

NO. 35251-6-II

COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

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

Appellants,

v.

TACOMA SCHOOL DISTRICT,

Respondent.

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DIVISION II
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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

Assignments of Error

Defendant/Respondent Tacoma School District (“District”) assigns no error to the superior court’s decision.

Issues Pertaining to Assignments of Error

The District disagrees with the statement of Issues Pertaining to Assignments of Error by Plaintiffs/Appellants Amy and Derek Benally. The District believes that the sole issue on appeal is more properly stated as follows:

Whether the superior court properly dismissed the Benallys’ negligence claim as a matter of law on summary judgment, where:

1. Despite repeated warnings from his friends, Derek Benally chose to sit on the high railing with an approximate 17-foot drop to a concrete landing below;
2. Derek Benally has admitted that he knew that sitting on the railing was dangerous; and
3. The District had no notice of any dangerous condition.

B. STATEMENT OF THE CASE

On September 30, 2003, around noon, Derek Benally congregated in a breezeway with friends outside of the cafeteria at Lincoln High School in Tacoma. CP 84. The breezeway is located on the second floor

and connects two school buildings. CP 65-67. There are railings located along the breezeway and down the stairs for safety purposes. CP 5-67. The railing is approximately four to four and a half feet tall and is constructed of thin metal. CP 65-67. It is not at a height or construction that is conducive to using it as a seat. CP 140-141. There are also benches located in the breezeway for students to sit on while in the area. CP 66, CP 140.

- 1. Despite repeated warnings from his friends, Derek chose to sit on the high railing with an approximately 17-foot drop below him to a concrete landing below.**

Derek has no recollection of events leading up to and following his fall. CP 60. Derek's friends, who witnessed the incident, testified that he leaned backwards while sitting on the railing and fell to the concrete landing below. CP 77 .

Derek's close friend Reginald Weathers was present when Derek fell and testified:

He was sitting on the railing . . . His face was toward us because I remember him falling backwards, and he always kicked his feet . . . He was just sitting there, and he kind of leaned back a little bit, but he didn't lean too far . . .

CP 77. Reginald Weathers further testified:

. . . Derek had sat on that railing before, and we all told him (referring to his friends), "You know, you shouldn't sit up on there. You just might fall." He was like, "Don't jinx me. Don't jinx me," and he still decided to sit there . . .

Q: Okay. So you didn't — and in your opinion — I'm asking for your opinion — you wouldn't have felt safe sitting there?

A: No, I wouldn't.

...

Q: Do you think it was stupid that people were sitting up there?

A: I'd really care less. I was, like, they know what's down there, and they know that's a big drop, so —

Q: You figured it was obvious, and they made the choice?

A: Yeah.

CP 78. His friend Justin Berdecia was also present at the incident and tells the same story:

There was the bar he was sitting on. He was close to the — from what I was looking at, the left corner, my left. He was holding on, he leaned back, and he just fell back.

...

I think Wesley might have sat up there once. We really didn't like sitting up there. We were all — we're not trying to fall. Derek didn't — Derek wasn't scared.

...

We all told him, "Don't sit up there because you might fall." (referring to friends). . .

...

Q: Do you remember kind of when you stopped asking him?

A: The day before he fell.

Q: Really?

A: Yeah. That's what was so shocking to us. We were like, "We just told him not to sit up there."

CP 82-83.

2. Derek knew that sitting on the railing was dangerous.

Derek, himself, testified that sitting on that railing would be "stupid" and "dumb" and would defy common sense:

Q. Okay. But you said yourself you didn't sit up on these railings because you're afraid of heights, right?

A. Yeah.

Q. That would be pretty —

A. Stupid?

Q. — stupid, fair to say?

A. Yeah.

CP 61. Derek testifies further:

Q. But even by your standards that would be a dumb thing to do (referring to sitting on the railing)?

A. Yeah. It's common sense.

CP 62.

As he was falling backwards, he apparently grabbed onto a cement pillar located to the side of the railing. The capstone did not prevent his

fall and was dislodged, turning to the side. Derek fell approximately 17 feet to the concrete floor below. CP 73.

Derek's friend, Reginald Weathers testimony confirms this account:

Q. And I guess that's my question: Did you actually see Derek's hand on the rock as it rotated, or did you see Derek with his hand on the rock, he fell, and then you looked back?

A. The second one is how I saw it.

CP 126. Reginald Weathers clearly testified that he saw Derek sitting on the railing with his hand on the rock and then when he looked back, Derek was gone. CP 126. Reginald Weathers also testified that the plaintiff was leaning back and kicking his feet while sitting on the railing. CP 77.

Another friend who was present, Justin Berdicia testified:

There was the bar he was sitting on. He was close to the — from what I was looking at, the left corner, my left. He was holding on, he leaned back, and he just fell back.

CP 82-83.

