OF REVIEW

MCR 7.305(B) requires an application to demonstrate that the dispute satisfies the Michigan Supreme Court's prerequisites for justiciability. In this case,

Plaintiff is asking the Court to grant leave to appeal in a straightforward tort case involving the application of governmental immunity. This case does not involve a question regarding the validity of a legislative act; this case does not involve the State of Michigan; this case does not involve any legal principles of major significance; rather, it involves the application of the Government Tort Liability Act to a fact specific situation—which is a topic this Court recently addressed in *Beals v Michigan*, No. 149901, 497 Mich 363; ___ NW2d ___ (2015). Lastly, the Court of Appeal’s decision is not “clearly erroneous,” nor does it conflict with any decisions from this Court.

LAW AND ANALYSIS

1. PLAINTIFF’S LAWSUIT AGAINST COACH SWAGER IS BARRED BY GOVERNMENTAL IMMUNITY

The Government Tort Liability Act, MCL 691.1401-.1419, “takes great pains to protect governmental employees to enable them to enjoy a certain degree of security as they go about performing their jobs.” *Tarlea v Crabtree*, 263 Mich App 80; 687 NW2d 333 (2004). Pursuant to MCL § 691.1407(2), “each . . . employee of a governmental agency [and] each volunteer acting on behalf of a governmental agency” is immune from tort liability for injuries to persons if all of the following are met: (1) The employee is acting or reasonably believes he is acting within the scope of his authority; (2) The governmental agency is engaged in the exercise or discharge of a governmental function; and (3) The employee's

conduct does not amount to gross negligence that is **the proximate cause** of the injury or damage. As such, a governmental employee must be **both** “grossly negligent” **and** “the proximate cause” of an injury before tort liability can be imposed.

a. Coach Swager was not “the” Proximate Cause of Plaintiff’s Injury

In *Robinson v City of Detroit*, 462 Mich 439, 459 (2000), the Michigan Supreme Court rejected liability if the governmental employee was only Aa” proximate cause of the purported injury. Rather, the Court held that proximate cause means **Athe one most immediate, efficient and direct cause preceding an injury.**@ *Id.* *Robinson* held that the statutory language used in the governmental immunity statute is more restrictive than conventional proximate cause requirements. Accordingly, the Court of Appeals in interpreting *Robinson* held: **AThe Legislature’s use of the definite article >the= clearly evinces an intent to focus on one cause. The phrase >the proximate cause= is best understood as meaning the one most immediate, efficient, and direct cause preceding an injury.**@ *Smith v Jones*, 246 Mich App 270, 280 (2001) (citing *Robinson*, 462 Mich at 458-459)(emphasis added).

Since *Robinson*, this Court has continued to narrowly construe “the proximate cause” language in MCL § 691.1407. For example, in *Reaume*, the plaintiff, a middle school student, went to wrestling practice. *Reaume v Jefferson*

Middle School, 2006 Mich App LEXIS 2517 (2006)(Exhibit 22), rev'd by *Reaume v Jefferson Middle School*, 477 Mich 1109; 729 NW2d 840 (2007). As Reaume waited in the gym for the rest of the team and the coaches to arrive, he talked to his friends with his back to the entrance. *Id.* at * 2-3. Nadeau, an assistant wrestling coach who weighed twice as much as Reaume, entered the gym, came up behind Reaume and, without alerting or informing Reaume, wrapped his arms around Reaume's chest and threw Reaume to the ground. *Id.* Once on the ground, Nadeau performed a wrestling roll. As the roll ended, Reaume posted his arm on the floor to right himself; however, Nadeau performed a second roll. *Id.* During the second roll, Reaume's elbow was fractured and required surgery to repair it. Based on these facts, the trial court and Court of Appeals denied Nadeau's motion for summary disposition based on governmental immunity by holding that Nadeau's unannounced demonstration was "the" proximate cause of injury.

