Supreme Court No. 89470-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Appeal from the Court of Appeals
Division 1
No. 67711-0-I

MADHURI PATEL, individually and on behalf of
AMANDA HINGORANI, a developmentally disabled minor,

Petitioner,

v.

KENT SCHOOL DISTRICT,

Respondent.

RESPONSE TO PETITION FOR REVIEW

NORTHCRAFT, BIGBY & BIGGS, P.C.
Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
819 Virginia Street, Suite C-2
Seattle, WA 98101
Telephone: (206) 623-0229
Facsimile: (206) 623-0234
mark_northcraft@northcraft.com
andrew_biggs@northcraft.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

I. IDENTITY OF RESPONDENT

The Kent School District, Respondent, is a Washington municipal corporation which operates schools within the State of Washington. The School District respectfully requests that this Court deny review of the Unpublished Opinion issued by Division One of the Court of Appeals on August 26, 2013. The Court of Appeals affirmed the lower court's judgment following the jury verdicts in favor of the School District.

II. DECISION AND RELIEF REQUESTED

1. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court;

2. The decision of the Court of Appeals is not in conflict with another decision of the Court of Appeals;

3. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States; and

4. The decision of the Court of Appeals does not involve an issue of substantial public interest that should be determined by the Supreme Court.

III. STATEMENT OF THE CASE

This case involves a student, Amanda Hingorani, and her mother, Madhuri Patel, who sued the Kent School District alleging negligent supervision.[1] The Plaintiffs relentlessly pursued the School District and,

[1] The School District objects to the Plaintiffs' Statement of the Case. RAP 10.3 requires that parties present a fair statement of the case. The plaintiffs did not attempt to present a fair account of the trial testimony. At the Court of Appeals and here, the plaintiffs

after a long and difficult trial, the School District was vindicated. The jury awarded nothing to either the student or her mother. By special verdict, the jury determined that, although the School District had breached its duty of care, this breach was not a proximate cause of any injury to Amanda. The jury further determined that the School District had breached no duty to Ms. Patel. CP 2445-47.

This court will also be interested to note that, although the Plaintiffs complain about the outcome at trial, there is every reason to conclude that the trial outcome was the result of the Plaintiffs' own questionable choices and tactics. Notably, neither Amanda nor her mother testified at trial – or even attended trial; the attorneys kept both Plaintiffs completely hidden from the jury. The Plaintiffs also failed to call any of the School District teachers, counselors, or administrators who knew Amanda and who worked with her at school.

Without any testimony from either Amanda or her mother, the Plaintiffs claimed that Amanda was so severely mentally incapacitated that she could not consent to sexual activities, so her sexual activities must have been forced. The jury rejected that incredible leap of logic and accepted the plentiful evidence to the contrary. As is true of this appeal,

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completely ignored six weeks of trial testimony – much of which directly contradicts their presentation of the facts.

the Plaintiffs' case was based solely on innuendo and accusations, with no actual support for their claims. The jury concluded that neither Amanda nor her mother was damaged by any conduct of the School District or by Amanda's sexual involvement with Matt Mills.

An objective recitation of facts as presented at trial, taken largely from the Unpublished Opinion,[2] follows: Amanda had cognitive and intellectual delays; she was classified by the Kent School District as mildly mentally retarded, and she was in a combination of general education and special education classes. RP 3722:8-19. The year before the events giving rise to the case, Amanda's mother discovered e-mail exchanges between Amanda and several classmates, some of whom urged Amanda to steal money from her mother in exchange for promises of friendship and sex. Ex. 75; Ex. 104 at KSD 4071-73. In one of the e-mail exchanges between Amanda and a student, they both used highly explicit sexual language to describe their sexual desires for one another.

The mother contacted the school to discuss her concern that Amanda was being exploited at school. An investigation of the incidents was immediately initiated. After interviewing both Amanda and the boy, school officials concluded that no sexual encounters had occurred. RP 2924:4-5. Nevertheless, because two of the students admitted to asking

[2] Petition for Review, Appendix A.

Amanda to steal money from Patel, they were both placed on long-term suspension, and neither student returned to the school. RP 2937:8-13; RP 2593:12-22; RP 2950:3-8; RP 2593:12-22. One other student was still enrolled there, but she and Amanda signed no-contact orders prohibiting each from contacting the other. RP 2950:9-20.