Derek sustained fractures to his wrists, a compound fracture to his leg, a broken tooth and minor internal injuries as a result of the fall. CP 45. After surgeries and physical therapy, Derek has made a dramatic recovery. CP 45, CP 58-59. He is now able to participate, and excel, in football, baseball and basketball. CP 58-59.

3. The District had no notice of a dangerous condition in the area.

No person has ever been injured due to the stone caps becoming loose. CP 86. The stone caps served a solely decorative purpose and were not intended to be used as a safety device. CP 86.

There is 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 86. One of the stone caps located on the first floor had become dislodged and was repaired, but this was not considered a safety concern. CP 141. The capstones were obviously not intended for use to catch a student's fall. David Koval, assistant principal at Lincoln High School in 2003, testified that he is not aware of anyone other than Derek falling off of the railing and that he was not aware of the capstones being loose. CP 86. Mr. Koval was also not aware of students sitting on the railing. *Id.*

On September 1, 2005, plaintiffs filed this complaint for damages alleging that Tacoma School District was negligent in failing to protect Derek from injury and failing to maintain the school facility in an appropriate manner. CP 1-7. Each party filed a motion for summary judgment, heard on July 14, 2006. CP 17, 42. The superior court denied the Benallys' motion and granted the District's motion for summary

judgment of dismissal. CP 198-199. Plaintiffs filed a motion for reconsideration on August 10, 2006 which the court denied. Plaintiffs then filed this appeal. CP 392-400.

C. SUMMARY OF ARGUMENT

The superior court properly dismissed the Benallys' negligence claim against the District because there was no genuine issue of material fact. Derek Benally chose to sit precariously on a high hand railing, causing him to fall approximately 17 feet to the concrete landing below. The evidence conclusively establishes, including plaintiffs' own admissions, that he knew and appreciated the danger of his actions. Mr. Benally assumed the risk by engaging in such an obviously dangerous activity.

The facts do not support a finding of negligence in this case, and accordingly, this court should affirm the superior court's dismissal of the Benallys' negligence claims against the District.

D. ARGUMENT

1. **The District was entitled to summary judgment because there was no genuine issue as to any material fact.**

"Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment

as a matter of law.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *see* CR 56(c). The purpose of summary judgment is to avoid useless trials on issues which cannot be factually supported, or, if factually supported, could not, as a matter of law, lead to a result favorable to the non-moving party. *Burriss v. General Ins. Co. of America*, 16 Wn. App. 73, 553 P.2d 125 (1976).

In its *de novo* review of a grant of summary judgment, this court may affirm a judgment of any ground established by the pleadings and supported by the evidence. *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998); *Jenson v. Scribner*, 57 Wn. App. 478, 480, 789 P.2d 306 (1990).

2. The oral opinion of the trial judge, as submitted by plaintiffs, is not properly before this court.

Plaintiffs quote the trial judge’s oral opinion in their Brief of Appellant. Such evidence is not admissible on summary judgment and is not proper on review:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

RAP 9.12. Although the District believes the decision was sound, the quotation of the trial court’s decision granting summary judgment in favor of the District is not properly before this court and should not be considered. The record accurately reflects the evidence and briefing that

the superior court considered.

3. Derek Benally assumed the risk when he chose to engage in dangerous behavior with full knowledge of the risks involved therefore negating any alleged duty on behalf of the District.

There are four classifications of assumed risk: express, implied primary, implied reasonable, and implied unreasonable. *Tincani v. Inland Empire Zoo*, 124 Wn.2d 121, 875 P.2d 621 (1994). Implied primary assumption of risk applies to those situations in which a person, by voluntarily choosing to encounter a known peril, impliedly consents to relieve the defendant of the duty to reasonably protect against that peril. The basis of assumption of risk is the plaintiff's consent "to the negation of a duty by the defendant with regard to those risks assumed." *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 498, 834 P.2d 6 (1992). The defense of implied primary assumption of risk bars recovery of damages arising from the specific risks assumed. *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 402, 725 P.2d 1008 (1986); *Ridge v. Kladnick*, 42 Wn. App. 785, 713 P.2d 1131 (1986). To invoke assumption of risk, the plaintiff "must have knowledge of the risk, appreciate and understand its nature and voluntarily choose to incur it." *Egan v. Cauble*, 92 Wn. App. 372, 377-78, 966 P.2d 362 (1988). A plaintiff is barred from recovery where he "had a reasonable opportunity to act differently or proceed on an

alternate course that would have avoided the danger.” *Zook v. Baier*, 9 Wn. App. 708, 716, 514 P.2d 923 (1973).

In *Tincani*, a 14-year-old student was injured, by falling off of a rock cliff, while animal watching at the zoo. The Zoo encouraged visitors, especially children, to explore the grounds but failed to provide adequate warnings, physical restrictions and safe facilities to do such exploring. *Tincani*, 124 Wn.2d at 144-45. The Court held, under these specific facts, that the risk of serious injury while visiting a zoo is not a risk that the student assumed. Therefore, the boy’s conduct did not constitute implied primary assumption of the risk but rather was implied unreasonable assumption of the risk which is treated as contributory negligence and is not a complete bar to recovery. *Id.* at 143-44.