The Michigan Supreme Court, however, reversed the lower courts by holding that the surprise takedown was not the proximate cause of the injury. *Reaume v Jefferson Middle School*, 477 Mich 1109; 729 NW2d 840 (2007). The Court held that, even accepting as true the allegation that the defendant, without warning, grabbed the plaintiff from behind and took him to the wrestling mat, that conduct did not produce the injury to the plaintiff. *Id.* Rather, the injury occurred when Plaintiff tried to escape from the wrestling hold. The plaintiff testified that,

after a completed body roll, he did what he had been taught to do - brace his arm to attempt an escape - and only then did the injury occur. *Id.* The Court held that, “[t]he defendant's alleged failure to give adequate notice of the initial takedown, utilized by the Court of Appeals as the basis to affirm the denial of summary disposition, was not the proximate cause of the plaintiff's injury.” *Id.* This holding demonstrates the narrow nature of “the proximate cause.” This Court broke down one continuous wrestling maneuver, a maneuver that lasted only seconds, and only looked at the last event to occur, even though the last event—bracing his arm—was intertwined with the negligent takedown. The plaintiff in Reaume followed his coach’s direction and an injury occurred, but this was not sufficient to be the proximate cause.

In a case decided this year, *Beals v Michigan*, No. 149901, 497 Mich 363; ___ NW2d ___ (2015), the Court held that a lifeguard’s failure to rescue an autistic student who was submerged in excess of eight minutes was not “the” proximate cause of the student’s drowning. MCL 691.1407(2). The 19-year old plaintiff was diagnosed with autism and drowned in a pool at the Michigan Career and Technical Institute—a state residential facility that provides technical and vocational training to students with disabilities. The defendant was the only lifeguard on duty when the incident occurred. The plaintiff accused the defendant of gross negligence in failing to rescue him for more than eight minutes. The Court

of Appeals affirmed the trial court's denial of summary disposition with regard to plaintiff's claim of gross negligence.

This Court granted leave to appeal and reversed. The sole issue before the Court was whether the defendant was the proximate cause of the victim's death. The plaintiff alleged that the defendant was the proximate cause of the victim's death because his inattentiveness prevented him from attempting a timely rescue. The defendant did not challenge whether his conduct was grossly negligent; however, he did argue that his failure to perform his job was not the proximate cause of the victim's death. The Court held that while it is unclear what caused the victim to remain under water, he voluntarily entered the pool and voluntarily dove under the water; therefore, the far more immediate, efficient, and direct cause of the victim's death was the unknown variable which caused the victim to remain submerged in the pool. "That we lack the reason for [the plaintiff's] prolonged submersion in the water does not make that unidentified reason any less the 'most immediate, efficient, and {"pageset": "S82"} direct' cause of his death." As such, the defendant was not the proximate cause of the plaintiff's death, and the lower court erred in denying summary disposition.

While *Reaume* and *Beals* provide excellent examples of this Courts' interpretation of the "the proximate cause requirement," numerous Court of Appeals opinions provide further guidance.

For example, in *Gray*, the plaintiff student and his fellow football-team members were in the school's weight room working out while listening to music. *Gray v Cry*, 2011 Mich App LEXIS 1605 (Mich Ct App Sept. 20, 2011)(Exhibit 1). Defendant was the football coach and a teacher at the school. The plaintiff and another student quarreled about the music being played on a CD player in the weight room. They began pushing one another, but other students successfully broke up the fight before any injury occurred. The plaintiff then started to walk away and leave the room. However, before the plaintiff could exit the room, defendant coach entered the weight room and said something to the effect of asking the two students if they wanted to “settle it.” The other student, who was then “hyped-up” according to the plaintiff, responded, “yeah, I want to fight” The defendant coach then instructed the other students not to restrain the students anymore, and defendant, in the plaintiff’s words, “backed off and let us fight.” During the fight, the plaintiff was injured. As egregious as these facts are, the Court of Appeals again confirmed that, in the governmental immunity context, there is individual liability only if the governmental employee is the one most immediate, efficient, and direct cause of the plaintiff’s injuries. The Court held that the students fighting was “the” proximate cause, not the coach instructing the students to fight. While plaintiff is dismissive of this case, because it involves a “third party,” it cannot be denied that the Coach ordered the dangerous conduct to

occur—which is the same argument being advanced by Plaintiff in this action.