In addition, the School District moved Amanda to a more restrictive special education classroom setting: a "self-contained" classroom located in a separate building with only four classrooms. RP 3720:23-3724:16; RP 3087:17-3088:19; RP 3110:18-3111:7. The school also provided Amanda with escorts to walk her between classes and to and from the bus. RP 3730:12-3732:15. The teacher also volunteered to take her lunches with Amanda in the classroom. RP 3188:12-3189:5; RP 3166:21-24. The special arrangements continued for the remainder of Amanda's freshman year in school.

During the same time period, Amanda began counseling services at Kent Youth and Family Services (KYFS). In June 2006, Amanda admitted to her counselor that during her freshman year, she had in fact engaged in sexual intercourse with a student. Amanda said that the incidents occurred in a school bathroom. The counselor contacted her supervisor to determine whether either Child Protective Services (CPS) or the school should be notified. The counselor explained to her supervisor that she believed that

Amanda had freely consented to the sexual intercourse with the student, and that Amanda understood the nature and consequences of her behavior.

Because the counselor and KYFS did not believe that the incidents involved either sexual or physical abuse, they determined that there was no need to file a report with CPS. Moreover, because Amanda had requested that information regarding her sexual activities remain private, KYFS determined that the school could not be notified of Amanda's sexual behavior. RP 3447:6-3449:10.

The next school year, the mother asked the school to continue the same arrangements from the previous year. She met twice with school officials and requested that, in addition to the previous arrangements, the school also provide Amanda with constant one-on-one supervision. RP 3725:12-3727:4; RP 3757:9-3758:25. The mother did not, however, tell school officials what she knew about Amanda engaging in sexual intercourse in the school bathrooms the previous year. RP 3759:6-9. The counselor also attended both meetings and she told the group that there were reasons to be concerned for Amanda's safety if she was left unsupervised. RP 3742:14-3743:18. She stated that her concerns related to "lunch, passing times, and especially bathroom times." RP 3725:12-3727:4. However, the counselor refused to elaborate with respect to her specific concerns. RP 3743:9-3745:12.

Following the meetings, the team, including the mother, determined that Amanda would remain in the self-contained special education classroom, and that she would continue to receive escorts between classes. RP 3758:4-3765:12. The team, including the mother, determined that Amanda would not, however, be provided with constant one-on-one supervision. *Id.* As the director of special education testified, federal education standards require that special education students be educated in the "least restrictive environment," such one-on-one monitoring can only be justified where a specific need is demonstrated. RP 3729:8-18. Based upon the information provided to the team, constant one-on-one supervision was deemed inappropriate for Amanda. RP 3759:1-5.

That year, Amanda was again placed in Ms. Wilhelm's self-contained classroom, and Amanda was initially escorted to and from the girls' restroom, which was directly adjacent to Ms. Wilhelm's classroom. RP 3758:4-3765:12. However, by the spring of 2007, because Amanda's behavior warranted fewer restrictions, in lieu of providing an escort for Amanda, Ms. Wilhelm began to simply monitor the clock while Amanda was using the restroom. RP 3242:20-3243:14. Ms. Wilhelm testified that Amanda was never gone for more than five minutes. RP 3246:1-4.

In March 2007, Amanda began a relationship with a fellow special education student from Ms. Wilhelm's class. The two students felt they

were boyfriend and girlfriend. RP 2212:7-2213:2, 2240:22-24. Between the months of March and April of 2007, the student and Amanda had sexual relations in the boys' bathroom on several occasions. RP 3322:7-11. The boy would leave Wilhelm's classroom to use the bathroom. Several minutes later, Amanda would also leave the classroom. The two students would then go to the boys' bathroom and enter the furthest stall. RP 2303:19-2305:13. The boy removed his pants, and either he or Amanda would then remove her pants and underwear. The boy would then attempt to put his penis into Amanda's anus, but it was never successful. RP 2512:14-21. Ex. 220 at Harborvw M C 12. The jury heard that it was Amanda's idea to attempt anal sex because she did not want to get pregnant. RP 2223:12-14; 2225:1-8. On one occasion, Amanda performed oral sex on the boy for approximately 1-2 seconds.

