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COURT OF APPEALS

No. 35251-6-II

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STATE OF WASHINGTON
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DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

AMY BENALLY, individually and as
parent and Guardian ad Litem of DEREK
J. BENALLY, a minor,

Appellant,

vs.

TACOMA SCHOOL DISTRICT,

Respondent.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 05-2-10969-1

BRIEF OF APPELLANT

Wayne C. Fricke
WSB #16550

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ASSIGNMENTS OF ERROR

1. The trial court erred in granting defendant's motion for summary judgment entered on August 3, 2006.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the School District violated the standard of care to plaintiff?

2. Whether the harm sustained by plaintiff was within the field of danger of the duty owed by the School District?

3. Whether the defective stone cap was the proximate cause of the injury to plaintiff?

4. Whether the School District was negligent in its failure to properly maintain in safe condition, the stone cap which resulted in plaintiff's suffering injuries?

5. Whether the plaintiff was contributorily negligent?

6. Whether plaintiff assumed the risk?

STATEMENT OF THE CASE

A. Procedural History

The complaint for damages was filed in this matter on August 18, 2005. CP 1-7. Defendant's answer was filed on September 23, 2005. CP 8-16. Plaintiff and defendant filed motions for summary judgment on June 16, 2006. CP 17, 42-53. On July 14, 2006, the court heard argument on the motions, denied plaintiff's motion and granted defendant's motion for summary judgment dismissing all of plaintiff's claims. CP 198-99. In her oral decision, the court stated:

All right. On this issue, first of all, the cap stone is a red herring. Cap stones are designed simply to be that, a stone that caps the top of a pillar. It's not designed to be some sort of a safety restraint system.

Secondly, it's pretty obvious from the photos that the School District was aware that the teenagers congregated there since they have two stone benches built in for the students to sit on. The railing is that. It's a safety railing designed to prevent students from walking off the end of this balcony. It is not designed to be a seat for 15-year-olds to sit on; and all of the eyewitnesses, as well as Mr. Benally, indicate that it was a really stupid idea to sit up on the railing when you're going to fall down 17 feet to a concrete floor.

Unfortunately, schools cannot possibly foresee every stupid thing that the teenagers are going to do that are attending the school; and I suppose, at some point perhaps, we'll get to that; that when they arrive at school, they're immediately enveloped in ten-foot cocoons and chained to their seats; so they don't assume any sort of risk.

Now, I'm going to grant the School District's motion. I think Mr. Benally knew that what he was doing was pretty stupid. His friends had advised him of that. He continued to do it. He fell backwards, attempted to grab a cap stone, which is simply a decorative ornament, and fell. If the cap stone hadn't been there, he would have fallen, anyway, because he was in a place doing something he wasn't supposed to be doing; and that is, he was sitting on a railing above a very sharp drop to concrete; so I will grant the summary judgment motion.

7/14/06 RP 18:5-19:16.

The written order dismissing the case was entered on August 3, 2006. CP 198-99, Appendix A.

Plaintiff filed a motion for reconsideration on August 10, 2006, CP 201, which the court denied on August 26, 2006. CP 401-02, Appendix B. A notice of appeal was timely filed that same day. CP 392-400.

B. Facts

Mr. Benally perched himself on a railing with his back to a 15-20 foot drop. As he leaned

backwards, he reached to grab a stone cap on a pillar, that is part of the staircase. As he grasped the cap it rotated, causing Mr. Benally to lose his balance resulting in him falling off the railing and plummeting 15-20 feet down to the cement floor. As a result of the fall plaintiff suffered serious injuries.

The Tacoma School District argued that Derek simply leaned backwards and fell to the concrete landing below, stating "As he was falling backwards, [Derek] apparently grabbed onto a cement pillar located to the side of the railing" and the "capstone did not prevent his fall and was dislodged". CP 45:3-4. The School District argued that "there [was] no evidence of similar incidents at Lincoln High School and no notice to the Tacoma School District that any problem existed in the area." CP 45:11-12.