Also persuasive, our appellate courts have had the opportunity to analyze pedestrian accidents in the governmental immunity context multiple times. Recently, in *Booth v Lockett*, 2011 Mich App LEXIS 1133 (2011), a high school student was struck by a car when he exited his bus after school. The evidence established that the defendant bus driver violated multiple traffic laws in connection with the accident. First, the bus driver parked close to a curve, which would not allow drivers approaching from the rear of the bus to react to the bus with sufficient time to stop. Additionally, to facilitate safe crossings, the bus driver was not supposed to allow students to exit from the front of the bus; rather, students were supposed to exit only at the rear of the bus, so that they could see approaching traffic without entering the intersection in front of the bus to gain a vantage point. When the defendant bus driver violated the above two laws, the plaintiff-student stepped out from the front of the bus and was struck by a vehicle. In overturning the trial court’s denial of governmental immunity, the Court of Appeals held that the bus driver was not “the” proximate cause, nor was he grossly negligent. The Court of Appeals again affirmed that violation of a law is not evidence of gross negligence. *Id* (citing *Cassibo v Bodwin*, 149 Mich App 474, 477; 386 NW2d 559 (1986)). **The Court of Appeals then held that “the” proximate cause of injury was when the student-plaintiff “stepped out into**

oncoming traffic and into the direct path of [the] approaching vehicle.” The operative facts are very similar to the present action because Plaintiff also stepped into oncoming traffic of his own volition.

In *Kruger v White Lake Township*, 250 Mich App 622, 648 NW2d 660 (2002), the plaintiff requested that her daughter (the decedent) be taken into custody because she was intoxicated and posed a danger to herself. Because the holding cell at the police station was occupied, officers placed the decedent in the booking room. While left alone in the room, the decedent escaped, fled the station, ran into traffic, and was fatally hit by a vehicle. Plaintiff sued the officers claiming that the decedent’s death was caused by the officers’ gross negligence because they knew the decedent posed a danger to herself and failed to safeguard her. In dismissing the action, the Court of Appeals held that the officers were entitled to governmental immunity because their actions could not be considered “the proximate cause” of the death because the decedent ran into oncoming traffic.

Additional cases interpreting *Robinson* have routinely found that the negligent supervision of students does not constitute the proximate cause of injuries pursuant to the governmental immunity statute; rather, the proximate cause is normally the student’s own conduct or the conduct of a third party. In a recent decision, *Watts v Nevils*, 2007 Mich App LEXIS 2167 (2007)(Exhibit 2), the Court had to resolve whether school chaperones could be held liable for an eleven-year-

old student's tragic drowning death. In that case, a student entered the deep end of a pool by his own free will and very unfortunately drowned. *Id.* at * 5. In addressing whether the chaperones were the proximate cause, the Court noted that the chaperones may very well have been negligent in not supervising the pool closely enough; the Court even noted that they may have been a proximate cause. The Court held, however, that this did not make them the proximate cause. *Id.* Rather, it was the young student's decision to get in the pool that was "the" proximate cause.

A review of the above cases leads to the conclusion that Coach Swager was not "the" proximate cause of Plaintiff's injury. In this case, there were multiple intervening causes that were more proximate than anything Coach Swager did. First, "the" proximate cause was Plaintiff's decision to voluntarily enter a roadway while a car was present. As was stated in the fact section above, other students looked both ways before crossing the street and did, in fact, cross safely. It is undisputed that the car was present for Plaintiff to see had he looked. Secondly, as Mr. Junkin's testified, he voluntarily crossed the street based on his own free will. Coach Swager never told Mr. Junkins to cross. (Exhibit 16.) If, by chance, Plaintiff followed Mr. Junkins, Mr. Junkins was more of a proximate cause than Coach Swager. Lastly, Driver Platt was admittedly accelerating through a yellow light after observing runners in the area. This conduct was negligent and was more of a

proximate cause than Coach Swager. Indeed, Plaintiff sued Driver Platt based on this exact theory and settled his cause of action for a substantial sum.

Factually, this case is very similar to the above cases, which were dismissed on the basis of governmental immunity. In *Reaume*, the student wrestler made the decision to escape a wrestling move—as he had been taught to do by his coach. In this case, Plaintiff crossed the street on his own volition, which undisputedly caused his injury. In *Watts v Nevils*, the Court of Appeals held that an eleven year old student made the decision to enter the deep end of the pool, which resulted in his drowning. This volitional act was “the” proximate cause, not the negligence of the chaperones who failed to come to his aid in a timely manner. Like the student in *Watts*, Plaintiff, again, chose to cross the street without insuring he could do so safely, unlike the students in front of him who did, in fact, look both ways. Likewise, in the *Gray* case, despite the fact that the coach instructed students to fight, the Court of Appeals held that governmental immunity barred the action because the students could have refused to fight. Had the students refused to fight, the student-plaintiff would not have been injured. Much like the plaintiffs in *Kruger* and *Booth*, “the” proximate cause was Plaintiff’s volitional act of running into a street when the circumstances of a car approaching should have told him not to do so. Plaintiff has not offered even a scintilla of evidence that Plaintiff was forced into the street by Coach Swager because that is an untenable proposition.

