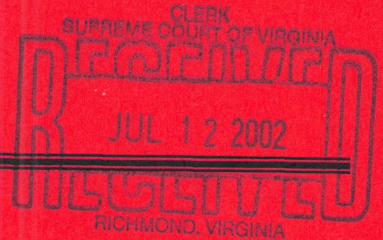


265VA12



IN THE

Supreme Court of Virginia

RECORD NO. 020439

ANDREW W. KOFFMAN, an infant,
by his father and Next Friend, **Richard Koffman, et al.**,
Appellant,

v.

JAMES GARNETT,
Appellee.

APPENDIX

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN, OSBORNE
& JENNINGS, P.C.
1401 Franklin Road, S.W.
Roanoke, Virginia 24032
(540) 982-0234

Counsel for Appellant

Iris W. Redmond
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235
(804) 560-9600

Counsel for Appellee

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,
3865 Woodridge Road
Troutville, VA 24175-5641

Defendant.

MOTION FOR JUDGMENT

Case No.: _____

COME NOW the Plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, and move the Court for judgment against the Defendant, James Garnett, on the grounds and in the amount as hereinafter set forth:

COUNT I

1. Andrew W. Koffman (hereinafter "Andy") is a 13-year old boy and Honor Roll student, who attends William Clark Middle School in Botetourt County, Virginia. Until his injuries sustained at the hands of Defendant James Garnett, sometimes hereinafter referred to as "Coach Garnett," Andy was participating on the boys' football team for William Clark Middle School as a third string defensive line player. This season was Andy's first year playing organized football.

2. At all times relevant to this Motion for Judgment, James Garnett was employed by the Botetourt County School Board as an assistant coach for the William Clark Middle School

Arter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
401 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24002-3206
540-982-0234

boys' football team. He is responsible, among other things, for the supervision, training and instruction of the defensive players on the William Clark Middle School football team.

3. On or about September 18, 2000, Andy was participating in a football practice with the William Clark Middle School boys' football team on school property as part of William Clark Middle School's athletic program.

4. During this football practice, Andy and other defensive football players were directed by Coach Garnett to engage in a compulsory tackling drill known as "The Cage." The team had lost their first game of the season a few days earlier. Coach Garnett ordered his players to perform "The Cage" tackling drill because he was upset by what he perceived to be the inadequate tackling performance of his defensive players.

5. During "The Cage" compulsory tackling drill, Coach Garnett became irate by what he perceived to be the continuing failure of his defensive players to tackle aggressively enough.

6. Coach Garnett then ordered Andy, a 13-year old boy, to hold the football so that Coach Garnett, an imposing, powerful man weighing well in excess of 220 pounds, could explain to the other players how to tackle. Andy was unaccustomed to handling the football since he was a third string defensive line player and had never carried the football in any game or scrimmage. Andy was ordered to stand upright and motionless with the ball.

7. Without just cause or provocation, Coach Garnett committed an unlawful assault and battery upon Andy by suddenly and intentionally thrusting his arms around Andy, violently yanking Andy off his feet and then slamming Andy's 13-year old body into the ground like a tackling dummy and with the force of Coach Garnett's powerful 220+ pound frame.

8. As a direct and proximate result of Defendant Garnett's unwanted, unwarranted and offensive attack upon Andy, Andy suffered a broken humerus bone in his left arm, was caused to suffer and will continue to suffer great pain of body and mind and his parents, Richard Koffman and Rebecca Koffman, have incurred, and will incur in the future hospital, doctors, and related bills in an effort to cure his injuries.

9. Prior to this assault, the William Clark Middle School football coaches, including Coach Garnett, had never used, nor had Andy or his parents consented to, physical force or violence by the coaches to instruct Andy on the rules and techniques employed in football. Because of this prior experience and his trust in Coach Garnett, Andy did not expect that Coach Garnett would engage in violent, aggressive contact between Coach Garnett and himself. As a consequence, Andy was in a relaxed, vulnerable, passive and stationary position, unaware that Coach Garnett would use aggressive, physical force so as to make him a tackling dummy for Coach Garnett.

COUNT II

10. Paragraphs 1 through 6 are herein incorporated by reference.

11. On or about September 18, 2000, Coach Garnett ordered the players under his control and supervision to perform a compulsory tackling drill, known as "The Cage." Coach Garnett was upset with the boys on his team because they had just lost their first game of the season and he was angered by what he perceived as their poor tackling performance. Andy did not contribute to the perceived poor tackling performance during this game since he was only a third string defensive line player and did not play even a single down with the defensive unit. Coach Garnett implemented "The Cage" compulsory tackling drill for the first time after his team's loss as a harsh, punitive measure.

12. During this drill, Coach Garnett became incensed by what he perceived as the continuing failure of his defensive players to tackle aggressively enough.

13. Coach Garnett abused his position of authority and acted with recklessness and utter disregard for the safety and welfare of Andy by forcing Andy to stand upright in a passive and vulnerable position to be an unknowing tackling dummy for a member of the adult coaching staff.

14. No coach on the William Clark Middle School boy's football team, including Coach Garnett, had ever used aggressive physical force or violence to instruct Andy prior to this incident. Furthermore, Coach Garnett, as a powerful 220+ pound man, was so much larger and stronger than 13-year old Andy, that Andy reasonably believed Coach Garnett would not physically attack him. However, Coach Garnett, suddenly and without warning, violated his trust by snatching Andy off his feet and then slamming him into the ground with the shockingly violent force and velocity of his powerful 220+ pound frame, snapping Andy's humerus bone in his left arm. Such abuse of power and authority and exploitation of a trusting 13-year old boy like Andy, under the circumstances then and there existing, constituted gross negligence by the Defendant.


15. As a proximate cause of Coach Garnett's gross negligence, Andy suffered a broken humerus bone in his right arm, was caused to suffer and will continue to suffer great pain of body and mind and his parents, Richard Koffman and Rebecca Koffman, have incurred, and will incur in the future hospital, doctors, and related bills in an effort to cure Andy of said injuries.

WHEREFORE, Plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually,

demand judgment against the Defendant, James Garnett, in the amount of \$75,000.00 in compensatory damages, and \$25,000.00 in punitive damages, with prejudgment interest on the judgment amount, and his costs in this behalf expended.

TRIAL BY JURY IS DEMANDED.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually

By: 
Of Counsel

P. Brent Brown
Ward Marsteller
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

Filed in the Clerk's Office the 6th day of November, 2000

Writ Tax	<u>15.00</u>	
Fee	<u>3.00</u>	
L.L. Fee	<u>4.00</u>	Testa:
Acct. 123	<u>100.00</u>	
Tech Fee	<u>3.00</u>	TOMMY L. MOORE Clerk
Sheriff's Fee	<u>12.00</u>	
Total Paid \$	<u>136.00</u>	Catherine R. Smith D.C.

PROOF OF SERVICE
COMMONWEALTH OF VIRGINIA

Case No.: 00000159

Botetourt County Circuit Court

Andrew W. Koffman

Service on: James Garnett

V.

3865 Woodridge Rd.

James Garnett

Troutville, VA 24175

CITY OR COUNTY

Return shall be made hereon, showing service of the:

☒ Notice of Motion of Judgment

☐ Subpoena in Chancery

which was issued on:

November 6, 2000

☐ Order dated

with a copy of the following documents filed on

November 6, 2000 attached:

☒ Motion for Judgment

☐ Amended Motion for Judgment

☐ Third Party Motion for Judgment

☐ Counterclaim

☐ Interrogatories

☐ Request for Admissions

☐ Production of Documents

☐ Bill of Complaint

☐ Bill of Complaint for Notary Acceptance

☐ Bill of Complaint for Non-Resident Service

☐ Amended Bill of Complaint

☐ Cross-Bill

☐ Notice

☐ Petition

RETURN OF SERVICE

☐ Personal Service

☐ Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:

☒ Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ Served on Secretary of the Commonwealth.

☐ Served on the Clerk of the State Corporation Commission pursuant to Virginia Code § 8.01-513.

☐ Served on registered agent of the corporation. List name and title:

☐ Served on the Commissioner of the Department of Motor Vehicles.

FOR GARNISHMENT OF FEDERAL WAGES ONLY:

☐ Pursuant to 5 U.S.C. § 5520a, service by certified or registered mail, return receipt requested.

☐ not found

Date: 11/7/00

by R.N. Sprinkle, Sheriff
IN THE CLERK'S OFFICE
BOTETOURT COUNTY CIRCUIT COURT

CITY OF ESTEY NOV 8 2000

TOMMY L. MOORE, CLERK
D.C.

In the Circuit Court for the County of Botetourt, on Friday, the 19th day of
Janaury, in the year Two Thousand-one. 61

PRESENT: The Honorable George E. Honts, III, Judge of said Court.

ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT

Defendant.


ORDER EXTENDING TIME

This day came the Defendant, by counsel, and moved the Court for an extension of time in which to file pleadings in response to Plaintiffs' Motion for Judgment. It appearing to the Court that Plaintiffs, by counsel, consent to such motion and that it is otherwise proper to do so;

It is accordingly ORDERED that the Defendant be, and hereby is, granted an extension of time to file pleadings in response to Plaintiffs' Motion for Judgment, such extension to be up to, through and including December 15, 2000.

The Clerk is directed to send a certified copy of this Order to counsel of record.

19 January 2001 nml. pro time to
ENTER this 14 day of December, 2000.


Judge

Koffman v. Garnett
Order Extending Time

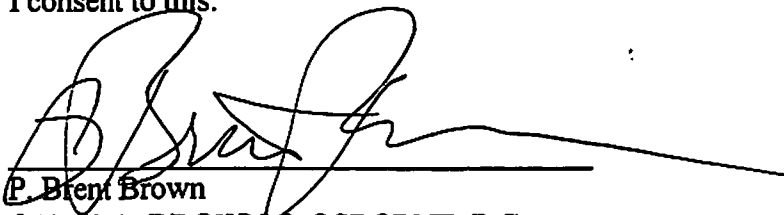
I ask for this:



Iris W. Redmond

MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 fax
Counsel for defendant

I consent to this:



P. Brent Brown

CARTER, BROWN & OSBORNE, P.C.
P.O. Box 13206
Roanoke, VA 24032-3206
(540) 982-0234
Counsel for plaintiffs

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

**ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,**

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT

Defendant.

· GROUNDS OF DEFENSE

COMES NOW defendant James Garnett (hereinafter "Garnett" or "defendant"), by counsel,
and for his Grounds of Defense to plaintiffs' Motion for Judgment, states as follows:

COUNT I

1. In response to paragraph one of the Motion for Judgment, Garnett admits that Andy Koffman (hereinafter "Koffman") attends school at William Clark Middle School in Botetourt County, Virginia and that Koffman participated on the boys' football team for William Clark Middle School. Garnett lacks sufficient knowledge to either admit or deny the remaining allegations contained in paragraph one and therefore such allegations are denied and strict proof thereof is demanded.

2. In response to paragraph two of the Motion for Judgment, Garnett admits he was employed as an assistant coach for the William Clark Middle School boys' football team. Garnett denies the remaining allegations contained in paragraph two and demands strict proof thereof.

3. Defendant admits the allegations in paragraph three of the Motion for Judgment.

4. In response to paragraph four of the Motion for Judgment, Garnett admits he

FILED
IN THE CLERK'S OFFICE 10:30
BOTETOURT COUNTY CIRCUIT COURT
TESTE: DEC 15 2000
TOMMY L. MOORE, CLERK
Sam Botetourt D.C.

participated in use of the “cage” during tackling drills in the practice on September 18, 2000. The remaining allegations in paragraph four are denied and strict proof thereof demanded.

5. Defendant denies the allegations contained in paragraph five of the Motion for Judgment.

6. The allegations contained in paragraph six of the Motion for Judgment are denied.

7. The allegations contained in paragraph seven of the Motion for Judgment are denied and strict proof thereof demanded.

8. Defendant denies the allegations contained in paragraph eight of the Motion for Judgment and demands strict proof thereof.

9. In response to paragraph nine of the Motion for Judgment, defendant admits and asserts that no William Clark Middle School football coaches, including Garnett, have ever used physical force or violence to instruct Koffman or any other player on the rules and techniques employed in football. Garnett lacks sufficient knowledge to either admit or deny the allegations regarding Koffman’s expectations. All remaining allegations in paragraph nine of the Motion for Judgment are denied and strict proof thereof demanded.

COUNT II

10. In response to paragraph ten of the Motion for Judgment, defendant restates his previous responses to paragraphs one through nine as if fully set forth herein.

11. In response to paragraph eleven of the Motion for Judgment, Garnett admits he participated in use of the “cage” during tackling drills in the practice on September 18, 2000. The remaining allegations in paragraph eleven are denied and strict proof thereof demanded.

12. Defendant denies the allegations contained in paragraph twelve of the Motion for

Judgment.

13. Defendant denies the allegations contained in paragraph thirteen of the Motion for Judgment.

14. In response to paragraph fourteen of the Motion for Judgment, defendant admits and asserts that no William Clark Middle School football coaches, including Garnett, have ever used physical force or violence to instruct Koffman or any other player on the rules and techniques employed in football. Garnett lacks sufficient knowledge to either admit or deny the allegations regarding Koffman's beliefs. All remaining allegations in paragraph fourteen of the Motion for Judgment are denied and specifically denies any act of gross negligence by Garnett.

15. Defendant denies the allegations contained in paragraph fifteen of the Motion for Judgment and demands strict proof thereof.

16. All allegations contained in the Motion for Judgment not expressly admitted herein are hereby denied.

17. Plaintiffs' Motion for Judgment fails to state a claim upon which relief can be granted.

18. Garnett denies that he is indebted to the plaintiffs in any amount or on any account whatsoever.

19. Plaintiffs' claims are barred by the doctrine of sovereign immunity.

20. Plaintiffs' claims may be barred by the statute of limitations.

21. Defendant will rely upon the defense, if shown by evidence from discovery or trial, that plaintiffs' claims are barred by assumption of the risk.

22. Defendant will rely upon the defense, if shown by evidence from discovery or trial,

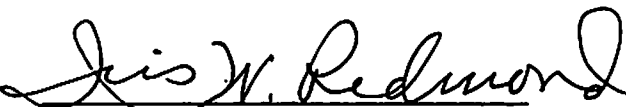
that the plaintiffs or another not under the control of defendant, or either of them, was guilty of negligence, which was the sole proximate cause of the alleged injuries and damages.

23. Defendant will rely upon the defense, if shown by evidence from discovery or trial, that intentional acts of the plaintiffs or another not under the control of defendant or either of them, were the sole proximate cause of the alleged injuries and damages.

24. Defendant will rely upon all defenses available to him at the trial of this matter and specifically reserves the right to amend this Grounds of Defense to take advantage of any defense occasioned by plaintiffs' own evidence, or any other evidence that develops during the course of this proceeding and/or at trial.

WHEREFORE, defendant Garnett respectfully requests that this Court dismiss with prejudice plaintiffs' Motion for Judgment, enter judgment in his favor, award him his costs and attorney's fees expended in this action, and for such other and further relief as this Court may deem just and proper.

JAMES GARNETT


By Counsel

Iris W. Redmond
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Grounds of Defense was mailed, postage prepaid, this 14th day of December, 2000 to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206.


Iris W. Redmond

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

**ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,**

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT

Defendant.

DEMURRER

COMES NOW defendant James Garnett, by counsel, and for his Demurrer to plaintiffs' Motion for Judgment, states as follows:

1. The Motion for Judgment fails to state a cause of action against this defendant upon which relief can be granted.
2. The cause of action asserted in the Motion for Judgment is barred by the doctrine of sovereign immunity.
3. The facts alleged in the Motion for Judgment do not, as a matter of law, rise to level of gross negligence.

WHEREFORE, defendant Garnett respectfully requests that this Court sustain his Demurrer to plaintiffs' Motion for Judgment, and for such other and further relief as this Court may deem just and proper.

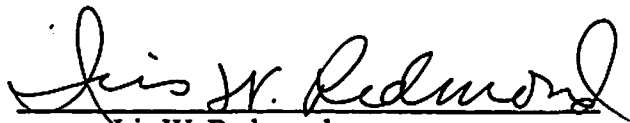
JAMES GARNETT


By Counsel

Iris W. Redmond
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Demurrer was mailed, postage prepaid, this 14th day of December, 2000 to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206.


Iris W. Redmond

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

NOTICE OF DEPOSITION

Case No.: 00000-159

PLEASE TAKE NOTICE that on the 27th day of March, 2001, at 10:00 a.m., or as soon thereafter as counsel may be heard, at the law offices of Carter, Brown & Osborne, P.C., 1401 Franklin Road, S.W., Roanoke, Virginia 24016, the undersigned, by counsel, will proceed to take the deposition of James Garnett, upon oral examination, in a certain action pending in the Circuit Court for the County of Botetourt to be used and considered for the purposes of discovery or as evidence in this action, or for whatever purpose may be deemed necessary and proper, and in accordance with the Rules of the Supreme Court of Virginia. If for any reason the taking of said depositions be not commenced or if commenced but not concluded on that day, the taking thereof will be adjourned from time to time until the same shall have been completed.

ANDREW W. KOFFMAN, an infant, by his father and
next friend, Richard Koffman, and his parents, Richard
Koffman and Rebecca Koffman, individually

By: 

Of Counsel

FILED
IN THE CLERK'S OFFICE 11:20 AM
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 02 2001

TOMMY L. MOORE, CLERK
Catherine R. Trath

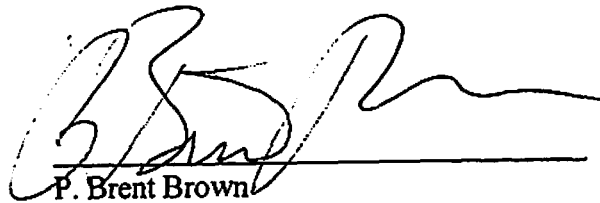
Carter, Brown &
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ATTORNEYS AT LAW
1401 Franklin Road, S.W.
P. O. Box 13206
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540-982-0234

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, P. Brent Brown, hereby certify that a true and correct copy of the foregoing Notice of Deposition was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 23 day of February, 2001.



P. Brent Brown

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
101 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

NOTICE OF HEARING

Case No.: 00000-159

PLEASE TAKE NOTICE that on the 8th day of March, 2001, at 3:30 p.m., in the Circuit Court for the County of Botetourt, the undersigned will move the Court to grant Plaintiff's Motion for Leave to Amend Motion for Judgment to Increase the Ad Damnum, establish a discovery schedule and set this case for trial by jury.

ANDREW W. KOFFMAN, an infant, by his father and
next friend, Richard Koffman, and his parents, Richard
Koffman and Rebecca Koffman, individually

By: 

Of Counsel

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

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BOTETOURT COUNTY CIRCUIT COURT

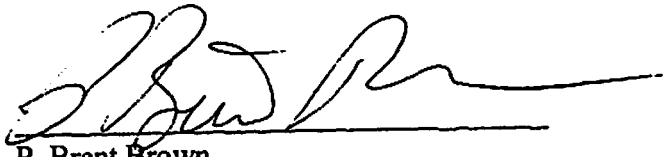
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TOMMY L. MOORE, CLERK
 D.C.

