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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO: 355861

Okanogan County Superior Court No: 14-2-00526-3

RYAN FRAZIER,

Plaintiff/Appellant,

v.

STEVE QUICK and JANE DOE QUICK, husband and wife,

and

OROVILLE SCHOOL DISTRICT NO. 410,

Defendant/Respondent.

APPELLANT'S OPENING BRIEF

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Appendix A (RCW 28A.405.100)

Appendix B (RCW 28A.405.220)

Appendix C (Tort Claim)

I. INTRODUCTION

Plaintiff Ryan Frazier appeals from (a) the Findings of Fact, Conclusions of Law and Judgment entered by Okanogan County Superior Court on August 22, 2017, and (b) from the Memorandum Order on Reconsideration dated January 9, 2017, and (b) from Pretrial decisions made the first morning of trial on May 23, 2017.

II. ASSIGNMENTS OF ERROR

- 1 – Certain Findings of Fact are not supported by the evidence at trial; and
- 2 – Certain Findings of Fact overlook or disregard critically important evidence and witness testimony regarding Plaintiffs' claims; and
- 3 – Certain Conclusions of Law are not supported by the Findings of Fact, and are otherwise unsupported by statute and/or case law; and
- 4 – The school board's determination to nonrenew Plaintiff's contract was made in violation of Washington statute and case law; and
- 5 – The Trial Court committed error by dismissing the jury and conducting a bench trial; and

6 - The Court committed error by granting Defendant's Motion for Reconsideration after previously Denying defendants' motions for summary judgment; and

7 – The Court committed error by granting motions *in limine* after previously ruling on the same issues in Defendants' Motions for Reconsideration, without new evidence or testimony, causing Plaintiff fatal prejudice; and

8 – The Court committed error by entering judgment against Plaintiff.

III. STATEMENT OF THE CASE

Ryan Frazier was hired to be a social studies and history teacher at Oroville Junior/Senior High School for the school term 2013-2014. He had previously worked one year at Tonasket. But since he was relatively new to the profession, he was considered a “provisional” teacher.

Ryan's school year seemed to be going very well. As indicated in the eVAL report prepared by his direct supervisor, school Principal Kristin Sarmiento he earned high marks for the in-class observations. He received some “Basic” designations, as well as several “Proficient” and “Distinguished” marks (Ex. 7).

He was never found to be deficient in any evaluation category. At no time during the year was he told that his performance was unsatisfactory.

or that his contract was in danger of being non-renewed.

Washington law requires that every provisional teacher be given actual notice of the intent to non-renew his/her contract no later than May 15th preceding the next school year. RCW 28A.405.220(2).

Ryan's name was originally on a list of teachers recommended for renewal (Ex. 22). However, on May 14, 2014 he received a letter (Ex. 8) from Superintendent Steve Quick stating that his contract would not be renewed. The letter identified 3 grounds for nonrenewal: (1) lack of lesson planning, and (2) cynical and defiant attitude as expressed in the evaluation documents, and (3) missing staff meetings.

The letter was the first time he was told there was a problem with his performance as a teacher.

Superintendent Quick testified he did not ask to see Ryan's written lesson plans until the meeting on May 28, 2014 (VRP 832:13-833:9). He testified first that he relied on conversations about lesson planning with Principal Sarmiento, on the original eVAL report (VRP 833:15-834:25). Quick would have recommend renewal if Ryan had produced lesson plans (VRP 685:17-23; 687:2-12).

After receiving the Notice of Probable Cause for Nonrenewal (Ex. 8), Ryan requested the meeting he was guaranteed by Washington statute which requires that after receiving notice of nonrenewal from the

Superintendent, a provisional teacher has an absolute right to meet with the superintendent to refute inaccurate information. RCW 28A.400.220¹.

The purpose of the statutory process is to provide due process to the provisional teacher and prevent arbitrary and biased nonrenewal. The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Steve Quick knew he was required by law to allow Ryan a fair and honest opportunity to refute allegations. He testified that “number one reason” for nonrenewal was alleged lack of lesson plans (VRP 683:6-16). He did not disclose that producing lesson plans to the OSD board would be sufficient for renewal recommendation (VRP 682:7-683:18; VRP 685:16-687:12).

IV. ARGUMENT

A. THE TRIAL COURT COMMITTED ERROR BY GRANTING DEFENDANT’S MOTIONS IN LIMINE AFTER PREVIOUSLY RULING ON THE SAME ISSUES IN THE MOTION FOR RECONSIDERATION

¹ Appendix B

The Defendants filed motions for summary judgment, which were denied (CP462-465). Following the Defendant's Motion for Reconsideration, the Court expressly found that the acts of the OSD school board (1) were arbitrary and capricious, and (2) made in disregard for important evaluations, observations, recommendations and comments, with possible withholding of information, and (3) board members failed to perform their duties, or failed to give proper review and consideration. (CP 1972-1974). The Court also denied the motion by Steve Quick to dismiss claims of tortious interference with Plaintiffs' contract, and negligence.

On the first morning of trial, without any new information or evidence, in the context of motions *in limine*, the court totally backtracked and reversed those decisions, dismissed the jury and convened a bench trial (VRP 5-62). Those decisions were prejudicial, unreasonably surprised the Plaintiff, and were clearly erroneous. Granting the motions *in limine* were nothing more than a surrogate for an improper request to reconsider the earlier reconsideration decisions.

B. THE OSD NONRENEWAL DECISION VIOLATED STATE LAW

Title 28A RCW is entitled "Common School Provisions" and covers a myriad of issues pertaining to operating schools, including contracts with

educators and administrators. Collectively, the statutes within Title 28A constitute this state's public policy as declared by the legislature, regarding public policy underlying nonrenewal of a teacher's contract. See *Simmons v Vancouver Sh. Dist.*, 41 Wn.App. 365, 704 P.2d 648 (1985); *Meyers v. Newport Consol. Joint Sch. Dist.*, 31 Wn.App. 145, 639 P.3d 853 (1982).

The only grounds on which a school board is permitted to decide to nonrenew a teacher are set forth in RCW 28A.405.100. A teacher has the right to assume that only statutory criteria will be used in an evaluation. *Barendregt v. Walla Walla Sch. Dist.*, 87 Wn.2d 154, 550 P.2d 525 (1976)

RCW 28A.405.100(1)(a) defines how a teacher is to be evaluated, and sets forth the exclusive criteria that are to be used in the evaluation process:

- instructional skill
- classroom management
- professional preparation and scholarship
- effort toward improvement when needed
- student discipline and attendant problems
- interest in teaching pupils
- knowledge of subject matter

In this case, the Court committed reversible error by failing to recognize that the superintendent and the OSD board of directors ignored the clear duty to limit the evaluation of Ryan Frazier to only the elements

defined in the statute. The Findings of Fact do not mention these requirements, and the Conclusions of Law do not apply the statute.

Furthermore, and contrary to Conclusion of Law #6, the decision by the OSD the board of directors was quasi-judicial.

“We think the trial court correctly construed this act. In deciding whether a teacher's contract shall be nonrenewed, the school directors perform a function quasi-judicial in nature.”

Pierce v. Lake Stevens Sch. Dist., 84 Wn.2d 772, 787, 529 P.2d 810

(1974) (emphasis added).