Plaintiff also suggests that the Court of Appeals misapplied this Court’s very decision in *Beals*. Plaintiff is mistaken. In *Beals*, this Court observed that, “[w]hile it is unknown what specifically caused Beals to remain submerged under the water, the record indicates that Beals voluntarily entered the pool and voluntarily dove under the surface of the shallow end into the deep end without reemerging.” The Court further noted: “[t]hat we lack the reason for Beals’s prolonged submersion in the water does not make that unidentified reason any less the ‘most immediate, efficient, and {"pageset": "S82" direct’ cause of his death.” The present case fits squarely within this Court’s holding in *Beals*. We do not know exactly why Plaintiff decided to run into the street in front of Defendant Pratt’s car—but he did—and he did so under his own power. This volitional act was “the” proximate cause of his injury.

While this accident is certainly tragic, Coach Swager was not “the” proximate cause of injury and this action is barred by governmental immunity. In school districts where students walk to school, elementary school students are assisted across streets by crossing guards. Once students enter middle school and high school, they cross streets without the assistance or availability of crossing guards. The reason why is commonsense: students of middle school and high school age are sufficiently mature and experienced to cross a street; these students know how to stop, look, and listen and determine if they can safely get to the other

side of the street.

In effort to circumvent the body of law against him, Plaintiff has tried to recast the legal standard applicable to this action. Plaintiff, in essence, argues a “but for” causation standard. On page 15 of his Application, Plaintiff argues that Defendant admitted that he was “the proximate cause.” To make this assertion, Plaintiff points to testimony that the accident would not have occurred if the entire team waited to cross the street until after Defendant Pratt’s car had passed. Of course this is true, and it could be extended further. The accident would not have occurred if Coach Swager cancelled practice; the accident would not have occurred if Plaintiff had missed practice; or the accident would not have occurred if Coach Swager decided to have practice after school. With hindsight, thousands of such hypotheticals could be surmised. However, such arguments only apply to a “but for” analysis; they have no utility in the algebraic determination of “the” proximate cause.

b. Had the Court of Appeals Considered the Issue of Gross Negligence, the Same Result Would Have Been Reached

Coach Swager is also immune from this suit because he was not grossly negligent. While the Court of Appeals found it unnecessary to decide this issue, Defendant contends that reasonable minds could not conclude his conduct amounted to “gross negligence,” as defined by the GTLA. 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(2)(C).

As the Legislature intended, the statutory gross negligence standard is difficult to satisfy. To find that a defendant acted in a grossly negligent manner is to conclude that the defendant simply did not care about the safety of the person under his supervision. In *Maiden v Rozwood*, 461 Mich 109, 121 (1999), the Supreme Court held that the gross negligence standard requires that a Defendant act “substantially more than negligent.” Furthermore, under the GTLA, gross negligence is said to suggest **“a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks,” so much so that the Defendant “simply [does] not care about the safety or welfare of those in his charge.”** *Tarlea, supra*, p 90. (alteration in original). Consistent with the Legislature’s intent to create a high threshold, Michigan courts have drawn a clear distinction between gross negligence and mere ordinary negligence, and the Court of Appeals has held that “[e]vidence of ordinary negligence does not create a material question of fact concerning gross negligence.” *Maiden, supra*, p 122. The Michigan Supreme Court has also instructed that violation of a statute or regulation is evidence of “only” ordinary negligence. *B&B Investment Group v County of Oakland*, 2000 Mich App LEXIS 2754 (2000)(citing *Jackson v Saginaw County*, 458 Mich 141, 146-147; 580 NW2d 870 (1998)).

The oft-cited case of *Tarlea v Crabtree*, 263 Mich App 80; 687 NW2d 339 (2004), confirms that Coach Swager should be dismissed from the case. In *Tarlea*, the individual football coaches conducted a football training practice at which Jeremy Tarlea died as a result of heat stroke. Plaintiff sued contending that the coaches were liable for the Plaintiff's death claiming that gross negligence on their part had caused the Plaintiff's injury by forcing him to run in dangerous conditions and not heeding obvious warnings. In discussing the application of the concept of gross negligence, the Court stated:

... gross negligence suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular 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.