In the present case, Derek Benally testified that he appreciated the danger involved in sitting on the railing. Therefore, his conduct constitutes implied primary assumption of the risk and is a complete bar to recovery. CP 61-62.

To prove that Derek Benally assumed the risk, the evidence must show that he (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk. Restatement (Second) of Torts § 496C(1) (1965). See *Egan v. Cauble*, 92 Wn.App. 372, 377-78, 966 P.2d 362 (1988). A plaintiff is barred from

recovery where he ‘had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger.’ *Zook*, 9 Wn. App. at 708, 716.

California courts found that a student assumed the risk under similar facts as ours. In *Ziegler v. Santa Cruz City High School*, 193 Cal. App. 2d 200, 13 Cal. Rptr. 912 (1961), a 13½-year-old student was fatally injured when he fell from a school stair railing on which he had been sitting and fell 12 or 13 feet to a concrete landing below. *Id.* The court upheld an assumption of the risk jury instruction and subsequent verdict and judgment for defendant school district. *Id.* at 202, 206. The court inferred knowledge of the danger of sitting on the railing where there was testimony that the student was bright, that he knew the area was crowded and he had previously been warned that it was dangerous. *Id.* at 204. The *Ziegler* court noted, “**The obvious, and almost the sole, danger in sitting upon the railing would be the possibility of falling to the concrete surface below.**” *Id.* at 204 (emphasis added).

- a. **Derek Benally knew and admitted that sitting precariously on a hand railing above an approximately 17-foot drop to a cement landing was unreasonably dangerous behavior.**

In the present case, this court need not infer actual knowledge, as in *Ziegler*, because Derek Benally has admitted that he knew sitting on the

railing was dangerous. CP 61-62. Furthermore, Derek Benally's friends who witnessed the fall also testified that they had warned him numerous times that sitting on the railing was dangerous. CP 78. His friend Justin Berdecia testified that he and his friends warned him not to sit on the railing because he might fall the day before the incident occurred. CP 82-83.

The evidence is uncontroverted that Derek Benally knew and appreciated that sitting on the railing was dangerous because he could fall to the ground below and become injured.

b. Derek Benally's reckless behavior was the proximate cause of his injuries.

Derek Benally failed to exercise reasonable care when he attempted to sit and balance on the top of the hand railing. In this case, the Benallys must prove that the alleged breach of duty proximately caused the injury. Proximate cause has two elements: cause in fact (but-for causation) and legal cause. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). To establish cause in fact, plaintiff must establish by a preponderance of the evidence that without the District's conduct, he would not have sustained the injury for which he now seeks relief. *Id.*

A cause in fact is one without which the accident would not have happened. In a negligence case, then, the plaintiff has the burden of producing evidence sufficient to support a finding that the defendant's negligent conduct was the

cause in fact, which is the same as saying that the plaintiff has the burden of producing evidence sufficient to support a finding that the accident would not have occurred but for the negligent conduct of the defendant.

Whitchurch v. McBride, 63 Wn. App. 272, 275, 818 P.2d 622 (1991). In the present case, there is no evidence to support the proposition that plaintiff's injury was proximately caused by any alleged negligent conduct by the District.

The focus in the legal causation analysis is whether the plaintiff owed a duty that would have prevented the plaintiff's injury and whether the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Minahan v. Western Wash. Fair Assoc.*, 117 Wn. App. 881, 73 P.3d 1019 (2003).

An actor whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant. *Adkisson v. The City of Seattle*, 42 Wn.2d 676, 683, 258 P.2d 461 (1953). "Wanton misconduct has been defined as: reckless disregard of what may be the probable consequences of an act calculated to cause injury. . . . The party doing the act . . . must be conscious of his conduct, is conscious from his knowledge of existing conditions and circumstances that injury will likely or probably result from his conduct, and, with a reckless disregard of consequences, does some act or omits some duty that results in injury."

Id. at 684-85. *See also State of Wash. v. Hinds*, 85 Wn. App. 474, 936 P.2d 1135 (1997).

In this case, if the District's conduct was a but-for and legal cause of Derek's injuries, liability may lie. A rational trier of fact could only find that if Derek would not have recklessly sat on the railing his injuries would not have occurred. It was Derek's reckless disregard for his own safety, and possible injury to innocent bystanders, that was the true proximate cause of his injuries.