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
11 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

CERTIFICATE OF SERVICE

I, P. Brent Brown, hereby certify that a true and correct copy of the foregoing Notice of Hearing was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 20 day of February, 2001.



P. Brent Brown

Irter, Brown &
borne, P.C.
SOLICITORS AT LAW
111 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

V.

JAMES GARNETT,

Defendant.

**MOTION FOR LEAVE TO AMEND
MOTION FOR JUDGMENT TO
INCREASE AD DAMNUM**

Case No.: 00000-159

COME NOW the Plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, pursuant to Rule 1:8 of the Rules of the Supreme Court of Virginia, and move this Court for leave to amend their Motion for Judgment to increase the ad damnum from \$75,000.00 in compensatory damages and \$25,000.00 in punitive damages to \$150,000.00 in compensatory damages and \$75,000.00 in punitive damages on the grounds that such amendment will further the ends of justice.

WHEREFORE, Plaintiff, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, pray that the aforesaid Motion be granted.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually

By: [Signature]
Of Counsel

FILED
IN THE CLERK'S OFFICE 11:20 am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 02 2001

TOMMY L. MOORE, CLERK
Catherine D. Tenth...

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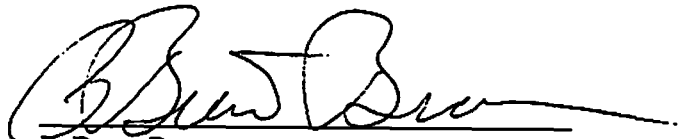
Arthur Brown & Borne, P.C.
ATTORNEYS AT LAW
1 Franklin Road S.W.
P.O. Box 13206
Arlington, Virginia 24032-3206
540-982-0234

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, P. Brent Brown, hereby certify that a true and correct copy of the foregoing Motion for Leave to Amend Motion for Judgment to Increase Ad Damnum was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 29 day of February, 2001.


P. Brent Brown

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Osborne, P.C.
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1 Franklin Road, S.W.
P.O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

ANDREW W. KOFFMAN

v.

Defendant.

Case No.: 00000159

- 22

supersedes the Rules of the Supreme Court of Virginia governing discovery. Any discovery motion filed shall contain a certification that counsel has made a good faith effort to resolve the matters in controversy with opposing counsel.

(3) **Designation of Experts.** If requested in discovery, plaintiff's, counter-claimant's, third party plaintiff's, and cross-claimant's experts shall be identified on or before 90 days before trial. If requested in discovery, defendants and all other opposing experts shall be identified on or before 60 days before trial. If requested, all information discoverable under Rule 4:1(b)(4)(A)(1) of the Rules of Supreme Court of Virginia shall be provided or the expert will not ordinarily be permitted to express any non-disclosed opinions at trial. If requested in discovery, experts or opinions responsive to new matters raised in the opposing parties' identification of experts shall be designated no later than 45 days before trial. The foregoing deadlines shall not relieve a party of the obligation to respond to discovery requests within the time periods set forth in the Rules of Supreme Court of Virginia, including, in particular, the duty to supplement or amend prior responses pursuant to Rule 4:1(e).

(4) **Dispositive Motions.** All dispositive motions shall be presented to the court for hearing as far in advance of the trial date as practical. All counsel of record are encouraged to bring on for hearing all demurrers, special pleas, motions for summary judgment or other dispositive motions not more than 60 days after being filed.

(5) **Exhibit and Witness List.** Counsel of record shall exchange 15 days before trial, copies of exhibits and a list of witnesses proposed to be introduced at trial. A list of exhibits and witnesses shall be filed with the Clerk of the Court simultaneously therewith but the exhibits shall not then be filed. Any exhibit or witness not so identified and filed will not be received in evidence, except in rebuttal or for impeachment or unless the admission of such

exhibit or testimony of the witness would cause no surprise or prejudice to the opposing party and the failure to list the exhibit or witness was through inadvertence. Any objections to exhibits or witnesses shall state the legal reasons therefor except on relevancy grounds, and shall be filed with the Clerk of the Court and a copy delivered to opposing counsel at least five days before trial or the objections will be deemed waived absent leave of court for good cause shown.

(6) **Pretrial Conferences.** Pursuant to Rule 4:13 of the Rules of Supreme Court of Virginia, when requested by any party or upon its own motion, the court may order a pretrial conference wherein motions *in limine*, settlement discussions or other pretrial motions which may aid in the disposition of this action can be heard.

(7) **Motions *in Limine*.** Absent leave of court, any motion *in limine* which requires argument exceeding five minutes shall be duly noticed and heard before the day of trial.

(8) **Witness Subpoenas.** Early filing of a request for witness subpoenas is encouraged so that such subpoenas may be served at least 10 days before trial.

(9) **Continuances.** Continuances will only be granted by the court for good cause shown.

(10) **Jury Instructions.** Counsel of record, unless compliance is waived by the court, shall, two business days before a civil jury trial date, exchange proposed jury instructions. At the commencement of trial, counsel of record shall tender the court the originals of all agreed upon instructions and copies of all contested instructions with appropriate citations. This requirement shall not preclude the offering of additional instructions at the trial.

(11) **Deposition Transcripts to be Used at Trial.** Counsel of record shall confer and attempt to identify and resolve all issues regarding the use of depositions at trial. It is the

obligation of the proponent of any deposition of any non-party witness who will not appear at trial to advise opposing counsel of record of counsel's intent to use all or a portion of the deposition at trial. It becomes the obligation of the opponent of any such deposition to bring any objection or other unresolved issues to the court for hearing before the day of trial.

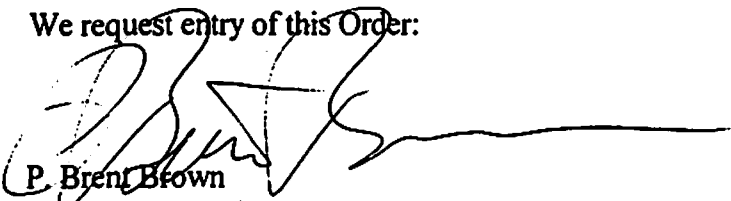
(12) **Waiver or Modification of Terms of Order.** Upon motion, the time limits and prohibitions contained in this order may be waived or modified by leave of court for good cause shown.

The Clerk of Court is directed to send a certified copy to counsel of record.

ENTER: This 16th day of March, 2001.


JUDGE

We request entry of this Order:


P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

see letter of 03/15/01 waiving endorsement
Iris W. Redmond
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway
Suite 160
Richmond, Virginia 23235

Counsel for Defendant

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

NOTICE OF DEPOSITION

Case No.: 00000-159

PLEASE TAKE NOTICE that on the 27th day of March, 2001, at 1:00 p.m., or as soon thereafter as counsel may be heard, at the law offices of Carter, Brown & Osborne, P.C., 1401 Franklin Road, S.W., Roanoke, Virginia 24016, the undersigned, by counsel, will proceed to take the deposition of Mark Woodie, upon oral examination, in a certain action pending in the Circuit Court for the County of Botetourt to be used and considered for the purposes of discovery or as evidence in this action, or for whatever purpose may be deemed necessary and proper, and in accordance with the Rules of the Supreme Court of Virginia. If for any reason the taking of said depositions be not commenced or if commenced but not concluded on that day, the taking thereof will be adjourned from time to time until the same shall have been completed.

ANDREW W. KOFFMAN, an infant, by his father and
next friend, Richard Koffman, and his parents, Richard
Koffman and Rebecca Koffman, individually

By:

Patrick T. Farrell
Of Counsel

FILED
IN THE CLERK'S OFFICE 11 am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 19 2001

TOMMY L. MOORE, CLERK
Catherine R. Smith D.C.

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
1401 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Patrick T. Fennell, hereby certify that a true and correct copy of the foregoing Notice of Deposition was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 16th day of March, 2001.



Patrick T. Fennell

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
1401 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

SERVICE OTHER THAN BY VIRGINIA SHERIFF

Case No. 00-159

VA CODE 8.01-293, 8.01-320, 8.01-325

Hearing Date 03-27-01

Attorney CBO

Botetourt County

Circuit Court

Andrew W Koffman an infant etcv. James Garnett

is the name and address of the person upon who service of the following is to be made.

☐ Notice of Motion for Judgment and Motion for Judgment☐ Subpoena in Chancery and Bill of Complaint☒ Witness Subpoena☒ Whom served Mark Woodie☒ WS (AD)

I, the undersigned swear/affirm that:

1. ☐ I am an official or an employee of an official who is authorized to serve process of type described in the attached Proof of Service and my title and bailiwick are:

or,

☒ I am a special process server. Appointed by the United States District Court/Western Division of Virginia

2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.

3. I am 18 years of age or older.

4. I served, as shown below, the above named person upon whom service of process was to be made with copies described above.

- Date and time of service 03-20-01 11:38 AM- Place of Service 367 Poor Farm Road Fincastle VA

Street Address, City and State

- Method of Service

(If served outside of VA, use only personal service)

☒ Personal Service☐ Being unable to make personal service, a copy was delivered in the following manner:☐ Delivery to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of person to be served after giving information of its purport.

List name, age of recipient, and relation of recipient to party:

☐ Delivered to person found in charge of usual place of business or employment during business hours and giving information of its purport.☐ Posted on front door or such other door as appears to be the main entrance of usual place of abode (other authorized recipient not found).March 20, 2001
SignatureName (Print or Type) Jeff Spar

Virginia Court Services PO Box 1 Roanoke, VA 24002-0001 (540-772-4559)

State of VA, ☐ City ☒ County of RoanokeSubscribed and sworn to/affirmed before me this day by Jeff Spar

March 20, 2001

Notary Public My Commission Expires: 8-31-02
Donald Suttles # 228194FILED
IN THE CLERK'S OFFICE 11:40 AM
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 21 2001

TOMMY L. MOORE, CLERK
Catherine R. Gath D.C.

SUBPOENA FOR WITNESS (CIVIL) -

ATTORNEY ISSUED VA. CODE §§ 8.01-407; 16.1-265; Supreme Court Rules 1:4, 4:5
Commonwealth of Virginia

Case No.: 00000-159

03-27-01 / 1:00 P.M.
HEARING DATE AND TIME

BOTETOURT COUNTY CIRCUIT Court

BOTETOURT COURT HOUSE, MAIN STREET, FINCASTLE, VA 24090
ADDRESS OF COURT

ANDREW W. KOFFMAN, AN INFANT, BY HIS FATHER AND NEXT FRIEND, RICHARD KOFFMAN, AND HIS PARENTS, RICHARD KOFFMAN AND REBECCA KOFFMAN, INDIVIDUALLY v./In re: JAMES GARNETT

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

MARK WOODIE
NAME

C/O WILLIAM CLARK MIDDLE SCHOOL, 367 POOR FARM ROAD
STREET ADDRESS

FINCASTLE
CITY

VA
STATE

24090
ZIP

TO the person summoned: You are commanded to appear

☒ in the law offices of CARTER, BROWN & OSBORNE, P.C.

☒ at 1401 FRANKLIN ROAD SW ROANOKE VA 24016
ADDRESS (DEPOSITION USE IN CIRCUIT COURT ONLY)

on **MARCH 27, 2001 AT 1:00 P.M.** to testify in the above-named case.

This subpoena is issued by the attorney for and on behalf of

ANDREW W. KOFFMAN, AN INFANT, BY HIS FATHER AND NEXT FRIEND, RICHARD KOFFMAN, AND HIS PARENTS, RICHARD KOFFMAN AND REBECCA KOFFMAN, INDIVIDUALLY
PARTY NAME

PATRICK T. FENNELL
NAME OF ATTORNEY

40393
VIRGINIA STATE BAR NUMBER

Carter Brown & Osborne
OFFICE ADDRESS

(540) 982-0234
TELEPHONE NUMBER OF ATTORNEY

1401 FRANKLIN RD ROANOKE VA 24016
OFFICE ADDRESS

(540) 982-8102
FACSIMILE NUMBER OF ATTORNEY

03-16-01
DATE ISSUED

Patrick T. Fennell
SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

FORM DC-497 (W) 7/00
MAR 16 2001

VIRGINIA COURT SERVICES

OSBORNE BROWN

TO the person summoned:

If you are served with this subpoena less than 5 calendar days before your appearance is required, the court may, after considering all of the circumstances, refuse to enforce the subpoena for lack of adequate notice. If you are served with this subpoena less than 5 calendar days before your appearance is required, you may wish to contact the attorney who issued this subpoena and the clerk of the court.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:	
ADDRESS:	
<input type="checkbox"/> PERSONAL SERVICE	Tel. No.
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:	
<input type="checkbox"/> Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> not found, Sheriff
DATE	by, Deputy Sheriff

CERTIFICATE OF COUNSEL

I, Patrick T. Fennell, counsel for Plaintiff Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually, hereby certify that a copy of the foregoing subpoena for witness was mailed to, Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendant, on the 16th day of March, 2001.


SIGNATURE OF ATTORNEY

VIRGINIA:

TESTE: MAR 26 2001

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT
TOMMY L. MOORE, CLERK
Tommy L. Moore D.C.

ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT

Defendant.

**MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANT'S DEMURRER**

COMES NOW defendant, by counsel, and submits the following Memorandum of Law in support of his previously filed demurrer. For the reasons set forth below, defendant respectfully asserts that plaintiffs have failed to state any cause of action against him.

STATEMENT OF FACTS

It is well settled that assessing the validity of a demurrer requires that the material facts as pled are assumed to be true. This allows that several types of facts are admitted, including, "those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." *Lentz v. Morris*, 236 Va. 78, 80, 372 S.E.2d 608, 609 (1988), citing *Rosillo v. Winters*, 235 Va. 268, 270, 3657 S.E.2d 717, 717 (1988).

Following these principles, a careful reading of the facts as alleged in plaintiffs' Motion for Judgment, without any excess verbiage or colorful adjectives, reveals the following facts.

1. Andrew Koffman (hereinafter "Koffman") was a member of the William Clark Middle School football team.
2. Defendant was employed by Botetourt County School Board as an assistant coach

- for the William Clark Middle School football team.
3. Defendant supervised, trained and instructed the players, including Koffman, on the William Clark Middle School football team.
 4. On September 18, 2000 defendant conducted a tackling drill known as “the cage” with Koffman and other defensive football players.
 5. During the tackling drill, defendant observed the players were not performing their tackles correctly.
 6. Defendant required Koffman to participate with him in a demonstration of proper tackling procedure.
 7. Defendant demonstrated the tackling procedure with Koffman.
 8. Koffman landed on the ground and broke his arm.

LAW AND ARGUMENT

A. This suit against defendant is barred by the doctrine of sovereign immunity.

Pursuant to Virginia statute, any teacher employed by a local school board in the Commonwealth of Virginia is not liable for civil damages for any acts or omissions resulting from the supervision, care or discipline of students when acting within the scope of employment. Virginia Code § 8.01-220.1:2. See also, *Lentz v. Morris, supra*. The only exception to this immunity protection is if the acts or omissions were the result of gross negligence or willful misconduct.

In an effort to circumvent the sovereign immunity that should apply in this case, the plaintiffs have asserted causes of action for an intentional tort and gross negligence. These causes of action will not survive a close scrutiny of the facts as set forth above.

A. Facts alleged by plaintiffs imply consent to defendant's actions.

The facts expressly alleged by plaintiffs include the facts that Koffman was a member of his school football team and defendant was a coach of that team. A fact that can be fairly and justly inferred from those facts, per the *Rosillo* case, is that plaintiffs consented to have defendant demonstrate football techniques. As football is very much a contact sport, it is reasonable to infer that such demonstrations would require contact. Therefore, under the law of intentional torts, the implied fact that plaintiffs consented to contact with Koffman's football coach means that defendant's acts were privileged and plaintiffs cannot recover against him for that act. *Personal Injury Law in Virginia, 2d Ed.*, Friend, Charles E., § 7.2 (1998)

C. Facts alleged do not support charge of gross negligence or intentional conduct.

The facts as alleged by plaintiffs are that Koffman landed on the ground and broke his arm when his coach demonstrated a tackling technique. The fact that plaintiffs' Motion for Judgment described this incident with emotional and colorful language does not change the fact that Koffman was injured during a teaching demonstration to the football team. At the very most, those facts *might* be sufficient to state a cause of action for simple negligence, but then plaintiffs' suit would be barred by sovereign immunity.

The *Lentz v. Morris* case also involved students playing tackle football. In that case, the plaintiff alleged that playing tackle football without protective equipment resulted in the plaintiff being injured when he was tackled with "great force and violence". *Id.* at 80, 372 S.E.2d at 609. The Virginia Supreme Court found that those facts did not support a charge of either gross negligence or intentional misconduct. Similarly, the facts in the instant case do not support a charge of the intentional torts of assault and battery, nor do they support a charge of gross

negligence.

Plaintiffs' gross negligence claim is based on an allegation that defendant abused his power and authority over Koffman by requiring him to participate in a tackling demonstration. However, implied in the facts alleged by plaintiffs is the notion that a coach is required to exercise authority over his players, both during games and practices. Such authority could reasonably be assumed to include participation in demonstration of football techniques. These facts are impliedly alleged by plaintiffs' own pleadings. The fact that Koffman suffered an injury during the demonstration does not create gross negligence.

Gross negligence as defined in the *Virginia Model Jury Instructions* requires a finding of, "such indifference to others as constitutes an utter disregard of caution amounting to a complete neglect of the safety of another person. It is such negligence as would shock fair-minded people, although it is something less than willful recklessness." *VMJI* 4.030. Requiring Koffman to participate in a tackling demonstration, albeit one in which Koffman was injured, clearly does not amount to gross negligence.

Therefore, because plaintiffs' pleadings do not state facts sufficient to establish a cause of action for assault and battery or gross negligence, defendant is protected from liability in this civil action by the doctrine of sovereign immunity.

D. Plaintiffs' Motion for Judgment fails to state a cause of action for punitive damages.

In order to state facts sufficient to establish a cause of action for punitive damages, plaintiffs must allege that defendant acted with actual malice toward Koffman or with willful and wanton disregard of the Koffman's rights. *Virginia Model Jury Instruction*, 9.080. Plaintiffs' Motion for

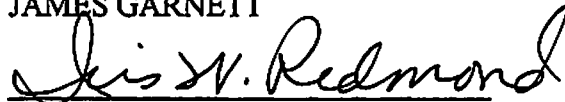
Judgment fails to specifically allege either fact. In addition, the facts that are alleged do not establish malice or willful and wanton conduct by the defendant toward Koffman. Therefore, plaintiffs' plea for punitive damages should be dismissed.

CONCLUSION

The facts as set forth by plaintiffs in their Motion for Judgment fail to state a cause of action for any intentional act, gross negligence, maliciousness, or willful and wanton conduct toward Koffman. Therefore, plaintiffs' Motion for Judgment should be barred against the defendant by the doctrine of sovereign immunity and his plea for punitive damages should be dismissed.

