

No. 43152-1-II

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

WILLIAM REINERT and
EVERGREEN SCHOOL DISTRICT,

Respondent,

v.

AMANDA BRADY

Appellant.

REPLY BRIEF OF APPELLANT AMANDA BRADY

Beau D. Harlan, WSBA #23924
Harlan Law Firm
211 E. McLoughlin Blvd.
Vancouver, WA 98663
(360)735-8200
(360)735-8204 Facsimile

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I. RESPONDENT IGNORES THE SUMMARY JUDGEMENT STANDARD BY ASSERTING CONTESTED FACTS IN THE LIGHT MOST FAVORABLE TO RESPONDENT

Respondent asserts that the school patrol and traffic monitors remained at their posts until the buses departed and ‘there were no children intending to cross 7th Ave. visible or present.’¹” In the matter at bar, Respondent asserts that Oliver-Philosof would not dismiss the school patrol until after the last bus left and ‘the bus was out of the driveway and down the road and there was no visible children in sight, then I would blow the whistle and we would be released.’²” Respondent’s proposed assertion runs contrary to the basic premise of summary judgment analysis, e.g., taking the facts and inferences from those fact in the light most favorable to the non-moving party.

To the contrary of Respondent’s asserted facts, Bobbi Hite, the principal at Crestline Elementary, explained the protocol with respect to the traffic safety monitors and school safety patrol in her deposition. More specifically, Hite testified, “Once all buses are moved out and gone, then staff moves into the building and traffic monitors and safety patrol kids move in.”³” It was the dispatch of the buses that dictated when the traffic monitor and safety patrol leave their positions at the crosswalks because “the majority of our students are out and gone for the day, and so it’s a reasonable expectations that buses are gone, kids have moved out so traffic monitors and kids move in to go home as well.” In stark contrast from to Oliver-Philosof testimony, Hite testified that the traffic monitors and safety patrol leave their posts as soon as the buses leave, without regard to the presence or absence of school children. When reviewing a

¹ Respondent’s Brief at pg. 5, 8

² Respondent’s Brief at pg. 4

³ CP 193

summary judgment, we consider all facts and reasonable inferences from them in the light most favorable to the non-moving party. *Vallandigham, v. Clover Park Sch. Dist.* No. 400, 154 Wn.2d 16, 26. Respondent's statement of facts ignores the basic premise of summary judgment analysis, e.g., accepting the facts in the light most favorable to the non-moving party.

The dispute of fact is central to the legal analysis. The purpose of employing traffic safety monitors and school safety patrol is 'to assist and aid members of the student body in the safe and proper crossing of streets, highways, and roads adjacent to the school. . .,' WAC 392-151-010. WAC 392-151-075 provides, "The hours that patrol members are on duty shall be determined by the needs of the school area from an accident prevention standpoint and the time schedule of the school being served....When a patrol member has been assigned to a particular crossing, the member shall be on duty at all times students are normally crossing streets or highways to and from school..." Assuming the protocol for the operation of the traffic safety monitors and school safety patrol is as Hite testified; the operation of the program is not designed to effectuate its stated purpose. The traffic safety monitors and school safety patrol may monitor pedestrian for as little as five and no more than ten minutes after school let out. Ultimately, the safety patrol and traffic safety monitors are not present when children would normally be crossing 7th Avenue.

II. RESPONDENT'S RELIANCE ON SELECTED OUT-OF STATE AUTHORITY IS UNPERSAUSIVE

Respondent's reliance on California tort law is misplaced because in California, a school district's liability for tortuous acts is defined by statute and there is no clear

consensus within California as to whether or not liability exists in the context of the matter at bar.

More specifically, California Code § 44808 provides:

Notwithstanding any other provisions of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances. In the event of such specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board.

Quite clearly, Washington's statutory scheme does not provide for an analogous provision limiting the school district's liability. Even with the statutory provision, California courts have found school districts liable in factually similar context to the matter at bar. In a case where the parents of a six year old student brought a tort action against a school district for injuries suffered when their child was hit by a car while walking home from school, the Federal District Court from the Northern District of California noted:

There is no case from the California Supreme Court foreclosing plaintiff's claims against the school district nor is there a clear consensus among the California Courts of Appeals on the issue of a school's duty to students on the way to school. . . .

California courts have been reluctant to set bright line rules restricting the liability of school districts for injuries to student which occur off school property. Courts have stressed that a negligent school district cannot automatically escape liability simply because the injury occurred off the school property. Instead, a school "may be held liable for injuries suffered by a student off school premises and after school hours where the injury resulted from the school's negligence while the student was on school

premises...” *Simpson v. Union Pacific Railroad Co.*, (C 02-4988 MHP, N.D.Cal. 2003)

Perna v. Conejo Valley Unified School Dist., 143 Cal.App.3d 292, presents a set of facts similar to the matter at bar. In *Perna*, Royce, age 12, was a student at Sequoia Intermediate School and her sister, Regina, age 14, was a student at Newberry Park High School. *Perna v. Conejo Valley Unified School Dist.*, 143 Cal.App.3d 292, 294. Although they attended different schools which let out at different times, the sisters customarily walked home from school together. *Id.* On the date of the events giving rise to the injury, Regina’s teacher asked her to stay after school to help grade papers. *Id.*, at 294. Regina waited for her sister and when the grading was completed at approximately 3:00 p.m. the girls left school and started home. *Id.* The city of Thousand Oaks employed a school crossing guard at an intersection the girls had to pass through on the way home. *Id.* The crossing guard was present from 11:15 a.m. until 2:45 p.m.. *Id.* The school crossing guard was no longer on duty when Regina and Royce crossed in the crosswalk of the intersection at approximately 3:15 p.m. *Id.* They were struck by a vehicle and sustained injuries which gave rise to the claim of negligence against the school district. *Id.* Similar to Evergreen School District, the school district’s denial of liability was premised upon the theory that the school district owned no duty to the girls. The court of review reversed the trial court’s decision to grant summary judgment for the school, stating:

In the instant case, the plaintiffs were kept late so that they were forced to cross an intersection at a time when the crossing guard was not there. It is alleged that the very act of keeping children after school contributed to a proximate cause of their injury. Had they been allowed to leave school on time, presumably they would have crossed at the intersection when the crossing guard was present to provide a greater margin of safety. *Perna v. Conejo Valley Unified School Dist.*, 143 Cal.App.3d 292.