Linda Colvin attended the meeting between Superintendent Quick and Ryan Frazier. As shown herein, she testified that Ryan tried to show Quick the lesson plans but he refused to look at them. Principal Kristin Sarmiento told Quick that there were lesson plans. Nevertheless, Quick told the Board there were no lesson plans.

Supporting letters from Principal Kristin Sarmiento, Linda Colvin and other teachers, and members of the public, somehow “disappeared” and were never shown to the directors before the OSD Board voted in executive session to nonrenew Ryan Frazier’s teacher contract. Steve Quick testified in his deposition that he provided some of the letters in support that he received, but he failed to produce them all. (VRP 175:10-176:10).

C. THE SUPERINTENDENT'S DECISION FOR NONRENEWAL VIOLATED THE COLLECTIVE BARGAINING AGREEMENT WITH THE OROVILLE EDUCATION ASSOCIATION

When Ryan Frazier was hired as a provisional teacher he became subject to the Collective Bargaining Agreement that was already negotiated between OSD and the OEA (Ex. 1), including the old teacher evaluation forms at Appendix A (pp. 48-51). However, Appendix I to the CBA (Ex. 2) is a Memorandum of Understanding (MOU) that controls use of the new TPEP method of evaluation.

This 2013 MOU regarding TPEP (Ex. 2) includes critical language that the superintendent, the OSD board of directors, and the Trial Court disregarded in this case:

- “2. The parties shall use the online eVal tool, including reporting forms, for both comprehensive and focused evaluations, with ongoing trainings occurring during the school year.
3. All provisional or probationary teachers in the District will be evaluated using the new comprehensive evaluation model. ...
12. All observations shall be openly conducted by the designated and trained evaluator.
13. The use of either the self-assessment portion of the eVal process or the use of the District-selected online lesson planner will not be a criteria used in the evaluation process.”

In this case, Steve Quick testified that he relied the information provided by Principal Sarmiento in the eVal report which indicated Ryan

was not doing lesson planning. But Ms. Sarmiento admitted it was an error for her to include this information in the report, because of the prohibition in the MOU. (VRP 348:6-349:9). Again, the Trial Court failed to recognize this critical issue.

The eVal tool (Ex. 84) was new, and was unfamiliar to Ms. Sarmiento who was tasked with applying it. (VRP 338:8-15, VRP 488:15-489:4). It was designed to be completed following three observations of the provisional teacher, with the final document including all observations made throughout the year. The self-assessment portion was to be disregarded (VRP 342:19-343:5).

Ryan apparently misunderstood the protocol, and his initial responses were inappropriate, but Ms. Sarmiento quickly determined that what initially seemed as defiance was merely a misunderstanding (VRP 343:5-345:18). In fact, the areas that were marked as “unsatisfactory” should have been changed, but she was locked out of the program and could not make corrections. (VRP 349:21-350:18). Her testimony does not support Finding of Fact #9.

D. THE COURT’S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE INACCURATE AND INCOMPLETE AND DISREGARD CRITICAL EVIDENCE

1. The Findings of Fact Exclude Critical Witness Testimony.

It is disturbing that the Trial Court completely ignored testimony by four witnesses who provided clear evidence that the OSD board acted in blatant disregard of the facts, and, therefore, arbitrarily and capriciously.

* Arnie Marchand (VRP 690-695). Mr. Marchand is a local tribal leader who testified about the robust and creative teaching methods exhibited when he was asked to make a presentation to Ryan Frazier's class.

* Lisa Cone (VRP 695-702). Mrs. Cone is a parent who was threatened with arrest because she tried to speak in support of Ryan Frazier at a public meeting of the OSD board.

* DR. SCOTT FINNIE (VRP 63-78). Dr. Finnie testified that Ryan Frazier was always willing to learn and adapt to conform to assignments and requirements. He was creative, innovative, and a very effective teacher (VRP 68:12-72:7)

* DR. STEVEN SMEDLE: (VRP 418-456). Ryan Frazier was a student in two of his classes as EWU (VRP 421:7-20). Dr. Smedley was a school principal responsible for evaluating teachers (VRP 424:1-23) and a superintendent responsible for overseeing the evaluation process (VRP

424:24-425:8). He was the director for Administrator Professional Certification in Central and Eastern Washington for 8 years, providing training to over 250 evaluators in proper teacher evaluation (VRP 425:9-19). He also trained teachers in lesson planning (VRP 425:20-24).

He examined the eVal report relied on by Steve Quick and based on his training, experience and background concluded that the OSD did not have proper ground to nonrenew Ryan Frazier (VRP 426:16-445:8). In particular, he noted that the superintendent should ask for input from the teacher's immediate supervisor (VRP 441:1-12) and give the teacher notice of potential deficiencies before deciding to nonrenew (VRP 442:8-444:10). A teacher should be given the opportunity to remediate (VRP 446:17-447:12).

* DR. DAVID LINDEBLAD: (VRP 506-513. He wrote a letter to OSD supporting renewal and offering his professional services as a mentor if needed, but received no response (VRP 508:4-513:9; Ex. 16).

* LINDA COLVIN: (VRP 513-602). It is particularly concerning that the Trial Court totally disregarded Ms. Colvin's testimony because she was the only person to witness the May 24, 2014 statutory meeting between Superintendent Quick and Ryan Frazier.

- ✓ Ms. Colvin taught in the Oroville schools for over 30 years. served as the association president, building rep. president of the

Washington Science Teachers Association, and was on the board of the Washington Education Association (VRP 514:25-515:19). She also worked with superintendents and principals in remediating staff (VRC515:20-516:16).

- ✓ Ms. Colvin not only participated in transitioning from the old method of teacher evaluation, into TPEP which was brand new the year Ryan Frazier was hired (VRC518:23-520:21). IN October 2014 the training for the new eVal tool was just beginning, and she was on the committee responsible for implementing it (VRP 522:15-524:11).
- ✓ Principal Sarmiento was the only person identified as being designated and trained as the evaluator (VRP 524:12-19). The MOU prohibited using the experimental planner software because it was very awkward (VRP 528:21-529:18).
- ✓ Exhibit 72 is an example of daily lesson plans prepared by Ryan Frazier (VRP 535:17-537:1). Oroville School District does not have any requirements for what a daily lesson plan must include (VRP 537:24-539:70).
- ✓ She never saw Ryan Frazier fail to use a daily lesson plan (VRP 539:12-23).

- ✓ Ms. Colvin also testified that Ryan Frazier did not have a defiant attitude, or cynical attitude (VRP 539:24-541:17), and he did not miss faculty meetings (VRP 541:18-542:5).
- ✓ She had no concerns about his job performance before Superintendent Quick issued a notice of intent to nonrenew Ryan's contract (VRP543:9-543:110).
- ✓ Ms. Colvin attended the statutory meeting on May 28, 2014 between the superintendent and Ryan Frazier (VRP 544:5-545:5).
- ✓ He brought examples of student work (VRP 545:21-546:3) and lesson plans (VRP 548:15-550:21).
- ✓ Quick denied that what was presented were lesson plans (VRP551:17-22). She testified they were, in fact, lesson plans (VRP 553:10-11) but Quick did not even look at them (VRP 553:12-18). Ryan offered the lesson plans but Quick simply turned a few pages for less than 1 minute during the 90-minute meeting (VRP558:10-559:13; VRP 581:12-582:13). Ryan never refused to do lesson planning (VRP 599:7-15).
- ✓ During the meeting voices were raised by both Superintendent Quick and Ryan Frazier (VRP 559:13-561:3).