WHEREFORE, defendant Garnett respectfully requests that this Court sustain his Demurrer and dismiss plaintiffs' Motion for Judgment, and for such other and further relief as this Court may deem just and proper.

JAMES GARNETT

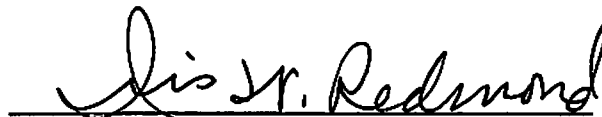


By Counsel

Iris W. Redmond
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 fax

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum of Law in Support of Defendant's Demurrer was sent via facsimile and mailed, postage prepaid, this 20th day of March, 2001 to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206.


Iris W. Redmond

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT

Defendant.

NOTICE TO TAKE DEPOSITIONS

TO: P. Brent Brown, Esquire
Carter, Brown & Osborne, P.C.
P. O. Box 13206
Roanoke, VA 24032-3206.

PLEASE TAKE NOTICE THAT on March 27, 2001, at 10:00 a.m., the deposition of witness Mark Wodie will be taken at the office of P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206, in accordance with the Rules of the Supreme Court of Virginia before a Notary Public or some other officer authorized to administer oaths. If for any cause the taking of the deposition be commenced and not be concluded, or not be commenced on that date, the taking thereof will be adjourned from day to day and from time to time until the same shall be completed. You are advised to appear and take such part as you deem appropriate.

JAMES GARNETT

FILED
IN THE CLERK'S OFFICE 11:05am
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 28 2001

TOMMY L. MOORE, CLERK
Catherine R. Tratholc


By Counsel

Iris W. Redmond, Esquire
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Deposition was sent via facsimile on this 26th day of March, 2001 to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206.


Iris W. Redmond

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT

Defendant.

NOTICE TO TAKE DEPOSITIONS

TO: P. Brent Brown, Esquire
Carter, Brown & Osborne, P.C.
P. O. Box 13206
Roanoke, VA 24032-3206.

PLEASE TAKE NOTICE THAT on April 5, 2001, at 1:30 p.m., the depositions of plaintiffs, Andrew W. Koffman, Richard Koffman and Rebecca Koffman will be taken at the office of P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206, in accordance with the Rules of the Supreme Court of Virginia before a Notary Public or some other officer authorized to administer oaths. If for any cause the taking of the depositions be commenced and not be concluded, or not be commenced on that date, the taking thereof will be adjourned from day to day and from time to time until the same shall be completed. You are advised to appear and take such part as you deem appropriate.

JAMES GARNETT

FILED
IN THE CLERK'S OFFICE 11:03 am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 28 2001

TOMMY L. MOORE, CLERK
Catherine R. Smith D.C.

James W. Redmond
By Counsel

Iris W. Redmond, Esquire
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Deposition was sent via facsimile on this 26th day of March, 2001 to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206.



Iris W. Redmond

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

MEMORANDUM IN OPPOSITION
TO DEMURRER

Case No.: 00000-159

COME NOW plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, and file this, their Memorandum in Opposition to defendant's demurrer, and move the court to dismiss the demurrer on the grounds hereinafter set forth:

**STATEMENT OF THE CASE AND FACTS RELEVANT TO DEFENDANT'S
DEMURRER**

On or about November 6, 2000, plaintiffs filed suit against defendant seeking recovery of damages incurred by plaintiff Andy Koffman ("Andy"). In their Motion for Judgment plaintiffs have alleged that defendant was grossly negligent and that he committed the intentional torts of assault and battery against Andy resulting in a broken humerus bone in Andy's arm and great pain of body and mind. Defendant demurred to plaintiffs' Motion for Judgment, and filed his "Memorandum of Law in Support of

Arter, Brown &
Sborne, P.C.
ATTORNEYS AT LAW
01 Franklin Road, S.W.
P.O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

FILED
IN THE CLERK'S OFFICE 10:50am
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAR 29 2001

TOMMY L. MOORE, CLERK
Catherine R. Erath D.C.

Defendant's Demurrer" with an incomplete summary of the facts that were alleged by plaintiffs in their Motion for Judgment.

Some of the allegations that defendant omitted in his Memorandum are as follows:

- a. Andy was thirteen years old at the time of the incident;
- b. the year in which the alleged assault and battery and grossly negligent

conduct of defendant took place was also Andy's first year playing organized football;

- c. Andy was on the third string of the team;
- d. the team had lost their first game of the season a few days earlier;
- e. defendant ordered his players to perform "The Cage" tackling drill because he was upset;

- f. defendant instituted "The Cage" drill upon the team as a harsh, punitive measure;

- g. during the drill defendant became irate because the players were not being aggressive enough;

- h. Andy did not contribute to defendant's perception of poor tackling performance because Andy was only a third string defensive player and had not even played a single down with the defensive unit;

- i. Andy had never carried the football in any game or scrimmage, and was unaccustomed to handling the football;

- j. defendant weighed well in excess of 220 pounds at the time of the incident;

- k. defendant ordered Andy to stand upright and motionless with the ball;

- l. defendant committed an unlawful assault and battery upon Andy;
- m. defendant suddenly thrust his arms around Andy, violently yanking Andy off his feet and slamming Andy into the ground like a tackling dummy and with the force of defendant's powerful frame weighing in excess of 220 pounds;
- n. defendant's attack upon Andy was unwarranted and offensive;
- o. prior to this assault no one had ever used such physical force or violence when instructing Andy on the rules and techniques of football;
- p. Andy did not expect, nor did he or his parents give their consent to the use of such physical force or violence;
- q. Andy was in a relaxed, vulnerable, passive and stationary position when defendant struck him;
- r. Andy was unaware that defendant would use such physical force and violence;
- s. defendant abused his position of authority and acted with recklessness and utter disregard for Andy's welfare and safety;
- t. defendant was so much larger and stronger than Andy that Andy reasonably believed defendant would not physically attack Andy;
- u. defendant's abuse of power and authority and exploitation of Andy, under the circumstances then and there existing constituted gross negligence by defendant;
- v. Andy's broken humerus bone and great pain of mind and body were proximately caused by defendant's gross negligence;

w. Andy's parents have incurred and will continue to incur in the future hospital, doctors and related bills in an effort to cure Andy of his injuries; and

In short, defendant omitted from his Memorandum those allegations that collectively present material issues of fact as to whether defendant committed an assault and battery against Andy, whether defendant's conduct was grossly negligent, and whether defendant's negligence was willful and/or wanton, all of which must be decided by a jury.

ARGUMENT

I. THE DOCTRINE OF SOVEREIGN IMMUNITY DOES NOT PROTECT DEFENDANT FROM PLAINTIFFS' PROPERLY PLEADED ALLEGATIONS OF GROSS NEGLIGENCE AND INTENTIONAL TORTS.

The law provides no sovereign immunity for defendant's actions that constitute gross negligence or intentional torts, and defendant has conceded as much.

Defendant's "Memorandum of Law in Support of Defendant's Demurrer", p. 2. See also Messina v. Burden, 228 Va. 301, 310-11, 321 S.E.2d 657, 662 (1984), and Coppage v. Mann, 906 F. Supp. 1025 (E.D. Va., 1995), citing Fox v. Deese, 234 Va. 412, 424, 362 S.E.2d 699 (1987)(defendant municipal employees not immune if evidence establishes that they committed intentional torts), and James v. Jane, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980)(state employee who acts in a grossly negligent manner is not protected by immunity).

II. DEFENDANT'S DEMURRER MUST FAIL BECAUSE PLAINTIFF'S CLAIM CONTAINS SUFFICIENT ALLEGATIONS OF MATERIAL FACTS TO INFORM DEFENDANT OF THE NATURE AND CHARACTER OF THE CLAIM AND PRESENTS MATERIAL ISSUES OF FACT THAT MUST BE RESOLVED BY A JURY.

In consideration of a demurrer the court must admit that all material facts properly pleaded are true. Catercorp, Inc. v. Catering Concepts, Inc., et al., 246 Va. 22, 431 S.E.2d 277, 279 (1993), Russo v. White, 241 Va. 23, 400 S.E.2d 160, 161 (1991), Rosillo v. Winters, 235 Va. 268, 270, 367 S.E.2d 717 (1988). Among the facts admitted are "all those expressly alleged, those that fairly can be viewed as impliedly alleged, and those that may be fairly and justly inferred from the facts alleged." Catercorp, at 22. Accordingly, in addition to those facts that are expressly alleged in plaintiffs' claim, amongst which are those listed in the summary above, the court must admit of the following facts, which can be viewed either as impliedly alleged or fairly and justly inferred from the facts alleged:

a. Defendant was angry and/or irate when he struck Andy with great physical force and violence. Defendant's actions were not borne of careful forethought and regard for Andy's safety. They were the result of anger that arose from frustration over a recent defeat followed by the defensive team's apparent lack of aggressiveness in practice. Defendant's anger led him to act in complete disregard for Andy's safety.

b. The encounter between Andy and defendant was not the ordinary player-on-player type of activity that normally takes place during football practice. This was a physical confrontation between two individuals of vastly different physical, mental and emotional characteristics: On the one hand Andy was physically young and comparatively small and slight of stature. He was inexperienced and unaccustomed to the manner of the conduct that he was about to experience. Mentally he was not prepared for what was about to happen to him. Defendant had instructed Andy to stand upright and motionless with the ball. Andy was vulnerable, passive and stationary when

he was struck. Defendant was aware of Andy's size and physical stature, and took no steps to curtail the violence with which he struck Andy, or to prepare Andy mentally or physically for the blow that he was about to receive.

On the other hand, defendant is very large and heavy, and was at the time aggressive, quick and forceful, using a level of violence that Andy was not prepared to counter. Under these circumstances, all of which are expressly alleged or can be fairly inferred from the allegations, reasonable men could differ as to whether defendant's actions constituted gross negligence, and as to whether his conduct was willful and/or wanton.

c. Because defendant was in part motivated by anger, and because his purpose was to engage in aggressive tackling of a student by a teacher who was much older and physically overwhelming, it may reasonably be inferred from the facts alleged that defendant intended to hurt Andy.

d. Neither Andy or either of his parents had given defendant their consent to defendant's use of such physical force and violence by a teacher against their son. By allowing Andy's willing participation in the football program up to that point, they consented to the use of that amount of force that is reasonable for a thirteen year old to expect from other players of roughly Andy's age, weight and size, i.e., Andy's team mates, and players on the other teams. Plaintiffs did not consent to the use of aggressive physical force and violence against Andy by a man many times Andy's age, weight and size.

e. Andy and his parents placed their trust in the coaching staff, and relied upon them to keep the games and practices safe for the participants.

Finally, plaintiffs allegations against defendant are specific enough to remove any uncertainty or doubt regarding the nature and character of the claims against defendant. Defendant's acts of physically attacking Andy, lifting him into the air and throwing him down to the ground with great force and violence were an assault and battery upon Andy, and constituted gross negligence.

- A. The court must deny defendant's demurrer as to Count II of plaintiffs' claim because, based on the facts alleged, fair minded people may differ as to whether defendant's actions constituted gross negligence.

The Supreme Court of Virginia has defined gross negligence as "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another." Meagher v. Johnson, 239 Va. 380, 383, 389 S.E.2d 310, 311 (1990), quoting Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971). Furthermore, "If fair minded people can differ respecting the conclusion that can be drawn from the evidence, a jury question is presented." Meagher, at 383, quoting Community Bus Company v. Windley, 224 Va. 687, 689, 299 S.E.2d 367, 369 (1983). See also Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987)("Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury Gross negligence is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another"), and Griffin v. Shively, 227 Va. 317, 320, 315 S.E.2d 210, 212 (1984)(gross negligence is generally an issue for the jury, and only becomes a question of law when reasonable minds cannot differ).

Plaintiffs have clearly and sufficiently alleged that defendant acted in complete and utter disregard for Andy's safety, particularly given all the circumstances of defendant's intentional attack upon Andy, including the physical characteristics of the two parties, defendant's instructions to Andy immediately prior to the attack, Andy's level of experience and state of mind leading up to the attack.

In Griffin v. Shively, the Supreme Court of Virginia drew a distinction between gross negligence and other more serious forms of negligence. The court stated that gross negligence is something less than willful recklessness, and that "willful or wanton negligence involves a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act or omission." Griffin, at 321.

In his Memorandum, defendant argues that plaintiffs' allegations do not support their claim of gross negligence because the court in Lentz v. Morris, 236 Va. 78, 372 S.E.2d 608 (1988) did not find sufficient facts alleged to support a claim for gross negligence. Lentz, at 82. The facts in Lentz that were material to the court's decision in that case are different from the facts alleged here in several critical areas. In Lentz, the plaintiff was injured when playing tackle football with other players. Id. at 80. The allegations in that case were that while the plaintiffs' injured party was playing tackle football with other students he was tackled (by other students) and sustained injuries. Id. Presumably the tackle that resulted in plaintiff's injuries in that case was motivated not by anger but simply out of the desire to tackle the plaintiff as part of the game. In this case plaintiffs have alleged that Andy was attacked not by other players, but by defendant, an adult that weighed in excess of 220 pounds at the time he struck Andy,

that defendant in this case was not motivated merely by the desire to tackle Andy, but rather by anger, and that defendant's purpose was not merely to tackle Andy, which presumably would have been very easy for defendant to do without injuring Andy, but rather a self-serving exercise in unchecked aggressiveness.

For a thirteen year old boy, "great force and violence" from another player of roughly equal size and weight is vastly different from "great force and violence" from an adult that weighs over 220 pounds.

B. The court must deny defendant's demurrer as to Count I of plaintiffs' claim because plaintiffs have properly pleaded the intentional torts of assault and battery.

Plaintiffs have properly pleaded all the elements of the torts of assault and battery, which include (1) defendant's intent to cause the contact between himself and Andy; (2) an attempt to touch, or an overt, threatening physical gesture; (3) the creation of a reasonable apprehension on Andy's part of an immediate battery; (4) offensive bodily contact; and (5) lack of privilege. Epps v. Commonwealth, 28 Va. App. 58, 502 S.E.2d 140, 141 (1998). See also *Personal Injury Law in Virginia*, Friend, Charles E., §§ 6.2.2, 6.3.1 (1990).

In their Motion for Judgment, plaintiffs have denied that they consented to defendant's violent physical attack upon Andy. Furthermore, as previously discussed, the only consent that may be inferred from Andy's participation on the team is consent to contact with other players whose age, weight and size are reasonably similar to Andy's. Reasonable minds may indeed differ about whether, when a thirteen year old boy signs up for football, he and/or his parents consent to him being tackled aggressively and violently by an adult two or three times his size and weight.

Finally, it has long been established in Virginia that "Consent cannot justify an assault." Miller v. Bennett, 190 Va. 162, 166, 56 S.E.2d 217, 219 (1949). Thus, consent is not a defense to plaintiffs' allegations that defendant committed the intentional torts of assault and battery upon Andy.

C. **The court must deny defendant's demurrer to plaintiffs' claim for punitive damages because plaintiffs have alleged an intentional tort.**

The Supreme Court of Virginia has held that "when a plaintiff pleads and proves an intentional tort under the common law of Virginia, the trier of fact may award punitive damages." Shaw v. Titan Corp., 255 Va. 535, 545, 498 S.E.2d 696, 701 (1998). See also Eslami v. Global One Communications, Inc., 48 Va. Cir. 17 (1999).

CONCLUSION

Plaintiffs have alleged sufficient facts upon which a jury could base compensatory and punitive damages awards for gross negligence, and assault and battery, and have created factual issues upon which reasonable minds could differ. For these reasons and others expounded above, defendant's demurrer should be overruled.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually.



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CERTIFICATE OF SERVICE

I, Patrick T. Fennell, hereby certify that a true and correct copy of the foregoing Memorandum in Opposition to Demurrer was mailed and sent by facsimile to Iris W. Redmond, MIDKIFF, MUNCIE & ROSS, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendant, this 28th day of March, 2001.



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ORIGINAL

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

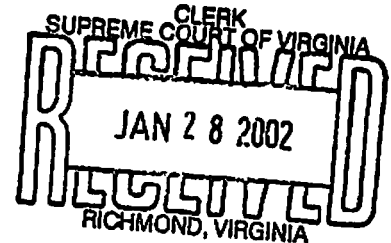
:
ANDREW W. KOFFMAN, an infant, :
by his father and next friend, :
RICHARD KOFFMAN, and his :
parents, RICHARD KOFFMAN and :
REBECCA KOFFMAN, individually, :
:

Plaintiffs

vs.

JAMES GARNETT,

Defendant



APRIL 5, 2001
10:00 A.M.

HEARD BEFORE:

THE HONORABLE GEORGE E. HONTS, III

FILED
IN THE CLERK'S OFFICE *10:50am* TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: NOV 01 2001

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By: IRIS W. REDMOND, ESQ.

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* * * * *

1 The following cause came on to be heard
2 on the 5th day of April, 2001, before the Honorable
3 George E. Honts, III, Judge of the Circuit Court for the
4 County of Botetourt, sitting at Fincastle, Virginia,
5 when the following proceedings were had:

6
7 (10:01 a.m.)

8 THE COURT: All right. Counsel ready
9 for the hearing?

10 MS. REDMOND: I don't know if you would
11 prefer me to go up to the podium.

12 THE COURT: Whatever you wish.

13 MS. REDMOND: I'll stay here, Your
14 Honor. This is our demurrer, and we've both
15 filed briefs. I'm not going to reiterate
16 everything that's in the briefs, Your Honor,
17 but I do want to focus on a few very salient
18 points.

19 I think that both sides are in agreement
20 that sovereign immunity would apply for simple
21 negligence but that there is an exception for
22 intentional torts or gross negligence.

23 And that, of course, is why the
24 plaintiffs have attempted to posture what we

1 see as a simple tackling technique
2 demonstration as an aggressive assault by a
3 coach on his student. Otherwise, they would
4 have no case because of the doctrine of
5 sovereign immunity.

6 In plaintiffs' responsive brief they
7 allege that we have left out crucial facts in
8 our brief. I disagree. I think that you will
9 see that the extraneous facts that the
10 plaintiff cites in their brief really make no
11 difference to the legal conclusions that must
12 be found from the core facts, and those core
13 facts are the facts that I have set forth in my
14 brief.

15 In summary, the differences I see
16 between what we have alleged are the core facts
17 in this case versus the extraneous facts are
18 these: The plaintiffs emphasize in their list
19 of facts in many different ways the age, size
20 and experience difference between Coach Garnett
21 and Andy Koffman.

22 I think that those facts themselves are
23 irrelevant to the fact that Andy voluntarily
24 became a member of a football team and from

1 that fact it is reasonable to infer that he
2 gave permission or consent for his coach to
3 demonstrate various football techniques
4 including hands-on demonstrations.

