NO. 920095

(COURT OF APPEALS NO. 71419-8-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MERCER ISLAND SCHOOL DISTRICT,

Petitioner

v.

N.W. and R.W., on behalf of B.W., a minor child, Appellants, et al.

Respondents.

INDIVIDUAL RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS AND INTRODUCTION

Respondents, Parents N.W. and R.W. on behalf of minor child, B.W., respectfully request this Court deny review of the April 13, 2015 published opinion of the Court of Appeals, Division 1 in *Mercer Island School District v. N.W. and R.W. ex rel. B.W.*, No. 71419-8-I, 347 P.3d 924 (April 13, 2015) (the "Opinion").

The decision of the Division 1, Court of Appeals correctly determined the Superior Court's reversal of Administrative Law Judge (ALJ) Mentzer's finding that the inadequate response of Petitioner to student-on-student racial harassment of B.W. satisfied deliberate indifference was legal error and unsupported by the undisputed factual record. The Court of Appeals unanimously found that the ALJ's finding of Petitioner's deliberate indifference was fully supported by the undisputed factual record and should be reinstated.

Now in a continuing effort to escape liability for its own well-documented misconduct, Petitioner seeks to cloak this pure self-interest by interjecting the substantial public interest doctrine, pursuant to RAP 13.4(b)(4). The instant petition for discretionary review is merely an attempt to circumvent the ALJ's undisputed factual findings, and the ALJ's well-reasoned application of the deliberate indifference standard to

these undisputed facts. For this reason, Petitioner's instant petition for discretionary review should be denied.

II. ANSWER TO ISSUE PRESENTED FOR REVIEW

1. The decision of the Court of Appeals was decided on on the ALJ's undisputed findings of fact, and is unique and distinguishable on that basis, and does not involve any issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

The facts of the case are adequately set out in the decision of the Court of Appeals and the ALJ's decision, attached hereto as Appendix A and Appendix B respectively. Respondents rely on those sources for the statement of the case.

IV. ARGUMENT

A. This Court Correctly Determined the Reversal by Superior Court was Legal Error, Reinstatement of ALJ's Decision in its Entirety is the Proper Remedy.

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of

Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, the Petitioner has invoked RAP 13.4(b)(4) as the basis for granting discretionary review. The holding by the Division I Court of Appeals in this case is not in conflict with RAP 13.4(b)(4) because the factual findings underpinning its decision are the ALJ's *undisputed factual findings* that are unique to this controversy.

Petitioner Mercer Island School District failed to sufficiently demonstrate any clear legal error within ALJ's Mentzer's deliberate indifference analysis. Petitioner has repeatedly failed to show legal error in the application of the deliberate indifference analysis to the undisputed facts of the case. This is fatal to their instant petition for review.

Respondents rely on their brief filed in the Court of Appeals and the decision of the Court of Appeals as a basis on which to conclude that none of these issues justifies relief under RAP 13.4(b) Accordingly, the District's petition for discretionary review should be denied.

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B. Petitioner's Attempt to Relitigate the ALJ's Undisputed Findings of Facts by seeking Discretionary Review of this Court is Improper.

It is well-settled that unchallenged administrative factual findings are to be treated as verities on appeal. *Skelly v. Criminal Justice Training Comm 'n*, 135 Wn.App. 340, 344, 143 P.3d 871, 873 (2006).

The Division 1 appellate court was unanimous in finding that the ALJ's undisputed Findings of Fact support the finding of deliberate indifference. Although the Court's concurrence opinion (Verellen.A.C.J.) declines to examine the application of the Office of Civil Rights (OCR) standard as the majority opinion did, the concurrence fully supports the ALJ's deliberate indifference finding and notes that "the undisputed findings of fact support deliberate indifference."[1]

Here, Petitioner seeks discretionary review of this case as a device to relitigate ALJ Mentzer's undisputed Findings of Fact (FOF). However, the District simply cannot unyoke its own liability from the albatross of the ALJ's undisputed findings of facts by invoking the substantial public interest doctrine. There is no legal bases that supports a relitigation of the ALJ's undisputed facts that are unique to these litigants only. Thus, a discretionary review of the case is improper and unnecessary.

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[1] Concurrence Opinion (Verellen.A.C.J.) at 1.

[2] See *Carlson v. Gibraltar Sav.*, 50 Wash.App. 424, 429, 749 P.2d 697 (1988), quoting *Buell v. Bremerton*, 80 Wash.2d 518, 522, 495 P.2d 1358

Accordingly, the petition for discretionary review should be denied.

C. Petitioner Knowingly Acquiesced in the ALJ's Application of Deliberate Indifference Standard, and is Precluded from Asserting Legal Prejudice, and Precluded from Asserting the Substantial Public Interest Doctrine

Petitioner Mercer Island School District should not be allowed to assert the substantial public interest doctrine on behalf of uninvolved third parties when it cannot make a credible claim of its own "legal prejudice" - based on the ALJ's application of the deliberate indifference standard. As acknowledged by Petitioner at the Division 1 oral argument, ALJ Mentzer offered Petitioner the opportunity to advise the ALJ if it felt the (more stringent) deliberate indifference standard for liability was inapplicable to this case but the District strategically chose to remain silent on the issue. Petitioner's attorneys knew the likelihood of a finding of liability for the District's response to discriminatory harassment was greatly reduced by a presumably more stringent deliberate indifference analysis by the ALJ.

Ultimately, Petitioner School District is upset that their strategic informed silence to the ALJ's request for their input regarding applicability of deliberate indifference to the undisputed facts was not rewarded. Petitioner simply gambled incorrectly and any claims of substantial public interest cannot revive petitioner's baseless claims of legal prejudice or injury.

Petitioner had reasonable opportunity to object to application of the deliberate indifference doctrine and knowingly chose not to do so. Petitioner is thus barred by the equitable doctrine of laches from claiming legal prejudice by res judicata (or otherwise) and thereby benefitting from its own acquiescence to the ALJ's deliberate indifference analysis.[2] Likewise, Petitioner has no standing to assert the public interest doctrine. Accordingly, the petition for discretionary review should be denied.

CONCLUSION

For the reasons stated above, the instant petition for discretionary review should be denied.

Respectfully submitted this 10th day of August, 2015.

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[2] See *Carlson v. Gibraltar Sav.*, 50 Wash.App. 424, 429, 749 P.2d 697 (1988), quoting *Buell v. Bremerton*, 80 Wash.2d 518, 522, 495 P.2d 1358 (1972).

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing:
Individual Appellants' Answer to Petition for Review

to be filed with the Clerk of the WA Supreme Court and I served same on the following counsel of record as follows:

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Dated: July 10, 2015 at Seattle, Washington.

By:_____
Ernest Saadiq Morris

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Please see attached BRIEF for filing; APPENDIX sent separately by mail.

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