- ✓ Ms. Colvin wrote an email to Steve Quick the next day recommending renewal and offering to serve as a mentor for Ryan (VRP561:4-562:19; Rx. 27).
- ✓ She also wrote a letter to the members of the school board (Ex. 18) which she handed to the superintendent's secretary (Erin McKinney) to deliver to the board members (VRP 593:4-9), however her letter was not included in the materials provided to the board before it voted to nonrenew Ryan (VRP 564:18-569:19; Ex. 81).

Ms. Colvin's characterization of the meeting is perhaps best summarized by Steve Quick himself, who testified that the issue was not job performance personal animosity. He conceded at trial that he was unhappy that Ryan Frazier wasn't "*a little more humble*" at the May 28, 2014 statutory meeting (VRP 820:13-19).

2. The Findings of Fact Mischaracterize Testimony

The Trial Court also cherry-picked from the testimony by Principal Kristin Sarmiento, creating an inaccurate and unfair characterization.

She was trained to administer the new TPEP teacher evaluation protocol, using the eVal tool, which involved applying the Marzano

Framework of rubrics, preconference reports, observation reports, post conference reports, and input from her as the evaluator and from the teacher. (VRP 338:8-343:5). The school principal conducts the classroom observations and does the teacher evaluations, not the superintendent (VRP361:18-362:4)

Finding of Fact #9 improperly focuses only Ms. Sarmiento's initial impression of Ryan Frazier's very first electronic entry in the eVal report. While she did testify that his quote from Dr. Seuss was a "smart aleck response" it was not defiant, and after meeting with him she concluded he was seriously concerned about student privacy but was willing to provide whatever information she asked him to provide. (VRP 343:15-345:19). The Finding of Fact entirely disregards the post-conference aspect of Ms. Sarmiento's report which puts this first entry in the first eVal report into perspective (VRP 489:12-491:4).

Findings of Fact #10-11-12-13-14-15 all center on alleged lack of lesson planning. All of these Findings are taking out of context by looking solely at the electronic eVal report and totally ignore Ms. Sarmiento's trial testimony, including the fact that she explained to Steve Quick the written entries did not tell the whole story.

In total, the Findings of Fact are inconsistent with the trial testimony by Ms. Sarmiento.

- ✓ Ms. Sarmiento testified it was improper for Steve Quick to say Ryan Frazier was not preparing lesson plans. (VRP 355:8-356:12; 392:2-24).
- ✓ In the eVal report she was actually referring only to the experimental online planning software which was not to be used in an evaluation. She realized her error, but once it was entered in the eVal report it could not be removed. (VRP 348:6-349:20; 384:6-23).
- ✓ She observed daily lesson plans, rubrics, questions, and graphic organizers, all of which were stored in multiple binders (VRP 491:13-492:15)
- ✓ She gave Ryan Frazier a final rating of “Basic” and told Steve Quick she recommended renewing the teacher contract. (VRP349:21-351:17) (Ex. 20).
- ✓ Ryan Frazier showed growth and improvement throughout the school year (VRP 354:25-355:6).
- ✓ Steve Quick told her he would renew Ryan Frazier’s contract. (VRP 353:12-354:15) (Ex. 21).

- ✓ Ms. Sarmiento was not notified that he changed his mind until after the May 14, 2014 nonrenewal letter was delivered to Ryan Frazier. She did not expect nonrenewal (VRP 355:9-25).
- ✓ She disagrees with the allegation by Steve Quick that Ryan Frazier did not do lesson planning (VRP 356:1-12) (Ex. 8).
- ✓ Documents produced at trial show “clear evidence of the amount of planning” and she has no doubt that Ryan Frazier conformed to all state requirements. (VRP 356:12-357:20) (Ex. 65).
- ✓ She sent an email to Steve Quick on May 28, 2014 specifically stating that Ryan Frazier does more lesson planning than most teachers, and any allegation of “winging it” was actually just taking advantage of a “teachable moment”. (VRP 357:21-360:15) (Ex. 26). This email was an effort to convince Steve Quick to renew Ryan Frazier's contract (VRP 362:12-18).
- ✓ Lesson plans are not required to be written in any particular format (VRP 360:16-361:17) (Ex. 139 p. 8)
- ✓ She is required to attend school board meetings and did attend the May 2014 meeting where no one was allowed to speak in support of renewing Ryan Frazier's contract (VRP 363:15-364:5).

- ✓ In the past the board allowed people to speak in support of a provisional teacher before a nonrenewal vote was taken (VRP364:13-365:1; 367:16-24).
- ✓ The board president, Rocky Devon, announced at the May 2014 meeting that members of the public would be allowed to speak regarding nonrenewal at the June 2014 board meeting (VRP 367:25-368:13).
- ✓ She told Steve Quick in face-to-face meetings and in email that Ryan Frazier's contract should be renewed (VRP 375:15-24).
- ✓ She never told Quick that Ryan Frazier was missing a large number of staff meetings (VRP 377:13-378:12).
- ✓ She did not find Ryan Frazier difficult to work with, the students like him and he had the necessary skills as a teacher (VRP 378:3-17).
- ✓ In the past a provisional teacher that was in danger of nonrenewal would get a warning and coaching, but she saw no need for that with Ryan Frazier (VRP378:18-380:6).
- ✓ She did not intend for the final eVal report to be interpreted as a recommendation for nonrenewal, she expected the contract to be renewed for another year (VRP380:10-381:13).

Ms. Sarmiento attempted to testify that she sent an email to the board recommending renewal, but the trial court erroneously relied on the “best evidence rule” to exclude that testimony. The email was unavailable, but she was prepared to testify to the content of the communication. (VRP 369:18-375:14) (Ex. 19 – offered but not admitted). This was an incorrect application of a basic principle of evidence generally requires that “the best possible evidence be produced.” *Larson v. A. W. Larson Constr. Co.*, 36 Wash.2d 271, 217 P.2d 789 (1950). When the document is unavailable the witness is permitted to prove the contents by parol evidence. *Walton v. Superior Court for Snohomish County*, 18 Wn.2d 810, 822, 140 P.2d 554 (1943). Excluding this testimony was clear evidence that both Steve Quick and the board members intentionally disregarded the recommendation of Principal Sarmiento that Ryan Frazier’s contract should be renewed.

The Findings of Fact are also incorrect and misleading regarding testimony from members of the OSD board of directors.

Todd Hill (VRP 767-786).

- ✓ The only material from Ryan Frazier that Steve Quick submitted to the board was a 3-page letter (VRP 771:23-772:24) (Ex. 11).

- ✓ He intended to vote to renew Ryan Frazier's contract and was disappointed that more materials were not provided to the board (VRP 770:1-773:16).
- ✓ He stated in two emails to Steve Quick that he wanted to renew the contract (VRP 774:19-23).
- ✓ Steve Quick did not tell the board that at the May 28, 2014 statutory meeting he received materials from Ryan Frazier that were not provided to the board (VRP 775:8-12).
- ✓ He was unaware that there was more material that was not provided to the board (VRP 775:22-24).
- ✓ Steve Quick did not tell the board that Principal Sarmiento recommended renewal (VRP 775:25-776:13).
- ✓ Steve Quick did not tell the board that Linda Colvin attended the May 28, 2014 meeting and wrote a letter to the board recommending renewal and stating that there were daily lesson plans contrary to what Steve Quick told the board, and the letter was placed in his mail slot (VRP 776:13-777:17).
- ✓ Steve Quick did not tell the board that Kristin Sarmiento sent an email to Steve Quick dated May 28, 2014 stating that Ryan Frazier did have binders filled with lesson plans and does more planning than most teachers (VRP 777:18-778:22).