4. The stone cap did not constitute a “dangerous condition” and was not the cause of Mr. Benally’s fall.

A “dangerous condition” is defined in terms of common law negligence, namely, a condition that poses an unreasonable risk of harm. *Gaeta v. Seattle City Light*, 54 Wn. App. 603, 609, 774 P.2d 1255 (1989). Inherent to a common law negligence claim is the requirement of due care, namely, that a dangerous condition involves a condition of property that creates a substantial risk of injury when such property is used with **due care** in a manner in which it is reasonably foreseeable that it will be used. *Id.*

In the present case, no allegations or evidence have been presented showing that the railing was intended for use as a seat or was defective in any way for its intended use as a hand railing. Plaintiff and his friends

testified that they knew that the railing was not intended to be used as a seat and to do so would be “dumb.” CP 61-62. Similarly, there is no evidence in the record to support the contention that the stone cap was intended to be used as a safety device or that the particular stone cap was loose prior to plaintiff’s accident.

5. The District was not aware of any alleged dangerous condition with regard to the capstone at issue.

Pillars throughout the school campus were topped with cement capstones. These capstones served a solely decorative purpose. CP 65-67. The testimony of former Tacoma School District employees show that one of the other capstones, located on the first floor had previously become dislodged and was repaired. CP 89. There is no evidence that the capstone at issue in this litigation was loose prior to Mr. Benally’s fall. CP 48.

The District owes it students a general duty to exercise ordinary care to keep the premises in a reasonably safe condition or to warn invitees of unsafe conditions. *Messina v. Rhodes Co.*, 67 Wn.2d 19, 27, 406 P.2d 312 (1965); *Huston v. First Church of God*, 46 Wn. App. 740, 744, 732 P.2d 173, *rev. denied* 108 Wn.2d 1018 (1987) (quoting *Leek v. Tacoma Baseball Club*, 38 Wn.2d 362, 365-66, 229 P.2d 329 (1951)).

However, when a property owner has “taken all precautions reasonably necessary to protect his invitees from injury, he is not liable merely because someone is injured on his property.” *Ciminski v. Finn*, 13 Wn. App. 813, 823, 537 P.2d 850 (1975).

Here, the District took all precautions reasonably necessary to protect Derek from injury. It is not reasonable to expect a student to sit on a hand railing located over a 17-foot sheer drop, let alone to use a smooth topped capstone as a last ditch effort to prevent his fall. There is no factual evidence to suggest otherwise.

6. The Benallys’ assertion that the trial court ignored a long line of cases regarding the District’s duty of care is incorrect and not supported by the record.

It is the school’s duty to protect students in its custody from reasonably anticipated dangers. *Christiansen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 70, 124 P.3d 283 (2005). Plaintiffs cite a string of cases regarding a school’s duty to its students alleging that the trial court “simply ignored the long line of cases on this very point.” Brief of Appellant at 15. On the contrary, each case was briefed by the parties on the record and is addressed below. Interestingly, plaintiffs fail to distinguish sexual-abuse cases from personal injury cases such as this one. It is well established and not at issue that minors cannot be held at fault for

failing to protect themselves from being sexually molested by an adult.

a. ***Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 67, 124 p.3d 283 (2005).**

In *Christiansen*, a 13-year-old student was sexually assaulted by her teacher. The student and her parents brought suit against the teacher, the Royal School District, and the principal alleging, in part, negligent hiring and supervision. The Court held that a student under the age of 16 may not have contributory fault assessed against her based on her conduct in participating in a sexual relationship with a teacher. *Id.* at 70-71.

In so holding, the court noted that **in other circumstances** Washington does apply contributory fault and the duty of protecting oneself to children. The act of **sexual abuse** was explicitly key to the court's holding and analysis. *Id.* at 69.

b. ***Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997).**

In *Niece*, a developmentally disabled woman was **sexually assaulted by a staff member** at a group home. The woman brought a negligence action for damages against the group home for failure to protect, negligent supervision, and vicarious liability for the staff member's actions. The court held that the group home had a duty to take reasonable precautions to protect her from the foreseeable consequences of her impairments, including possible sexual assaults by staff. *Id.* at 45-

46. The Court stated that the special relationship between the woman and the group home was akin to the relationships between schools and students, innkeepers and guests, and hospitals and patients. *Id.* at 44-45. The *Niece* Court held that if a special relationship is present, a party has a duty to prevent harms caused by the **intentional or criminal conduct** of third parties. *Id.* at 44.

c. ***McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953).**

In *McLeod*, a twelve-year-old girl was **forcibly raped** by older fellow students during a noon recess in a long, dark room located in the school gymnasium. The Court applied the following law:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

- (a) knows or has reason to know that he has the ability to control the conduct of third persons, and
- (b) knows or should know of the necessity and opportunity for exercising such control.

Id. at 362-363 quoting 2 Restatement, Torts, 867, § 320. Central to the decision in this sexual assault case is the duty to control third persons from

harming others.

