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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**ORIGINAL**

COURT OF APPEALS DIVISION II By \_\_\_\_\_  
OF THE STATE OF WASHINGTON

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**Michele Anderson, a single person, individually and as the administrator of  
the Estate of Sheila Rosenberg,  
*Petitioner***

v.

**Soap Lake School District, et al,  
*Respondents.***

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Appeal from the Court of Appeals Division III

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*Amended*  
**PETITION FOR REVIEW**

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**TABLE OF CONTENTS**

	Page No.
Table of Authorities.....	3
I. Identity of Petitioner.....	4
II. Court of Appeals Decision.....	4
III. Issues Presented for Review.....	6
A. <b>Do factual questions regarding duties owed require a denial of summary judgment?</b>	6
B. <b>Does a school district’s requirement that students sign a contract to participate in school sports create a duty to protect those students?</b>	6
C. <b>Does a contract of adhesion create a heightened duty on the part of a school district toward student athletes?</b>	6
D. <b>Does a school district’s hiring, training and supervising an inexperienced coach who provided alcohol to students cause the district to incur liability for the actions of that staff?</b>	6
E. <b>Does a coach’s provision of alcohol to his student athletes cause imputed liability on the part of the school district?</b>	6
IV. Statement of the Case.....	6
V. Argument.....	10
A. <b>The Washington State Supreme Court should accept review in this case because the Court of Appeals opinion upholding a grant of summary judgment violates previous Supreme Court opinions precluding summary judgment where there is a genuine issue of material fact.</b>	10
B. <b>The Court should accept review because the school district’s contract of adhesion created a duty on the part of the school district to protect student athletes and their parents and to rule otherwise is an issue of substantial public interest.</b>	13

C. <b>The court should accept review because public policy and the school district’s contract of adhesion with student athletes created a heightened duty between student athletes, parents and the school district.</b>	17
D. <b>The court should accept review because the ruling of the lower court ruling that a school district is not liable for negligent supervision, hiring, and a training of a basketball coach that serves players alcohol and allows them to drive home is an issue of substantial public interest.</b>	18
E. <b>The court should accept review because the ruling of the lower court that a basketball coaches sanctioned activity did not impute liability to his employer is an issue of substantial public interest and in conflict with another Court of Appeals decision.</b>	23
VI. Conclusion.....	27
Appendix	

## TABLE OF AUTHORITIES

<u>Washington Cases</u>	<u>Page Nos.</u>
<i>Kok v. Tacoma School District No. 10</i> , 179 Wn. App. 10, 17, 317 P. 3d 481 (2013)	9
<i>N.K. v. Corp. of President Bishop</i> , 175 Wn. App. 517, 525, 307 P. 3d 370 (2013)	9
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 264, 275, 979, P.2d 400 (1999)	9,10
<i>McLeod v. Grant County School District</i> , 42 Wn.3d 319, 319 (Wash. 1953); <i>McLeod v Grant Cy. Sch. Dist. No. 128</i> , 42 Wn.2d 316, 319, 320, 255, P.2d 630 (1953)	9,13
<i>Peck v. Siau</i> , 65 Wn. App. 285 (Wash. Ct. App. 1992); <i>Peck v. Siau</i> , 65 Wn. App. 285, 288, 827 P.2d 1108 (1992); <i>Peck</i> , 65 Wn. App. at 288 – 89	9,15
<i>McLeod v. Grant County School District</i> , 42 Wn.2d at 322	9,15,16
<i>Lowman v. Wilbur</i> , 178 Wn.2d 165, 169, 309 P.3d 387 (2013)	9
<i>Richland School District v. Mabton School District</i> , 111 Wn. App. 377, 389, 45 P.3d 580 (2002)	10
<i>Stuart v. Coldwell Banker Commercial Group, Inc.</i> , 109 Wash.2d 406, 420, 745 P.2d 1284 (1987); <i>Id. at 421, 420, 745 P.2d 1284</i>	12
<i>Wagenblast v. Odessa School District</i> , 856, 758 P.2d 973; <i>Id.</i> at 856, 758 P.2d at 973; <i>Wagenblast v. Odessa School Dist. No. 105-157-166J</i> , 758 P.2d 968, 110 Wn.2d 845 (Wash. 1988); <i>Wagenblast v. Odessa School District</i> , 110 Wn.2d 845 (Wash. 1988)	12
<i>Carlsen v. Wackenhut Corp.</i> , 73 Wn. App. 247, 252 – 53, 868 P.2d 882 (1994)	12,13, 15, 20
<i>Banks v. Nordstrom, Inc.</i> , 57 Wn. App. 251, 258, 787 P.2d 953 (Wash.App. Div. I 1990)	16
	19