- ✓ He was not told that the TPEP MOU prohibits using the online planner software in an evaluation (VRP 778:24-779:9).
- ✓ He wanted to allow Ryan Frazier to talk with the board but board chair Rocky Devon told the board only written input was permitted by state law (VRP 779:17-781:10).
- ✓ He was aware that Ryan Frazier was at the meeting (VRP 783:25-784:2) but he was not aware he brought examples of lesson plans that Steve Quick said did not exist (VRP 783:17-21).
- ✓ He was not aware that Ryan Frazier presented lesson plans to Steve Quick gave them back (VRP784:3-9).
- ✓ He was not aware that Steve Quick had other documents that were not provided to the board (VRP785:2-5).
- ✓ The school principal conducts teacher evaluations (VRP785:13-16).
- ✓ There are no OSD regulations or policies defining what a lesson plan is (VRP785:17-786:7).

Brad Scott (VRP 786-799)

- ✓ When he came to the board meeting he was expecting to hear from Ryan Frazier (VRP789:17-25)

- ✓ The board voted for nonrenewal because the only thing provided to the board was the 3-page letter from Ryan Frazier and Steve Quick's recommendation (VRP 790:4-19).
- ✓ Because of the material presented Ryan Frazier appeared to be "un-coachable" (VRP790:20-791:2).
- ✓ The principal evaluates the teacher but he received no information from Ms. Sarmiento regarding renewal (VRP791:5-11) (Ex. 81).
- ✓ He was not provided copies of the exhibits presented to Steve Quick at the May 28, 2014 meeting attended by Linda Colvin (VRP 792:6-21).
- ✓ It was board chair [Rocky Devon] or superintendent [Steve Quick] that told the board state law only requires the board to consider only written submissions (VRP 792:22-793:18; 794:2-7).
- ✓ The letter from Steve Quick to the board (Ex. 81) said Ryan Frazier doesn't do lesson planning, doesn't attend staff meetings, and won't listen to make corrections to his attitude, but the board was not told Principal Sarmiento contradicted these claims (VRP 794:15-795:21).

- ✓ He did not know Ryan Frazier provided materials to the superintendent that he expected to be provided to the board (VRP 797:12-17).
- ✓ He thought Ryan Frazier was allowed to present documents at the meeting. (VRP 797:18-799:3).

Travis Loudon (VRP 799-812)

- ✓ He would have relied on recommendations from both the superintendent and the principal, and materials provided by Ryan Frazier (VRP 802:15-25).
- ✓ Even though Principal Sarmiento gave Ryan Frazier a rating of “Basic” he would have voted to nonrenew because he wants only above average teachers (VRP805:10-25).
- ✓ He has no training in how to interpret the eVal tool (VRP806:8-11).
- ✓ He believes that a rating of “Basic” on the eVal tool means the teacher is “not meeting any of the standard” (VRP806:15-20).
- ✓ The letter written by Linda Colvin (Ex. 18) is not included in the materials provided to the board by Steve Quick (Ex. 18) (VRP 807:19-808:20).

- ✓ He did receive a copy of the letter from Linda Colvin, but he can't recall how, or whether he received it at the time the board voted to nonrenew (VRP808:21-809:21).
- ✓ He was unable to recall whether the board was told that Ms. Sarmiento and Ms. Colvin disagreed with the allegation that Ryan Frazier did not do lesson planning (VRP 809:14-811:6).

Rocky Devon (By deposition VRP 999-1016).

- ✓ He was elected by the school board as president (VRP 1010:16-18).
- ✓ He was told that Linda Colvin attended the meeting between Steve Quick and Ryan Frazier, but does not recall if he received a letter from her (VRP1011:15-25).
- ✓ There was no board vote to remove Ryan Frazier's name [from the list of renewal contracts], but there was a conversation among board members (VRP 1012:21-1013:6). The request to remove Ryan Frazier's name came from Rocky Devon and Todd Hill (VRP 1014:1-7).
- ✓ Ryan Frazier's name was removed because "*we had some issue with some of the things he had done in the classroom*" such as the Pledge of Allegiance was not "*being taken seriously*" in his classroom, and "*he was not teaching patriotism*", and he had a

class assignment about racism, so when the board packet came out with Ryan Frazier's name on the list of teachers to be renewed "*we asked that we do not do the renewal at that time*" (VRP 1013:5-22).

- ✓ He never talked to Ms. Sarmiento about her evaluation, and did not tell her he was concerned about the Pledge of Allegiance or assignment about racism (VRP1015:2-7).
- ✓ He was not aware that the Principal recommended renewal (VRP1015:8-9).
- ✓ Whether Ms. Sarmiento felt like she could work with him was irrelevant, "*I said I didn't care.*" (VRP 1015:25-1016:4).

Finally, the Findings of Fact fail to record that the superintendent, Steve Quick, was biased and did not act as a fair and neutral supervisor as required by state law.

- ✓ He prepared a document for board president Rocky Devon to use to prevent members of the public from speaking in favor of renewing Ryan Frazier's contract (VRP 606:2-612:2) (Ex. 9) which was written in advance of the June 2014 meeting because it was known Ryan Frazier intended to speak at the board meeting (VRP620:1-16). He did this to "avoid controversy" (VRP 630:1-633:12).

- ✓ He admitted that at the May 28, 2014 statutory meeting he was given binders but spent only about a minute looking at contents (VRP623:19-624:20).
- ✓ Ryan Frazier presented documents at the May 28, 2014 statutory meeting (VRP 612:3-613:4).
- ✓ He agrees that Ryan Frazier “probably planned”, based on his visits to the classroom (VRP 625:17-626:1).
- ✓ He exchanged emails with board member Todd Hill who wanted to renew Ryan Frazier’s contract, and agreed the board has discretion to receive public comment but recommended against it because of something that happened when a different provisional teacher was nonrenewed the previous year (VRP 633:15-645:6) (Ex. 12).
- ✓ Minutes from the board meeting on June 23, 2014 (Ex. 14), where the board voted to nonrenew Ryan Frazier’s contract, confirm that members of the public tried to talk in support of Ryan Frazier (VRP 651:8-20).
- ✓ He did not tell the board the Linda Colvin and David Lindeblad volunteered to mentor Ryan Frazier (VRP 669:23-670:11)
- ✓ He never offered coaching to Ryan Frazier (VRP 672:1-7).

- ✓ Principal Sarmiento is the only one who observed and evaluated Ryan Frazier (VRP 679:16:680:1).
- ✓ He believes Ms. Sarmiento was lying when she testified that she recommended renewal (VRP680:5-18).
- ✓ If Ryan Frazier had lesson plans he would not have been nonrenewed (VRP 685:17-23; 687:2-12).

E . THE COURT’S CONCLUSIONS OF LAW ARE ERRONEOUS AND ARE NOT SUPPORTED BY THE FINDINGS OF FACT

Conclusion of Law #3 - An employer does have a duty to avoid causing inflicting emotional distress, as discussed herein.