5 The emphasis on the relative sizes
6 between the two parties, I believe, Your Honor,
7 is also irrelevant because it is reasonable to
8 infer that there is going to be a significant
9 size difference between players in the
10 middle-school ages. We're talking about boys
11 who have developed and boys who have not, and
12 there's going to be a significant size
13 difference between the boys themselves.

14 In their brief they try to distinguish
15 the case of Lentz v. Morris by saying that was
16 a case where a student was tackled by another
17 student. This case is vastly different, they
18 assert, because it was a football coach and his
19 student that were involved.

20 That brings me to my next assertion,
21 Your Honor, that it is not reasonable to infer,
22 as the plaintiffs have done, that Coach Garnett
23 struck Andy. Their express allegation is that
24 he picked him up and that he fell to the

1 ground, not that he was struck in an actual
2 tackle, and their own pleadings set forth the
3 fact that Coach Garnett was demonstrating a
4 technique.

5 They allege that he was angry and
6 wanting to show the players what needed to be
7 done. We vigorously deny that he was angry.

8 But even accepting that fact as true,
9 which you would have to do on a demurrer, that
10 does not change the fact that this was a
11 demonstration to other students. This was not
12 an aggressive attack. It's just not reasonable
13 to infer that this was an aggressive attack by
14 Coach Garnett against one of his students.
15 He's not going to demonstrate anything to his
16 students by aggressively attacking one of them
17 in front of all of the other class.

18 It is also not reasonable to infer
19 that -- this is what I've just said but it
20 takes it one step up. The plaintiffs say that
21 Coach Garnett intended to hurt Andy. This is
22 not anything that they expressly alleged but
23 they say that that's a reasonable inference.

24 We assert, Your Honor, that that is a

1 ludicrous inference, that a coach would intend
2 to hurt one of his students in a demonstration
3 in front of all of his other students. These
4 facts just cannot be stretched that far.

5 For those reasons, the differences in
6 what we believe are correct implications from
7 the facts that the plaintiffs themselves have
8 expressly alleged as I've set forth in my
9 brief, that Andy was a member of the team, that
10 Coach Garnett was the coach, that he was
11 demonstrating a technique to the other students
12 and to Andy as well, mean that the plaintiffs
13 have not established facts sufficient to state
14 a cause of action for assault and battery.
15 They have not established that the plaintiff
16 was afraid by the battery or that the touching
17 was not consented to.

18 Again I refer you to my earlier argument
19 that as a member of this team it is entirely
20 reasonable to infer that in the contact sport
21 of football a coach will demonstrate techniques
22 to his students.

23 It is also reasonable to infer that Andy
24 knew what was about to happen. Otherwise, the

1 demonstration would have had no effect for the
2 other students. There had to be some
3 indication that a demonstration was about to
4 come forward.

5 The plaintiffs' own facts allege that
6 this demonstration resulted from
7 dissatisfaction on Coach Garnett's part with
8 how the students were tackling.

9 Certainly we have a different spin on
10 whether there was dissatisfaction and whether
11 or not he was angry about their lack of
12 tackling.

13 But again, assuming the facts as
14 alleged, their own allegation is that he was
15 trying to demonstrate a correct tackling
16 technique, and therefore, it would be
17 reasonable to assume that Andy knew what was
18 coming up, that there would be some statement,
19 "Kids, this is the way you do it." This is,
20 obviously, a fact that has not been alleged by
21 the plaintiffs, but I think it's reasonable to
22 infer that he would have knowledge of what was
23 about to happen.

24 And our contention, Your Honor, is that

1 the facts of this case as they exist, the core
2 facts, can never be made to state a cause of
3 action for assault and battery no matter how
4 they are pled, and therefore, that count should
5 be dismissed.

6 We also assert, Your Honor, that
7 reasonable minds could not differ as to whether
8 these facts amount to gross negligence. We
9 acknowledge the plaintiffs' contention that
10 gross negligence is a lesser negligence than
11 willful and wanton conduct, but it still
12 requires an utter disregard of caution and
13 neglect for the safety of others, and none of
14 these facts as alleged by the plaintiffs, that
15 Coach Garnett was desirous of demonstrating a
16 tackling technique to the rest of his team,
17 indicate any degree of utter disregard or
18 caution for the safety of his players.

19 In fact, to the contrary, it would be
20 reasonable to infer that a coach wants to
21 demonstrate proper tackling techniques not only
22 to accomplish a tackle but to protect the
23 safety of his own students.

24 Clearly some ways of tackling are safe

1 and some would certainly be dangerous for the
2 person who's doing the tackling. That does not
3 allow for a conclusion or an inference that
4 Mr. Garnett acted with gross negligence, with
5 utter disregard for the safety of his players.

6 Finally, we have asserted that the facts
7 do not support a plea for punitive damages.

8 The plaintiffs' own response to that is
9 they have alleged an intentional tort, and
10 certainly punitive damages may be awarded if an
11 intentional tort is proven, as the case they
12 cited, but it does not require that punitive
13 damages be awarded.

14 Even if an intentional tort is proven,
15 it still requires a finding of malice toward
16 the specific plaintiff or willful and wanton
17 conduct by the defendant.

18 Our assertion is that these facts do not
19 amount to gross negligence. Clearly they do
20 not amount to willful or wanton conduct, which
21 the plaintiffs admit is a greater standard of
22 negligence.

23 And there are no allegations, express or
24 implied, that Mr. Garnett had any malice toward

1 Andy specifically as a person.

2 Therefore, we would ask that the plea
3 for punitive damages be dismissed as well.

4 Thank you, Your Honor.

5 THE COURT: Gentlemen.

6 MR. FENNEL: Good morning, Judge.

7 THE COURT: Morning.

8 MR. FENNEL: May it please the Court,
9 Judge, we think that the actions of Coach
10 Garnett in this situation will shock the
11 conscience of most reasonable people. We think
12 that it will shock their conscience to think
13 that by allowing their child to participate in
14 a middle-school football program that parents
15 are giving their consent to their child being
16 tackled by a fully grown adult coach.

17 We think that this will be shocking to
18 most people for this reason: Parents are
19 typically very concerned about the safety and
20 well-being of their child. When a child
21 participates in a football program, the parents
22 have to be able to look to somebody and rely on
23 somebody to make sure that that football
24 program is a safe program.

1 In a case like this, naturally parents
2 will look to the person who is most directly
3 able to influence the program to make sure that
4 it is a safe program. In this case, they would
5 look towards the coaches.

6 The coaches are the people most directly
7 involved with the students and the players,
8 most directly able to make sure that this
9 program is a safe one.

10 So the parents place their trust in
11 these coaches to make sure that the program is
12 safe.

13 Naturally, when they find out that it is
14 not another student that is causing a very
15 serious injury to a student, to a player during
16 football practice but rather the coach, the
17 very coach who is entrusted with the safety of
18 these children and who these parents are
19 relying on to make sure that this is a safe
20 program, we think that will constitute a
21 shocking revelation to parents to realize that
22 their children could be subjected to this kind
23 of physical activity.

24 Andy's very safety was in the hands of

1 Coach Garnett. Coach Garnett had a
2 responsibility to make sure that this football
3 program was a safe one. And rather than making
4 sure that it is a safe program --

5 It wasn't just another player running up
6 and tackling Andy. It was Coach Garnett
7 wrapping his arms around Andy, picking him up
8 off the ground and thrusting him down to the
9 ground.

10 I would direct your attention to
11 Paragraphs 7 and 14 in our motion for judgment.
12 We didn't just say that he dropped him on the
13 ground. Coach Garnett lifted Andy two feet off
14 the ground -- Andy's feet were two feet off the
15 ground -- and he thrust him down to the ground.

16 This kind of physical activity we think
17 is shocking to most reasonable people, a coach
18 tackling a 13-year-old student.

19 When parents realize that middle-school
20 children may be tackled by fully grown adult
21 coaches in a manner as if the student himself
22 is a fully grown adult, we think that would be
23 quite shocking.

24 Now, this was an unprecedented move in

1 the football practices that were taking place.
2 Andy had never seen any coach attack or tackle
3 another student in any kind of manner during
4 any of the football practices. This type of
5 coach-on-player activity had never been done
6 before. Andy had never seen it before.

7 The coach wrapped his arms around Andy's
8 thighs, stood up straight, causing Andy's feet
9 to be two feet off the ground, and thrust him
10 down to the ground, caused a very bad injury.
11 The coach used the full force of his 220-plus
12 pounds.

13 This was a coach. This wasn't another
14 player.

15 The defense likes to call this a
16 demonstration. I don't think this was a
17 demonstration. Andy had seen lots of
18 demonstrations.

19 A demonstration, which is what Andy was
20 accustomed to, was when a coach might get down
21 next to a football player on the team, a
22 student, and he might crouch down and show him
23 the right position to stand in, he might show
24 him how to position his body, perhaps how to

1 contact the other players, anticipate the other
2 players' moves and that sort of thing.

3 This was not a demonstration. This was
4 the real thing. This was a real tackle. This
5 was Coach Garnett lifting up Andy and thrusting
6 him down to the ground.

7 The coach told Andy to stand up and hold
8 the football. Andy was expecting a
9 demonstration. That's what he had seen many
10 times before during practices. That's what
11 Andy expected. Completely out of the blue, and
12 very surprisingly to Andy, that's not what
13 happened.

14 THE COURT: Okay. If that's true, then
15 on the question of the assault and battery
16 where is your evidence supporting the creation
17 of the reasonable apprehension on Andy's party
18 of immediate battery? I mean, if he was sucker
19 punched on the thing, how did he anticipate
20 being battered?

21 MR. FENNEL: Well, he didn't have an
22 anticipation of the coach picking him up
23 because Andy didn't expect it. But Andy, once
24 he was picked up --

1 THE COURT: How else is he going to be
2 tackled if the coach doesn't touch him? This
3 is a contact sport.

4 MR. FENNEL: That's our point, Judge,
5 that the coach shouldn't have tackled him in
6 the first place.

7 The coach is not another player. Andy
8 didn't expect to be tackled by the coach. He
9 never expected to be tackled by the coach, and
10 we've alleged that in our motion for judgment.
11 Andy had seen lots of demonstrations, but it
12 was never a case where a coach actually tackled
13 another student.

14 The coach told Andy to stand up and hold
15 the football. He was expecting the coach to
16 come over and give him a demonstration but he
17 was not expecting a real live tackle.

18 Coach Garnett tackled Andy just like he
19 would tackle one of his peers, one of the other
20 coaches or some other full-grown adult, not a
21 13-year-old child.

22 We think it is grossly negligent for a
23 full-grown adult coach who is entrusted with
24 the safety of the children in the football

1 program to tackle a student the way that we
2 have alleged that Coach Garnett tackled Andy,
3 particularly when there are elements of
4 carelessness and anger and lack of concern for
5 the safety of Andy involved.

6 We have alleged very explicitly that
7 Coach Garnett was angry when he tackled Andy.
8 We have alleged that he was careless and that
9 he had no regard whatsoever for Andy's personal
10 safety.

11 THE COURT: You also allege he was a
12 third stringer. Was the coach mad at a third
13 stringer?

14 MR. FENNELL: The coach was mad at the
15 team because, number one, they had lost a game,
16 and number two, he didn't feel that they were
17 performing the way they should during the
18 practice.

19 And the coach, we feel, wanted to
20 impress upon the team an image of an
21 aggressive, violent and tough football player
22 tackling another football player. And that's
23 exactly what he did to Andy.

24 He wanted to impress upon those players

1 an image that would stick in their minds. So
2 he made it violent, he made it tough, he made
3 it aggressive.

4 And that's okay when it's a player on
5 player. If it was another player against Andy,
6 that would have been okay. But this was an
7 adult who had vastly more experience, he
8 weighed more than Andy, he's bigger than Andy,
9 and he just applied the full force of his
10 weight against a 13-year-old boy.

11 And when you add in the elements of
12 anger and carelessness and lack of prudence,
13 disregard for Andy's safety, all of which we
14 have alleged, we think that sufficiently
15 distinguishes it from Lentz v. Morris to create
16 a question in reasonable minds as to whether
17 that constituted gross negligence.

18 We think that Andy's participation in
19 the program did not constitute consent either
20 by Andy or his parents for a coach to tackle
21 Andy in the fashion that we've alleged in this
22 case. They might have consented for a student
23 to do it but not for a coach.

24 I believe that we have established

1 sufficient allegations in our motion for
2 judgment to create issues of fact upon which
3 fair-minded people can differ.

4 And I would also just quickly point out
5 that consciousness of the danger to Andy is not
6 required under Griffin v. Shively to establish
7 gross negligence.

8 And finally, quickly, on the assault and
9 battery, we believe that we've laid out all the
10 elements of an assault and a battery in the
11 motion for judgment, including an intent on the
12 coach's part to cause the contact and an actual
13 offensive touching.

14 We think there was a reasonable
15 apprehension once the coach wrapped his arms
16 around Andy that Andy was going to get hurt.
17 He was afraid. And we believe there was an
18 overt threatening physical gesture, and again,
19 no consent for coaches to tackle these children
20 in this manner.

21 Thank you, Judge.

22 MS. REDMOND: Your Honor, I don't want
23 to go over everything that I said before, and
24 I'm sure you don't want me to either. I just

1 want to focus on a couple of points.

2 In their argument plaintiffs have said
3 that the coach was mad at the team. Of course,
4 we vigorously deny he was mad. But even
5 assuming that was true, there was no specific
6 malice directed toward Andy. They're saying he
7 was unhappy with the whole team. That, I
8 think, right there knocks out any claim for
9 punitive damages. Unless there is some kind of
10 specific malice toward Andy, there cannot be
11 punitive damages, or unless something is
12 specifically directed at him, I don't think it
13 is going to amount to willful and wanton
14 conduct.

15 I think that the plaintiffs are
16 stretching to make a case for gross negligence.
17 They don't come close to making one for willful
18 and wanton. Therefore, I would ask that the
19 punitive damages be dismissed.

20 As far as the gross negligence, they
21 have asserted they pled specifically facts
22 regarding Mr. Garnett's carelessness, his anger
23 and his lack of concern for safety of the
24 students.

1 The only allegation I see here with
2 regard to any of those allegations is that they
3 allege that Mr. Garnett was angry. And as I
4 said previously, I don't think that that
5 affects whether they have stated a cause of
6 action in this case either for assault and
7 battery or for gross negligence.

8 If a coach is unhappy with his team,
9 which is certainly not the first time that that
10 would happen, it does not mean automatically
11 that he is going to be careless and have a lack
12 of concern for the safety of his players.

13 Additionally, the plaintiffs have
14 alleged in their assault and battery claim that
15 that the tackling of Andy -- and again, we
16 vigorously deny there was an actual tackle.

17 But even if you assume that he was
18 picked up and brought down to the ground,
19 there has been no allegation that his body was
20 laid out on top of Andy or anything like that
21 but that Andy hit the ground after he'd been
22 picked up.

23 Andy is a member of a football team. He
24 has seen at this point in time -- the facts of

1 this case have alleged they have already played
2 games, which means that they had already had
3 practices, weeks of practices before they
4 played their games. He had seen tackling
5 demonstrated, he had tackled other students,
6 other students had tackled him.

7 When Mr. Garnett wrapped his arms around
8 him, he could not have had a reasonable fear
9 for his safety at that time. He would expect a
10 tackling demonstration, which is what he had.

11 What we have here are facts that perhaps
12 amount to simple negligence, but I don't think
13 they even meet that. What they amount to are
14 facts that describe an accident.

15 A demonstration happened and the student
16 fell to the ground and fell in such a way that
17 a bone was broken. I do not think that a jury
18 is going to find that that shocks the
19 conscience.

20 The fact that the injury occurred when
21 contact occurred between the coach and student
22 does not rise to the level of shocking the
23 conscience. These same facts could have
24 occurred in tackling between two students of

1 disparate sizes.

2 In the Lentz v. Morris case the Court
3 found that it was not gross negligence when a
4 student was injured, and the allegation was
5 with great force and violence, by another
6 member of his team.

7 And again, we've had a lot of emphasis
8 on the difference in size between Mr. Garnett
9 and Andy Koffman. The Lentz v. Morris case
10 does not allege anything about the size of the
11 players. And it would be reasonable to infer
12 that if one player is injured by another that
13 there might be a difference in size.

14 The plaintiffs have alleged that Lentz
15 v. Morris involves tackling between students of
16 similar size but there is no such fact set
17 forth in Lentz v. Morris. The Court made a
18 finding that there was not gross negligence
19 when the tackling occurred between two players
20 and it was a tackle with great force and
21 violence.

22 I do not think the fact of picking up
23 Andy and dropping him to the ground can be
24 considered a tackle with great force and

1 violence.

2 Therefore, I don't think that the
3 plaintiffs have met their pleading requirements
4 and I don't think they can, Your Honor, meet
5 their pleading requirements for assault and
6 battery or for gross negligence.

7 Thank you.

8 THE COURT: All right. I'm going to
9 have something to you in a week's time; okay?
10 I'll look through your memoranda again. I
11 appreciate your arguments here. I'll get it to
12 you hopefully by next Friday.

13
14 (The hearing was concluded at 10:28
15 a.m.)

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* * * * *

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23

24

Commonwealth of Virginia

BOTETOURT COUNTY CIRCUIT COURT
P. O. BOX 110
FINCASTLE, VIRGINIA 24090
(540) 473-8310



ROCKBRIDGE COUNTY CIRCUIT COURT
COURTHOUSE SQUARE
LEXINGTON, VIRGINIA 24450
(540) 463-4758

JUDGE GEORGE E. HONTs, III

April 9, 2001

P. Brent Brown Esq.
Carter, Brown & Osborne, P.C.
P.O. Box 13206
Roanoke, VA 24032-3206

Iris W. Redmond Esq.
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235

Koffman v. Garnett

Dear Counsel:

This motion for judgment comes upon the defendant's demurrer essentially raising the doctrine of sovereign immunity on behalf of the defendant, a public school teacher and coach of a football team at a middle school.

Briefs were requested and presented. Both briefs set out the facts alleged and except to the extent it is necessary to do so here, those facts will not be recited. Suffice it to say that the plaintiff, a 13-year member of the school football squad, was chosen by the coach to be part of a demonstration of how to tackle an opponent. The defendant tackled the boy and took him to the ground. In the process, the boy suffered a broken bone. The plaintiff alleges the act was an intentional battery and/or conduct that amounted to gross negligence. The plaintiff also seeks punitive damages.

The physical facts are not in dispute. The plaintiff alleges the coach was angry at the team, that he used great force and violence, and that the coach was a man weighing approximately 220 pounds. It is not set out in the pleadings what the size of the plaintiff may have been, only that he was 13 years old at the time of the incident.

The football team was the school team and presumably engaged in interscholastic competition; the team had in fact lost its first game of the season involved. We do not forget as judges what we have known as ordinary persons, and football is a contact sport in which tackling is part of the game. Also, there is no evidence that membership on the football team is a requirement of or by the school.