Tarlea, supra, at p 90. The Court noted that “with the benefit of hindsight, a claim can always be made that extra precautions could have” prevented the given harm. *Id.* at 90. This, however, “is insufficient to find ordinary negligence, much less recklessness.” *Id.*

Another recent Supreme Court case, *Perry v McCahill*, confirms the high burden a Plaintiff has in establishing gross negligence under the GTLA. 467 Mich 945, 656 NW2d 525 (2003), reh'g 2002 Mich App LEXIS 663 (Mich App 2002). In *Perry*, the plaintiff was a 25 year old special education student in the Wayne-Westland School District. *Perry*, 2002 Mich App LEXIS 663, ** 1-2. The plaintiff

was severely mentally impaired, had the mental capacity of a four year old child, was deaf, and had a history of seizure disorder for which she was taking medication. Regardless of Plaintiff's condition, while in her adapted aquatics class, the adult supervisors (1) did not supervise her one-on-one, (2) they did not have a lifeguard stationed on the deck of the pool who could scan the entire pool, and (3) the defendants did not use a life preserver that would keep plaintiff's face out of the water if rendered unconscious by a seizure. Based on these facts, the Court of Appeals held that there was a question of fact regarding whether the defendants were grossly negligent when Plaintiff drowned. In overturning the Court of Appeals and reinstating the trial court's grant of summary disposition, the Michigan Supreme Court held that none of the defendants were grossly negligent. *Perry*, 467 Mich at 945. The Supreme Court again confirmed that it is fundamental that "evidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Id* at * 18.

The case of *Vermilya v Dunham*, 195 Mich App 79; 489 NW2d 496 (1991) is also illustrative of the difficulty in meeting the gross negligence standard. In *Vermilya*, an 11 year old student/soccer player was injured when a known tippable steel goal post was pushed upon him on the school playground. The defendant was the school principal. The principal had two weeks prior notice that the goal post could be tipped, and he also knew students climbing on the goal had previously

tipped them over. He did not, however, prevent the students from using the goals until the goals were properly anchored. As a result of the tippable nature of the soccer goal, the plaintiff suffered serious injuries when the goal fell on top of him. The *Vermilya* court, however, rejected the idea that pleadings of "gross negligence" preclude a grant of summary disposition in every case in which a plaintiff alleges that negligent conduct by a defendant government employee results in injury, and affirmed the finding that the Principal's conduct could not be considered to constitute gross negligence.

The unpublished case of *Hiar v Strong*, No 274247, 2007 Mich App LEXIS 1183 (2007), also illustrates that Defendant Swager was not grossly negligent under the GTLA. In *Hiar*, Defendant Strong, the township gravedigger, dug a grave. After digging the grave, however, Strong did not barricade the area, nor did Strong mark the open hole. Furthermore, there was no pile of dirt above ground to indicate that a hole may be present. Strong testified that it was common for him to dig a grave and leave it open for several days without marking the holes. Unfortunately, while walking through the cemetery looking for a family member's grave, Plaintiff stepped into the open grave and was injured. Based on these facts, the Court held that Strong did not leave the hole unmarked because he did not care whether anyone was injured; rather, Strong believed that the hole was visible and he did not think anyone would be injured. As such, the Court held that Strong was

not grossly negligent. *This Court held that it is likely that a governmental employee cannot be considered grossly negligent if he creates an “open and obvious” danger. Id. at 9-10.* Extending this Court’s holding in *Hiar*, in a 2007 published opinion, this Court held that vehicular traffic vis-à-vis a pedestrian is an “open and obvious” danger. *Richardson v Rockwood Ctr, LLC*, 275 Mich App 244, 249 (2007).

In this case, the evidence establishes numerous actions on the part of Coach Swager which were intended to prevent injury. Coach Swager advised all students to wear reflective clothing; Coach Swager prohibited students from wearing earphones, so that they could hear cars; Coach Swager taught students how to run on roads with cars present; Coach Swager even told students the obvious—do not cross streets without looking both ways. Additionally, the above testimony establishes that, when Coach Swager crossed the intersection, the other students with him also believed it was safe to cross. This was a decision that many other young adults thought was safe at that time.

At his deposition, Coach Swager was asked whether safety was a primary concern for his team. In response, Coach Swager testified: “safety is always a primary concern. Always.” (Exhibit 5: Swager’s Dep at 44-45.) However, Coach Swager carefully explained the dichotomy that is always present in school athletics and education in general:

We could spend all season running around the indoor track, ten laps -- ten laps per mile, and be pretty darn safe; however, 80 percent of the kids would quit the team, if not 90 or a 100 percent of them. Second of all, we wouldn't learn how to run cross-country. We wouldn't get the variety of training in even though arguably by staying in the one little room on the indoor track it would be marginally safer. (Exhibit 5: Swager's Dep at 44.)