However, the two individuals that were with Derek Benally described the situation quite differently. First, Reginald Weathers, who was present at the time of the fall, indicated that Derek was leaning back with one hand on the stone cap, that the "rock slipped, kind of slid, and

[Derek] lost his balance and that's how he fell backwards." CP 126 at 14:9-13. He had seen his hand on the rock and saw the rock actually rotate causing the fall. CP 126 at 14:16-18, 16:2-9. It happened very quickly. CP 126 at 14:16-18.

Additionally, Justin Berdecia, another friend of Derek's also was present when he fell from the railing. CP 131 at 11:6-18. He likewise described it similarly to Reginald Weathers. He indicated that Derek was sitting on the bar and during this time he was holding on to the "big stone square". CP 131 at 11:9-25. He likewise said that Derek didn't fall until the stone cap shifted causing the fall. CP 133 at 18:8-20.

Moreover, Justin indicated that this was not an unusual place for people to sit. CP 132-33 at 15:15-16:9. Reginald Weathers also stated that Derek and other kids had sat on that very railing prior to this time. CP 128 at 24:18-25:9.

Nor was this the first time a stone cap on this very staircase was found to be causing a safety concern. The District had notice of a continuing problem with this particular staircase and the caps that were becoming loose in the

months leading up to the situation causing Derek's fall. Walter Erstad, who is a custodian at the school, testified that the school was having problems with these caps on a regular basis. He stated that one of the caps would come off periodically and that the "chief" was tired of waiting for maintenance so he would do the work himself. CP 137 at 20:20-21:20, 160-61.

No less than five employees of the District testified as to the continuing problems with the staircase. For instance, John Gassin, who worked at the school between May 10, 1999 and March 14, 2002, recalled there being a loose stone cap although he initially thought it was at Stadium High School. CP 38 at 13:15-22. However, when presented with an exhibit he pointed out the very specific stone cap that was at issue. CP 39 at 15:3-18. He also indicated he had seen carpenters repair the stone caps that were loose. CP 39 at 16:1-11. Paul Gratias also testified that he remembered stone caps becoming loose. CP 93 at 13:3-25. He worked for the Tacoma School District for ten years in the maintenance department. CP 148 at 8:9. In fact he indicates that one cap

actually disappeared for an extended period of time. CP 150 at 14:1-17.

Furthermore, Theodore Skrivseth who works for the School District as a carpenter testified that there was a problem with the same staircase in November of 2000. CP 157 at 22:1-28:25. Finally, Walter Erstad, a carpenter at the Tacoma School District, also testified seeing a stone cap missing at one time. CP 153-54 at 13:5-14:19. He testified that one of the stone caps would come off periodically and the chief was tired of waiting for maintenance so he would do the work himself. CP 137 at 20:20-21:20.

The work orders that were submitted verify that there was a continuing problem with these caps on a regular basis leading up to the cap that dislodged and caused Derek Benally to fall. These orders indicate preexisting problems occurring on October 8, 2000; November 1, 2000; and May 5, 2003. Not once, not twice, but at least three times this very problem happened prior to Derek Benally's fall, which was caused when the cap shifted. CP 24-41. The work order dated November

11, 2001, specifically states: "Concrete cap is loose, safety concern." CP 26.

Unfortunately, the School District had individuals within the maintenance department repair these caps even though they were not qualified to do so. Moreover, when the other caps were "fixed", the School District did not check the remaining caps to determine if they were safely attached, at least not until after Derek Benally fell. At that time, principal Grant Hosford testified that while he didn't remember it happening in the past, he immediately had all of the caps checked for safety reasons after Derek's fall. CP 141 at 25:7-18. The District also placed signs warning people not to sit on the railing after Derek fell -- signs which were subsequently removed. CP 142 at 26:16-27:6.

Because the trial court simply ignored all of these facts, plaintiff requests that this court reverse the summary judgment determination.