<i>Jachetta v. Warden Joint Consolidated School Dist.</i> , 142 Wn. App. 819, 824, 176 P.3d 545 (2008)	20
<i>Travis v. Bohannon</i> , 128 Wn. App. 231, 239, 115, P.3d 342 (2005)	
<i>Sherwood v Moxee School Dist. No. 90</i> , 58 Wash.2d 351, 363 P.2d 138 (1961)	20
	21
<i>Rhea v. Grandview School Dist. No. JT 116-200</i> , 694 P.2d 666, 39, Wn. App. 557 (Wash. App. Div. 3 1985) (citing <i>Sherwood v. Moxee Sch. Dist. 90</i> , 58 Wash.2d 351, 363 P.2d 138 (1961))	22,23
<i>Chappel v. Franklin Pierce School District 402</i> , 71 Wn.2d 17, 20 – 24, 426 P.2d 471 (1967)	22,23

Other Authorities

	<u>Page Nos.</u>
RAP 13.4	3

## **I. IDENTITY OF PETITIONER**

COMES NOW, Michele Anderson, Petitioner, and brings this Petition for Review pursuant to RAP 13.4, and respectfully requests this court to accept review of the unpublished Court of Appeals decision terminating review designated in Part II.

## **II. COURT OF APPEALS DECISION**

The above captioned matter was brought before the Court of Appeals following dismissal from the Grant County Superior Court on a summary judgment motion brought by Soap Lake School District. The Court of Appeals upheld the lower court's rulings in an unpublished decision on November 22, 2016. Appendix A. The Petitioner did not file a Motion for Reconsideration.

The Petitioner contends that there were genuine issues of material fact remaining in dispute at the time of the summary judgment decision, that the Soap Lake School District created for itself a duty to protect student athletes via a contract of adhesion, and that the Soap Lake School District was negligent in its supervision, hiring, and training of basketball coach Igor Lukashevich whose sanctioned activity imputed liability to the district.

The Supreme Court should accept review of this decision because it conflicts with Supreme Court decisions, conflicts with other Court of Appeals decisions, involves question of statutory interpretation, and involves issues of substantial public interest that should be determined by the Supreme Court. RAP 13.4 (b)(1, 2, 4).

### III. ISSUES PRESENTED FOR REVIEW

- A. **Do factual questions regarding duties owed require a denial of summary judgment pursuant to previous Supreme Court opinions?**
- B. **Does a school district's requirement that students sign a contract to participate in school sports create a duty to protect those students pursuant to public interest?**
- C. **Does a contract of adhesion and public interest dictate that there is a heightened duty between student athletes, parents and the school district?**
- D. **Does public interest dictate that a school district incurs liability when it negligently hires, trains, and supervises a basketball coach who provides alcohol to his students?**
- E. **Does a coach's sanctioned activity where he provides alcohol to his student athletes impute liability to the school district pursuant to public interest and a previous Court of Appeals decision?**

### IV. STATEMENT OF THE CASE

At 12:50 a.m. on February 19, 2011, in the middle of the basketball season for Soap Lake High School, 17 year old Soap Lake basketball players Sheila Rosenberg and Pavel Turchik were tragically killed when their vehicle hit a driveway culvert at speeds estimated by law enforcement to be 99 miles per hour. CP 00003.

