Cause No. 43121-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

JANETTE MEARS, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF MERCEDES MEARS AND AS LIMITED GUARDIAN FOR JADA MEARS, AND MICHAEL MEARS

Appellants,

vs.

BETHEL SCHOOL DISTRICT NO. 403, A MUNICIPAL CORPORATION; RHONDA K. GIBSON, AND HEIDI A. CHRISTENSEN,
Respondents,

CORRECTED REPLY BRIEF OF RESPONDENTS ON CROSS APPEAL

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I. INTRODUCTION TO REPLY BRIEF

The Parents argue that the School District's cross-appeal should be disregarded by this court because the arguments made in support of it are deficient. RCW 28A.210.270 provides the District and its employees with a very specific immunity from any suit or liability related to the administration of oral medications to any student. The trial court's refusal to grant summary judgment on this point was error.

Jada Mears, through her parents, brought a "bystander" emotional distress claim seeking damages for the few minutes that she was in and out of the health room while school employees were caring for her sister. Respectfully, the trial court erred by allowing this claim to proceed to trial. Bystander claims are limited in Washington to situations where the defendant caused the initial injury through some act of negligence. In the case at bench, the District did not cause Mercedes to have an asthma attack. They District employees were simply doing everything they legally could to save her life. They were acting in a role similar to a first responder or Good Samaritan. Our courts have never extended the "bystander" claim to this limit. The trial court erred in not dismissing this claim on summary judgment.

II. STATEMENT OF THE CASE

The District's Statement of the Case in its Responsive Brief and Opening Brief on Cross Appeal is adequate to address the issues raised in this Reply Brief.

III. ARGUMENT

1. THE DISTRICT'S ARGUMENTS ON CROSS APPEAL ARE NOT DEFICIENT.

The Parents argue that this court should ignore the issues raised by the District on its cross-appeal because its arguments are inadequate, without authority, fail to cite to the record, and are conclusory. The Parents quarrel with the extent of analysis given by the District to its arguments. The Parents seem to relate brevity to inadequacy, which is evident not only from their argument here, but is attested to by the length of their briefing in this case. The issues on cross-appeal are simple. The District is entitled to immunity for its actions and the trial court should have granted its summary judgment on that issue. Furthermore, Jada Mears' by-stander claim does not meet the legal standards and should have been dismissed. The briefing is adequate and the arguments are clear. This court should address the issues on their merits.

2. RCW 28A.210.270 PROVIDES THE DISTRICT EMPLOYEES WITH IMMUNITY.[1]

The Parents argue that the immunity provisions of RCW 28A.210.270 do not apply to this case because this case only involves the "failure to administer EpiPen and [the District Employees] failure to provide CPR." This argument ignores the central issue of the case at trial, and before this court, to wit; that the school employees correctly determined that Mercedes was having an asthma attack and their only option, pursuant to the doctor's order, was to administer Albuterol. While the District prevailed on this claim before the jury, it was entitled to a summary judgment ruling (and likely a jury instruction) holding that it was immune from any liability for administering the Albuterol.

The District agrees that it has the burden of establishing its immunity. Likewise, the District concedes that the immunity statute must be strictly construed if it is in derogation of the common law. The Parents argue that the statute does not apply to injections of EpiPen. The District again agrees and has not argued that the immunity provisions of RCW 28A.210.270 apply to injectible medications.[2] The District's argument is

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[1] Admittedly, given the jury's verdict this argument is probably moot.

[2] The record is undisputed that EpiPen was never used in this case. The doctor's order restricted the use of EpiPen to Anaphylaxis events. The District's employees all determined that this was an asthma attack and not Anaphylaxis, so they had no authority to use EpiPen.

only that to the extent the Plaintiff's claim rests on allegations related to the use of EpiPen, the District is immune from such liability.

RCW 28A.210.270 has not been addressed by our courts. However, the statute is clearly written and the immunity provisions are obvious. The statute, paraphrased to fit the facts of this case, reads:

> (1) In the event a school employee administers oral medication [Albuterol], . . . to a student . . . in substantial compliance with the . . . [Doctor's order], then the employee, the employee's school district or school of employment, and the members of the governing board and chief administrator thereof shall not be liable . . . for civil damages in their individual or marital or governmental or corporate or other capacities as a result of the administration of the medication.