ARGUMENT

The appellate court engages in the same inquiry as the lower court. Nielson v. AgriNorthwest, 95 Wn.App. 571, 977 P.2d 613, rev.

denied 138 Wn.2d 1023, 989 P.2d 1137 (1999);
Schaaf v. Highfield, 127 Wn.2d 17, 21, 896 P.2d
665 (1995).

A summary judgment motion under CR 56(c) may be granted if the pleadings, affidavits, and depositions before the trial court establish that there is no genuine issue of material fact and that as a matter of law the moving party is entitled to judgment.

Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). The court must assume facts most favorable to the non-moving party. Id. "A material fact is of such a nature that it affects the outcome of the litigation." Id. "The issue of . . . proximate cause [is] generally not susceptible to summary judgment." Id. See also Doherty v. Municipality of Metropolitan Seattle, 83 Wn.App. 464, 468, 921 P.2d 1098 (1996) and Ford v. Hagel, 83 Wn.App. 318, 321, 920 P.2d 260 (1996).

The court must accept the non-moving party's evidence as true and must consider all the facts and all reasonable inferences therefrom in the light most favorable to him. Fairbanks v. J.B. McLoughlin Co., Inc., 131 Wn.2d 96, 929 P.2d 433, 435-36 (1997). An inference is a process of

reasoning by which a fact or proposition sought to be established is deduced as a **logical consequence** from other facts, or a state of facts, already proved or admitted. Id. (Emphasis in original). It is not the court's function to resolve existing factual issues nor can the court resolve a genuine issue of credibility such as is raised by reasonable contradictory or impeaching evidence. Id. at 436. A summary judgment motion should be denied if reasonable persons may reach different conclusions. Wood v. City of Seattle, 57 Wn.2d 469, 358 P.2d 140 (1960).

Importantly, any doubt as to the existence of a material fact should be resolved against the moving party. Burback v. Bucher, 56 Wn.2d 875, 355 P.2d 981 (1960). The movant is required to negate even the existence of admissible evidence that might raise a material issue of fact when attempting to prove the absence of a genuine issue of material fact. Klossner v. San Juan County, 21 Wn.App. 689, 586 P.2d 899 (1978) aff'd 93 Wn.2d 42, 605 P.2d 330 (1980).

The trial court essentially ignored all of the law on summary judgment in granting the School

District's motion. Where there was uncontroverted evidence that the negligent maintenance was responsible for plaintiff's fall, the court referred to this as a "red herring." 7/14/06 RP 28:6-10. When there was no evidence presented that plaintiff would have fallen "anyway", the trial court found that he would have. 7/14/06 RP 19:11-16. Finally, no evidence was presented that the stone caps were merely for artistic purposes, yet the court accepted the School District's argument that that was the only purpose for them being there. 7/14/06 RP 18:5-9.

Ultimately, the court placed the burden on the plaintiff. In short, it ignored the evidence and the law in unjustly granting the School District's motion. This Court should reverse.

I. THE SCHOOL DISTRICT HAS A HEIGHTENED DUTY OF CARE TO PROTECT STUDENTS FROM HARM.

Initially, it is important to consider the duty of care in relation to the protection of its students. Specifically, it is well established in this state that the School District has "an enhanced and solemn duty to protect minor students in its care." Christensen vs. Royal School Dist.

No. 160, 156 Wn.2d 62, 67, 124 P.3d 283 (2005).

It is the sole responsibility of the School District, since it is in a special relationship with the students in its custody, to protect them from reasonably anticipated dangers. *Id.*, at 70 (citing McLeod v. Grant County School Dist. No. 128, 42 Wn.2d 316, 320, 255 P.2d 360 (1953)). See also Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997) (School District has a duty to protect students from reasonably anticipated dangers because the placement of the students in the care of the defendant results in loss of students' ability to protect himself). This heightened duty is justified by the student's inability to protect him or herself. McLeod, supra, at 320. As stated in Christensen,

"The relationship between the school district and its administrators with a child is not a voluntary relationship, as children are required by law to attend school. Consequently, "the protective custody of teachers is mandatorily substituted for that of the parent"."