We will address the three issues covered in the demurrer separately:

1. **Allegation of Intentional Tort:** Counsel for the defendant observed in her argument that the allegation of the coach's anger was directed toward the entire team and not toward the plaintiff individually. It is alleged the plaintiff was a third-string player rather than a starter and individual anger directed at the plaintiff for failure to perform satisfactorily is neither expressed nor can it be reasonably inferred.

The coach had the plaintiff stand, holding the ball, and had announced his intention of demonstrating appropriate, and no doubt aggressive, tackling technique. There is no allegation that the plaintiff protested his selection or refused to take part in the demonstration. The coach then tackled the plaintiff, raised him off the ground and took him to the ground where the impact occurred and the damage done.

While the defendant argues that anger, as alleged (and taken as true as it must be for these purposes), is irrelevant, we note the anger was generalized and the stated intention was to show proper technique. The plaintiff characterizes the act as not a demonstration but "a real tackle." The stated purpose was, in fact, to show how to perform "a real tackle." Anger, then, may not be totally irrelevant, but an intention to inflict injury and harm so as to constitute a willful tort does not necessarily flow therefrom. An intention to batter and inflict injury on the plaintiff cannot be reasonably inferred from these facts. Accordingly, the demurrer as to an intentional battery is sustained.

2. **Gross Negligence:** Gross negligence is defined by both counsel as an utter disregard of the rights of another. This was "a real tackle." The purpose of the demonstration was to show how to make "a real tackle." There are inherent risks in "a real tackle." The plaintiff does not allege the technique used by the defendant was inappropriate to that purpose. The plaintiff alleges that the defendant-coach, being a man of some 220 pounds, put his inordinately superior strength and weight to an improper use on a 13-year-old, and in doing so would shock the conscious of any reasonable person.

We note again the absence of a showing of the size or development of the plaintiff and note that, as counsel for the defendant argues, the plaintiff's consent to take part in the demonstration may be inferred.

The plaintiff contends, in argument, that there is a distinction between an injury sustained in a game, or practice, as a result of contact between one football player and another and one sustained as a result of the action of the coach. The difficulty the Court perceives with that argument is this: if the purpose of the demonstration is to instruct on the proper method of tackling, then the coach would be remiss if he sets one inexperienced player against another without instructing on the proper technique to be used to accomplish the purpose. By the same reasoning, he would be remiss to commit his players to a game without instructing them on what sort of contact may be expected to be made with them, or for them to make with opposing players.

The Court concludes there has been no showing of gross negligence on the part of the defendant. Accordingly the demurrer of the defendant is sustained.

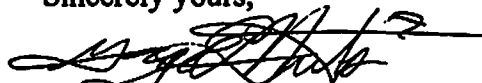
3. **Punitive Damages:** Punitive damages require a showing of an underlying intentional tort or conduct which is willful and wanton misconduct or malice. The Court has found no intentional tort underlying the conduct, nor has it found a showing of utter disregard of the rights

of another, a showing somewhat less than willful and wanton misconduct or malice. Accordingly the demurer of the defendant is sustained.

The defendant may have been negligent in his act. If so, that negligence was simple negligence and does not rise to a more insidious variety of malice. Accordingly, the Court finds that the doctrine of sovereign immunity applies to the defendant in these performances of his duties as an employee of the public school system and as coach of the school's football team.

Counsel for the defendant is directed to prepare an order in conformity herewith and present the same with appropriate endorsements and exceptions if any be taken.

Sincerely yours,



George E. Honts III

GEHIII/tjh

Cc: Mr. Tommy L. Moore, Clerk
Botetourt County Circuit Court

MIDKIFF, MUNCIE & ROSS, P.C.

ATTORNEYS AND COUNSELLORS AT LAW
9030 STONY POINT PARKWAY, SUITE 160
RICHMOND, VIRGINIA 23235

(804) 560-9600

FAX (804) 560-5997

HTTP://WWW.MIDKIFFLAW.COM

LUCIAN W. HINER
OF COUNSEL

April 9, 2001

Mr. Paul Yengst
30 West Franklin Street, Suite 203
Roanoke, Virginia 24011

VIA FEDERAL EXPRESS

Re: Andrew W. Koffman v. James Garnett
Case No. 00000-159
Claim No.: L3500-1962
Our File No.: 4301.237

Dear Mr. Yengst:

We have enclosed two (2) Subpoenas duces Tecum, along with two copies of each, and ask that you serve the subpoenas as soon as possible on Orthopaedic Surgery of Roanoke, Custodian of Records, 2110 Carolina Avenue, SW, Roanoke and Roanoke Community Hospital, Custodian of Records, 101 Elm Avenue, SE, Roanoke. Please return a copy of each subpoena to our office indicating the type of service obtained and your invoice.

Thank you for your attention to this matter.

Sincerely,


Iris W. Redmond

IWR/rd

Encls.

cc: Tommy L. Moore, Clerk (w/encls.)
Botetourt Circuit Court
Courthouse, Main Street, P.O. Box 219
Fincastle, Virginia 24090

P. Brent Brown, Esquire (w/encls.)
Carter, Brown & Osborne, P.C.
P.O. Box 13206
Roanoke, VA 24032-3206

FILED
IN THE CLERK'S OFFICE 11am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: APR 11 2001

TOMMY L. MOORE, CLERK
Catherine R. Smith O.C.

SUBPOENA DUCES TECUM (CIVIL) -
ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265;
Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: 00000-159

June 12, 2001 at 9:00 a.m.
HEARING DATE AND TIME

CIRCUIT COURT FOR THE COUNTY OF BOTETOURT
Main Street, P.O. Box 219
Fincastle, Virginia 24090

ANDREW W. KOFFMAN v. JAMES GARNETT

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

ROANOKE COMMUNITY HOSPITAL
Custodian of Records
101 Elm Avenue, SE
Roanoke, Virginia

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

SEE EXHIBIT "A" ATTACHED.

at 9030 Stony Point Parkway, Suite 160, Richmond, Virginia, 23235, on **APRIL 23, 2001 at 10:00 A.M.**

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of Defendant James Garnett.

Iris W. Redmond (Bar No. 32560)
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235
Telephone: (804) 560-9600

4/9/01

DATE ISSUED


SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:.....	
ADDRESS:.....	
<input type="checkbox"/> PERSONAL SERVICE	Tel. No.
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:	
<input type="checkbox"/> Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> not found, Sheriff
..... DATE	by Deputy Sheriff

CERTIFICATE OF COUNSEL

I, Iris W. Redmond, counsel for defendant, hereby certify that a copy of the foregoing Subpoena duces Tecum was mailed, postage prepaid, by First Class Mail, to plaintiff's attorney, P. Brent Brown, Carter, Brown & Osborne, Post Office Box 13206, Roanoke, Virginia, 24032-3206, on this 9th day of April, 2001.


IRIS W. REDMOND

EXHIBIT "A"

Please produce any and all medical records, including, but not limited to **actual x-ray films**, photographs and billing information regarding the plaintiff, **Andrew W. Koffman, DOB: 7-28-87; S.S. No.: 438-75-5739;** to be produced in the office of Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway Suite 160, Richmond, Virginia 23235 on or before APRIL 23, 2001 at 10:00 A.M.

NOTICE TO PROVIDERS:

IF YOU RECEIVE NOTICE THAT YOUR PATIENT HAS FILED A MOTION TO QUASH (OBJECTING TO) THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, SEND THE RECORDS ONLY TO THE CLERK OF THE COURT WHICH ISSUED THE SUBPOENA USING THE FOLLOWING PROCEDURE: PLACE THE RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT WHICH STATES THAT CONFIDENTIAL HEALTH CARE RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING THE COURT'S RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT.

SUBPOENA DUCES TECUM (CIVIL) –
ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265;
Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: 00000-159

June 12, 2001 at 9:00 a.m.
HEARING DATE AND TIME

CIRCUIT COURT FOR THE COUNTY OF BOTETOURT
Main Street, P.O. Box 219
Fincastle, Virginia 24090

ANDREW W. KOFFMAN v. JAMES GARNETT

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

ORTHOPAEDIC SURGERY OF ROANOKE

Custodian of Records
2110 Carolina Avenue, SW
Roanoke, Virginia

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

SEE EXHIBIT "A" ATTACHED.

at 9030 Stony Point Parkway, Suite 160, Richmond, Virginia, 23235, on APRIL 23, 2001 at 10:00 A.M.,

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of Defendant James Garnett.

Iris W. Redmond (Bar No. 32560)
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235
Telephone: (804) 560-9600

4/9/01
DATE ISSUED


SIGNATURE OF ATTORNEY

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NAME:.....

ADDRESS:.....

☐ **PERSONAL SERVICE**

Tel.
No.

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.....

☐ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ not found

....., Sheriff

..... by, Deputy Sheriff

DATE

CERTIFICATE OF COUNSEL

I, Iris W. Redmond, counsel for defendant, hereby certify that a copy of the foregoing Subpoena duces Tecum was mailed, postage prepaid, by First Class Mail, to plaintiff's attorney, P. Brent Brown, Carter, Brown & Osborne, Post Office Box 13206, Roanoke, Virginia, 24032-3206, on this 9th day of April, 2001.


IRIS W. REDMOND

EXHIBIT "A"

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In the Circuit Court for the County of Botetourt County, On Wednesday, the 11th day of April, in the year Two Thousand-one.

238

PRESENT: The Honorable George E. Honts, III, Judge of said Court.

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

ORDER

Case No.: 00000-159

THIS DAY came plaintiffs, by counsel, and moved this court for leave to amend their Motion for Judgment and increase the ad damnum contained therein, a copy of the said motion having been served upon defendant.

UPON CONSIDERATION WHEREOF, it appearing to the court that substantial justice will be promoted by allowing such amendment and that defendant will not be adversely affected thereby, it is


ORDERED that plaintiffs be, and they hereby are, granted leave to amend their Motion for Judgment as set forth in their Motion for Leave to Amend Motion for Judgment to Increase Ad Damnum, that plaintiffs' Amended Motion for Judgment, attached hereto, is hereby filed with this court, and that no additional pleading responsive to plaintiffs' Amended Motion for Judgment is required from defendant; and it is further

ORDERED that a copy of this order with enclosure be mailed to counsel of record.

ENTER this 11th day of April, 2001.

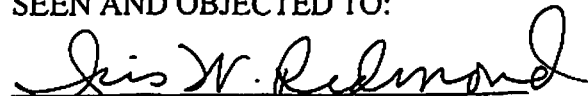

Judge

WE ASK FOR THIS:


P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
Telephone (540) 982-0234
Facsimile (540) 982-8102

Counsel for plaintiffs

SEEN AND OBJECTED TO:


Iris W. Redmond
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235-1939
Telephone: (804) 560-5997
Facsimile: (804) 560-5997

Counsel for defendant

SERVICE OTHER THAN BY VIRGINIA SHERIFF

Case No. 00000-159

VA. CODE 8.01-293, 8.01-320, 8.01-325

23-Apr-01

BOTETOURT COUNTY CIRCUIT

COURT

ANDREW KOFFMAN

v. JAMES GARNETT

SERVE > ROANOKE COMMUNITY HOSPITAL
MEDICAL RECORDS CUSTODIAN
101 ELM AVE SE
ROANOKE, VA

is the name and address of the person upon whom service of the following is to be made.

☒ SUBPOENA DUCES TECUM

☐


I, the undersigned swear/affirm that:

1. ☐ I am an official or an employee of an official who is authorized to serve process of type described in the attached Proof of Service and my title and bailiwick are:

or,

☒ I am a private process server.

2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.

3. I am over 18 years of age or older.

4. I served, as shown below, the above-named person upon whom service of process was to be made with copies described above.

- Date and time of service: 4/10/01 3:28 PM

- Place of service: SAME AS ABOVE

Street Address, City and State

- Method of service:

<input checked="" type="checkbox"/> personal service	<input type="checkbox"/> Other (allowed only in Virginia)
<input type="checkbox"/> Being unable to make personal service, a copy was delivered in the following manner: <input type="checkbox"/> Delivery to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of person to be served after giving information of its purport. List name, age of recipient, and relation of recipient to party: 6-3 yr old	
<input type="checkbox"/> Posted on front door or such other door as appears to be the main entrance of usual place of abode (other authorized recipient not found).	

APR 10 2001

DATE

Paul Yengst
SIGNATURE

Name (Print or Type)

PAUL YENGST

State of Virginia

☒ City

☐ County of Roanoke

FILED
IN THE CLERK'S OFFICE 11:20am
BOTETOURT COUNTY CIRCUIT COURT

Subscribed and sworn to/affirmed before me this day by the above named process server

TESTE: APR 19 2001

APR 10 2001

DATE

Tommy L. Moore
NOTARY PUBLIC
Catherine E. Smith D.C.

My Commission Expires: MAY 31 2004

PAUL YENGST & ASSOCIATES, INC.

P.O. BOX 2525 ROANOKE, VA 24010

540-343-1312

***** SERVICE SINCE 1985

SUBPOENA DUCES TECUM (CIVIL) –
ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265;
Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: 00000-159

June 12, 2001 at 9:00 a.m.
HEARING DATE AND TIME

CIRCUIT COURT FOR THE COUNTY OF BOTETOURT
Main Street, P.O. Box 219
Fincastle, Virginia 24090

ANDREW W. KOFFMAN v. JAMES GARNETT

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at 9030 Stony Point Parkway, Suite 160, Richmond, Virginia, 23235, on **APRIL 23, 2001 at 10:00 A.M.**

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of Defendant James Garnett.

Iris W. Redmond (Bar No. 32560)
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235
Telephone: (804) 560-9600

4/9/01

DATE ISSUED


SIGNATURE OF ATTORNEY

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<input type="checkbox"/> not found, Sheriff
..... DATE	by, Deputy Sheriff

CERTIFICATE OF COUNSEL

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IRIS W. REDMOND

EXHIBIT "A"

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<input type="checkbox"/> not found, Sheriff
DATE	by, Deputy Sheriff

CERTIFICATE OF COUNSEL

I, Iris W. Redmond, counsel for defendant, hereby certify that a copy of the foregoing Subpoena duces Tecum was mailed, postage prepaid, by First Class Mail, to plaintiff's attorney, P. Brent Brown, Carter, Brown & Osborne, Post Office Box 13206, Roanoke, Virginia, 24032-3206, on this 9th day of April, 2001.


IRIS W. REDMOND

EXHIBIT "A"

Please produce any and all medical records, including, but not limited to **actual x-ray films**, photographs and billing information regarding the plaintiff, **Andrew W. Koffman, DOB: 7-28-87; S.S. No.: 438-75-5739;** to be produced in the office of Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway Suite 160, Richmond, Virginia 23235 on or before APRIL 23, 2001 at 10:00 A.M.

NOTICE TO PROVIDERS:

IF YOU RECEIVE NOTICE THAT YOUR PATIENT HAS FILED A MOTION TO QUASH (OBJECTING TO) THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, SEND THE RECORDS ONLY TO THE CLERK OF THE COURT WHICH ISSUED THE SUBPOENA USING THE FOLLOWING PROCEDURE: PLACE THE RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT WHICH STATES THAT CONFIDENTIAL HEALTH CARE RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING THE COURT'S RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT.

SERVICE OTHER THAN BY VIRGINIA SHERIFF

Case No. 00000-159

VA. CODE 8.01-293, 8.01-320, 8.01-325

23-Apr-01

BOTETOURT COUNTY CIRCUIT

COURT

ANDREW KOFFMAN

v. JAMES GARNETT

SERVE > ORTHOPEDIC SURGERY OF ROANOKE
MEDICAL RECORDS CUSTODIAN
2110 CAROLINA AVE
ROANOKE, VA

is the name and address of the person upon whom service of the following is to be made.

☒ SUBPOENA DUCES TECUM

I, the undersigned swear/affirm that:

1. ☐ I am an official or an employee of an official who is authorized to serve process of type described in the attached Proof of Service and my title and bailiwick are:

or,

☒ I am a private process server.

2. I am not a party to, or otherwise interested in, the subject matter in controversy in this case.

3. I am over 18 years of age or older.

4. I served, as shown below, the above-named person upon whom service of process was to be made with copies described above.

- Date and time of service: 4/11/01 9⁵² AM

- Place of service: SAME AS ABOVE

Street Address, City and State

- Method of service:

☒ personal service☐ Other (allowed only in Virginia)☐ Being unable to make personal service, a copy was delivered in the following manner:☐ Delivery to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of person to be served after giving information of its purport.

List name, age of recipient, and relation of recipient to party:

Angie Talbot

☐ Posted on front door or such other door as appears to be the main entrance of usual place of abode (other authorized recipient not found).

APR 11 2001

DATE

Name (Print or Type)

State of Virginia

☒ City☐ County of Roanoke

Subscribed and sworn to/affirmed before me this day by the above named process server

APR 11 2001

DATE

Paul Yengst
SIGNATURE
PAUL YENGST

FILED
IN THE CLERK'S OFFICE 11:20 AM
BOTETOURT COUNTY CIRCUIT COURT

TESTE: APR 19 2001

TOMMY L. MOORE, CLERK
Catherine R. Smith D.C.

Man a. W.

NOTARY PUBLIC

My Commission Expires: MAY 31 2004

PAUL YENGST & ASSOCIATES, INC.

P.O. BOX 2525 ROANOKE, VA 24010

540-343-1312

SERVICE SINCE 1985

SUBPOENA DUCES TECUM (CIVIL) –
ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265;
Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: 00000-159

June 12, 2001 at 9:00 a.m.
HEARING DATE AND TIME

CIRCUIT COURT FOR THE COUNTY OF BOTETOURT
Main Street, P.O. Box 219
Fincastle, Virginia 24090

ANDREW W. KOFFMAN v. JAMES GARNETT

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

ORTHOPAEDIC SURGERY OF ROANOKE

Custodian of Records
2110 Carolina Avenue, SW
Roanoke, Virginia

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

SEE EXHIBIT "A" ATTACHED.

at 9030 Stony Point Parkway, Suite 160, Richmond, Virginia, 23235, on APRIL 23, 2001 at 10:00 A.M.,

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of Defendant James Garnett.

Iris W. Redmond (Bar No. 32560)
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235
Telephone: (804) 560-9600

4/9/01

DATE ISSUED


SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:.....	
ADDRESS:.....	
<input type="checkbox"/> PERSONAL SERVICE	Tel. No.
Being unable to make personal service, a copy was delivered in the following manner:	
<input type="checkbox"/> Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:	
<input type="checkbox"/> Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)	
<input type="checkbox"/> not found, Sheriff
DATE	by, Deputy Sheriff

CERTIFICATE OF COUNSEL

I, Iris W. Redmond, counsel for defendant, hereby certify that a copy of the foregoing Subpoena duces Tecum was mailed, postage prepaid, by First Class Mail, to plaintiff's attorney, P. Brent Brown, Carter, Brown & Osborne, Post Office Box 13206, Roanoke, Virginia, 24032-3206, on this 9th day of April, 2001.