**d. *Rice v. Sch. Dist. No. 302 of Pierce County*,
140 Wash. 189, 248 P. 388 (1926).**

In *Rice*, the school principal and janitor strung an electrical wire across the school playground for use during the evening of radio entertainment. *Id.* at 190. The wire became loose and several students began pulling and playing with the wire during morning recess. The teacher assigned to the supervision of the area saw the boys playing with the electrical wire and failed to tell them that it was dangerous. *Id.* at 190-91. As the boy pulled on the wire it severely shocked and burned him. *Id.* at 191. In *Rice*, the employees created the dangerous condition and directly observed the young students endangering themselves without warning of the danger.

**e. *Bruenn v. North Yakima Sch. Dist. No. 7*,
101 Wash. 374, 172 P. 569 (1918).**

In *Bruenn*, a group of seven and eight year old boys removed a teeter-totter board from its base, balanced it on a swing, and began to teeter. All actions complained of happened during recess period at the elementary school. *Id.* at 375. The plaintiff's verdict was reached by jury and therefore the Supreme Court was not reviewing the opinion *de novo*. In affirming the verdict, the Court accepted as true the evidence that a teacher was present and thus should have prevented the very young boys

from engaging in such dangerous behavior. It was only under this presumption that the Court stated, “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 377.

Each of the cases above is clearly distinguishable from the present case on one of two grounds. Each involves either sexual abuse or a situation where employees were present and observed the dangerous behavior of young students. Neither of these grounds is applicable in this case. In sum, the heightened duty of a school district to protect its students is not absolute and does not absolve students of due care.

7. Washington courts do apply the duty of protecting oneself to children under such circumstances as the present.

Although the trial court based its decision on implied primary assumption of the risk, plaintiffs argue the absence of contributory negligence. Regardless, Washington courts have a long history of holding children responsible for their actions in non-sexual abuse cases: *Robinson v. Lindsay*, 92 Wn.2d 410, 413, 598 P.2d 392 (1979), (holding child to an adult standard of care when engaged in an activity that is inherently dangerous, such as operating dangerous machinery); *Berry v. Howe*, 39 Wn.2d 235, 238, 235 P.2d 170 (1951), (finding an 11-year-old caddy

contributorily negligent for failing to protect himself from being hit in the eye by a golf ball); *Brown v. Derry*, 10 Wn. App. 459, 464, 518 P.2d 251(1974), (holding a 16-year-old contributorily negligent for injuries sustained from riding on the trunk of a moving car while wearing a wetsuit). Derek Benally had a duty to protect himself from the obvious and known danger of sitting on the railing and he failed to do so.

8. Expert Thompson's testimony is not supported by the evidence on record and is unpersuasive.

Mr. Thompson's report and testimony was considered by the superior court. CP 194-99. His report and testimony fail to take into account relevant and necessary evidence available to him and available in the record. For example, the following is a list of evidence that Mr. Thompson admittedly **failed** to consider in reaching his opinions:

- No site visit was conducted. CP 213.
- No measurements of the site were provided. CP 214.
- Mr. Thompson did not perform any interviews. *Id.*
- No depositions were reviewed or considered. *Id.*
- Mr. Thompson reviewed only unsworn transcribed interviews of witnesses. *Id.*
- Mr. Thompson did not speak with the plaintiff. *Id.*
- Mr. Thompson had no information regarding the number of staff present or enrollment numbers at the school. CP 216.

Mr. Thompson's lack of foundation for his opinions is evident throughout his deposition testimony. In his report, Mr. Thompson opines, "It is clear from the student's statements that they were not aware of any prohibitions against an inherently dangerous behavior." CP 196. When the students testified, under oath in deposition, it became clear that the students **were aware** that sitting on the railing was dangerous, that they were not allowed to sit on the railing, they had been warned by faculty not to sit on the railing and they had warned the plaintiff not to sit on the railing. CP 61-62, CP 82-83. Although plaintiffs' expert, Mr. Thompson, did not review the student's deposition testimony in reaching his opinions, the trial court did and was clearly appropriately versed in the true facts of the case. CP 387-88.

E. CONCLUSION

The Benallys' burden on summary judgment was to present proof that raised a genuine issue of material fact to support their contention that the District breached its duty of care to Derek Benally. They failed to carry that burden. The evidence conclusively shows that Derek's actions, in intentionally sitting precariously on a hand railing located above a steep sheer drop to a concrete landing below, constitutes an implied primary assumption of the risk of falling that bars recovery of damages.

Accordingly, this court should affirm the superior court's dismissal of the Benallys' claims in their entirety.

RESPECTFULLY SUBMITTED this 18 day of December, 2006.

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

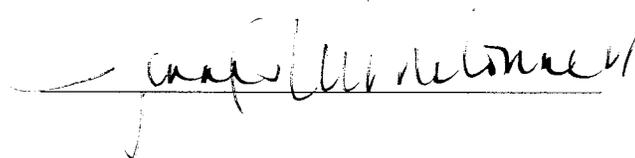
By: 

Charles P. Leitch, WSBA No. 25443
Christina L. Smith, WSBA No. 32569
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on or before December 18, 2006, I served a true and correct copy of the foregoing BRIEF OF RESPONDENT via legal messenger, to:

Monte E. Hester, Inc., P.S.
Mr. Wayne Fricke, Esq.
1008 South Yakima, #302
Tacoma, WA 98405

A handwritten signature in black ink, appearing to read "Monte E. Hester, Inc.", is written over a horizontal line.