On April 27, 2007, an Assistant Principal saw Amanda and the boy hugging in the school hallway. He was standing behind Amanda with his arms around her waist, and Amanda was leaning back against him, smiling. RP 1836:17-1837:5. The Assistant Principal promptly notified Ms. Wilhelm. The next week, Ms. Wilhelm saw the boy quietly leave the classroom shortly after Amanda left to use the restroom. Because the boy and Amanda were seen hugging in the hall the week before, Ms. Wilhelm quickly followed the boy out of the classroom. She did not find the

students together; Ms. Wilhelm found Amanda in the girls' restroom, washing her hands. Ms. Wilhelm escorted Amanda back to the classroom. The boy returned to class approximately three minutes later.

Amanda was extremely angry with the teacher for interfering with her, but the teacher promptly notified the mother about the incident. The mother asked Amanda about the incident later that day, and Amanda told her mother that she had sex with Mills in the boys' bathroom on two occasions during the previous week. During the ensuing investigation, Amanda told Detective Belinda Ferguson that "she liked the boy and he liked her." Amanda stated that the boy "asked her if she wanted to have sex, she agreed and the two went into the bathroom together." Ex. 221 at KC Sheriff 8. Detective Ferguson observed that "Amanda was very calm talking about the incident." *Id.* When Detective Ferguson asked Amanda if the boy "forced her to do anything she didn't want to do," Amanda said 'no." The jury also learned that Amanda was relaxed and in no distress when she described her activities to a specially trained sexual assault nurse at Harborview Hospital, to whom Amanda said she was a willing participant in the activities. Ex. 220 at Harborvw M C 13.

In short, the evidence produced at trial overwhelmingly supports the jury's conclusion that Amanda knowingly and voluntarily engaged in sexual activities with a classmate, and that neither Amanda nor her mother

was damaged by any conduct on the part of the School District. The jury found that proximate cause was lacking, and in any event, the damages were $ -0- .

On appeal, the Plaintiffs raised seven assignments of error. The Court of Appeals held that none of those contentions had merit. Now the Plaintiffs are taking their last, desperate shot at the School District.

IV. ARGUMENT

The Plaintiffs have gone to great lengths to present the factual scenario they wish the jury had adopted but, of course, at this stage in the process, the merits of the underlying case are not at issue. Rather, the question is whether the court of appeals made legal errors involving important and unsettled issues of law, or where settled law has clearly been applied incorrectly. All arguments based on inadequacy of evidence are misplaced and should be rejected. Review is merited here only if the Court of Appeals' Unpublished Order creates a conflict in law, raises a significant constitutional question, or addresses an issue of substantial public interest that affects persons beyond the parties in the case. None of those standards apply, nor is this court faced with any broad policy implications raised by the Unpublished Order.

As is more fully described below, the Court of Appeals followed existing precedent, that court did not make any new law. In fact, by

declining to publish its opinion, the Court of Appeals implied that there is nothing noteworthy about the issues on appeal, and that the decision was based on existing Supreme Court precedent. A Court of Appeals decision is published if: (1) the decision decides an unsettled or new question of law or constitutional principle; (2) it modifies, clarifies or reverses an established principle of law; (3) the decision is of general public interest or importance, or (4) the decision is in conflict with a prior opinion of the Court of Appeals. RAP 12.3(d). By declining to publish the opinion, the Court has told us that none of the above criteria apply.

Further, because the decision is unpublished, we know that other parties and courts may not rely on the Opinion, even if the Court of Appeals arguably misstated the legal rule in its unpublished opinion. A party may not cite unpublished decisions as authority. RAP 13.4, GR 14.1. Obviously, because an unpublished decision is not precedential, it cannot lead to any lower court confusion or negative consequences to other persons if the appellate decision is allowed to stand. From the perspective of Supreme Court review, the instant case presents a routine, unremarkable Court of Appeals ruling that does not merit Supreme Court's attention.

Additionally, because the Plaintiffs' counsel chose an ill-advised and unconventional path at trial, this case does not provide a good

platform for making determinations about significant areas of law. The facts and issues are specific to this case, and they have no broader public importance. Even if this court were to find that the case presents issues that rise to the level of Supreme Court review, there will surely be better cases on which the Supreme Court can announce any new law.

