

NO. 734491-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

(Snohomish County Superior Court Cause No. 14-2-04738-8)

JOHN ARCHER as Legal Guardian of
JOHN B. ARCHER, a minor child,

Appellant,

vs.

MARYSVILLE SCHOOL DISTRICT,
a local governmental entity,

Respondent.

REPLY BRIEF OF APPELLANT

John Budlong, WSBA #12594
Tara L. Eubanks, WSBA #34008
THE BUDLONG LAW FIRM
100 Second Ave. S., Ste 200
Edmonds, Washington
(425) 673-1944

Attorneys for Plaintiff-Appellant

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I. INTRODUCTION

Appellant John Archer respectfully offers this Reply to the Brief of Respondent Marysville School District.

II. ARGUMENT

A. The Legislature Intended For School Districts To Be Responsible For, Not Immune From, Injuries Caused by Defective Playground Athletic Equipment.

In *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d 684, 693, 317 P.3d 997 (2014), the Supreme Court ruled that the “fundamental objective” in construing the recreational use immunity statutes, RCW 4.24.200 and .210, “is to ascertain and carry out the intent of the legislature.” *State v. Morales*, 173 Wash. 560, 567, 269 P.3d 263 (2012).” By abolishing sovereign immunity and repealing RCW 28.58.030 in 1967, the legislature indicated its specific intent to hold school districts legally responsible for, not immune from, injuries caused by defective playground athletic equipment. Laws of 1967, ch. 164, § 16. There is no legislative history or statutory language which suggests the legislature intended for recreational use immunity to apply to sports like basketball, which require the use of a “playground... athletic apparatus or appliance”—*i.e.* a basketball pole, backboard and hoop. RCW 28.58.030.

RCW 4.96.010 (1967) provides that school districts, as quasi-municipal corporations, “shall be liable for damages arising out of their tortious conduct...to the same extent as if they were a private individual or corporation.” By repealing RCW 28.58.030, the legislature also “ma[d]e the school district liable upon precisely the same basis as an individual or corporation is responsible” for injuries caused by defective playground athletic apparatuses. *Sherwood v. Moxee School Dist. No. 90*, 58 Wn.2d 351, 357, 363 P.2d 138 (1961).

A private individual who maintained a corroded, defective basketball pole in his back yard and allowed the neighborhood kids and anyone else to use it for free outdoor recreation would be liable, if it collapsed and injured a 13 year-old like John Archer. Similarly, a private landowner who constructed a shallow, outdoor swimming pool with an elevated diving platform and allowed everyone in the community to swim and dive into it free of charge would be liable in tort to a child who broke his neck from diving and became quadriplegic. Neither neighborly good intentions nor the benefits of child play, *see Respondent's Brief, pp. 26-28*, would provide a legal excuse for a private landowner who failed adequately to inspect, or turned a blind eye to, or professed ignorance of his defective athletic

equipment or unsafe outdoor premises after a tortious injury occurred. It also would be a fact question as to whether the private landowner or the District “had the prudence to take precautions intended to keep users safe”, *Respondent’s Brief*, p. 28, especially when injury is present and evidence that the basketball poles were inspected is absent.¹ Yet the District contends neither it nor the private landowner owed a duty of reasonable care to the children they invited to use their defective equipment or dangerous facilities. Instead the District argues they both should be immune because they exposed them to the dangerous conditions for the sake of free outdoor recreation.

The District’s contention that RCW 4.24.210 bars John Archer’s tort claim is based on the incorrect assumption that the legislature intended RCW 4.24.210 to bar all tort lawsuits against private or public landowners who “allow members of the public to use [their lands] for the purposes of [free] outdoor recreation.” If that were true, recreational use immunity would swallow the common law of premises liability rather than be “an exception...carved out [of] the ‘public purpose’ invitee doctrine” established

¹Both Sunnyside Elementary staff and the County Health Department participated in the school inspection on January 24, 2014, the day before the accident: “The staff was helpful during the inspection....” CP 331. But there is no evidence that either the District or the County inspected the basketball poles.