Conclusion of Law #6 – the acts of a school board in determining to nonrenew a provisional teacher’s contract is quasi-judicial, as discussed herein.

Conclusion of Law #8 – the wrongful acts by Steve Quick in withholding evidence and mischaracterizing information, and acting with bias, was not in good faith, as discussed herein.

Conclusion of Law #9 – the meeting conducted on May 28, 2014 as required by state law, was unfair, and did not provide Ryan Frazier with a meaningful opportunity to show the superintendent that nonrenewal was inappropriate, as discussed herein.

Conclusion of Law #12 – the board did not give due consideration to all available evidence and information before voting to nonrenew, because the board chairman prevented Ryan Frazier and members of the public from presenting or speaking, as discussed herein.

Conclusion of Law #14 – the decision to nonrenew Ryan Frazier’s contract was the result of bad faith, misconduct, and bias in violation of state law, as discussed herein.

Conclusion of Law #16 – the acts of the board were arbitrary and capricious, as the court previously determined in its Memorandum Order on Reconsideration (CP 1972-1974). It failed to consider any information presented in support of renewal, prevented Ryan Frazier from presenting materials after notifying the public that input would be allowed, and disregarded information from relevant sources including Linda Colvin and school Principal Kristin Sarmiento, as discussed herein.

Conclusion of Law #17 – the Complaint by Ryan Frazier has legal merit, as discussed herein.

Conclusion of Law #18 – the Defendants should not have been awarded costs.

F . DISMISSING DEFENDANT STEVE QUICK WAS REVERSIBLE ERROR

The Trial Court should not have granted any of the defendants' motions for summary judgment is not appropriate when the moving party's statement of facts are simply too incredible to be believed. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d P.2d 77 (1985); *Balise v. Underwood*, 62 Wn.2d 195, 381 P.2d 966 (1963).

For over 100 years Washington has recognized the common law rule that an agent acting within the scope of his duties remains personally liable for his wrongful actions, even if the principal is vicariously liable.

A school district is a municipal corporation as recognized in the Constitution of the State of Washington. RCW 28A.320.010; *Maxon v. Sch. Dist.*, 5 Wash. 142, 31 Pac. 462 (1892.). A school district is liable for its torts. *Travis v. Bohannon*, 128 Wn.App. 231, 115 P.3d 342 (2005); *Coates v Tacoma Sch. Dist.* 55 Wn.2d 392, 347 P.2d 1093 (1960). There is no doubt that school districts are liable for their negligence. *Wagenblast v Odessa Sch. Dist.* 110 Wn.2d 845, 758 P.2d 968 (1988). School Districts are liable for judgments against it. RCW 28A.320.020.

Members of a school board are elected officials. RCW 28A.343.300. The liability of the County for the wrongful employment actions by its elected officials is clear. *Broyles v. Thurston County*, 147 Wn.App. 409, 195 P.3d 985 (2008).

The superintendent is an employee of the District, not an elected official. RCW 28A.400.010. A superintendent is, o]however, an agent of the school district. RCW 28A.400.020.

An agent acting within the scope of his authority is still personally liable for his wrongful actions, even though the conduct is within the scope of employment and his employer may also be vicariously liable. *Schuey v. Adair*, 18 Wash. 188, 51 Pac. 388 (1897); *Dodson v Econ. Equip. Co.*, 188 Wash. 340, 62 Pac. 708 (1936); *Eastwood v. Horse Harbor Found'n. Inc.*, 170 Wn. 2d 380, 241 P.3d 1256 (2010).

G. STEVE QUICK IS LIABLE FOR TORTIOUS INTERFERENCE WITH CONTRACT

This claim was improperly dismissed on Quick's motion for summary judgment. The Court mistakenly accepted the argument that Quick is somehow a party to the contract between Ryan Frazier and OSD. But he is not a party.

Both Quick and the District are liable for the wrongful acts that resulted in unfairly and improperly denying renewal of Ryan Frazier's contract. See *Bratton v Calkins*, 73 Wn.App. 492, 870 P.2d 981 (1994); *Scott v. Blanchet High Sch.*, 50 Wn.App. 37, 747 P.2d 1124 (1987).

Quick interfered with the contract, and OSD violated its statutory

obligations as a result of that interference.

Quick was employed as the superintendent of Oroville School District, and therefore an agent of the board of directors. A superintendent is an administrative employee² designated by the school board. RCW 28A.150.080. The school board has sole authority to determine the qualifications of the superintendent. RCW 28A.400.0140. A superintendent is required to attend all meetings of the board of directors, keep records as required by the board and by law, maintain detailed financial accounts, and has “such other duties as a district school board shall prescribe.” RCW 28A.400.030.

Quick violated the statutory obligation to base his nonrenewal decision solely on the evaluative factors defined in RCW 28A.405.100, then he lied to the School Board about the reasons for his recommendation for nonrenewal. And he refused to comply with the statutory and constitutional rights of due process.

Regardless of the District’s subsequent actions, Steve Quick is personally liable for his intentional and indefensible actions to ignore his responsibility under the law, and base a recommendation on lies, misrepresentations, and half-truths after ignoring Ryan Frazier’s due

² RCW 28A.400.010.

process rights.

Washington common law recognizes a cause of action for tortious interference which arises when the defendant pursues an improper objective to harm the plaintiff, or uses wrongful means to cause harm, that results in injury to the Plaintiff's contractual or business relationship with another party. *Pleas v City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

This tort has five elements: (1) a valid contract or expectancy, (2) defendant's knowledge, (3) intentionally interfering which causes breach of contract or expectancy, (4) for the improper purpose of harming the plaintiff *or* using wrongful means (5) which in fact cause injury to plaintiff's contractual or business relationships. *Pleas v City of Seattle, supra* at 802.

Every element is met here. Quick knew about Frazier's contract renewal, he intentionally and wrongfully recommended nonrenewal to the board, which refused to renew the contract based on Quick's misrepresentations.

H. NONRENEWAL OF RYAN FRAZIER'S CONTRACT WAS ARBITRARY AND CAPRICIOUS

Nonrenewal of a provisional teacher's contract is handled differently than for a tenured employee. Admittedly, provisional teachers

do not have tenure. *Schlosser v. Bethel Sch. Dist.*, 183 Wn.App. 280, 333 P.3d 475 (2014). However, having the status of provisional teacher does not divest Ryan Frazier of all his rights. In this case, he has a right to (a) protection from arbitrary and capricious termination, (b) protection from intentional or negligent misconduct, (c) damages for wrongful interference with his right to contract renewal, and (d) relief for the defamation resulting from Quick's false statements.

The superintendent and school board are allowed broad discretion, provided they comply with the statutory requirements to restrict evaluating the teacher's performance as defined in RCW 28A.400.100 (as expressly required by RCW 28A.400.220). The superintendent and the school board are not given unbridled authority to act arbitrarily.

Petroni v. Deer Park Sch. Dist. 414, 127 Wn.App. 722, 113 P.3d 10 (2005) unequivocally supports Plaintiff's position in this case. Ms. Petroni was hired as a provisional teacher and during her first year the principal observed four separate instances of misconduct. He met with her each time, and eventually recommended to the district superintendent that she be non-renewed. The superintendent gave notice of nonrenewal and the School Board agreed. The Court rejected her claim that the School Board did not have authority to non-renew her contract based on the misconduct which resulted in an adverse evaluation.