IRIS W. REDMOND

EXHIBIT "A"

Please produce any and all medical records, including, but not limited to **actual x-ray films**, photographs and billing information regarding the plaintiff, **Andrew W. Koffman, DOB: 7-28-87; S.S. No.: 438-75-5739**; to be produced in the office of Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway Suite 160, Richmond, Virginia 23235 on or before APRIL 23, 2001 at 10:00 A.M.

NOTICE TO PROVIDERS:

IF YOU RECEIVE NOTICE THAT YOUR PATIENT HAS FILED A MOTION TO QUASH (OBJECTING TO) THIS SUBPOENA, OR IF YOU FILE A MOTION TO QUASH THIS SUBPOENA, SEND THE RECORDS ONLY TO THE CLERK OF THE COURT WHICH ISSUED THE SUBPOENA USING THE FOLLOWING PROCEDURE: PLACE THE RECORDS IN A SEALED ENVELOPE AND ATTACH TO THE SEALED ENVELOPE A COVER LETTER TO THE CLERK OF COURT WHICH STATES THAT CONFIDENTIAL HEALTH CARE RECORDS ARE ENCLOSED AND ARE TO BE HELD UNDER SEAL PENDING THE COURT'S RULING ON THE MOTION TO QUASH THE SUBPOENA. THE SEALED ENVELOPE AND THE COVER LETTER SHALL BE PLACED IN AN OUTER ENVELOPE OR PACKAGE FOR TRANSMITTAL TO THE COURT.

SUBPOENA DUCES TECUM (CIVIL) –
ATTORNEY ISSUED VA. CODE §§ 8.01-413, 16.1-89, 16.1-265;
Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: 00000-159

June 12, 2001 at 9:00 a.m.
HEARING DATE AND TIME

CIRCUIT COURT FOR THE COUNTY OF BOTETOURT
Main Street, P.O. Box 219
Fincastle, Virginia 24090

ANDREW W. KOFFMAN v. JAMES GARNETT

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SEE EXHIBIT "A" ATTACHED.

at 9030 Stony Point Parkway, Suite 160, Richmond, Virginia, 23235, on **APRIL 23, 2001 at 10:00 A.M.**

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of Defendant James Garnett.

Iris W. Redmond (Bar No. 32560)
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, Virginia 23235
Telephone: (804) 560-9600

4/9/01
DATE ISSUED


SIGNATURE OF ATTORNEY

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TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME:.....

ADDRESS:.....

☐ PERSONAL SERVICE

Tel.

No.

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:

☐ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ not found

....., Sheriff

by, Deputy Sheriff

DATE

CERTIFICATE OF COUNSEL

I, Iris W. Redmond, counsel for defendant, hereby certify that a copy of the foregoing Subpoena duces Tecum was mailed, postage prepaid, by First Class Mail, to plaintiff's attorney, P. Brent Brown, Carter, Brown & Osborne, Post Office Box 13206, Roanoke, Virginia, 24032-3206, on this 9th day of April, 2001.


IRIS W. REDMOND

EXHIBIT "A"

Please produce any and all medical records, including, but not limited to **actual x-ray films**, photographs and billing information regarding the plaintiff, **Andrew W. Koffman, DOB: 7-28-87; S.S. No.: 438-75-5739;** to be produced in the office of Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway Suite 160, Richmond, Virginia 23235 on or before APRIL 23, 2001 at 10:00 A.M.

NOTICE TO PROVIDERS:

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VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

V.

JAMES GARNETT,

Defendant.

**MOTION FOR LEAVE TO AMEND
MOTION FOR JUDGMENT**

Case No.: 00000-159

COME NOW the Plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, pursuant to Rule 1:8 of the Rules of the Supreme Court of Virginia, and move this Court for leave to amend their Motion for Judgment to add additional allegations relevant to this action, as more fully set forth in plaintiffs' Second Amended Motion for Judgment attached hereto as Exhibit A, on the grounds that such amendments will further the ends of justice.

WHEREFORE, Plaintiff, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, request that the aforesaid Motion be granted, and that the court accept as properly filed the Second Amended Motion for Judgment attached hereto as Exhibit A.

Carter, Brown & Osborne, P.C.
ATTORNEYS AT LAW
1401 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

FILED
IN THE CLERK'S OFFICE 11:25am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: APR 26 2001

TOMMY L. MOORE CLERK
Catherine R. Gath P.C.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually

By: Patrick T. Fennell
Of Counsel

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Patrick T. Fennell, hereby certify that a true and correct copy of the foregoing Motion for Leave to Amend Motion for Judgment was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 25th day of April, 2001.

Patrick T. Fennell
Patrick T. Fennell

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
1401 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

General Counsel
Federal Bureau of Investigation
Washington, D.C.

EXHIBIT A

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

NOTICE OF HEARING

Case No.: 00000-159

PLEASE TAKE NOTICE that on the 12th day of June, 2001, at 11:00 a.m., in the Circuit Court for the County of Botetourt, the undersigned will move the Court to grant Plaintiff's Motion for Leave to Amend Motion.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually

By: Patrick T. Fennell

Of Counsel

P. Brent Brown
Patrick T. Fennell
CARTER, BROWN & OSBORNE, P.C.
P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiff

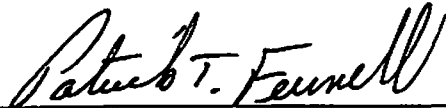
FILED
IN THE CLERK'S OFFICE 11:20 AM
BOTETOURT COUNTY CIRCUIT COURT

TESTE: MAY 11 2001

TOMMY L. MOORE, CLERK
Catherine R. Gauthier D.C.

CERTIFICATE OF SERVICE

I, Patrick T. Fennell, hereby certify that a true and correct copy of the foregoing Notice of Hearing was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 10th day of May, 2001.



Patrick T. Fennell

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
1401 Franklin Road, S.W.
P. O. Box 13206
Roanoke, Virginia 24032-3206
540-982-0234

020439
ORIGINAL

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BOTETOURT

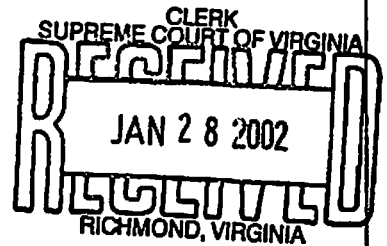
----- :
ANDREW W. KOFFMAN, :
an infant, by his father and :
next friend, Richard Koffman, :
and his parents, Richard Koffman :
and Rebecca Koffman, individually, :
:

Plaintiffs :
:

-vs- :
:

JAMES GARNETT, :
:

Defendant :
----- :
:



JUNE 12, 2001
11:00 a.m.

HEARD BEFORE:

THE HONORABLE GEORGE E. HONTA, III

FILED
IN THE CLERK'S OFFICE *4:30 PM*
BOTETOURT COUNTY CIRCUIT COURT

TESTE: JAN 02 2002

TOMMY L. MOORE, CLERK

[Signature] D.C.

CENTRAL VIRGINIA REPORTERS
P. O. Box 12628
Roanoke, Virginia 24027
(540) 380-5017

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APPEARANCES:

CARTER, BROWN & OSBORNE, ESQS.
Roanoke, Virginia
BY: P. BRENT BROWN, ESQ.

Counsel on Behalf of Plaintiffs

MIDKIFF, MUNCIE & ROSS, ESQS.
Richmond, Virginia
BY: IRIS W. REDMOND, ESQ.

Counsel on Behalf of Defendant

1
2 The following cause came onto be heard
3 before the Honorable George E. Honts, III, Judge
4 of the Circuit Court for the County of Botetourt,
5 sitting at Fincastle, Virginia on this, the 12th
6 day of June, 2001 when the following was had:

7
8 (The Court Reporter, Lisa M. Hooker, RPR
9 was duly sworn.)

10
11 THE COURT, THE HONORABLE GEORGE E. HONTs,
12 III: All right. Your motion, I assume, Mr.
13 Brown?

14 MR. BROWN: Yes, Your Honor. We're here
15 today on Plaintiff's motion to amend the Motion
16 for Judgment, and a copy of the amended Motion for
17 Judgment I believe has been filed with the Court.

18 THE COURT: I think it has.

19 MR. BROWN: This event occurred on
20 September 18 of 2000. The suit was filed on
21 November 6 of 2000, and eight months later, we
22 come before you, after having now taken three
23 depositions and having been heard on the
24 Defendant's demurrer, and you having issued an

1 opinion from a hearing on April 5.

2 THE COURT: Yes.

3 MR. BROWN: Our motion is to amend the
4 pleadings, to conform the pleadings to what we now
5 know the evidence will be and includes the
6 information that we did not have before. We cite
7 the Court to Rule 1:8, which I'm sure the Court is
8 well aware of, that leave to amend should be
9 liberally granted in furtherance of the leave of
10 justice.

11 No trial date has been currently set or
12 scheduled in this case, so there is no prejudice
13 to the Defendant and no prejudice -- no case at
14 all that the Plaintiff has sat on his rights in
15 this case at all, and this case has moved on
16 extremely fast.

17 There was a previous request for an
18 amendment for the addendum, which was done. I do
19 cite the Court to Peterson v. Castano,
20 260 Va. 299 2000, which is the latest word from
21 the Virginia Supreme Court where it was found that
22 the trial court abused its discretion in failing
23 to provide a leave to amend where there was no
24 prejudice to the Defendant.

1 Now, the changes or the additions to the
2 Motion for Judgment, if the Court would like to
3 make this a little bit easier, I've put in yellow
4 marker. I will give you a copy, too. Then I can
5 just summarize.

6 MS. REDMOND: You could have mine.

7 MR. BROWN: I hope that it is pretty
8 close. The first change is to make a specific
9 allegation of anger, that he was angry, and there
10 was testimony that his face was red in the
11 depositions. Basically, he lost his temper and
12 became angry and took that anger out on a
13 particular student, and that is what we allege.

14 Your opinion on the demurrer stated that he
15 was angry, but when I looked at our initial Motion
16 for Judgment, we used the word "irate." Maybe
17 they are equivalent, but it needs to be cleaned up
18 to allege, especially based on new information,
19 that he was angry. The second is the weight, the
20 relative size of the two individuals that are
21 involved.

22 THE COURT: Okay.

23 MR. BROWN: We did not have that
24 information and we requested it at the other, so

1 we went back and looked at medical records for the
2 child and then took the deposition of the
3 Defendant and got the relative weights. It's 144
4 for the child and 260, almost twice the child's
5 weight, for the adult coach. That has been added
6 in there.

7 The other new allegation that clarifies
8 what was going on is that the child was standing
9 upright and motionless. This was not a normal
10 tackle, where you would be down in a protective
11 stance, and we've alleged, and I think that we
12 will be able to prove surely, that this is not a
13 normal or customary or safe stance in which to
14 receive a tackle, and that is what is new in here,
15 and we talk about snapping the second largest and
16 strongest bone in the body, and we specifically
17 alleged in Paragraph 7 that conduct was motivated
18 by his irritation and anger, so it was irritation
19 at the failure of play of the Defendants, and it
20 is true, as you pointed out in your opinion, that
21 the anger was not specifically at this child, but
22 this is no different than somebody getting angry
23 at their wife when they get home and striking
24 their own child. It is a transfer of anger, and

1 again, the gravamen of our case here is that he
2 lost his temper and the child was standing
3 straight up.

4 The other difference that we have here is
5 that the clarification of the violation of the
6 trust and the expectancy, neither of these types
7 of activities had never gone on before, and
8 although we stated it, I think it states quite
9 clearly in here now that there was no consent to
10 this, to this activity of the coach taking
11 somebody, standing them straight up, getting angry
12 at them and throwing them down, and I guess that
13 it's coming in on the analogy of a physician who
14 certainly may have consent to do an operation, but
15 that consent doesn't extend to operating on the
16 wrong leg or to doing something different than the
17 consent allows.

18 Consent is an issue of fact that ought to
19 be decided in the view of the Plaintiff by a Jury,
20 certainly after hearing some evidence on whether
21 or not there was consent, so I think the way that
22 we've added Paragraph 9 in there to specifically
23 allege lack of consent is what is new there.

24 Then I think that you'll see on Page -- in

1 Paragraph 16 and 17 have been added, where we've
2 added "No coach, including Garnett had ever used
3 aggressive physical force to instruct him," and
4 goes on through there, "in violation of the trust
5 and an intentional act of lifting him up,
6 snatching him off his feet," and it was motivated
7 by the anger, and again, 17, the consent issue, so
8 those are what the changes are.

9 I think that we're here today on the
10 request to amend. This request was made in good
11 faith, based on information, and is not unusual
12 after a demurrer and it's not unusual after
13 discovery to be able to obtain information, and it
14 ought to be included.

15 THE COURT: All right.

16 MR. BROWN: And based on the rule and the
17 case law, we respectfully ask that the Judge allow
18 us to amend this Motion for Judgment.

19 MS. REDMOND: Well, Your Honor, our
20 argument, of course, is going to be that the
21 proposed amendment is still not stating facts that
22 would survive a demurrer, and we'll certainly file
23 a demurrer again if there is an amendment
24 allowed.

1 As to the motion to amend itself, I believe
2 that a lot of what was allegedly added -- I mean,
3 there is language added, was alleged in the motion
4 -- the first Motion for Judgment, so I don't
5 think that there is much that is added to this
6 amended Motion for Judgment.

7 Just to go down the points stated by
8 counsel, they said that they added that he was
9 angry. There was an allegation of anger in
10 addition to the words that amounted to anger.
11 Paragraph 1 of Count II says that he was angered
12 by what you perceived to be the poor tackling
13 performance, so all of that is not new. The
14 weight is new. Your Honor, I'm not sure whether
15 you want me to address what our arguments would be
16 on a demurrer.

17 THE COURT: No.

18 MS. REDMOND: So I will just address the
19 amendment. I will admit that the weight is new,
20 and that they are alleging that he was not in a
21 safe stance in which to receive a tackle, although
22 they had already alleged that he was standing --
23 ordered to stand upright and motionless with the
24 ball.

1 Again, the motivation by anger, that is not
2 a new allegation. They allege that he was angry;
3 they allege that he was previously -- they alleged
4 that he was upset at their poor tackling
5 performance. Again, there is nothing added that
6 would be an allegation of anger specifically
7 directed at the Plaintiff, so our contention is
8 that that is nothing new.

9 The consent was already -- the lack of
10 consent was already alleged. In Paragraph 10,
11 they very clearly set forth that prior to this
12 assault, that Andy -- neither Andy nor his parents
13 consented to physical force or violence by the
14 coaches to instruct Andy on the rules and
15 techniques employed in football. In addition, in
16 Count II, the allegation that no coach had ever
17 done that previously was already there. That was
18 not a new allegation in Paragraph 16. I don't
19 know about that he's highlighted that, but there
20 was -- yes, he did highlight that, but I think if
21 you look at the Motion for Judgment, original
22 Paragraph 16, that that is a new allegation.

23 They allege in the first Motion for
24 Judgment that no coach had done that previously,

1 and they specifically allege the consent -- the
2 lack of consent in Paragraph 10, so therefore,
3 Paragraph 9 really adds nothing to their Motion
4 for Judgment.

5 The reference to the break, that he snapped
6 -- his right humerus was snapped and it's the
7 largest strong and strongest bone in the body
8 again does not add anything additional to the
9 Motion for Judgment. The original Motion for
10 Judgment said that he suffered a broken humerus
11 bone and had suffered great pain of body and
12 mind. Adding some more colorful language about --
13 and more descriptive language about the break
14 itself does not change the essence of the facts
15 alleged, which is that he suffered a broken bone
16 and had great pain and suffering.

17 Again, the motivation to anger that is
18 alleged in that same paragraph is not anything
19 new. Really, the only thing new in this Motion
20 for Judgment is the factual allegation about the
21 weight of Andy, and I don't think, Your Honor,
22 that that would -- is justification to allow a
23 motion to amend this Motion for Judgment. Again,
24 that is specifically without addressing any of our

1 demurrer issues.

2 THE COURT: I understand; I don't want you
3 to do that.

4 MR. BROWN: Your Honor, this is a classic
5 case where Rule 1:8 should apply, and that
6 "liberally" is the word that is used, and I can't
7 overemphasize enough that if we had been in a
8 situation where we're four years down the road and
9 I'm suddenly making these kinds of changes in this
10 case, then I think that would give pause to the
11 Court, but given the history of this case and the
12 circumstances of this case, this Plaintiff is
13 entitled to go forward with their best case, and
14 that doesn't address the issue of what your
15 decision may be on the demurrer.

16 THE COURT: I understand that. I think
17 that it's more in the phraseology. This, I think,
18 puts the case potentially in a posture where it
19 raises by the form of the pleading the possibility
20 of an individual's action that may take it out
21 from under the exceptions that exist. I'm not
22 saying that it does, but I think that it's
23 sufficient to grant your motion, and I do so, and
24 you can have this copy back and prepare some Order

1 to that effect, and Ms. Redmond, you get your
2 demurrer in order and we'll see you all later.

3 MS. REDMOND: All right; thank you, sir.

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5 (The Proceedings were concluded.)

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In the Circuit Court for the County of Botetourt, on Monday, the 25th day of June, in the year Two Thousand-one.

405

PRESENT: The Honorable George E. Honts, III, Judge of said Court.

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.


Case No.: 00000-159

ORDER

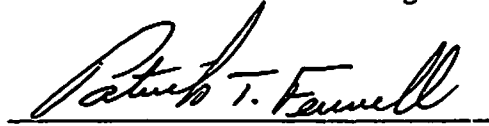
On April 5, 2001, came defendant, in person, and by counsel and plaintiffs, by counsel, upon defendant's Demurrer filed in this action. And the Court having considered the parties' Memoranda previously filed in this matter and having heard oral argument, it is accordingly ORDERED that the defendant's Demurrer as to Count I (assault and battery) and the claim for punitive damages derivative therefrom is sustained and that the Demurrer to Count II for plaintiffs' Motion for Judgment (gross negligence) is sustained. the Court being of the opinion that the facts as alleged in the Motion for Judgment are not sufficient to overcome the application of sovereign immunity to the defendant in the performance of his duties as an employee of the public school system and as coach of the school's football team.

WHEREUPON on April 26, 2001, the plaintiffs lodged with the Court their Second Amended Motion for Judgment and requested leave to file the same, to which the defendant objected. On the 12th day of June, 2001, appeared the defendant in person and by counsel, and

the plaintiffs by counsel, upon plaintiffs' motion for leave to file the Second Amended Motion for Judgment. And the Court, having examined the pleading and having heard the arguments of counsel, finds the ends of justice would be furthered by allowing such amendment, and that the defendant will not be prejudiced, it is accordingly ORDERED that plaintiffs' Second Amended Motion for Judgment is hereby filed and defendant shall file a response within 21 days of the date of the entry of this ORDER.