Similarly, in *Eric M. v. Cajon Valley Union*, 174 Cal.App.4th 285, 289 (2009), the court of review found that the trial court incorrectly determined the [school] District did not owe Eric a duty of reasonable care when he was struck by a vehicle while he walked home from school. Ultimately, defendant's reference to *Wright v. Arcade School District*, 230 Cal.App.2d 272, is misleading because not only is it interpreting a statute that specifically limits school district liability, a statute that does not exist in Washington, but a significant body of case law runs contrary to the proposition for which it was cited.

Defendant cites a Colorado case, *Jefferson v. Gilbert*, 7235 P.2d 774 for the proposition that the school district does not have a duty to post crossing guards when children would normally be present. Colorado has authority running to the contrary as well. In *Gilbert v. Arvada*, 694, P.2d 847, Plaintiff, Christian Gilbert, was walking home from school with a classmate. As the children crossed an intersection about five blocks from the school, Christian was struck and injured by a vehicle driven by Roy Miller. *Id.*, at 848. Plaintiff's brought an action against the school district claiming that the school district's caused Christian's injuries. *Id.* After the trial court entered summary judgment in favor of the school district, the Colorado Court of Appeals reversed, stating:

Here, there was evidence before the court stating that crossing guards were assigned to the subject intersection following the afternoon dismissal of all the other classes. Yet, no guards were supplied to supervise kindergarten children in crossing the very same intersection. In our view, if guards were in fact supplied for this intersection when other classes were dismissed, the failure to provide guards for the kindergarten class creates a very real factual issue whether the district was negligent in not affording protection, similar to that given the older children, to the youngest most vulnerable children in its care. This issue must be resolved by the trier of fact. *Gilbert v. Arvada*, 694 P.2d 847, 849.

Applying the rational enunciated in *Gilbert*, where the court determined that the school district had a duty to post crossing guards five blocks from the school, it would seem self-evident that Crestline had a duty to post the traffic monitors and school safety patrol at the intersections immediately in front of Crestline Elementary when ‘children would normally be present,’ 16 minutes after the bell rang.

Defendants’ reliance on *Gilmore v. City of Zion*, 237 Ill.App.3d 244 is misplaced as well. Similar to California, Illinois has a statute which limits a school district’s liability to circumstances under which the school district is guilty of willful or wanton misconduct. The court of review affirmed the dismissal of the school district from the personal injury action, in part, because the Plaintiffs failed to allege facts sufficient to establish the requisite ‘willful and wanton’ conduct. *Id.*, at 754. As previously noted, the Washington’s legislature hasn’t limited a school district’s liability to circumstances of ‘willful or wanton’ conduct.

III. EXISTENCE OF LEGAL DUTY ‘DEPENDS ON MIXED CONSIDERATIONS OF LOGIC, COMMON SENSE, JUSTICE, POLICY, AND PRECEDENT’

The existence of a legal duty is a question of law and “depends on mixed considerations of logic, common sense, justice, policy, and precedent. *Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62, 66 (2005) In the matter at bar, logic, common sense, justice, policy, and precedent dictate that if a school district employs traffic safety monitors and school safety patrol ‘to assist and aid members of the student body in the safe and proper crossing of streets, highways, and roads adjacent to the school . . .,’ that they remain on duty ‘at all times students are normally crossing [the] street. . .’ In the matter at bar, Crestline Elementary’s practice was for the school safety patrol and traffic

safety monitors to abandon their posts as soon as the buses left, e.g., 5 or 10 minutes after school let out, when children were still present and using the crosswalks in question.

Dated this 5th day of November, 2012



BEAU D. HARLAN, WSBA No. 23924
Attorney for Plaintiff

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WASHINGTON STATE COURT OF APPEAL

DIVISION TWO

AMANDA BRADY, an individual and
legal guardian for MALLORIE
BROUSSARD, a minor child,

Appellant,

vs.

WILLIAM REINERT, an individual,
EVERGREEN SCHOOL DISTRICT, a
local government entity operating with the
State of Washington.

Respondent.

No: 43152-1-II

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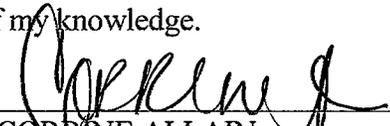
I, Corrine Allain, declare:

I am employed in the State of Washington, over the age of 18 years at the time of service hereinafter mentioned, not a party to the above-entitled action, and competent to be a witness therein.

On November 5, 2012, I mailed a copy of the REPLY BRIEF, postage prepaid, first class mail, directed to the individuals indicated below.

<p>Diana V. Blakney Tierney Law Firm, PC 2955 80th Ave. SE, Suite 205 Mercer Island, WA 98040</p>	<p>Simon Harding Schulte, Anderson, Downes, Aronson & Bittner P.C. 811 SW Naito Parkway, Suite 500 Portland, OR 97204</p>
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct to the best of my knowledge.


CORRINE ALLAIN

HARLAN LAW FIRM

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