in *McKinnon v. Wash. Fed. Sav. & Loan Ass'n*, 68 Wn.2d 644, 650–51, 414 P.2d 773 (1966). See *Camicia*, 179 Wn.2d at 695. In *Camicia*, the Supreme Court rejected a defendant’s similar argument that recreational use immunity erases a public landowner’s “common-law duty under *Keller v. City of Spokane*, 146 Wash. 2d 237, 249, 44 P.3d 845 (2002) to maintain roadways in a reasonably safe condition for ordinary travel...”, concluding that such a sweeping interpretation would be “absurd” and “unjust.” *Camicia*, 179 Wn.2d at 699. The legislative history and the legal authority does not support the District’s extreme position that recreational use immunity erases the common law of premises liability whenever a member of the public is tortiously injured by a public landowner’s negligence while enjoying free outdoor recreation on public lands.

The District contends the language in RCW 4.24.210 “is not ambiguous [and] does not require statutory construction”, *Respondent’s Brief*, p. 17, citing *Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, 353 P.3d 204 (2015) (“If the statutory language is unambiguous, our review is at an end.”) But the immunity language of RCW 4.24.210 doesn’t eliminate a public landowner’s common law duty to maintain safe roads, *Camicia*, 179 Wn.2d at 699, and it “does not apply to every individual injured on land made

available for public recreation.” *Id.* at 712 (Madsen, C.J. dissenting). Under *Camicia*, the language of RCW 4.24.210 does not bar claims against a public landowner for injuries caused by a defective athletic apparatus on an urban public school playground to which the legislature did not intend for recreational use immunity to apply.

B. The Legislature Did Not Encourage Public Landowners to Expose Members of the Public to Dangerous Equipment or Facilities for the Sake of Free Outdoor Recreation.

The legislature in 1967 enacted RCW 4.24.200 “to encourage [private] owners of land to make available land and water areas to the public for recreational purposes by limiting their liability toward persons entering thereon....” *See McCarver v. Manson Park and Irrigation Dist.*, 92 Wn.2d 370, 374, 597 P.2d 1362 (1979) (“The impetus behind the model legislation was ‘to encourage availability of private lands by limiting the liability of owners.’”) The legislative purpose of RCW 4.24.200 has never included public landowners or public lands. RCW 4.24.200 was amended once in 1969 to make private owners “or others in lawful possession and control of lands or water areas or channels” eligible for recreational use immunity. Laws of 1969, ch. 24, §1, 2. *App.* 8. The legislature did not offer that inducement to public landowners. When the legislature first extended

recreational use immunity to public landowners in 1972, its limited purpose was “to increase the availability of trails and areas for all-terrain vehicles....” Laws of 1972, ch. 153, §1. *App. 9.*

Private landowners can avoid tort liability by excluding members of the recreating public from their lands. Recreational use immunity was extended to “any lands whether rural or urban” to provide “private landowners [with] clear protection from liability when they allow their land to be used for recreational purposes.” *See* HB 50 (1979) Bill Report by the Majority sponsors Reps. Newhouse and Smith. *App. 12, pp. 29, 107, 114, 117-119.* It was intended to “limit the liability of persons who give easements for trails and recreational purposes”, particularly to encourage “large landowners such as timber companies to open some of their properties for recreation” free of charge. *See* Senate Majority Leader Walgren’s February 26, 1979 letter to Senate Judiciary Committee Chair Marsh. *App. 12, p. 124.*

Sunnyside Elementary School’s website says it “was constructed in the early 1960s” and has been open to the public for education, transportation, and free outdoor recreation since before RCW 4.24.210 was enacted in 1967. The legislature had no reason to enact RCW 4.24.200 and .210 to encourage public landowners to “open” public lands like the

Sunnyside Elementary playground, which have always been open to the public for recreational and non-recreational purposes. There is no evidence the legislature enacted recreational use immunity to deter public landowners from locking the public out of public recreation lands or to reward school districts for allowing members of the public to play and be injured on defective, dangerous playground athletic equipment.

The District argues that without recreational use immunity, school districts will be “discourage[d]” from allowing members of the public to use unsafe playground athletic apparatuses and appliances. *Respondent’s Brief*, p.10. As the legislature indicated by repealing RCW 28.58.030, that is another good reason why immunity should not apply.