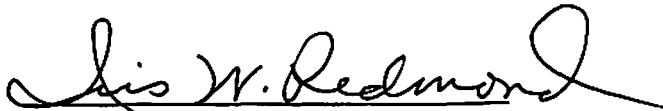
28 June 2001

 HONORABLE GEORGE E. HONTs, III
 Judge, Botetourt County Circuit Court

SEEN AND AGREED to in part and objected to in part as follows: Plaintiffs' request entry of this ORDER in regard to the granting of leave to file the Second Amended Motion for Judgment, and object and except to the granting of defendant's Demurrers to Counts I and II of plaintiffs' Motion for Judgment, and to the claim of full punitive damages for the reasons set forth in plaintiffs' Memorandum in Opposition to Demurrer and for the reasons set forth in the oral arguments on April 5, 2001.


 P. Brent Brown
 Patrick T. Fennell
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 P. O. Box 13206
 Roanoke, Virginia 24032-3206
 Telephone: (540) 982-0234
 Fax: (540) 982-8102

Counsel for Plaintiff

SEEN AND AGREED to in part and objected to in part as follows: Defendant requests entry of this Order in regard to the Court's sustaining defendant's Demurrer to Counts I and II and the punitive damage claim of plaintiffs' Motion for Judgment and object and except to the Court's granting plaintiffs leave to file their Second Amended Motion for Judgment for the reasons set forth in defendant's Memorandum and in oral argument on the Motion on June 12, 2001.



Iris W. Redmond
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9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
Telephone: (804) 560-5997
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Counsel for Defendant

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

**ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,**

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT,

Defendant.

**SPECIAL PLEA OF SOVEREIGN IMMUNITY AND DEMURRER
TO PLAINTIFFS' SECOND AMENDED MOTION FOR JUDGMENT**

COMES NOW defendant James Garnett (hereinafter "Garnett") by counsel, and for his special plea of sovereign immunity and demurrer to plaintiffs' Second Amended Motion for Judgment, states as follows:

SPECIAL PLEA OF SOVEREIGN IMMUNITY

1. As a matter of law, plaintiffs' Motion for Judgment is barred because Garnett is protected by the doctrine of sovereign immunity.
2. Garnett is an employee of an immune governmental entity and is thereby protected by that immunity.
5. The facts alleged by plaintiffs do not support a charge of either gross negligence or intentional misconduct as to Garnett.

WHEREFORE, defendant Garnett respectfully requests this Court to grant his special plea of sovereign immunity and dismiss plaintiffs' Motion for Judgment and for such other and further relief as this Court may deem just and proper.

FILED
JUL 16 2001
BOTETOURT COUNTY CIRCUIT COURT

TESTE: JUL 16 2001

TOMMY L. MOORE, CLERK

Tommy Moore D.C.

DEMURRER

1. The Second Amended Motion for Judgment fails to state a cause of action against this defendant upon which relief can be granted.

2. Count I of plaintiffs' Second Amended Motion for Judgment fails to state facts sufficient to give rise to a cause of action for assault and battery. Other than conclusory statements, no facts are alleged to support a lack of consent to defendant making bodily contact with plaintiff Andrew Koffman (hereinafter "Andrew"). Further, there are no allegations that defendant directed anger specifically at Andrew as an individual or that defendant had any intent to inflict injury and harm on Andrew.

3. Count II of plaintiffs' Second Amended Motion for Judgment fails to state facts that rise to a level of gross negligence. Again, other than conclusory statements, no facts are alleged to support a finding that Andrew did not consent to take part in the tackling demonstration. Mere allegations of simple negligence against this defendant are demurrable and barred by the doctrine of sovereign immunity.

4. Finally, plaintiffs' Second Amended Motion for Judgment fails to allege facts sufficient to justify an award of punitive damages. Plaintiffs fail to allege any facts that amount to actual malice or willful and wanton disregard for others.

WHEREFORE, defendant Garnett respectfully requests that this Court sustain his Special Plea of Sovereign Immunity Demurrer to plaintiffs' Second Amended Motion for Judgment, and for such other and further relief as this Court may deem just and proper.

JAMES GARNETT

By Counsel



Iris W. Redmond (#32560)
MIDKIFF, MUNCIE & ROSS, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235-1939
(804) 560-5997
(804) 560-5997 (facsimile)
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Demurrer to Plaintiff's
Second Amended Motion for Judgment was faxed and mailed, postage prepaid, this 13th
day of July, 2001, to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box
13206, Roanoke, VA 24032-3206.



IRIS W. REDMOND

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,
3865 Woodridge Road
Troutville, VA 24175-5641

Defendant.

SECOND AMENDED MOTION
FOR JUDGMENT

Case No.: 00000-159

COME NOW Plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually, by counsel, and move the Court for judgment against Defendant James Garnett on the grounds and in the amount as hereinafter set forth:

COUNT I

1. Andrew W. Koffman (hereinafter "Andy") is a 13-year old boy and Honor Roll student who attends William Clark Middle School in Botetourt County, Virginia. Until his injuries sustained at the hands of Defendant James Garnett, sometimes hereinafter referred to as "Coach Garnett," Andy was participating on the boys' football team for William Clark Middle School as a third string defensive line player. This season was Andy's first year playing organized football.

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
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540-982-0234

2. At all times relevant to this Motion for Judgment, James Garnett was employed by the Botetourt County School Board as an assistant coach for the William Clark Middle School boys' football team. He is responsible, among other things, for the supervision, training and instruction of the defensive players on the William Clark Middle School football team.

3. On or about September 18, 2000, Andy was participating in a football practice with the William Clark Middle School boys' football team on school property as part of William Clark Middle School's athletic program.

4. During this football practice, Andy and other defensive football players were directed by Coach Garnett to engage in a compulsory tackling drill known as "The Cage." The team had lost their first game of the season a few days earlier. Coach Garnett ordered his players to perform "The Cage" tackling drill because he was upset and angry by what he perceived to be the inadequate tackling performance of his defensive players.

5. During "The Cage" compulsory tackling drill, Coach Garnett became more irate and angry by what he perceived to be the continuing failure of his defensive players to tackle aggressively enough.

6. Coach Garnett then ordered Andy, a 13-year old boy weighing approximately 144 pounds, to hold the football so that Coach Garnett, an imposing, powerful man weighing approximately 260 pounds, could explain to the other players how to tackle. Andy was unaccustomed to handling the football since he was a third string defensive line player and had never carried the football in any game or scrimmage. Andy was ordered to stand upright and motionless with the ball. Standing upright and motionless is not a normal, customary or safe stance in which to receive a tackle.

7. Without warning, just cause or provocation, and without the consent of Andy or Andy's parents, Coach Garnett committed an unlawful assault and battery upon Andy by suddenly, intentionally thrusting his arms around Andy's lower extremities, violently yanking Andy off his feet by two feet or more and then, with the force of Coach Garnett's powerful 260 pound frame, slamming Andy's 13-year old, 144 pound body into the ground like a tackling dummy, snapping Andy's right humerus, the second largest and strongest bone in the body. This conduct was motivated by Coach Garnett's irritation and anger at the continuous failure of the defensive players to tackle aggressively enough.

8. As a direct and proximate result of Defendant Garnett's unwanted, unwarranted and offensive attack upon Andy, Andy suffered a broken humerus bone in his left arm, was caused to suffer and will continue to suffer great pain of body and mind and his parents, Richard Koffman and Rebecca Koffman, have incurred, and will incur in the future hospital, doctors, and related bills in an effort to cure his injuries.

9. Neither Andy nor his parents consented to physical violence upon Andy by the adult coaching staff. When thirteen year old Andy and his parents agreed to participate in organized intermediate school football they reasonably expected that Andy would engage in a contact sport with other children of like age and experience. Neither Andy nor his parents reasonably expected or consented to Andy's participation in aggressive contact tackling by the adult coaches.

10. Furthermore, prior to this assault, the William Clark Middle School football coaches, including Coach Garnett, had never used, nor had Andy or his parents consented to, physical force or violence by the coaches to instruct Andy on the rules and techniques employed in football. Because of this prior experience and his trust in Coach Garnett, Andy did not expect

that Coach Garnett would engage in violent, aggressive contact between Coach Garnett and himself. As a consequence, Andy was in a relaxed, vulnerable, passive and stationary position, unaware that Coach Garnett would use aggressive, physical force so as to make him a tackling dummy for Coach Garnett.

COUNT II

11. Paragraphs 1 through 10 are herein incorporated by reference.

12. On or about September 18, 2000, Coach Garnett ordered the players under his control and supervision to perform a compulsory tackling drill, known as "The Cage." Coach Garnett was upset with the boys on his team because they had just lost their first game of the season and he was angered by what he perceived as their poor tackling performance. Andy did not contribute to the perceived poor tackling performance during this game since he was only a third string defensive line player and did not play even a single down with the defensive unit. Coach Garnett implemented "The Cage" compulsory tackling drill for the first time after his team's loss as a harsh, punitive measure.

13. During this drill, Coach Garnett became incensed and angered by what he perceived as the continuing failure of his defensive players to tackle aggressively enough.

14. Coach Garnett abused his position of authority and acted with recklessness and utter disregard for the safety and welfare of Andy, and without the consent of Andy or Andy's parents, by forcing Andy to stand upright in a passive and vulnerable position to be an unknowing tackling dummy for a member of the adult coaching staff.

15. Standing upright and motionless is not a normal, customary or safe stance in which to receive a tackle.

16. No coach on the William Clark Middle School boy's football team, including Coach Garnett, had ever used aggressive physical force or violence to instruct Andy prior to this incident. Furthermore, Coach Garnett, as a powerful 260 pound man, was so much larger and stronger than 13-year old, 144 pound Andy, that Andy reasonably believed Coach Garnett would not physically attack him. However, Coach Garnett, suddenly and without warning, and without the consent of Andy or Andy's parents, violated his trust by intentionally thrusting his arms around Andy's lower extremities, snatching Andy off his feet, which were then at least two feet up in the air, and then slamming him into the ground with the shockingly violent force and velocity of his powerful 260 pound frame, snapping Andy's humerus bone in his left arm. This conduct was motivated by Coach Garnett's irritation and anger at the continuous failure of the defensive players to tackle aggressively enough, and under the circumstances then and there existing, constituted gross negligence by the Defendant.

17. Neither Andy nor his parents consented to the physical tackling of Andy by the adult coaching staff. When thirteen year old Andy and his parents agreed to participate in organized intermediate school football they reasonably expected that Andy would engage in a contact sport with other children of like age and experience. Neither Andy nor his parents reasonably expected or consented to Andy's participation in aggressive tackling by the adult coaches.

18. As a proximate cause of Coach Garnett's gross negligence, Andy suffered a broken humerus bone in his right arm, the second largest and strongest bone in the human body, was caused to suffer and will continue to suffer great pain of body and mind and his parents, Richard Koffman and Rebecca Koffman, have incurred, and will incur in the future hospital, doctors, and related bills in an effort to cure Andy of said injuries.

WHEREFORE, Plaintiffs, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually, demand judgment against the Defendant, James Garnett, in the amount of \$150,000.00 in compensatory damages, and \$75,000.00 in punitive damages, with prejudgment interest on the judgment amount, and his costs in this behalf expended.

TRIAL BY JURY IS DEMANDED.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually

By: Patrick T. Fennell
Of Counsel

P. Brent Brown
Patrick T. Fennell
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P. O. Box 13206
Roanoke, Virginia 24032-3206
(540) 982-0234

Counsel for Plaintiffs

Filed in the Clerk's Office the 18 day of July, 2001

Writ Tax	<u>10.00</u>	
Fee	<u>50.00</u>	
L.L. Fee	<u>—</u>	Teste:
Acct. 123	<u>—</u>	
Tech Fee	<u>—</u>	TOMMY L. MOORE Clerk
Sheriff's Fee	<u>—</u>	
Total Paid \$	<u>60.00</u>	<u>Shirley Chamberlin</u> D.C.

Carter, Brown &
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Roanoke, Virginia 24032-3206
540-982-0234

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

**ANDREW W. KOFFMAN, an infant,
by his father and next friend, Richard Koffman
and his parents, RICHARD KOFFMAN and
REBECCA KOFFMAN, individually,**

Plaintiffs,

v.

CASE NO.: 00000159

JAMES GARNETT,

Defendant.

NOTICE OF HEARING

TO: Patrick T. Fennell, Esquire
Carter, Brown & Osborne, P.C.
P.O. Box 13206
Roanoke, VA 24032-3206

PLEASE TAKE NOTICE that on September 27, 2001 at 3:30 p.m., in Botetourt Circuit Court, Main Street, Fincastle, Virginia, counsel of record for the Defendant, James Garnett, shall bring forth for hearing Defendants' Plea of Sovereign Immunity and Demurrer.


JAMES GARNETT

By Counsel

FILED
IN THE CLERK'S OFFICE 11:25am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: SEP 21 2001

TOMMY L. MOORE, CLERK
Catherine R. Gath D.C.



Iris W. Redmond (#32560)
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Richmond, VA 23235-1939
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(804) 560-5997 (facsimile)
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Hearing was faxed and mailed, postage prepaid, this 19th day of September, 2001, to P. Brent Brown, Esquire, Carter, Brown & Osborne, P.C., P. O. Box 13206, Roanoke, VA 24032-3206.


IRIS W. REDMOND

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE

COUNTY OF BOTETOURT

ANDREW W. KOFFMAN, an infant by :
his father and next friend, :
Richard Koffman, and his parents, :
Richard Koffman and Rebecca :
Koffman, individually :

Plaintiffs

-VS-

JAMES GARNETT

Defendant

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JAN 28 2002
RICHMOND, VIRGINIA

SEPTEMBER 27, 2001
3:30 P.M.

HEARD BEFORE:

THE HONORABLE GEORGE E. HONTs, III

FILED
IN THE CLERK'S OFFICE 4:30 PM TIME
BOTETOWN COUNTY CIRCUIT COURT

TESTE: JAN 02 2002

TOMMY L. MOORE, CLERK
R. Dewitt D.C.

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ROANOKE, VIRGINIA 24027
(540) 380-5017

ORIGINAL
129

APPEARANCES:

CARTER, BROWN & OSBORNE, ESQS.

Roanoke, Virginia

BY: P. BRENT BROWN & PATRICK T. FENNELL, ESQS.

Counsel on behalf of the Plaintiffs

MIDKIFF, MUNCIE & ROSS, ESQS.

Richmond, Virginia

BY: IRIS W. REDMOND, ESQ.

Counsel on behalf of the Defendant

* * * * *

1 The following cause came on to be heard on
2 the 27th day of September, 2001, before the Honorable George
3 E. Honts, III, Judge of the Circuit Court of Botetourt
4 County, sitting at Fincastle, Virginia when the following
5 proceedings were had:

6
7 (The court reporter, Stacy L. Wiebesiek,
8 RPR was duly sworn.)

9
10 THE COURT: All right. Whenever you are
11 ready.

12 MS. REDMOND: Your Honor, we are here on
13 my demurrer of special pleading to the Plaintiff's
14 Second Amended Motion for Judgment, this one in
15 response to your ruling on my previous demurrer.

16 I think, Your Honor, if we look at a
17 careful reading of the language and the material
18 that was added to this Motion for Judgment that
19 the amended Motion for Judgment still fails to
20 state a cause of action, that there is nothing
21 substantially new in this Motion for Judgment that
22 would give rise to a finding of gross negligence
23 or intentional tort by my client, the defendant in
24 this matter.

1 As we are already agreed and acknowledge,
2 it would take that kind of finding to abrogate the
3 doctrine of sovereign immunity which would serve
4 to protect him.

5 And if Your Honor allows, I would like to
6 go through and just examine briefly the things
7 that I see that were added to this Motion for
8 Judgment and how they may or may not affect my
9 demurrer.

10 THE COURT: All right.

11 MS. REDMOND: Initially, the first thing I
12 noticed was that the plaintiffs are now using the
13 word "angry" a few more times, but I do not see
14 that there is still any allegation of an anger
15 specifically directed at the plaintiff.

16 And as you noted in your opinion and as
17 they have alleged, the plaintiff was a
18 third-string defensive player. In their own
19 allegations, he had never carried a football in a
20 game or a scrimmage, and so it is not reasonable
21 to infer based on facts that they have alleged,
22 anger at inadequate tackling performances, that
23 there is any specific anger directed at the
24 plaintiff.

1 Obviously, it would be hard to direct
2 specific anger for poor tackling at someone who
3 had never had the opportunity to tackle. And,
4 therefore, there are still no facts alleged that
5 establish any willful intent to inflict harm,
6 which would be required for this intentional tort
7 to stand.

8 In addition, they have added a specific
9 allegation regarding the plaintiff's weight. In
10 your ruling you had mentioned specifically that
11 there was no allegation regarding his weight.
12 They have alleged that he weighed 144 pounds.

13 They had previously alleged the weight of
14 the coach, and I think now they have upped it by
15 about 40 pounds from 220 to 260, but the previous
16 Motion for Judgment did contain an allegation
17 about the weight of the coach defendant.

18 I believe that the only thing that this
19 allegation showed, the fact that he weighed 144
20 pounds, serves to help our case rather than
21 theirs. It shows the plaintiff is not a 98-pound
22 weakling. He was certainly a reasonable size to
23 be on a middle school football team.

24 Difference in weight alone does not

1 establish gross negligence. In fact, their
2 difference in weight was obviously implied by the
3 language in the first Motion for Judgment where
4 they alleged that the coach used his 220 pounds
5 and put his inordinately superior strength and
6 weight up against this middle-schooler. That
7 allegation was already made in the first Motion
8 for Judgment. Simply adding how much the
9 plaintiff weighs does not create a scenario of
10 gross negligence.

11 The next thing that I see that was added
12 in Paragraph 6 is that he was -- the plaintiff was
13 standing upright and motionless, which is not a
14 normal, customary, or safe stance in which to
15 receive a tackle. Again, we contest that that
16 does not establish any kind of willful intent to
17 harm the plaintiff or gross negligence, because
18 the purpose of this drill is to instruct on proper
19 technique.

20 In addition, this was something that was
21 previously alleged in the prior Motion for
22 Judgment. Paragraph 10 has very little that has
23 changed, and there it says that he was standing --
24 I'm sorry -- it's not Paragraph 10.

1 It is Paragraph 14, that he was standing
2 upright in a passive and vulnerable position.
3 That was previously alleged in the other Motion
4 for Judgment. This does not add anything
5 different, and it also does not establish gross
6 negligence or willful intent.

7 The remainder -- I'm sorry, there is one
8 other thing. The next paragraphs that had
9 significant additions were Paragraphs 7 and 9 and
10 16 and 17. Those paragraphs basically enlarge on
11 the concept that this was without consent.

12 However, again this does not add anything
13 to the prior Motion for Judgment. The prior
14 Motion for Judgment already specified that this
15 was without consent by either the plaintiff or his
16 parents, that they did not consent to tackling by
17 their coach.

18 What this does is adds more descriptive
19 language regarding the tackle, the colorful
20 language that was used in the first one. They
21 discuss motivation of the coach, but that has
22 already been addressed by the fact that it still
23 is directing anger at the defensive players,
24 plural, not at anything singular. These things

1 were pled initially. Paragraph 10 and Paragraph
2 14 both said that they were without -- that there
3 was no consent of the parents.