LEXSEE 193 CAL. APP. 2D 200



Analysis
As of: Dec 16, 2006

**IRENE MAY ZIEGLER, Appellant, v. SANTA CRUZ CITY HIGH SCHOOL
DISTRICT et al., Respondents**

Civ. No. 19435

Court of Appeal of California, First Appellate District, Division Two

193 Cal. App. 2d 200; 13 Cal. Rptr. 912; 1961 Cal. App. LEXIS 1686

June 20, 1961

SUBSEQUENT HISTORY: [***1]

Appellant's Petition for a Hearing by the Supreme Court was Denied August 16, 1961.

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Santa Cruz County. Charles S. Franich, Judge pro tem. *

* Assigned by Chairman of Judicial Council.

Action against school districts for damages for wrongful death of a pupil on school property.

DISPOSITION:

Affirmed. Judgment for defendants affirmed.

**HEADNOTES: CALIFORNIA OFFICIAL
REPORTS HEADNOTES**

(1) Negligence--Assumption of Risk--Knowledge of Danger. --It is necessary to the defense of assumption of risk that the person in question have actual knowledge of the danger; it is not enough that, in the exercise of due care, he should have known.

(2) Id.--Assumption of Risk--Knowledge of Danger. --Though actual rather than constructive knowledge is required under the defense of assumption of risk, actual knowledge may be inferred from the circumstances.

(3) Trial -- Instructions -- Applicability to Evidence. -- It is not error to give an instruction on a theory advanced by a party if there is any evidence on which to

base it, though the evidence may be slight or inconclusive.

(4) Schools--Liability--Injuries to Pupils--Knowledge of Danger. --In an action for the death of a 13 1/2-year-old pupil who was fatally injured when he fell from a school stair railing on which he had been sitting after being pushed or threatened by another pupil, dropping 12 or 13 feet to a concrete landing below, there was at least "slight" evidence that the deceased had actual knowledge of the danger of sitting on the railing where there was testimony that he was a bright and intelligent child and above average in his school work, and a classmate testified that the students had been warned by teachers not to sit on the railings because to do so would be dangerous. Moreover, it was proper to infer that the deceased had actual knowledge of the specific danger in sitting on the railing, where it was outside the school auditorium in which a dance was then in progress, he must have known that many of the students would be coming out of the exit door onto the landing and he could easily be jostled from the railing, and he was aware of the propensity of his classmates to indulge in horseplay, particularly in view of the fact that the principal testified that horseplay, including scuffling, presented a definite supervisory problem.

(5) Id.--Liability--Injuries to Pupils--Instructions. --In an action for the death of a 13 1/2-year-old pupil who was fatally injured when he fell from a school stair railing on which he had been sitting after being pushed or threatened by another pupil, dropping 12 or 13 feet to a concrete landing below, the trial court did not err in instructing the jury on the defense of assump-

tion of risk, the duty to attend school not including the obligation to sit on railings that abut on 12-foot drops.

(6) Id.--Liability--Injuries to Pupils--Appeal--Harmless Error. --In an action for the death of a 13 1/2-year-old pupil who was fatally injured when he fell from a school stair railing on which he had been sitting after being pushed or threatened by another pupil, dropping 12 or 13 feet to a concrete landing below, alleged error in instructing the jury that a school district would not be liable for injuries caused by the use of a stair railing when the particular use was not one for which the railing had been designed or intended and when the school district, in the exercise of ordinary prudence, could not reasonably have anticipated this particular use, could not have misled the jury where all other instructions, including the assumption of risk instructions, were free from error, and where, though the subject matter of the instruction was not in issue in view of a ruling on prior appeal, the evidence presented conclusively established that defendants had actual knowledge that students had been sitting on and leaning against the railing in question, and the principal testified that he had seen students indulging in this practice as often as two or three times a month.

(7) Appeal -- Harmless Error -- Instructions. -- Where the court gives an erroneous instruction based on a supposed fact and the evidence establishes without conflict that this fact does not exist, no harm can be said to have resulted from the error.

COUNSEL:

Donald O. May, J. Frank Murphy and Eugene J. Adams for Appellant.

Lucas, Wyckoff & Miller, Stephen Wyckoff, Donald R. Haile and Lucas, Wyckoff, Miller, Stanley, Scott & Bennett for Respondents.

JUDGES:

Shoemaker, J. Kaufman, P. J., and Draper, J., concurred.