In *Petroni*, Division III made it crystal clear that where there is no misconduct the superintendent and the Board are not free to arbitrarily non-renew a provisional teacher. In fact, the court provides a bright line test (which Steve Quick deliberately disregarded):

“¶28. A plain reading of RCW 28A.405.220 establishes that when an evaluation is the basis for the superintendent's determination, that determination is "subject to," or limited by the evaluation requirements of RCW 28A.405.100. Consequently, **whenever a superintendent's nonrenewal determination is based on an evaluation, the determination must be based on the teacher's failure to meet the evaluation criteria.**” (emphasis added)

Petroni v. Deer Park Sch. Dist. 414, 127 Wn.App. 722, 731, 113 P.3d 10 (2005).

Ryan Frazier was never accused of misconduct, there were no meetings with him or other cautions that his performance was substandard, and no one counseled him how to improve or even that needed to improve. He was ambushed at the last minute by Steve Quick, and deprived of the rights afforded to him by Public Policy.

The decision to non-renew Ryan Frazier's contract was not based on any allegations, claims, or inferences of misconduct. Therefore, nonrenewal must be decided within the context of the statutory elements. The *Petroni* decision expressly restricts the superintendent and the School Board to consider only the evaluation criteria described in RCW 28A.405.100 which reads in relevant part as follows:

“(1) ... For classroom teachers the criteria shall be developed in the following categories: Instructional skill; classroom management, professional preparation and scholarship; effort toward improvement when needed; the handling of student discipline and attendant problems; and interest in teaching pupils and knowledge of subject matter.”

Ryan Frazier was evaluated by Principal Kristin Sarmiento, who testified that she gave him good a good evaluation and recommend that his contract be renewed.

RCW 28A.410.220(2) expressly states that in the context of issuing a notice of nonrenewal to a provisional teacher “[t]he determination of the superintendent shall be subject to the evaluation requirements of RCW 28A.405.100.” Consequently, Steve Quick violated his legal obligation to base his nonrenewal determination solely on the results of Ryan Frazier’s evaluation. The decision to non-renew was based on misrepresentations, mischaracterizations, false statements, and blatant disregard of uncontroverted evidence.

RCW 28A.405.220 requires that notice of the superintendent’s decision for nonrenewal “shall state the reason or reasons for such determination.” And, “[t]he determination of the superintendent shall be subject to the evaluation requirements of RCW 28A.405.100.” Quick

admits he based his decision for nonrenewal on Ryan's alleged failure to use on online lesson planner software. This was in direct breach of the TPEP/MOU contract with the Teacher's Association which prohibited using that as a basis for evaluation.

Teachers have a legitimate expectation of freedom from arbitrary action, which dictates being treated consistent with the statutes and policies governing their employment by the District. See *Green v. Cowlitz Cy. Civil Serv. Comm'n*, 19 Wn.App. 210, 577 P.2d 141 (1978); *Tacoma v. Civil Serv. Bd.*, 10 Wn. App. 249, 518 P.2d 249 (1973). That expectation is a fundamental right that belongs to teachers. *Williams v. Seattle Sch. Dist.*, 97 Wn.2d 215, 643 P.2d 426 (1982).

Most importantly, every teacher has the right to be free from arbitrary and capricious actions by the superintendent and the School Board. The courts possess inherent power to protect individual citizens from arbitrary action, including the denial of a license to pursue such an occupation. *Standow v. Spokane*, 88 Wn.2d 624, 631, 564 P.2d 1145 (1977).

In a case involving nonrenewal of a principal Division III observed that in the absence of established evaluative criteria, the educator serves at the whim and pleasure of the superintendent. With no guidelines against which to measure his performance the educator may thereby be deprived

of a legitimate opportunity for improvement. Without knowledge of the criteria to be employed in a discharge or nonrenewal hearing, the educator is further handicapped in his or her ability to dispute the propriety of the termination decision.

“This was not the intent of the legislature. Furthermore, established evaluative criteria and prior evaluations are important for purposes of judicial review.”

Hyde v. Wellpinit Sch. Dist., 26 Wn.App. 282, 288, 611 P.2d 1388 (1980).

The meeting between Ryan Frazier and superintendent Steve Quick was a meaningless waste of time because Quick refused to listen and refused to even look at the evidence offered which proved his decision for nonrenewal was baseless and wrong. The Declaration of Linda Colvin shows that Quick was dismissive, abrupt, and unfair.

In RCW 28A.405.220(3) the legislature requires a superintendent to give the teacher an opportunity to refute any facts upon which the superintendent’s determination of nonrenewal was based, and to make any argument in support of reconsideration.

Linda Colvin witnessed the meeting. It is apparent that Steve Quick violated his statutory and constitutional duty to provide a fair hearing to Ryan Frazier.

The legislature gives school superintendents authority to determine

probable cause for nonrenewal. *Schlosser v Bethel Sch. Dist.* 183 Wn.App. 280, 333 P.3d 475 (2014). But this is not a license to act arbitrarily and capriciously, or to misrepresent and disregard the facts. The decision to non-renew a teacher's contract must be based on probable cause, and the actions taken must comply with basic due process rights. *Carlson v. Centralia Sch. Dist.*, 27 Wn.App. 599, 619 P.2d 998 (1980).

The basic nature of due process is to protect a person against arbitrary administrative actions, and a teacher has the right to assume that only the statutory criteria will be considered. *Barendregt v Walla Walla Sch. Dist.*, 87 Wn.2d 154, 550 P.2d 525 (1976); see also: *Pierce v. Lake Stevens Sch. Dist.*, 84 Wn.2d 772, 529 P.2d 810 (1974).

The May 14, 2014 Notice of Probable Cause for Nonrenewal proves superintendent Quick knew he has a legal obligation to base his recommendation on evidence and verifiable proof constituting probable cause. Here, though, he has no proof and, in fact, tried to hide the truth by refusing to show the School Board the information from Linda Colvin, Kristin Sarmiento, and various others including other teachers who vouched for Ryan's skill and capabilities.

Statutes give the superintendent authority to determine probable cause for nonrenewal. *Schlosser v. Bethel Sch. Dist.*, 183 Wn.App. 280, 333 P.3d 475 (2014).

Determining whether governmental action is arbitrary and capricious is question of fact, not question of law. *Robinson v. Seattle*, 119 Wn.2d 34, 839 P.2d 318 (1992) (§ 1983 claim); *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988) (toxicology report); *State v. Pierce County*, 65 Wn.App. 614, 829 P.2d 217 (1992) (zoning).

When determining whether action by the governmental entity was arbitrary and capricious the trier of fact must look only at the evidence available at the time the decision was made, not information obtained later. *Pierce County Sheriff v. Civil Service Comm'n*, 98 Wn.2d 690, 658 P.2d 648 (1983); *Westberry v. Interstate Dist Co.*, 164 Wn.App. 196, 263 P.3d 1251 (2011); *Schneider v. Snyders Foods*, 116 Wn. App. 706, 66 P.3d 640 (2003); *Snider v. Bd. of Comm'rs*, 85 Wn. App. 371, 932 P.2d 704 (1997); *Coupeville School Dist. v. Vivian*, 36 Wn. App. 728, 677 P.2d 192 (1984).