Investigators determined that the vehicle Sheila was riding in struck a driveway culvert and became airborne for at least 120 feet, spiraling through the air. CP 00108. Sheila and Pavel were unrestrained. *Id.* The vehicle then "slammed down on the passenger side violently before going airborne again." *Id.* During this, the investigator's own words recreate the scene: "While the Pontiac was rolling violently out of control, Sheila was ejected out the front passenger window and out in front of the Pontiac's path. The Pontiac slammed down again

on the passenger side and on top of Sheila.” *Id.* Sheila was found 20 feet from the roadway, dead from blunt force trauma, with a BAC of .20. CP 00109. 17 year old Pavel’s BAC was .17 and after being transported via helicopter to a Spokane hospital, he too succumbed to his injuries. CP 00109.

Sheila’s iPhone was located at the scene near her body, along with a digital camera. CP 00104. The responding investigator used the photographs from the phone and camera to identify Sheila, as her clothes were the same clothes that she was wearing in the photographs on the camera, which were taken the night before. CP 00105. In this case, investigators for the Plaintiff, working in conjunction with Michele Anderson, used the iPhone to establish a timeline of events.

Found on the iPhone were several text messages between Sheila, Pavel and Coach Lukashevich. Facebook and iPhone messages were used in an attempt to establish a timeline of events from the night of February 18, 2011. CP 00060. Text messages between Pavel and Sheila indicate that plans were made while at the Soap Lake High School basketball court to drink alcohol at Coach Igor’s house later in the evening on February 18<sup>th</sup>. CP 00060 to CP 00062. Apparently, Sheila was being rewarded by Coach Lukashevich for performance as a member of the basketball team. On February 18, 2011, at 9:58 p.m., Coach Lukashevich sent a text message to Sheila’s phone which read “Got your ice cream.” Sheila responded, “did you?!” and Coach Lukashevich replied, “Yea bring Victoria and come over.” CP 00078.

During the course of the investigation, Sheila's mother, Ms. Anderson, learned from friends of Sheila about the involvement of Coach Lukashevich providing alcohol to minors. She informed the investigating officer, Deputy Sainsbury, who then interviewed various individuals, including Coach Lukashevich, Ruby Langley, and Catrina Langley. CP 00115. Ruby Langley was friends with Sheila and was on the track team with her. CP 00090.

Deputy Sainsbury was provided conflicting information at various points but what became clear from his investigative reports was that Coach Lukashevich invited Sheila and Pavel to his house and supplied them with liquor. CP 00115. Ruby Langley told Deputy Sainsbury that she initially did not tell him anything about Coach Lukashevich's involvement in supplying Sheila and Pavel with alcohol because "she didn't want to get Igor in trouble." CP 00115. Ruby testified in this case that she was "close" friends with Sheila, that she had previously been around Sheila when they were drinking alcohol, and that on the night of February 18, 2011 when they were at Coach Lukashevich's house together, Sheila appeared to be intoxicated. CP 00094. Ruby observed Coach Lukashevich drink a combination of vodka and what she believed to be cranberry juice. CP 00097. She then observed Coach Lukashevich, Sheila, and Pavel drink a shot of alcohol, poured by Coach Lukashevich. CP 00097 to CP 00098, CP 00122. Ruby's sister, Catrina Langley, noticed that Sheila was "very intoxicated" while at Coach Lukashevich's house. CP 00130. Nothing in the record indicates that Coach Lukashevich ever tried to stop Sheila or Pavel from leaving his

house despite obvious signs of intoxication. He invited them over, allowed them to become intoxicated further, and then allowed Pavel to drive and Sheila to get in the car with him. Sheila and Pavel left Coach Lukashevich's house shortly after midnight on the early morning of February 19, 2011 and they were killed within minutes thereafter.