C. The Legislature Did Not Intend to Confer Recreational Use Immunity on Public Owners of Urban Lands.

The legislature did not intend for the 1979 amendments to RCW 4.24.210 to bar tort claims against public owners of urban lands like the Sunnyside Elementary playground in the City of Marysville. The House and Senate leadership who sponsored the 1979 amendments believed and intended the 1972 and 1979 amendments would only apply to private landowners, except for public landowner immunity for ATV torts on public lands. *See App. 12, pp. 29 107, 114, 117-119, 124.* The 1979 amendments

expanding private landowner immunity to “any lands whether rural or urban” were enacted on March 19, 1979. *App. 11*. The 1979 Legislature did not know that four months later in July 1979 the Supreme Court in *McCarver v. Manson Park and Irrigation Dist.*, 92 Wn.2d 370, 375, 597 P.2d 1362 (1979) would broadly extend recreational use immunity to public landowners for all of the activities listed in RCW 4.24.210, not just for ATV torts.

When the Supreme Court decided *McCarver* in July 1979, it was unable to determine the legislature’s intent as to the scope of public landowner immunity under the 1972 amendments to RCW 4.24.210, which added “public” landowners in §16 of the All-Terrain Vehicles statute:

The limited legislative history available concerning the addition of the words “public or private” [in the 1972 amendments to RCW 4.24.210 in the ATV statute] does not greatly assist us in the present inquiry [to what extent RCW 4.24.210 applies to public landowners].

Id. at 375.

Since the plaintiff in *McCarver* was fatally injured in 1973, the Supreme Court only construed the 1972, not the 1979 amendments to RCW 4.24.210. The *McCarver* court did not consider the legislative history of the 1979 amendments and did not discover that the legislature still only intended for RCW 4.24.210 to apply to private landowners, except for ATV torts on public agricultural and forest lands. The *McCarver* decision broadly extended

recreational use immunity to public landowners for all of the activities listed in RCW 4.24.210, reinstating the sovereign immunity for outdoor recreation torts on “agricultural and forest lands and water areas or channels” that the legislature had abolished in 1967. *Id.* at

In *Curran v. City of Marysville*, 53 Wn. App. 358, 766 P.2d 358 (1991), Division One ruled the 1979 amendments to RCW 4.24.210 barred the claims of a plaintiff who injured herself while attempting to jump over a T-bar athletic apparatus in a Marysville city park. It held that “RCW 4.24.210 applies to accidents on municipal park playground and exercise apparatus.” *Id.* at 365. *Curran* recognized that the original 1967 statute “would not have applied to the instant case.” *Id.* at 361. It also noted the paradox that “in 1967, the same year that this statute [RCW 4.24.210] was first enacted, the Legislature passed RCW 4.96.010 eliminating sovereign immunity for municipalities. Laws of 1967, ch. 164, §1.” *Id.* at 362, fn.2. Division One concluded from the 1972 and 1979 amendatory language that “[t]he withdrawal of immunity as to municipally-owned recreational lands has been gradually eroded by subsequent amendments to RCW 4.24.210” and “the statute must so apply [to bar Curran’s claims], given the ever broadening

effect of the Legislature’s amendments to the statutory language.” *Id.* at 362, fn. 2, 363.

But neither *Curran* nor the cases it cites— *McCarver*, *Partridge v. Seattle*, 49 Wn. App. 211, 741 P.2d 1039 (1987), *Preston v. Pierce Cy.*, 48 Wn. App. 887, 741 P.2d 71 (1987), *Riksem v. Seattle*, 47 Wn. App. 506, 736 P.2d 275 (1987)— nor *Swinehart v. City of Spokane*, 145 Wn. App. 836, 845, 187 P.2d 345 (2008) considered the legislative history showing the legislature only intended the 1979 amendments to apply to private landowners. Although the 1972 and 1979 amendments broadened the outdoor recreation activities listed in RCW 4.24.210, that does not indicate the legislature intended to expand the immunity of public landowners or to reinstate school district immunity for injuries caused by defective playground athletic apparatuses.

“Once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it.” *State v. Roggenkamp*, 153 Wn.2d 614, 629, 106 P.3d 196 (2005). The Supreme Court in *McCarver* ruled the 1972 amendments to RCW 4.24.210 extended recreational use immunity to public landowners for the activities referenced in the statute on agricultural and forest lands and waterways. The Supreme

Court has not held that the 1979 amendments apply to public owners of urban lands like the Marysville School District or that school districts are immune from injury claims involving defective playground athletic equipment.