The courts have inherent constitutional power to review “illegal or manifestly arbitrary and capricious action violative of fundamental rights”. *State ex rel. DuPont-Fort Lewis Sch. Dist. 7 v. Bruno*, 62 Wash.2d 790, 794, 384 P.2d 608 (1963). Evaluating whether actions of a school board were arbitrary and capricious involves triggering a “constitutional certiorari”, not a statutory writ. *Coughlin v. Seattle School Dist.*, 27 Wn.

App. 888, 624 P.2d 183 (1980), *dist'd on other grounds*, *Haynes v. Seattle School Dist.*, 111 Wn.2d 250, 758 P.2d 7, fn. 2 (1988)

A school board is performing a quasi-judicial act when it determines an employee's rights and liabilities under an existing contract. *Haynes v. Seattle School Dist.*, 111 Wn.2d 250, 758 P.2d 7 (1988).

The court has jurisdiction to review the legality of the acts of public officers alleged to be arbitrary and capricious. *Reagles v. Simpson*, 72 Wn.2d 577, 434 P.2d 559 (1967); *Cosmopolis Consol. Sch. Dist. v. Bruno*, 59 Wn.2d 366, 367 P.2d 995 (1962).

The actions of state agencies and public bodies are subject to the constitutional power of the judiciary to review illegal or manifestly arbitrary and capricious actions violative of fundamental rights. *Hood v. Washington State Personnel Board*, 82 Wash.2d 396, 511 P.2d 52 (1973); *DuPont-Fort Lewis School Dist. 7 v. Bruno*, 62 Wash.2d 790, 384 P.2d 608 (1963).

Using the arbitrary and capricious standard (rather than de novo review) a court will reverse an administrative action that is willful and unreasoning, made in disregard of facts and circumstances. *Snider v. Bd. of Comm'rs*, 85 W. App. 371, 932 P.2d 704 (1997).

In *Francisco v. Board of Directors*, 85 Wash.2d 575, 537 P.2d 789 (1975), the court identified four steps to determine if an agency's action is

administrative or quasi-judicial: (1) the court could have been charged in the first instance with the responsibility of making the decision; (2) the function of the agency is one that courts have historically performed; (3) the agency performs functions of inquiry, investigation, declaration and enforcement of liabilities as they stand on present or past facts under existing laws; and (4) the agency's action is comparable to the ordinary business of courts.

“In reviewing the law on judicial review of administrative action, the *constitutional* jurisdiction of the superior court on appeal from agency action is as follows: If the power exercised by an agency is essentially administrative, the superior court, upon appeal provided by statute, is limited to a consideration of whether the agency acted arbitrarily, capriciously, or contrary to law. *Household Fin. Corp. v. State*, 40 Wash.2d 451, 244 P.2d 260 (1952); *In re Harmon*, 52 Wash.2d 118, 323 P.2d 653 (1958). If the administrative agency performs an essentially judicial function, the superior court, on appeal from a decision of the board, has, if there is a statute so permitting, the *constitutional* power to allow a trial de novo. *Floyd v. Department of Labor & Indus.*, 44 Wash.2d 560, 269 P.2d 563 (1954).”

Francisco v. Board of Directors, 85 Wash.2d 575, 578–79, 537 P.2d 789 (1975) (emphasis original).

Interpreting the policies of a school board is a quasi-judicial function. *Benson v. Roberts*, 35 Wn. App. 362, 666 P.2d 947 (1983).

As indicated above, determining if an action is arbitrary and capricious presents a question of fact. One court noted as follows:

“Regardless of the procedure agreed to and followed, however, the question presented on appeal to the superior court for determination was not whether the school board was arbitrary and capricious, measured by the test of whether there was any evidence to support it. The question presented was whether the school board met the burden of proving and establishing, by competent evidence, the cause or causes specified in the notice of nonrenewal of plaintiff’s teaching contract.”

*Reagan v. Republic School Dist.*³, 4 Wn.app. 279, 480 P.2d 807 (1971).

Superintendent Steve Quick sent a letter to Ryan Frazier dated May 14, 2014 notifying him that there was “probable cause” for nonrenewal identified the specific bases for nonrenewal:

*“I am disturbed by your attitude and believe that you are not a good fit for our program. Given you attitude towards our expectations and your demonstrated lack of effort in lesson planning, staff meeting participation and overall performance this year, I have found the probable cause exists for nonrenewal of your provision al teaching contract.”*⁴

Ryan Frazier asked for his statutory right to a meeting with the superintendent to explain why the proposed reasons for nonrenewal were inaccurate. That meeting occurred on May 28, 2015.

Linda Colvin also attended the meeting in her capacity as a senior educator and representative of the teacher’s union.

³ Although *Reagan* involved a statutory right of appeal by a tenured teacher, the court’s reasoning clearly applies equally to the issue of how the trial court should evaluate any arbitrary and capricious actions of any school board that adversely affect any teacher.

⁴ Appendix 1.

Despite the fact Ryan provided proof that the alleged reasons for nonrenewal were false, Quick issued a letter to the school board dated June 5, 2015⁵ in which he falsely alleged three grounds for nonrenewal;

- a. failure “*to regularly write formal lesson plans as requested by his building principal*” after he “*was given the option of using two separate online lesson planners*”
- b. failure “*to attend and participate regularly in staff meetings and professional development activities*”
- c. being “*loud and disrespectful*”

Additionally, there was a contract between the district and the teachers that contained a Memorandum of Authorities (MOU) which prohibited evaluating a teacher based on use or refusal to use the new online lesson planning software. But Quick’s June 5, 2014 letter to the board (Ex/ 13) explicitly references alleged failure to use the software, and fails to disclose the evidence from Ryan Frazier, Kristin Sarmiento and Linda Colvin that there was ample proof of extensive lesson planning, and comments to the contrary were inaccurate.

⁵ Appendix 2.

Quick made no effort to comply with the duty to conduct evaluation of Ryan Frazer pursuant to the statutory requirements.

RCW 28A.405.100(4)(a) provides that at any time after October 15 in a given school year, a teacher must be notified in writing if his performance is deficient. There was no notice whatsoever given to Ryan Frazier until he was ambushed by Quick's letter of May 14, 2014 after his name was improperly removed from the renewal list.

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING SUMMARY JUDGMENT FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Contrary to the Conclusion of Law #3, an employee is entitled to claim damages for negligent infliction of emotional distress arising from acts that occur in the workplace. *Chea v. Men's Wearhouse, Inc.*, 85 Wn.App. 405, 932 P.2d 1261 (1997). Claims of negligent infliction of emotional distress presents fact question for the jury that are not subject to summary judgment. *Strong. v. Terrell*, 147 Wn. App. 376, 195 P.3d 977 (2008)

Plaintiff had the statutory right to have his contract renewed, unless and until the District affirmatively notified him by May 15th that his contract would not be renewed. RCW 28A.405.220. Notification was required to be made through Superintendent Steve Quick. This concept is,

apparently, an articulation of the Washington rule of employment at will as applied to provisional teachers, before they acquire tenure after 3 years.

However, it is against public policy for any employer to take an adverse employment action in violation of public policy. See *Kumar v. Gate Gourmet, Inc.*, 180 Wn.2d 481, 325 P.3d 193 (2014); *Snyder v MSC*, 145 Wn.2d 233, 35 P.3d 1158 (2001).