A petition for review will only be accepted by the Supreme Court if one of the following conditions is met: (1) The decision of the Court of Appeals is in conflict with a decision of the Supreme Court; (2) The decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; (3) The decision of the Court of Appeals involves a significant question of law under the Constitution of the State of Washington or of the United States; or (4) The petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b). Neither in the petition for review, nor in the Unpublished Decision, are there any issues that meet the standards set forth above.

A. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH WASHINGTON LAW.

1. The Trial Court Properly Applied the Doctrine of Parental Immunity.

The mother's proportionate fault was clearly at issue in this case, and the School District proved that Ms. Patel was an at-fault party (*i.e.* she

had knowledge of Amanda's sexual activities at school, but she failed to tell the school). CP 6657; RP 4617:1-4620:4. The Plaintiffs incorrectly argued that the doctrine of parental immunity bars apportionment of fault to a parent. CP 349-356; CP 1698-1700. RP 99: 10-100:13; CP 6694-6701; CP 6675.

RCW 4.22.070 requires a jury to determine the percentage of total fault attributable to ***every entity which caused the claimant's damages*** with the single exception of entities immune from liability to the claimant under Title 51 RCW (Industrial Insurance). The statute provides a mechanism to distribute fault among tortfeasors, and it expressly states that allocation of fault is done for all immune parties. Laws of 1986, Ch. 305, RCW 4.22.070. The clear language of the statute tells us that defendants cannot be forced to pay for damages caused by immune parties. In the case at hand, the School District is only liable for its proportionate share of the fault, and it cannot be held to pay damages allocated to immune parties.

Washington recognizes the limited parental immunity doctrine, whereby parents are immune from claims by their children, unless their behavior rises to the level of wanton misconduct." *Zellmer v. Zellmer*, 164 Wn.2d 147, 154, 188 P.3d 497 (2008). *Jenkins v. Snohomish Cy. PUD 1*, 105 Wn.2d 99, 105, 713 P.2d 79 (1986) (citations omitted).

Parental immunity also acts to bar contribution and indemnity actions against parents. *See Jenkins*, 105 Wn.2d 99; *Baughn v. Honda Motor Co.*, 105 Wn.2d 118, 119, 712 P.2d 293 (1986). The parental immunity cases tell us that (1) children may not sue their parents for negligence, and (2) defendants may not obtain indemnity or contribution from parents.

Here, the Plaintiffs are attempting to persuade this court that – simply because a parent has parental immunity – fault may not be allocated under RCW 4.22.070. That argument is patently incorrect and it is contrary to both the intent and the clear language of the statute, which requires juries to determine the fault of immune parties.

It is important to note that no Washington court has ever agreed with the Plaintiffs' position. The Plaintiffs' reliance on *Chhuth v. George*, 43 Wn. App. 640, 719 P.2d 562 (1986) is misguided. *Chhuth* was decided prior to RCW 4.22.070 being enacted,[3] and Washington did not have its current system of apportioning fault when the case was decided. The discussion of apportioning fault in *Chhuth* actually refers to a contribution action against a parent, which is clearly barred by parental immunity. *Id.* at 646-47. Similarly, none of the other cases cited by the Plaintiffs address allocation of fault pursuant to RCW 4.22.070.

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[3] The Tort Reform Act of 1986 took effect on August 1, 1986. Laws of 1986, ch. 305, 910. *Chhuth* was decided on April 29, 1986. 43 Wn. App. 640.

There was never any question presented at trial as to whether Ms. Patel was entitled to parental immunity, because neither her daughter nor any defendant sought damages from Ms. Patel. The only question was whether fault could be allocated to a parent, and the Court reached the obvious conclusion that fault is properly allocated to immune parents. The Court recognized that allocating fault reaches the desired effect of having a defendant such as the School District pay only its allocated share of fault, and not the percentage of fault attributable to an immune parent. The parent remains immune, and she is not subject to an award of damages. The effect of the allocation bears on the defendant; the defendant is not be forced to pay the portion of damages allocated to an immune party.

Additionally, Ms. Patel had her own individual negligence claim against the School District, so the jury had to consider Ms. Patel's own fault to determine the comparative negligence issues. Ms. Patel's individual claims are subject to the normal rule that contributory fault diminishes her claim pursuant to RCW 4.22.005. The trial court properly applied the law, and the Court of Appeals affirmed the trial court.