Id., at 70 (citations omitted).

As far back as 1926, the Washington Supreme Court recognized a School District's duty to its students. See Rice v. School Dist. No. 302 of

Pierce County, 140 Wash. 189, 248 Pac. 388 (1926).

In Rice, the plaintiff was seriously burned when he touched a wire after he was told to not touch it anymore. 140 Wn. At 190-191. In affirming the judgment in favor of the plaintiff, the court observed:

As to the second, the jury was instructed that it was the duty of the defendant to exercise ordinary care to see that the school grounds and all things connected therewith were kept in a reasonably safe condition for the use of the pupils attending school from the time the defendant had knowledge that the wire was dangling down and reaching the ground where pupils might take hold of it, and that they were chargeable with ordinary care to prevent injury to the pupils from such condition, and that as to the persons directly in charge of the school grounds, such as principal and teachers, who were for this purpose agents of the school district, and their part of this instruction, to which exception was taken by the appellant, is assigned as error. But we think it falls within the doctrine of Bruenn v. North Yakima School Dist. No. 7, 101 Wash. 34, 172 P. 569, where, in speaking of injuries to a pupil playing on a teeter board on the school grounds temporarily removed from its original position and dangerously used on a swing, it was held that the charge of negligence was sustained, the court saying: "If the teacher knew it, it was negligence to permit it, and, if she did not know it, it was negligence not to have observed it."

Id., at 389-90.

Likewise, in this situation, if the School District knew of the problem, it was its responsibility to fix it. If it didn't know it was its responsibility to observe the problem. Here, it was conclusively established that the School District knew of the safety problem. It is unconscionable that the trial court referred to this as a red herring. 7/14/06 RP 18:6-10.

Even if David Koval nor Grant Hosford knew, no less than five employees -- John Gassin, Walter Erstad, Paul Gratias, Theodore Skrivseth, and Wallace Block -- were aware of this situation. Moreover, at least one work order specifically stated the problem was a safety concern. With that knowledge it was ludicrous for the School District to argue and the trial court to find that it "was not a dangerous condition and the District had no knowledge of any dangerous conditions in the area." CP 48:15-16. Moreover, even if it did not know, as in Rice, supra, it was its duty to know. The trial court simply ignored the long line of cases on this very point.

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II. THE CIRCUMSTANCES SURROUNDING
DEREK'S INJURY WERE
FORESEEABLE.

Here, the students testified that Derek, as well as others, would sit on this very railing previous to Derek's fall. While the principal indicated that he could not recall observing anyone sitting on the railing, neither would he say he never saw it happen. In spite of this, the School District allowed a defective stone cap to exist. It would not be unreasonable to foresee that a person would be harmed in this fashion if the cap failed at an inopportune time.

As noted in Seeberger vs. Burlington Northern R. Co., 138 Wn.2d 815, 823, 982 P.2d 1149 (1999), foreseeability is a question of fact for the jury unless the circumstances of the injury "are so highly extraordinary or improbable as to be wholly beyond the range of expectability" (quoting McLeod vs. Grant County School Dist. No. 128, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)). The harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the Defendant. Id., (citing

Maltman v. Sauer, 84 Wn.2d 975, 981, 530 P.2d 254 (1975)).

The School District argued that Mr. Benally's actions were "obviously reckless". There is no evidence that this was the case. The School District owes a heightened duty to its students. It owes a duty to warn and to maintain the premises in a reasonably safe condition. In this instance there was evidence that these caps were loose and could cause injury to students if not maintained in a safe condition. This was a known gathering spot of students to converse before or after classes or during the lunch hour and it was known that these caps were loose prior to this time.

After this incident, warning signs were posted and the principal (who was unaware of the caps being loose in the first place) had all the caps checked to see if they were loose. Obviously, this risk was in the general field of danger that should have been anticipated. It is reasonable to conclude that there could be an injury of this type as a result of the defective condition.