Coach Swager's observation is entirely accurate. Student football players would not receive as many concussions if the players did not practice tackling. Students would never be at risk for drowning in school pools if swimming programs were cancelled or took place in 3-foot deep pools. Handicapped students would not be injured learning to walk if they remained strapped in a wheelchair all day. As an educator, Coach Swager carefully balanced the risks and rewards of his program and his decisions were not "grossly negligent."

Plaintiff has been extraordinarily critical of Coach Swager and students crossing at an intersection against a red light, in a rural area, and with no cars immediately present. However, Coach Swager testified that, in his opinion, because he could safely cross the street, it was okay to do so. (Exhibit 5: Swager's Dep at 55 & 59.) In fact, as the undisputed testimony shows, it was safe for Coach Swager and the students with him to cross the street. Coach Swager's belief comports with logic, but is also supported by Michigan law. MCL 257.613 provides that a pedestrian facing a red light "shall not enter the highway unless they can do so safely and without interfering with vehicular traffic." MCL 257.613.

In any event, Coach Swager only crosses streets if he determines it is safe to; he does not do so with a reckless disregard for anyone's safety. (Exhibit 5: Swager's Dep at 55 & 59.)

In the cases discussed above, student injuries were more foreseeable than in the present lawsuit and the teachers were still entitled to governmental immunity. For example, in *Perry*, a special education student with a seizure disorder drowned in a pool. The student did not have a lifejacket that would have kept his face above water, nor was he being closely supervised. Despite these facts, the Michigan Supreme Court held that the teachers' actions only amounted to ordinary negligence. In this case, Plaintiff was a healthy high school student who was an experienced road runner. Coach Swager was justified in believing that Plaintiff could safely look both ways before crossing streets, just as the other dozen runners testified they did before crossing the same street.

Coach Swager testified that he only crossed the street after looking both ways and after determining that it was safe to cross. (Exhibit 5: Swager's Dep at 51.) Coach Swager was not the only runner to analyze the safety of crossing at that time. As was discussed above, multiple students with Coach Swager testified that they also looked both ways and determined that it was safe to cross. This is a situation where numerous adults/young adults all individually determined that there was sufficient distance from the car to cross safely at that moment. This is

not a situation where Coach Swager saw a car, believed that it was dangerous to cross, and then told students to cross believing that they might not make it across. Rather, Coach Swager, just like the other young adults at the intersection, correctly determined that they could cross with the vehicle being at a distance.

Plaintiff has argued that Coach Swager was grossly negligent because the pedestrian signal was red when he crossed and Plaintiff contends that this would constitute a civil infraction. This argument is a red herring. Our courts have repeatedly instructed that, in the context of governmental immunity, a violation of a statute may constitute ordinary negligence, but it does not constitute gross negligence. *Bevelyn Fisher v Southfield Pub Schs*, 2010 Mich App LEXIS 65 (Mich Ct App Jan 12, 2010)(citing *Poppen v Tovey*, 256 Mich App 351, 358; 664 NW2d 269 (2003)). The statute cited by Plaintiff, MCL 257.613(1)(d) actually provides that pedestrians facing a red light “shall not enter the highway unless they can do so safely and without interfering with vehicular traffic.” As such, at a normal intersection, it is not even improper for a pedestrian to cross against a red light if they can do so safely. The important consideration is always that the pedestrian look both ways and make an individualized assessment as to their own safety.

I dare say that there is not a person who reads this brief who has not approached an intersection on a quiet morning and, seeing no traffic in the vicinity,

crossed the street even though a traffic signal might have suggested otherwise. That is not grossly negligent; it is crossing a street. Likewise, a high school cross-country runner must always be aware of his surroundings because they must cross a myriad of roads and driveways and must safely negotiate obstacles such as cars, bikes, and pedestrians. A coach cannot take each runner by the hand and walk each student across the street. In reality, the majority of high school cross country teams do not have coaches even running with the team and the students are trusted to make safe decisions on their own.

RELIEF REQUESTED

For the reasons argued above, leave to appeal should be denied.

s/TIMOTHY J. MULLINS

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