4 In addition, these are general allegations
5 that there was no consent. There are no facts
6 that are alleged that would lead to proving that
7 allegation. They do not allege that the parents
8 or Andy said, yes, I can be in football, or, You
9 can be in football, but, no, the coaches cannot
10 demonstrate tackling techniques. There is nothing
11 that said that when Andy was asked to participate
12 in the demonstration that he said no, he did not
13 want to.

14 It would be reasonable to infer from the
15 facts that they have alleged that it would not be
16 negligent to demonstrate a proper technique. Or,
17 put more easily, it would be reasonable to infer
18 from these facts alleged that it would be
19 negligent for the coach not to have demonstrated
20 proper tackling technique as that is what he was
21 trying to do.

22 In addition, I don't think that any
23 specific consent would be required because it is
24 reasonably inferred by his voluntary membership in

1 the team.

2 The final change that I see, Your Honor,
3 is a more detailed description of the break in his
4 left arm. However, it does not add anything to a
5 charge of gross negligence or intentional tort
6 because they have previously alleged that he had a
7 broken humerus bone and was suffering great pain
8 of body and mind, the fact that the humerus bone
9 is a larger bone in the body.

10 And they added the word "snapping",
11 although, of course, there is no detail about what
12 kind of fracture there is. There are many types
13 of fractures. That does not raise that to a level
14 of gross negligence, and it does not substantially
15 change what was already alleged in the prior
16 Motion for Judgment, that he had a fracture, a
17 broken bone.

18 In conclusion, we believe that, although
19 they have more broad allegations made in this
20 Motion for Judgment, there are no new facts
21 alleged that would allow or compel the abrogation
22 of the sovereign immunity protection.

23 In fact, to allow this lawsuit to go
24 forward we believe would damage the very thing

1 that the Supreme Court was seeking to protect
2 when, after twenty years of precedents, they
3 issued the Lens v. Morris case and provided
4 protection to a school coach and said that
5 sovereign immunity applied.

6 I would like to briefly read the last
7 paragraph in that opinion. If school teachers
8 performing functions equivalent to this defendant
9 are to be hailed into court for the conduct set
10 forward by these facts, fewer individuals will
11 aspire to be teachers. Those who have embarked on
12 a teaching career will be reluctant to act, and
13 the ordinary administration of the school systems
14 will suffer all to the detriment of our youth and
15 the public at large. Thank you, Your Honor.

16 THE COURT: All right. Gentlemen.

17 MR. BROWN: Your Honor, I would like to
18 address, if I may, first the issue of anger. The
19 pleadings allege and we will prove that the coach
20 was angry. He was irritated. And there would be
21 evidence that might -- and it's not necessarily
22 germane here, but there would be evidence to prove
23 these allegations that he was angry. And, yes, he
24 was angry at the team as a whole and particularly

1 at some of the defensive linemen.

2 But when I think of that anger, I think of
3 the situation that you may have had in this very
4 courtroom in the criminal context, Judge, where a
5 husband might come in and become angry with his
6 wife.

7 If he was angry with his wife and then he
8 walked out the door and he ran into and saw a
9 child and lifted up that child or struck that
10 child, it would be no defense to an assault and
11 battery charge either civilly or criminally in
12 this court that he was mad at his wife and not the
13 child, therefore, that there is no assault and
14 battery.

15 If it is motivated by the anger, just
16 because he takes his anger out on somebody who
17 does not deserve the anger, that is certainly not
18 a defense in the Commonwealth of Virginia.

19 The question of the weight is one through
20 discovery we can get more information, and we can
21 exact our pleadings. Accordingly, we now do know
22 the weight has been properly alleged at 260 pounds
23 and 144 pounds. That is almost twice the weight.

24 And not only is it twice the weight. You

1 are talking about a mature male as opposed to an
2 adolescent who is 13 years old, and there is a big
3 difference in there. It is incumbent upon the
4 adult to act in an adult-like manner.

5 So, basically, we have somebody, the
6 allegations show, that basically got mad and lost
7 it and using his superior weight and superior size
8 took it out on a person that it should not have
9 been taken out on, if anybody. It certainly
10 shouldn't be taken out on anybody. But the mere
11 fact that he wasn't the one he was mad at is not a
12 defense.

13 I want to deal with the conduct for just a
14 moment, Judge. This is not a case as alleged
15 where things got just a little rougher than people
16 might have expected. Certainly, when you are in
17 football practice, you expect that people are
18 going to get tackled and that things are going to
19 happen like that.

20 We have alleged that this behavior, that
21 is, coaches tackling students, had never, never
22 occurred before, and this was not the normal way
23 of conducting practice. This was not the normal
24 way of so-called demonstrating. This was -- by

1 the fact that it had never occurred before would
2 certainly show someone that it wasn't necessary to
3 the normal conduct of the class.

4 And I think importantly, and this is a new
5 allegation in there that became more specific,
6 that the child was made to stand upright and
7 motionless. This is contrary to every bit of
8 training in terms of what will be in the evidence,
9 expert evidence and other evidence, to show that.

10 We have alleged, which is more important
11 in these proceedings, that having a child stand
12 completely upright and motionless is not normal.
13 We have alleged that it is not customary. We have
14 alleged that. And, most importantly, it is not
15 safe to do that, and that is what he had the child
16 do.

17 Then when you add the sudden and
18 unexpected nature, because it had never happened
19 before, the child didn't know that this was going
20 to happen. And so the coach acts according to the
21 allegations in a fit of anger. The child is
22 standing up there and does not know the coach is
23 going to tackle him.

24 That has two consequences. First, the

1 child had no opportunity, Judge, to decline to
2 participate. He had no opportunity to say, hey,
3 you know, I don't want you to tackle me. My gosh,
4 I have been -- I signed up for being in a practice
5 and being with children back and forth, although
6 he wouldn't use children, but going back and
7 forth. The child just had no opportunity to
8 decline to participate.

9 Counsel said something like he did not say
10 he didn't want to participate. The allegation
11 showed he had no chance to decline, to stand up
12 straight -- well, he was told to stand up
13 straight, and he did that, but he didn't know what
14 was going to happen. Then all of a sudden this
15 person twice his size, a mature adult, lifts him
16 up and throws him to the ground.

17 The second consequence of the sudden and
18 unexpected nature of what happened was he had no
19 opportunity to brace himself to prevent or reduce
20 the likelihood of injury to himself.

21 This conduct that we have alleged here is
22 basically the coach is just in a fit of anger, has
23 lost it, has taken out his anger on another child.
24 He has done something that is completely improper

1 and unusual and unsafe.

2 He had the child stand completely up and
3 then all of a sudden jump and grab his feet, lift
4 him two feet in the air, and throw him to the
5 ground with such force as to break the second
6 strongest bone in the body. That is not what he
7 signed up for, and that is not what the parents
8 would want him to do.

9 An assault is an unlawful touching unless
10 there is consent, and there was no consent to this
11 activity by the coach. It goes so far beyond, as
12 we have alleged, what was normal or reasonable
13 under the circumstances that it could not be said
14 to be any consent.

15 When there is in the pleadings an
16 allegation of actually no consent and standing on
17 the pleadings, then you can't imply there was
18 consent based on these type of pleadings under
19 what has been alleged. And that is what I have to
20 say, Judge.

21 THE COURT: Ms. Redmond?

22 MS. REDMOND: Well, Your Honor, I don't
23 really have much to add to my prior argument
24 except that, again, I don't see that there are

1 additional facts that have been alleged which
2 would change the previous ruling.

3 There have been allegations in the prior
4 Motion for Judgment certainly talking about
5 surprise. And the fact that counsel has
6 emphasized the sudden and unexpected nature of the
7 tackle happening was, if not stated outright,
8 certainly implied from the first Motion for
9 Judgment. And, in fact, we have that Andy did not
10 expect that Coach Garnett would engage in violent
11 aggressive contact between Coach Garnett and
12 himself. That was alleged prior.

13 Our contention still stands that
14 participation in this football team implies
15 consent to participate in demonstrations of proper
16 tackling techniques, proper tackling techniques,
17 which is what happened here.

18 THE COURT: All right. What else do we
19 have here today? Is that it?

20 MR. BROWN: Your Honor, on this case I'm
21 not aware of anything else. We await your rulings
22 before -- we have held off on further discovery on
23 the case. We have taken depositions of the
24 parties.

1 THE COURT: Well, we have been down now --
2 I guess this has really been the third time, and I
3 haven't visited these pleadings for some time
4 prior to today.

5 I think in fairness to everybody,
6 including the Court, we need to either set this
7 case in motion or put it to rest. So, indulge me
8 for about a week, and I will have something in
9 your hands, if you would, please.

10 MR. BROWN: Yes, sir.

11 MS. REDMOND: Thank you, Your Honor.

12 THE COURT: Okay. I appreciate you coming
13 up.

14
15 (The Hearing was adjourned.)
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Commonwealth of Virginia

BOTETOURT COUNTY CIRCUIT COURT
P. O. BOX 110
FINCASTLE, VIRGINIA 24090
(540) 473-8310

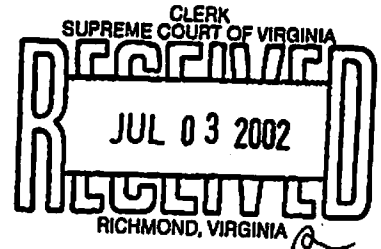


ROCKBRIDGE COUNTY CIRCUIT COURT
COURTHOUSE SQUARE
LEXINGTON, VIRGINIA 24450
(540) 463-4758

October 1, 2001

JUDGE GEORGE E. HONTS, III

P. Brent Brown Esq.
Carter, Brown & Osborne, P.C.
P.O. Box 13206
Roanoke, VA 24032-3206



Iris W. Redmond Esq.
Midkiff, Muncie & Ross, P.C.
9030 Stony Point Parkway, Suite 160
Richmond, VA 23235

Koffman v. Garnett

Dear Counsel:

This action comes upon the plaintiff's second amended motion for judgment and the defendant's continuing plea of sovereign immunity.

Reference is made to previous rulings of this Court in this action. After having pleaded the third time, the Court finds the plaintiff has not risen to a standard required by the holding in Lentz v. Morris, 236 Va 78 (1988).

We note *Lentz* involved the tackling of a student with "great force and violence" in a tackle football game played without protective gear, at p. 80. The Supreme Court concluded "... given the purposes served by the doctrine, mandates immunity for this defendant. If school teachers performing functions equivalent to this defendant are to be haled into court for the conduct set forth by these facts, fewer individuals would aspire to be teachers ... will be reluctant to act ... all to the detriment of our youth and the public at large. *Ibid* at p. 83.

In the instant case, the defendant was acting within the cope of his employment, the instruction of how to play, and playing football is inherently dangerous and always potentially violent.

Accordingly, the Court grants the defendant's motion invoking the doctrine of sovereign immunity and directs this action be dismissed. Counsel for the defendant is directed to prepare and present and appropriate, duly endorsed order.

Sincerely yours,

A handwritten signature in black ink, appearing to read "George E. Honts III".
George E. Honts III

GEHIII/tjh
Cc: Mr. Tommy L. Moore, Clerk
Botetourt County Circuit Court

In the Circuit Court for the County of Botetourt, on Monday, the 26th day of November, in the year Two Thousand-one.

717

PRESENT: The Honorable George E. Honts, III, Judge of said Court.

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT.

Defendant.

ORDER

Case No.: 00000-159

On the 27th day of September, 2001 came the parties, by counsel, and argued defendant's Special Plea of Sovereign Immunity and Demurrer to Plaintiff's Second Amended Motion for Judgment filed herein.

Upon consideration of the memoranda submitted by counsel before a hearing of this case held by this Court on April 5, 2001, and upon consideration of the argument of counsel at hearings on April 5, 2001 and September 27, 2001, the Court finds that defendant, an employee of the Botetourt County School Board, is immune from allegations of simple negligence pursuant to the doctrine of sovereign immunity, and that plaintiff's Second Amended Motion for Judgment is insufficient as a matter of law to establish a claim for gross negligence, because the facts alleged therein do not rise to the level of gross negligence. The Court further finds insufficient facts alleged in Plaintiff's Second Amended Motion for Judgment to sustain a cause of action for the intentional torts of assault and battery.

WHEREFORE, the Court does hereby ORDER and ADJUDGE that defendant's Special Plea of Sovereign Immunity and Demurrer be, and it hereby is, sustained, and that this

matter be, and it hereby is, dismissed with prejudice, and it is further ORDERED, that the Clerk of this Court shall certify a copy of this order to counsel of record.

ENTER this 26th day of December, 2001.


Judge

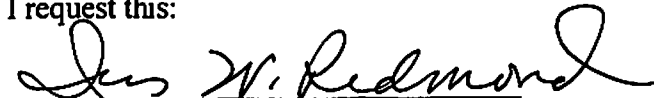
Seen and objected to on the grounds set forth in Attachment A:



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Counsel for plaintiffs

I request this:



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Telephone: (804) 560-5997
Facsimile: (804) 560-5997

Counsel for defendant

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

vi.

JAMES GARNETT,

Defendant.

ATTACHMENT A TO
ORDER

Case No.: 00000-159

Plaintiff objects to the entry of this Court's order sustaining defendant's Special Plea of Sovereign Immunity and Demurrer to Plaintiff's Second Amended Motion for Judgment for the reasons set forth below:

1. Those reasons set forth in Plaintiff's Memorandum in Opposition to Demurrer, and those reasons set forth by counsel ore tenus in hearings on April 5, 2001 and on September 27, 2001.

2. The law provides no immunity, sovereign or otherwise, for defendant's actions that constitute gross negligence or intentional torts.

3. In consideration of a demurrer the Court must admit that all material facts properly pleaded are true.

4. Among the facts admitted are all those expressly alleged, those that fairly can be viewed as impliedly alleged, and those that may be fairly and justly inferred from the facts alleged.

5. Gross negligence is that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of another.

6. Gross negligence is generally an issue for the jury, and only becomes a question of law when reasonable minds cannot differ.

7. Plaintiff has clearly and sufficiently alleged that defendant acted in complete and utter disregard for plaintiff's safety, particularly given all the circumstances of defendant's intentional attack upon plaintiff.

8. Reasonable minds may differ as to whether the alleged facts constitute gross negligence.

9. Plaintiff has properly pleaded all the elements of the torts of assault and battery, including (i) defendant's intent to cause the contact between himself and plaintiff; (ii) an attempt to touch, or an overt, threatening physical gesture; (iii) the creation of a reasonable apprehension on plaintiff's part of an immediate battery; (iv) offensive bodily contact; and (v) lack of privilege.

10. Plaintiff has properly pleaded that neither he nor his parents gave consent to defendant's violent physical attack upon him.

11. The only consent that may be inferred from plaintiff's participation on a football team is consent to contact with other players in the ordinary course of play and practice, not consent to the kind of intentional, reckless, aggressive and violent contact by a coach, motivated by the coach's desire to assuage his anger, that is alleged in plaintiff's Second Amended Motion for Judgment.

12. When a plaintiff pleads and successfully proves the intentional torts of assault or battery, the trier of fact may award punitive damages.

VIRGINIA:

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Plaintiffs

v.

JAMES GARNETT,

Defendant.

NOTICE OF APPEAL AND
FILING OF TRANSCRIPTS

Case No.: 00000-159

COMES NOW plaintiff, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually, in accordance with Rules 5:9 and 5:11 of the Rules of the Supreme Court of Virginia, and hereby gives notice of his appeal to the Supreme Court of Virginia from the Order of this Court dated November 26, 2001, and from the Order of this Court dated June 25, 2001. Plaintiff further gives notice and certifies that the transcripts of the hearings in this case, held on April 5, 2001, June 12, 2001 and September 27, 2001, have been attached to this Notice to be filed with the Court.

ANDREW W. KOFFMAN, an infant, by his father and
next friend, Richard Koffman, and his parents, Richard
Koffman and Rebecca Koffman, individually

By: *Patrick T. Fennell*
Of Counsel

FILED
IN THE CLERK'S OFFICE 11:15am TIME
BOTETOURT COUNTY CIRCUIT COURT

TESTE: DEC 13 2001

TOMMY L. MOORE, CLERK
Catherine R. Erath D.C.

Carter, Brown &
Osborne, P.C.
ATTORNEYS AT LAW
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Counsel for Plaintiff

CERTIFICATE OF SERVICE

I, Patrick T. Fennell, hereby certify that a true and correct copy of the foregoing Notice of Appeal and Filing of Transcripts was mailed or caused to be delivered to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 12th day of December, 2001.



Patrick T. Fennell

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF BOTETOURT

ANDREW W. KOFFMAN,
an infant, by his father and
next friend, Richard Koffman,
and his parents, Richard Koffman
and Rebecca Koffman, individually

Plaintiffs

v.

JAMES GARNETT,

Defendant.

NOTICE OF FILING OF
OF TRANSCRIPTS

Case No.: 00000-159

COMES NOW plaintiff, Andrew W. Koffman, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually, in accordance with Rule 5:11 of the Rules of the Supreme Court of Virginia, and hereby certifies that the transcripts of the hearings in this case, held on April 5, 2001, June 12, 2001 and September 27, 2001, have been hand-delivered to the Court for filing this 26th day of December, 2001.

ANDREW W. KOFFMAN, an infant, by his father and next friend, Richard Koffman, and his parents, Richard Koffman and Rebecca Koffman, individually

By:

Patrick T. Fennell

Of Counsel

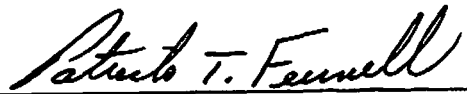
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FILED
IN THE CLERK'S OFFICE 9:00 AM
BOTETOURT COUNTY CIRCUIT COURT
TESTE: JAN 03 2002
TOMMY L. MOORE, CLERK
[Signature] D.C.

CERTIFICATE OF SERVICE

I, Patrick T. Fennell, hereby certify that a true and correct copy of the foregoing Notice of Filing of Transcripts was mailed to Iris W. Redmond, Midkiff, Muncie & Ross, P.C., 9030 Stony Point Parkway, Suite 160, Richmond, Virginia 23235, counsel for Defendants, this 26th day of December, 2001.



Patrick T. Fennell

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Osborne, P.C.
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ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT ERRED IN RULING THAT PETITIONERS' AMENDED MOTION FOR JUDGMENT AND SECOND AMENDED MOTION FOR JUDGMENT DID NOT PRESENT MATERIAL ISSUES OF FACT THAT MUST BE RESOLVED BY A JURY.
- II. THE TRIAL COURT ERRED IN RULING THAT THE FACTS ALLEGED IN PETITIONERS' AMENDED MOTION FOR JUDGMENT AND SECOND AMENDED MOTION FOR JUDGMENT DO NOT RISE TO THE LEVEL OF GROSS NEGLIGENCE.