**

III. THE FAILED STONE CAP WAS THE PROXIMATE CAUSE OF THE INJURY.

All of the individuals who were present at the time of the fall, saw the fall, and remember the fall, indicate that Derek lost his balance and fell when the cap pivoted and slipped. It was not a situation of Derek grabbing the cap to prevent his fall. The fall occurred as a result of the defective cap.

Nor was there any evidence produced to suggest, as the court found, that Derek "would have fallen anyway." 7/14/06 RP 19. However, even if there was, the eyewitness' testimony was that he fell because of the faulty stone cap. Consequently, the faulty cap was the proximate cause of the injury.

IV. DEREK DID NOT ASSUME THE RISK.

The School District argues that Derek assumed the risk based on his "reckless conduct" notwithstanding the fact there is nothing to indicate his conduct was reckless at all. "Assumption of the risk" involves a situation when the plaintiff knowingly and voluntarily chooses to encounter the specific risk. See Home v. North Kitsap School Dist., 92 Wn.App. 709, 720, 965 P.2d

1112 (1998). Before the assumption of risk is invoked it is incumbent upon the defendant to demonstrate by the evidence that the plaintiff:

- (1) Had full subjective understanding;
- (2) Of the presence and nature of the specific risk, and,
- (3) Voluntarily chose to encounter the risk.

92 Wn.App. at 720.

Knowledge and voluntariness are questions of fact for the jury unless reasonable minds cannot differ on the proposition. Id. As the Home court stated:

Whether a plaintiff decides to knowingly to encounter a risk turns on whether he or she, at the time of decision, actually and subjectively knew all facts that a reasonable person in the defendant's shoes would know and disclose, or concomitantly, all facts that a reasonable person in the plaintiff's shoes would want to know and consider. Thus, "The test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk." The plaintiff must "be aware of more than just the generalized risk of [his or her] activities; there must be proof [he or she] knew of and appreciated the specific hazard which caused the injury." And a plaintiff "appreciates the specific hazard" or risk only if he or she actually and subjectively knows all facts that a reasonable person in the defendant's shoes would know and disclose, or, concomitantly, all facts

that a reasonable person in the plaintiff's shoes would want to know and consider when making the decision at issue."

Id., at 720-21.

Again, there is no indication that Derek assumed the risk because there is no evidence that he knew of the specific hazard, i.e., that he knew that the cap would rotate or was loose. Thus, the School District did not demonstrate that "assumption of the risk" should apply.

V. DEREK WAS NOT CONTRIBUTORILY NEGLIGENT.

Those cases that have allowed for contributory or comparative negligence on the part of a student involve inherently dangerous activities. For instance, in Robinson v. Lindsay, 92 Wn.2d 410, 598 P.2d 392 (1979), the Supreme Court held that when a child is involved in an inherently dangerous activity such as operating dangerous machinery the child should be held to the standard of care of an adult. Berry v. Howe, 39 Wn.2d 235, 235 P.2d 170 (1951) affirmed the trial court's decision that an 11-year-old could be held contributorily negligent for failing to protect himself from being hit by a golf ball

while acting as a caddy. And in Brown v. Derry, 10 Wn.App. 459, 518 P.2d 251 (1974) it was held that a 16-year-old child could be held contributory negligence for injuries sustained from riding on the trunk of a moving car while wearing a wet suit.

Here, sitting on a staircase, which is a common activity, is not inherently dangerous. As a result an adult standard of care should not apply; nor should summary judgment have been given on the issue of contributory negligence.

In sum, Derek's injuries are a direct result of the Tacoma School District having full knowledge of a safety hazard involving the stone caps at issue, failing to fix them even though it was aware of the safety hazard, resulting in Derek's fall. It was ludicrous of the court to suggest that it was a red herring. This court should reverse.

CONCLUSION

Based on the files and records herein, Mr. Benally requests that this court reverse the trial court and remand this case for trial.

APPENDIX

Exhibit "A" Order granting defendant's
 motion for summary judgment
 dismissal, dated 8/3/06

Exhibit "B" Order denying plaintiffs'
 motion for reconsideration,
 dated 8/25/06

RESPECTFULLY SUBMITTED this 16 day of
October, 2006.