Adverse employment actions can provide the basis for a claim of negligent infliction of emotional distress when the Defendant is shown to have acted wrongfully. *Chea v. Men's Wearhouse*, 85 Wn.App. 405, 932 P.2d 1261 (1997). It is for the jury to determine if the wrongful acts of a defendant support a claim for negligent infliction of emotional distress. *Strong v. Terrell*, 147 Wn.App. 376 at *30, 195 P.3d 977 (2008).

Emotional distress damages are allowed for negligence when the Plaintiff's emotional distress is foreseeable when the reactions reasonable in the context of the circumstances. *Bylsma v Burger King Corp.*, 176 Wn.2d 555, 560-561, 293 P.3d 1168 (2013) [intentionally tainted food]; *Schmidt v Coogan*, 181 Wn.2d 661 at *26, 335 P.2d 424 (2014) [attorney malpractice]; *Birchler v Castello Land Co.*, 133 Wn.2d 106, 942 P.2d 968 (1997) [timber trespass].

Intentional Infliction of Emotional Distress is also called the tort of outrage, which involves conduct so outrageous in character and so

extreme in degree as to go beyond all possible bounds of decency that it is regarded as atrocious and utterly intolerable in civilized society. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002).

There are three elements for the tort of outrage (all of which exist here): (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, (3) actual result to plaintiff of severe emotional distress. However, objective symptoms or medical treatment is not a requirement to prove this tort. *Kloepfel v Bokor*, 149 Wn.2d 192, 195, 66 P.3d 630 (2003). This is because the tort of outrage involved intentional conduct.

In *Cagle v. Burns & Roe*, 106 Wn.2d 911, 726 P.2d 434 (1986) the Supreme Court expressly recognized that emotional distress damages are available when a Plaintiff's employment is terminated in violation of public policy. In fact, the Supreme Court has also explained that when the wrongful actions are intentional, emotional distress damages are available without proof of foreseeability.

“Accordingly, we hold that upon proof of the tort of wrongful termination of employment in violation of public policy, the claimant only is required to offer proof of emotional distress in order to recover those damages attributable to the wrongful termination.”

Cagle v. Burns & Roe, *supra* at 920. See also *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984).

Wrongful actions that result in the loss of the Plaintiff's home have been held to support a claim for intentional infliction of emotional distress. See: *Montgomery v SOMA Fin. Corp.*, NO. C13-360RAJ, 2014 US Dist. Lexis 68603 at *22-24, 2014 WL 2048183 at *7 (W.D. Wash, Hon. Richard A. Jones, May 19, 2014), cited by *Lyons v US Bank*, 181 Wn.2d 775 at *29, 336 P.3d 1142 (2014).

Ryan Frazier presented proof that he was physically injured as a direct and proximate result of the wrongful acts and omissions of the Defendants, after he was fired (not while he was employed as a teacher). He was hospitalized for several days suffering from pneumothorax caused by stress and loss of body mass because of the emotional distress.

Contrary to Defendants' assertions at summary judgment, Plaintiff was not required to seek medical treatment for emotional distress. The Supreme Court has explained that emotional distress damages are available where the nature of the breach of contract is likely to result in emotional distress. *Gaglidari v. Denny's Rest.*, 117 Wn.2d 426, 815 P.2d 1362 (1991)⁶. However, at p.8-9 of Defendants' Motions in Limine, they

⁶ The *Gaglidari* court explained that a Plaintiff the proves the defendant is liable for breach of contract is entitled to recover all damages that may fairly and reasonably be considered arising naturally from the breach.

admit that Ryan Frazier testified in his deposition about the pneumothorax and its relationship to the wrongful nonrenewal of his contract.

J. OSD DENIED RYAN FRAZIER THE RIGHT TO SPEAK
IN SUPPORT OF RENEWING HIS CONTRACT WHICH
DEPRIVED HIM OF THE RIGHT AFFORDED TO PREVIOUS
SIMILARLY SITUATED TEACHERS

Principal Sarmiento confirmed that in previous nonrenewals, the provisional teacher was allowed to address the OSD board of directors, and members of the public were allowed to speak. But Ryan Frazier was denied that opportunity.

At the June 23, 2014 meeting when the School Board voted to terminate (“non-renew”) Ryan Frazier he was prepared to present evidence of Steve Quick’s wrongful actions. Also in attendance was Ms. Sarmiento, several teachers, and a room full of parents who wanted to testify on his behalf. However, Rocky Devon and Steve Quick changed the rules and announced they would not allow anyone to speak, and the board was being restricted to making a decision based on documents only. Predictably, those documents were only the ones prepared by Steve Quick and did not include any of the files previously presented.

Ryan Frazier did prepare lesson plans (VRP 171:25-172:24; VRP 319:2-14)) (Ex. 58).

After he was nonrenewed he learned that his binders containing lesson plans and student work had been removed from his classroom (VRP 176:13-177:16).

There is no real dispute that the board of directors refused to allow testimony at the June 23, 2014 meeting where the vote for nonrenewal was taken. Ryan Frazier was prepared to present both testimony and documentation to the board (VRP 312:23-315:15) (Ex. 11).

Ryan Frazier was at the June 2014 school board meeting along with a room full of members of the public who intended to speak in his support. He brought boxes full of lesson plans and other evidence he intended to provide to the board members (VRP 163:19-165:4) but was stymied when he and the others were prevented from speaking, even though public testimony was advertised as being available. (VRP 160:15-161:18).

The board breached its promise to allow oral testimony at the June meeting.

V . CONCLUSION

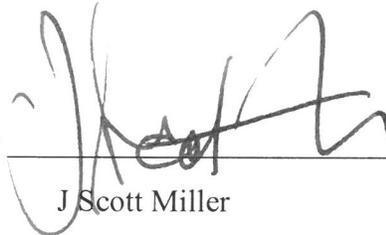
The Court committed reversible error in several dimensions. First, by reconsidering the correct determination to deny Defendants' motions for Summary Judgment. There were questions of fact and the motions should have been denied entirely, as originally decided.

Next, by allowing Defendants another bite at the apple by reconsidering the reconsideration order through motions *in limine*.

Finally, by disregarding critically important testimony and documentation showing that the school board, and Steve Quick, ignored the statutory requirement to evaluate Ryan Frazier on only designated grounds. That error was compounded by withholding supporting proof that should have resulted in renewal of his contract.

The Plaintiff respectfully requests that the case be reversed and remanded for entry of judgement in favor of Plaintiff, with damages and attorney fees to be awarded as originally requested.

By

A handwritten signature in black ink, appearing to read "J. Scott Miller", is written over a horizontal line. The signature is stylized and cursive.

J Scott Miller

WSBA No. 14620

CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on May 25, 2018, at Spokane, Washington, a copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

<input type="checkbox"/> Via Hand Delivery	Jerry J. Moberg Jerry Moberg & Associates, P.S. P.O. Box 130 124 3 rd Ave., S.W. Ephrata, WA 98823 jmoberg@jmlawps.com 1-509-754-4202 – fax
<input type="checkbox"/> Via Overnight Mail	
<input checked="" type="checkbox"/> Via U.S. Mail	
<input type="checkbox"/> Via Facsimile	
<input type="checkbox"/> Via Messenger	
<input type="checkbox"/> Via Email	



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