While it is true that the Washington Courts of Appeals “have consistently granted recreational use immunity to public landowners”, *Respondent’s Brief*, p. 19, the Supreme Court has disapproved or distinguished many of those decisions. See *Jewels v. City of Bellingham*, 183 Wn.2d at 395-96, disapproving *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989); *Cultee v. City of Tacoma*, 95 Wn. App. 505, 977 P.2d 15 (1999); *Ertl v. Parks & Recreation Comm’n*, 76 Wn. App. 110, 882 P.2d 1185 (1994); *Tabak v. State*, 73 Wn. App. 691, 870 P.2d 1014 (1994); *Jewels v. City of Bellingham*, 180 Wn. App. 605, 324 P.3d 700 (2014). See also *Camicia v. Howard S. Wright Constr. Co.*, 179 Wn.2d at 698, distinguishing *Chamberlain v. Department of Transportation*, 79 Wn. App. 212, 214, 901 P.2d 344 (1985) and *Riksem v. City of Seattle*, 47 Wn. App. 506, 508, 736 P.2d 275 (1987) on their facts. No Washington court has considered whether the legislature intended the 1979 amendments to extend recreational use immunity to public owners of urban lands. The post-1979

amendments to RCW 4.24.210 also do not address the scope of public landowner immunity.

The rule that “the legislature is presumed to know the existing state of the case law in those areas in which it is legislating” has concerned Supreme Court decisions. *See e.g. In re Personal Restraint of Quackenbush*, 142 Wn.2d 928, 936, 106 P.3d 196 (2005) and *Woodson v. State*, 95 Wn.2d 257, 623 P.2d 683 (1980). The Supreme Court has not construed the 1979 amendments to RCW 4.24.210 or their legislative intent. There is no plausible reason to expect the legislature would revisit the 1979 amendments just because the 10 year-old plaintiff in *Curran* broke her arm in 1984 while attempting to jump over a T-bar in a city park.

D. Recreational Use Immunity Should Be Strictly Construed and Restrictively Applied Because of Effects and Consequences the Legislature Did Not Intend.

The Court of Appeals has said the scope of recreational use immunity should be construed strictly because it is in derogation of the common law. *Nielsen v. Port of Bellingham*, 107 Wn. App. 662, 666-67, 27 P.2d 1242 (2001); *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 437, 824 P.2d 541 (1992). But its decisions have applied recreational use immunity expansively without considering the legislative history of RCW 4.24.200 and .210 and

without construing those statutes *in pari materia* with the legislature's contemporaneous abolition of municipal sovereign immunity and repeal of school district tort immunity for injuries caused by defective athletic apparatuses. See e.g. *Home v. North Kitsap Sch. Dist.*, 92 Wn. App. 709, 717, 965 P.2d 1112 (1998), assuming a school district would be immune under RCW 4.24.210 for injuries involving a dangerous curb bordering a school football field without considering the legislature's repeal of RCW 28.58.030. These expansive constructions and broad extensions of recreational use immunity to public landowners and public lands have produced effects and consequences the legislature almost certainly did not foresee or intend.

Recreational use immunity does not encourage landowners to eliminate dangerous artificial latent conditions on outdoor recreation lands and facilities to which members of the public are exposed and can be injured. Instead, it encourages landowners to deny knowledge of such conditions after a tortious injury occurs. See e.g. *Jewels v. City of Bellingham*, 180 Wn. App. 605, 611, 324 P.3d 700 (2014) (public landowner contended it had no actual knowledge of the condition of a water diverter it built because it was unaware of any other accidents involving it).

It is cheaper to ignore than to fix a dangerous, artificial, latent condition like the basketball pole that collapsed on John Archer unless the cost of failing to exercise reasonable care exceeds the costs of inspection, maintenance and repair. By eliminating the duty of reasonable care, recreational use immunity removes the legal and financial motivation for private or public landowners to inspect for, fix, eliminate or warn of unknown dangerous artificial latent conditions on outdoor recreation lands or facilities. When a member of the public is injured by a dangerous artificial latent condition, RCW 4.24.210(4) invites the landowner to plead ignorance or not fully disclose his knowledge of the condition to escape legal and financial legal accountability.