LAW OFFICES OF MONTE E.
HESTER, INC. P.S.
Attorneys for Appellant

By: Wayne C. Fricke
Wayne C. Fricke
WSB #16550

CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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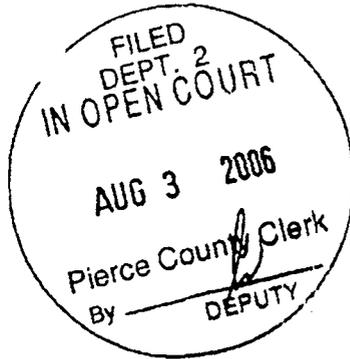
Amy Benally
3819 East "G" Street
Tacoma, WA 98404

Signed at Tacoma, Washington this 16th day
of October, 2006.


Kathy Herbstler



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Hon. Katherine M. Stolz

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

AMY BENALLY, individually, and as parent
and Guardian ad Litem of DEREK J.
BENALLY, Minor,

No. 05-2-10969-1

Plaintiffs,

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
DISMISSAL

vs.

TACOMA SCHOOL DISTRICT,

Defendant.

THIS MATTER having come on regularly before the above-entitled Court for hearing on the Defendant Tacoma School District's Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment, and the Court having heard the arguments of counsel and considered the records and files herein, including:

1. Defendant's Motion for Summary Judgment Dismissal with Attachments;
 - a. Declaration of Christina L. Smith in Support of Motion for Summary Judgment;
2. Plaintiff's Reply Memorandum to Defendant's Motion for Summary Judgment with Attachments;
 - a. Affidavit of Wayne C. Fricke In Support of Plaintiff's Reply Memorandum to Defendant's Motion for Summary Judgment;
3. Reply Memorandum in Support of Defendant's Motion for Summary Judgment;

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ORDER GRANTING
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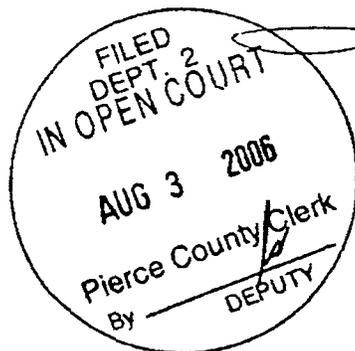
- 4. Plaintiff's Motion for Partial Summary Judgment with Attachments;
 - a. Affidavit of Wayne C. Fricke in Support of Motion for Partial Summary Judgment;
- 5. Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment with Attachments;
 - a. Declaration of Christina L. Smith in Support of Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment;
- 6. Affidavit of Kenneth W. Blanford in Reply to Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment.
- 7. Supplemental Affidavit of Wayne C. Fricke Re: Motion for Partial Summary Judgment;

And the Court being fully advised in the premises, now, therefore, it is

HEREBY ORDERED, ADJUDGED AND DECREED that:

- 1. Defendant Tacoma School District's Motion for Summary Judgment is hereby GRANTED.
- 2. Plaintiff's Motion for Partial Summary Judgment is DENIED.
- 3. Plaintiff's complaint and all claims therein are hereby dismissed with prejudice.

GIVEN UNDER MY HAND IN OPEN COURT this 3rd day of Aug, 2006.



Hon. Katherine M. Stolz

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Presented by:

LEE, SMART, COOK, MARTIN
& PATTERSON, P.S., INC.

By: Charles P.E. Leitch
Charles P.E. Leitch, WSBA No. 25443
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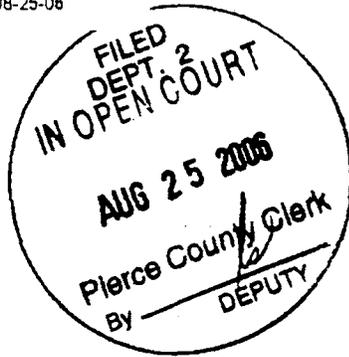
Approved as to form;
Notice of Presentation Waived:

MONTE E. HESTER, INC., P.S.