The Plaintiffs also incorrectly argue that RCW 4.22.020 somehow overrides the tort reform act, and prevents a defendant from allocating fault to a parent. As Division One of the Court of Appeals described (prior to the Tort Reform Act of 1986), RCW 4.22.020 merely provides that

husbands and wives will be treated like everyone else in tort law. *Vasey v. Vasey*, 44 Wn. App. 83, 96, 721 P.2d 524 (1986). The statute confirms that there is no disparity of treatment which can form the basis of a constitutional challenge. *Id.* Later amendments included children in the statute, but the intent is clearly unchanged.

The case at hand does not involve imputation of fault between family members – it involves nothing more than the garden-variety allocation of fault among at-fault parties. The concept of imputing fault to another family member is an entirely different concept than the tort reform method of allocating fault between entities. Pursuant to the statute, the allocation must be made to all immune entities, such as parents protected by parental immunity.

In simple terms, every plaintiff's damages are reduced by the proportionate fault of released and immune parties. That has been the case for nearly thirty years. Plaintiffs – whether they are children or not – cannot force defendants to pay damages that are attributable to other at-fault entities, even if those entities are immune from suit. Here, the School District pays for only its own share of damages. That is truly one of the hallmarks of the tort reform legislation: defendants do not pay 100% of the damages if there are other entities which are also at fault.

In its Unpublished Opinion, the Court of Appeals appropriately

summarizes other important issues relating to this topic:

> Patel first asserts that the trial court erred by instructing the jury to consider the percentage of fault attributable to Patel when assessing Amanda's alleged injuries. ... However, because Patel demonstrates no prejudice arising from these alleged errors, her assertions provide no basis for a grant of appellate relief.
>
> Given the jury's special verdict findings, it is clear that the trial court's instructions regarding the apportionment of fault had no effect on the verdict in favor of the District. Although the jury determined that both the District and Patel had breached a duty owed to Amanda, it found that these actions were not the proximate cause of any injury to Amanda. The jury likewise concluded that although both the District and Patel had violated the law by failing to report suspected abuse or neglect, Amanda was not proximately injured by these violations. The jury found by special verdict that the amount of Amanda's noneconomic and future economic damages was $0.
>
> Patel's assignments of error have no bearing on these dispositive jury determinations.
>
> ...
>
> ... Indeed, having determined that neither Patel's nor the District's conduct was a proximate cause of Amanda's alleged injuries, the jury never reached the question of whether to apportion fault to Patel.

Unpublished Opinion at 9, 10. The Plaintiffs' position that the Opinion is contrary to established law is without merit and their petition for review should be rejected.

2. The Trial Court Followed Established Law and Exercised its Discretion as is Required by ER 412.

The Plaintiffs incorrectly argue that the trial court committed

reversible error by exercising its discretion to allow certain ER 412 evidence at trial. That issue was raised on appeal and rejected. A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). A trial court abuses its discretion only if the exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). In some cases, ER 412 limits certain types of evidence relating to sexual activities, but there are exceptions, and the trial judge must exercise its discretion. ER 412 provides that such evidence is admissible if it is otherwise admissible and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.

In the case at hand, the trial court engaged in lengthy oral argument with the parties and considered multiple briefs regarding the issue of whether to admit evidence regarding birth control and Amanda's relationship with her cousin. CP 9479-9553; 9466-9473; 9474-9478, 9458-9465; 9449-9457; RP 17:3-60:22. The School District offered evidence that Amanda was knowledgeable about birth control, pregnancy and genetics, and evidence about her historical sexual dealings with her cousin as evidence that Amanda had the capacity to consent to sex, as well as to contest the clamed damages. *Id.* Clearly, the Plaintiffs placed both

consent and damages issues at the forefront of the case, and the trial court's decision to allow a portion of the requested evidence at trial was within the court's discretion.

The record reflects that the court carefully considered the issues. The Plaintiffs argued and made innuendos suggesting that Amanda was sexually molested or victimized, but they presented no actual evidence that she was forced to engage in sexual acts with another student. Rather, the evidence was completely to the contrary; and the evidence showed that Amanda, consented to every sexual activity. The Plaintiffs' claim that "the trial court failed to exercise authority and instead allowed [the School District's] expert's opinion to establish the admissibility of evidence"[4] is simply without any support in the record and must be rejected.