OPINION BY:

SHOEMAKER

OPINION:

[*202] [**913] This is an appeal by the plaintiff in a wrongful death action from a verdict and judgment for defendants. Plaintiff Irene Ziegler brought this action to recover damages for the death of her 13 1/2-year-old son, whose death resulted from injuries sustained when he fell from a landing outside a school auditorium.

This is the second trial of the case. Plaintiff originally brought the action alleging that defendants Santa Cruz City High School District and Santa Cruz City Elementary School District [***2] had negligently maintained, controlled and supervised the school premises and the students thereon and had also allowed the premises to remain in a dangerous and unsafe condition. Following a trial on the merits, the court granted a nonsuit in favor of defendants, and plaintiff appealed therefrom. (*Ziegler v. Santa Cruz City High Sch. Dist. (1959), 168 Cal.App.2d 277 [335 P.2d 709].*) The nonsuit was held proper as to plaintiff's cause of action under *Government Code, section 53051* (which provides for liability of local agencies for the defective or dangerous condition of public property). However, the judgment of nonsuit was reversed as to the issue of the alleged negligent supervision, and the case was remanded for retrial as to this issue.

The evidence produced at the second trial establishes that the accident occurred when Leonard, plaintiff's son, came out of the school auditorium where a dance was being held. The students who wished to leave the dance had just been given permission to depart, so Leonard and others left the auditorium through a hallway opening on a rear stairway which descended to the school playground. At the rear stairway landing Leonard stopped [***3] and sat on the landing railing in such a manner as to have one foot resting on the landing and the other foot in the air. When Leonard had been in this position for approximately 20 to 30 seconds, another student suddenly came out of the exit and threw his arms out toward Leonard. The facts are not clear as to whether Leonard was merely startled and "flinched back" or whether he was actually pushed from the railing. In any event, Leonard fell backwards off the railing, dropping 12 or 13 feet to a concrete landing below, receiving the injuries which caused his death.

Appellant's first contention is that the trial court erred in instructing the jury upon the doctrine of assumption of risk. Appellant does not attack the correctness of these instructions but contends the evidence was insufficient to justify giving the [*203] instructions at all. * Appellant points out [**914] that the elements of the defense of assumption of risk are the person in question's knowledge and appreciation of the danger involved and his voluntary acceptance of the risk. (*Perry v. First Corporation (1959), 167 Cal.App.2d 359, 366 [334 P.2d 299];* see Rest., Torts, § 893.) (1) It is necessary [***4] to this defense that the person have *actual* knowledge of the danger, and it is not enough that, in the exercise of due care, he should have known. (*Prescott v. Ralphs Grocery Co. (1954), 42 Cal.2d 158, 162 [265 P.2d 904].*) Appellant then asserts that the facts in the case at bar are insufficient to support a finding that decedent had

any knowledge or appreciation of the danger involved and that the court erred in instructing the jury on assumption of risk.

* It may be noted at this point that respondents are of the opinion that appellant waived her right to object to the instructions on assumption of risk because of a stipulation on her part that assumption of risk would be an issue at the trial. This position does not appear to be well taken. Respondents point out that appellant, in a pretrial stipulation, denied all the affirmative defenses in respondents' answer and stipulated that they would be in issue at the trial. Assumption of risk was among the defenses set forth in respondents' answer. Respondents thus argue that appellant should now be barred from objecting to the giving of instructions on a defense which she stipulated would be in issue.

A party must be given a wide opportunity to plead all theories which he hopes will ultimately find support in the evidence presented at the trial. His right to plead a specific defense should not, however, automatically entitle him to pertinent instructions should it ultimately develop that the defense pleaded finds no support in the evidence. Neither should the opposing party be barred from objecting to such an instruction merely because he stipulated prior to trial that such a defense would be in issue.

***5]

(2) Although appellant's contention is sound in alleging that actual, rather than constructive, knowledge is required under the defense of assumption of risk, the rule is also well established that such actual knowledge may be inferred from the circumstances. (*Gomes v. Byrne* (1959), 51 Cal.2d 418, 421 [333 P.2d 754]; *Sheppard v. City of Los Angeles* (1959), 172 Cal.App.2d 338, 342 [342 P.2d 282]; *Ching Yee v. Dy Foon* (1956), 143 Cal.App.2d 129, 138-139 [299 P.2d 668].) (3) It is also settled that it is not error to give an instruction on a theory advanced by a party if there is any evidence at all upon which to base it, even though this evidence may be slight or inconclusive. (*Washington v. City & County of San Francisco* (1954), 123 Cal.App.2d 235, 238 [266 P.2d 828]; *Brandes v. Rucker-Fuller Desk Co.* (1929), 102 Cal.App. 221, 227 [282 P. 1009].) The question thus presented is whether the record contains any evidence, including inferences [*204] to be drawn from the circumstances, that Leonard knew and appreciated the danger of sitting upon the handrail in the manner described above.