By: Wayne Fricke
Wayne Fricke, Esq., WSBA No. 16550
Of Attorneys for Plaintiff



05-2-10969-1 26039810 ORDY 08-25-06



Hon. Katherine M. Stolz
Hearing: 8/25/06 9:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

AMY BENALLY, individually, and as parent
and Guardian ad Litem of DEREK J.
BENALLY, Minor,

No. 05-2-10969-1

Plaintiffs,

ORDER DENYING PLAINTIFFS'
MOTION FOR RECONSIDERATION

vs.

TACOMA SCHOOL DISTRICT,

Defendant.

THIS MATTER came before the Court's regular motion calendar on Plaintiff's Motion for Reconsideration. Plaintiff asks the Court to reconsider its order granting Defendant's Motion for Summary Judgment. The Court has heard oral argument. The Court has reviewed all filings in support and in opposition to this motion, specifically the following:

1. Plaintiff's Motion for Reconsideration and attachments submitted to the Court;
2. Defendant's Response to Plaintiff's Motion for Reconsideration; and
3. All filings referenced in the Court's Order Granting Summary Judgment for Defendant.

The Court considers itself fully advised. Accordingly, IT IS HEREBY ORDERED: Plaintiff's Motion for Reconsideration is DENIED.

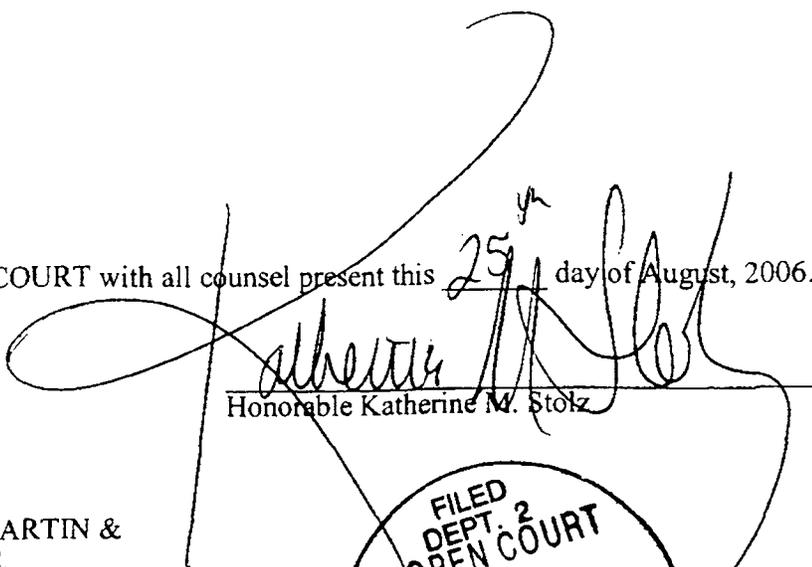
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ORDER DENYING
RECONSIDERATION
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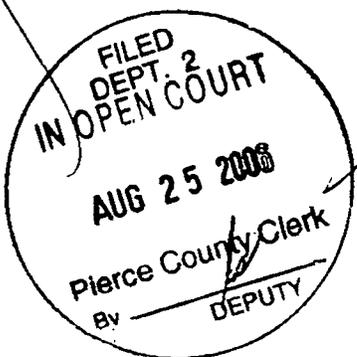
DONE IN OPEN COURT with all counsel present this 25th day of August, 2006.



Honorable Katherine M. Stolz

Presented by:

LEE, SMART, COOK, MARTIN & PATTERSON, P.S., INC.



By: Charles P.E. Leitch
Charles P.E. Leitch, WSBA No. 25443
Of Attorneys for Defendant

Approved as to Form:
Notice of Presentation Waived:

MONTE E. HESTER, INC., P.S.

By: Wayne Fricke F-C
Wayne Fricke, Esq., WSBA No. 16550
Of Attorneys for Plaintiffs