Under the common law,

an invitee “is ... entitled to expect that the possessor will exercise reasonable care to make the land safe for his [or her] entry”. Restatement (Second) of Torts § 343, comment b. Reasonable care requires the landowner to inspect for dangerous conditions, “followed by such repair, safeguards, or warning as may be reasonably necessary for [the invitee's] protection under the circumstances.”

Tincani v. Inland Empire Zoological Soc., 124 Wn.2d 121, 138-39, 875 P.2d 6 (1994), *quoting* Restatement (Second) of Torts § 343, comment b.

In contrast, when recreational use immunity applies, a landowner owes [public invitees] only a duty to warn of ‘known dangerous artificial

latent condition[s].’ RCW 4.24.210(4)(a).” *Camicia*, 179 Wn.2d at 702. “All four elements (known, dangerous, artificial, latent) must be present in the injury-causing condition for liability to attach to the landowner.” *Jewels v. Bellingham*, 183 Wn.2d at 395, *citing Davis v. State*, 144 Wn.2d 612, 616, 30 P.3d 460 (2001).

Whether a condition is “latent’ (or “dangerous” or “artificial”) is an objective inquiry.” *See Jewels v. City of Bellingham*, 183 Wn.2d 388, 398, 353 P.3d 204 (2015). “‘Known’ under the recreational land use statute means *actual* knowledge, not constructive knowledge.” *Id.* at fn. 5. “For liability to attach to a landowner under Washington’s recreational land use statute, the defendant must have actual knowledge that the condition *exists*...” *Id.* at 401. “Actual knowledge” is “subjective knowledge.” *In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle v. Snohomish Regional Drug Task Force*, 166 Wn.2d 824, 215 P.3d 166 (2009). The basketball pole that collapsed on John Archer was in a “dangerous artificial latent” condition. If that condition was “known” to the District, the exception to immunity in RCW 4.24.210(4) would apply, and the District would owe John Archer a duty of reasonable care and be subject to liability.

Recreational use immunity encourages hasty summary judgment motions, like the one the District filed here, to escape liability before an injured party can exercise the constitutional right to “extensive discovery” to determine whether or not the defendant’s denials of “known” conditions are true or untrue. *See Doe v. Puget Sound Blood Center*, 117 Wn.2d 772, 780 (1991) and *Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 979 (2009). The District moved for summary judgment before any depositions were taken based on its risk manager’s declaration that the District “had no notice of any structural issues related to the basketball poles” *in the year before John Archer’s accident*:

“7. *In the year prior to the June (sic) 25, 2014 accident, the Marysville School District had no notice of any structural issues related to the basketball poles at Sunnyside Elementary, received no complaints regarding any of the poles, and did not see any visible defects with any of the poles, including the pole involved in Mr. Archer’s injury.*

CP 358. (Emphasis added)

The risk manager’s declaration does not say the District lacked actual knowledge of the pole’s structural condition from an earlier notice more than one year before John Archer’s accident. That no such notice is recorded in the District’s Playground Inspection Reports or Accident/Incident Reports does not rule out the District having actual knowledge of the defective

condition of the poles from other sources. CP 358. Further, the risk manager lacks personal knowledge to certify that the condition of the pole was unknown to other District employees who were not identified or deposed. The holes in the District's submissions leave questions of fact whether it knew of the structural defects in the pole before John Archer's accident.

Archer asked the trial court to grant a CR 56(f) continuance until "(1) the District fully answered plaintiff's discovery requests regarding its recreational use immunity defense and (2) the Supreme Court issue[d] its decision in *Jewels v. City of Bellingham*... which deals with the 'known' element the District claims it lacks as to the dangerous condition of the basketball pole that collapsed on plaintiff." CP 298. The trial court erred in granting summary judgment and in denying a CR 56(f) continuance because the District's submissions do not establish that it lacked actual knowledge of the structural defects in the basketball pole before the accident.

Recreational use immunity also encourages public landowners like the District to take inconsistent positions on their duty to promote public safety. For years, the District held itself out to its parents and students that it would select and install safe, suitable, durable playground equipment, as though recognizing that it owed them a duty of reasonable care. CP 318-320. But

after its basketball pole collapsed on John B. Archer, the District disavowed any duty of reasonable care, singled John out for recreational use immunity, and walked away from his injury.