(4) In the case at bar, Leonard voluntarily chose to [***6] sit upon the railing despite the backdrop of 12 or 13 feet to a concrete surface below. Leonard was 13 1/2 years of age at the time of the accident, and both his aunt and his mother testified to the fact that he was a bright and intelligent child. His teacher also testified that he was above average in his work. It would seem that from these circumstances alone the jury could infer that Leonard had actual knowledge of the danger involved when he sat upon the railing. Furthermore, there was testimony by a classmate of Leonard's that the students had been warned by teachers not to sit upon the railings because to do so would be dangerous. Certainly the jury would be entitled to infer that Leonard was also aware of these warnings. Under these circumstances there was at least "slight" evidence that Leonard had actual knowledge of the danger of sitting upon the railing.

Although appellant argues that knowledge of the specific danger is necessary, a contention with which we do not agree, it appears that this requirement was also met. The obvious, and almost the sole, danger in sitting upon the railing would be the possibility of falling to the concrete surface below. Since approximately [***7] 500 students were in attendance at the school [**915] dance, and since some of these students had just been dismissed therefrom, Leonard must certainly have had actual knowledge that many of these students would be coming out the exit door onto the landing and that he could easily be jostled from the railing. The specific cause of Leonard's fall in the instant case was the act of a student who either startled him or actually pushed him from the railing. Certainly it can be inferred that Leonard was aware of the propensity of his classmates to indulge in horseplay, particularly in view of the fact that the principal of Leonard's school testified that horseplay, including scuffling, presented a definite supervisory problem, especially with children of the junior high age. Just prior to the occurrence of the accident Leonard had in fact been poking this very student in the ribs while on the dance floor, and had thus been indulging in the very type of horseplay which ultimately resulted in his fall from the railing. Under these circumstances, it is proper to infer that Leonard had actual knowledge of the specific danger in sitting on the railing.

[*205] Appellant argues, [***8] however, that Leonard's acceptance of the risk was not "voluntary" since Leonard was required under section 12101 of the Education Code to attend school. Appellant relies upon *Finnegan v. Royal Realty Co.* (1950), 35 Cal.2d 409 [218 P.2d 17], where the court stated that workmen could not be said to have voluntarily assumed the risk of unsafe working conditions since their only choice was to put up with these conditions or lose their livelihood. This point merits little discussion. (5) Suffice it to say

that by no stretch of the imagination can the duty to attend school be said to include the obligation to sit upon railings which abut upon 12-foot drops. The trial court did not err in instructing the jury upon the defense of assumption of risk.

(6) Appellant's second and final ground for reversal is that the trial court erred in instructing the jury that a school district would not be liable for injuries caused by the use of a stair railing when the particular use was not one for which the railing had been designed or intended and when the school district, in the exercise of ordinary prudence, could not reasonably have anticipated this particular use. This instruction is taken [***9] from the last paragraph of BAJI 219-F (Cal.Jury Instns., Civ., vol. 2, pp. 877-879), and was designed to be given where "condition negligence" rather than "conduct negligence" is in issue (see pp. 852-853).

Upon oral argument appellant concedes that were it not for the fact that the court instructed the jury as to the doctrine of assumption of risk it would not be urging the fallacy of this instruction, for even if it were error to so instruct, it could not be said to have misled the jury where all other instructions were free of error. Inasmuch as we have concluded that the assumption of risk instructions were correct, the situation conceded by appellant has not changed. While the subject matter of this instruction was not in issue in view of the ruling on the prior appeal and to instruct thereon was error, nevertheless the instruction did not mislead the jury and did not bring about a miscarriage of justice entitling the appel-

lant to a reversal. Under this instruction the jury was told that they could not find respondents liable if they found that Leonard's use of the railing was not one for which it had been designed or intended *and* that respondents could not reasonably [***10] have anticipated this use. The evidence presented at the trial conclusively established that respondents had actual knowledge that students had been sitting upon and leaning against the railing in question. Mr. Miller, the principal of [*206] respondent school, testified that he had seen students indulging in this practice, and that he had personally observed the students doing this as often as two or three times a month. In view of this completely uncontradicted testimony establishing that respondents had actual knowledge that students sat upon the railing in question, it would seem clear that the jury must have found that Leonard's use of the railing was foreseeable by [*916] respondents. (7) Where the court gives an erroneous instruction which is based on a supposed fact and the evidence establishes without conflict that this fact does not exist, no harm can be said to have resulted from the error. (*Robinson v. Western Pacific R. R. Co. (1874)*, 48 Cal. 409, 424-425; *Fidelity etc. Co. v. Paraffine Paint Co. (1922)*, 188 Cal. 184, 196 [204 P. 1076].) Since the erroneous portion of this instruction was contingent upon a finding that respondents could not [***11] reasonably have foreseen the use of the railing, it cannot be assumed that appellant suffered prejudice from the giving of this instruction.

Judgment affirmed.