The Plaintiffs' reliance on *State v. Summers*, 70 Wn. App. 424, 853 P.2d 953 (1993) is misplaced. The criminal defendant in *Summers* was attempting to introduce evidence of a rape victim's past sexual behavior, without any of the unique characteristics present in our case. *Id.* at 432-33. The two cases present completely different issues and completely different uses for the evidence. The *Summers* court was not dealing with the issue of whether or not there was evidence that one had the capacity to consent to the activity:

[4] Petition for Review, p. 16.

> Where the *lack of capacity is based on a permanent, organic condition*, it logically follows that prior acts of intercourse cannot demonstrate that the victim understands the nature and consequences because the prior acts may have occurred due to the same lack of capacity.

Id. at 435 (emphasis added).

Likewise, the Plaintiffs' reliance on *State of Washington v. Ortega-Martinez*, 124 Wn.2d 702, 716, 881 P.2d 231 (1994) is misplaced. That case involved interpretation of a criminal statute: whether there was sufficient evidence to prove that the victim had the ability to understand the nature and consequences of a sexual act at a given time and in a given situation. In the absence of that showing, the jury verdict was potentially defective. The case has nothing to do with a court exercising discretion in connection with allowing ER 412 evidence at trial.

ER 412 specifically contemplates an exercise of discretion by the trial court, which necessarily results in the admission of evidence when the court determines it is appropriate. The Plaintiffs' attempt to have the Court of Appeals overturn the trial court's exercise of discretion failed. It is not appropriate for the Plaintiffs to ask this court to revisit that issue.[5]

B. THE DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE A SIGNIFICANT CONSTITUTIONAL QUESTION.

[5] And the court is reminded that the Plaintiffs chose not to testify, so even if they could establish that the ER 412 evidence had an effect on the verdict, they cannot complain, when they failed to attempt to cure the issue at trial.

The Plaintiffs do not argue that the Court of Appeals' decision involves constitutional issues, and the School District agrees that there are no constitutional issues involved here.

C. THE DECISION OF THE COURT OF APPEALS DOES NOT INVOLVE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

The Plaintiffs do not argue that the appeal involves issues of substantial public interest, and the School District agrees that issues of substantial public are not involved here.

V. CONCLUSION

The Plaintiffs have not provided this court with a sufficient basis for accepting review of the case. The Plaintiffs failed to establish that the Court of Appeals strayed from existing legal precedent, that the Unpublished Opinion deals with significant constitutional issues, or that the case involves issues of substantial public interest that should be determined by this court. The School District respectfully requests that the Plaintiffs' unsupported petition for review be denied.

DATED this 25th day of October, 2013.

NORTHCRAFT, BIGBY & BIGGS, P.C.

Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
Attorneys for Respondent School District

OFFICE RECEPTIONIST, CLERK

To: Michelle Tomczak
Cc: Andrew Biggs; Marks Northcraft; Lilly Tang
Subject: RE: Patel v. Kent School District -- RESPONSE TO PETITION FOR REVIEW

Rec'd 10-25-13

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From: Michelle Tomczak [mailto:Michelle_Tomczak@northcraft.com]
Sent: Friday, October 25, 2013 3:03 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Andrew Biggs; Marks Northcraft; Lilly Tang
Subject: Patel v. Kent School District -- RESPONSE TO PETITION FOR REVIEW

Case Name: *Patel v. Kent School District*
Case Number: not yet issued
Filing Attorneys: Mark S. Northcraft, WSBA #7888
Andrew T. Biggs, WSBA #11746
Telephone: 206-623-0229
mark_northcraft@northcraft.com
andrew_biggs@northcraft.com

Attached please find Kent School District's Response to Petition for Review and Certificate of Service for filing with the Court. Please contact our office should you have any questions or need any additional information. Thank you.

Michelle A. Tomczak | Legal Assistant to Aaron D. Bigby, Andrew T. Biggs, and Jenna M. Wolfe
NORTHCRAFT, BIGBY & BIGGS, P.C. | 819 Virginia Street, Suite C-2 | Seattle WA 98101
Tel: 206.623.0229 | Fax: 206.623.0234 | Email: michelle_tomczak@northcraft.com