This may be another reason why the legislature did not intend for recreational use immunity to apply to public landowners, except in regard to ATV torts. Private landowners are not subject to or governed by public safety policies. They may either welcome members of the public to use their lands for free outdoor recreation under the standard of care in RCW 4.24.210(4) or treat them as trespassers. In either situation, private landowners owe no duty of reasonable care.

The same is not true for public landowners whose sovereign immunity has been abolished or repealed and supplanted with common law and statutory duties of reasonable care. Public landowners are subject to public safety policies, which implicate their own assumptions of a duty of reasonable care. These duties are found the Restatement (Second) of Torts § 343 and in RCW 28A.320.015(1)(a)(ii), which requires school districts to “[p]romote the effective, efficient, or safe management and operation of the school district.” The statutory directive to promote the safe management and operation of the school district implies that direct school districts will inspect

for, repair, eliminate or warn of dangerous conditions consistent with a duty of reasonable care. Public confidence suffers and the legislature's public safety policies are undermined when public landowners like the District adopt and profess a duty of reasonable care, then abandon it after their defective athletic equipment collapses on a child on a school playground and seek refuge in immunity because he was enjoying free outdoor child play.

Before John Archer was injured, the District adopted and professed the standard of reasonable care in its Playground Equipment policy. CP 318-320. This raises a fact issue on whether the District intended to follow a standard of reasonable care or a standard of recreational use immunity though its "action in opening [the Sunnyside Elementary playground] to the public for recreation." *Camicia*, 179 Wn.2d at 697.

E. The District's Inaccurate Statements.

The District's statement that John Archer claims "the playground was not open to the public for recreational purposes", see *Respondent's Brief*, p. 25, and that "[t]here is no other public use for the playground other than recreation", *id.* p. 31, are inaccurate. The playground was used for carnivals and other annual events, CP 327, which may be more significant uses than its incidental recreational uses. If the trier of fact concluded that shooting hoops

was only an incidental recreational use of the Sunnyside Elementary playground when school was not in session, immunity would not apply. *See Camicia*, 179 Wn.2d at 697, rejecting the “view that recreational immunity follows from the mere presence of incidental recreational use of land that is open to the public.”

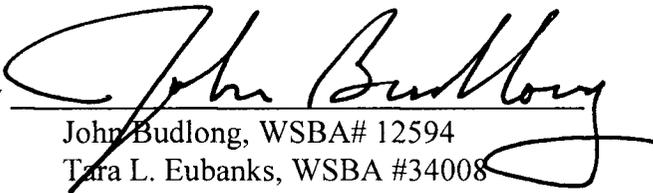
Further, the District does not face liability to any “free recreational user who was unintentionally injured on [its] property, merely because an injury occurred.” *See Respondent’s Brief*, p. 10. If the District is not immune, Archer will have to prove it failed to comply with the three elements of premises liability in the Restatement (Second) of Torts § 343 (1965). *See Tincani v. Inland Empire Zoological Soc.*, 124 Wn.2d at 138.

III. CONCLUSION

The Court should dismiss the District’s recreational use immunity defense or reverse the summary judgment and remand for a trial on whether it applies.

RESPECTFULLY OFFERED this 4th day of November 2015.

THE BUDLONG LAW FIRM

By 
John Budlong, WSBA# 12594
Tara L. Eubanks, WSBA #34008

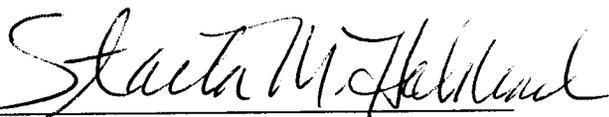
Attorneys for Appellant John Archer

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date indicated below, a true and correct copy of the attached Brief of Appellant was filed with the court and delivered via e-mail to the following persons:

Emma Gillespie
Preg O'Donnell & Gillett, PLLC
901 5th Avenue, Suite 3400
Seattle, WA 98164-2026
Of Attorney for Respondent Marysville School District

DATED this 4th day of November, 2015.


Starla M. Hohbach