Immunity depends only on a valid doctor's order on file and the administration of the oral medication in compliance with the order. In this case, the evidence is unrebutted that the District had on file a valid doctor's order instructing the District employees to administer Albuterol in the event of an asthma attach. It is equally unrebutted that the District administered the Albuterol in compliance with the order. Therefore, the District is entitled to immunity from damages that are claimed to result from the administration of the medication. The District is entitled to immunity under this statute.

3. JADA'S BYSTANDER CLAIM SHOULD HAVE BEEN DISMISSED ON SUMMARY JUDGMENT.

The question before the Court is whether the traditional "bystander" claim applies to a situation where the bystander witnesses an event that was not initially caused any negligence of the defendant. To this point, the only cases that have recognized a "bystander" claim were cases where the defendant negligently caused an injury to a family member and another family member arrived on the scene to witness the aftermath. *Colbert v. Moomba Sports, Inc.*, 163 Wash.2d 43, 49, 176 P.3d 497, 500 (Wash.,2008)(The tort of negligent infliction of emotional distress is a limited, judicially created cause of action that allows a family member to a recovery for "foreseeable" intangible injuries caused by viewing a physically injured loved one shortly after a traumatic accident) Cases considering the "bystander" claim all involve accidents caused by the negligence of a third party. See for example, *Hegel v. McMahon*, 136 Wash.2d 122, 125–26, 960 P.2d 424 (1998)(Car Accident); *Gain v. Carroll Mill Co.*, 114 Wash.2d 254, 261, 787 P.2d 553 (1990)(car accident); *Chavez v. Estate of Chavez*, 148 Wash.App. 580, 581, 201 P.3d 340, 341 (2009)(Car accident); *Greene v. Young*, 113 Wash.App. 746, 749, 54 P.3d 734, 736 (2002)(Accident resulting from a carjacking); *Washburn v. Beatt Equipment Co.* 120 Wash.2d 246, 840 P.2d 860

(Wash.,1992)(Propane explosion); *Cunningham By and Through Cunningham v. Lockard*, 48 Wash.App. 38, 45, 736 P.2d 305, 308 (1987)(car pedestrian accident)

No Washington case has addressed "bystander" liability in the case of actions of emergency responders following an injury inducing event. California has addressed the issue and rejected a "bystander" claim against emergency personnel on the theory that the bystander was not aware that the emergency personnel were causing any injury to the family member at the time. *Wright v. City of Los Angeles*, 219 Cal.App.3d 318, 350, 268 Cal.Rptr. 309, 329 (Cal.App. 2 Dist.,1990)

The District's employees did not cause the asthma attack in this case. There were simply providing aid to Mercedes as a result of the asthma attack. The Parents claim that the "bystander" claim could be brought against EMT's or others providing treatment "if their actions were "negligent." (Appellants Reply Brief at 32) They cite no authority for this claim. In this regard the Court's decision in *Timson v. Pierce County Fire Dist. No. 15*, 136 Wash.App. 376, 385, 149 P.3d 427, 432 (2006) is instructive. In *Timson*, a third party failed to stop at an intersection and collided with the Timson's SUV. A child riding the in the Timson SUV and not wearing a seat belt was catapulted to the rear of the SUV behind the rear seat. The child was not readily visible in that location. The

EMT's arrived and treated the injured at the scene. They did not notice that the child was trapped in the back of the SUV until about ½ hour after their arrival. The Childs mom was at the scene the entire time. She sued the EMT's for negligent infliction of emotional distress under the "bystander" theory. This Court rejected that claim, in part, because the mom was not a bystander to the accident and the EMT's did not owe any direct duty to her.

There is no basis for "bystander" liability in this case. While Jada was present during a brief part of the time that school personnel were rendering assistance to Mercedes, she was not aware that they were doing any harm to Mercedes. The District did not precipitate the event that required them to render assistance to Mercedes. The Court should not extend the bystander claim to emergency responders.

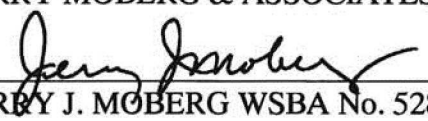
IV. CONCLUSION

The District was immune from any liability claimed by the Parents as a result of the District's decision to administer Albuterol to Mercedes. The Court should uphold the immunity provided in RCW 28A.210.270. Further, the Court should rule that claims against the District or the emergency responders following an event that was not precipitated by

their negligence are outside of the parameters of the "bystander" mental distress claim.

RESPECTFULLY SUBMITTED July 22, 2013.

JERRY MOBERG & ASSOCIATES



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