Soap Lake was a member of the Washington Interscholastic Activities Association (WIAA), which set forth standards for student athletes. One of those standards was that student athletes were to abstain from alcohol and to abstain from activities and events where alcohol was present. Sheila and Pavel were prohibited from drinking alcohol pursuant to the Soap Lake School District's "Activities Code" which all basketball players, including Sheila, were required to sign prior to being allowed to play basketball. This Activities Code required student athletes to abstain from alcohol and not attend events where alcohol was present. CP 00087 at Paragraph 3(B). Enforcement of the "Activities Code" was the responsibility of the basketball head coach, Igor Lukashevich. CP 00087 ("The head coach or advisor will determine the disciplinary action necessary for violation of team or organizational rules"). The Code prohibited student athletes from consuming alcohol, *inter alia*, throughout the on- and off-season. CP 00086. See Activities Code attached as Appendix B.

## V. ARGUMENT

- A. The Washington State Supreme Court should accept review in this case because the Court of Appeals opinion upholding a grant of summary judgment violates previous Supreme Court opinions precluding summary**

**judgment where there is a genuine issue of material fact.**

The Supreme Court should accept review of this decision because the Court has previously ruled that summary judgment is only appropriate where there are no genuine issues of material fact. Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and inferences are to be viewed in the light most favorable to the nonmoving party. Kok v. Tacoma School District No. 10, 179 Wn. App. 10, 17, 317 P.3d 481 (2013).

The existence of a duty is a question of law which the Court of Appeals reviews de novo. N.K. v. Corp. of President Bishop, 175 Wn. App. 517, 525, 307 P.3d 370 (2013), review denied, 179 Wn. 2d 1005 (2013). Whether a defendant breached its duty is generally a question of fact. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). It is well settled in Washington State that a school district has a duty to “anticipate dangers which may reasonably be anticipated, and then to take precautions to protect [students] in its custody from such dangers.” McLeod v. Grant County School District, 42 Wn.3d 319, 319 (Wash. 1953); Peck v. Siau, 65 Wn. App. 285 (Wash. Ct. App. 1992). Foreseeability of injury is a question for the jury unless the circumstances of the injury are “so highly extraordinary or improbable as to be wholly beyond the range of expectability.” McLeod, 42 Wn.2d at 322.

In order to prove a claim for negligence, Ms. Anderson must show (1) that Soap Lake owed a duty to her and her daughter, Sheila, (2) that Soap Lake breached that duty, (3) that Sheila suffered an injury as a result (4) and that Soap Lake's breach was the proximate cause of Sheila's injury. Lowman v. Wilbur, 178 Wn. 2d 165, 169, 309 P.3d 387 (2013).

“What constitutes reasonable care and whether a defendant breached its duty are generally questions of fact.” Richland School District v. Mabton School District, 111 Wn. App. 377, 389, 45 P.3d 580 (2002), Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Plaintiff alleges Soap Lake owed a duty to its students. What were the duties of Soap Lake pursuant to the Activities Code? Soap Lake's own principal/athletic director Kevin Kemp did not know. In fact, he did not know or could not remember a majority of the questions asked of him in his deposition. Mr. Kemp did not concern himself with whether or not Coach Lukashevich provided alcohol to minors on the night of Sheila's death, even though he recommended not hiring Coach Lukashevich for the subsequent basketball seasons because of his involvement in the deaths of Pavel and Sheila. CP 00476 to CP 00478.

The Coach provided alcohol to his students, as evidenced by testimony from the Langley sisters. Moreover, he organized the drinking event at his home, and confirmed that it was specifically a reward for performance on the basketball team. In Mr. Kemp's deposition, he testified that Coach Lukashevich did not need authorization to conduct an off-campus basketball activity. CP 00405, Lines 16-20;

CP 00406, Lines 1-16. Coach Lukashevich did not need to obtain authorization to invite members of the basketball team over to his house for ice cream. CP 00404, Lines 5-13. In fact, Coach Lukashevich took girls on the basketball team to a pizza parlor in Ephrata, and did not need any authorization to do that. CP 00405. Coach Lukashevich was the head coach, he made the rules and the girls followed them. There is nothing to indicate that Sheila or Pavel could say “no” to Coach Lukashevich without having repercussions on the basketball court.

**B. The Court Should Accept Review Because The School District’s Contract Of Adhesion Created A Duty On The Part Of The School District To Protect Student Athletes And Their Parents and To Rule Otherwise is an Issue of Substantial Public Interest.**

Soap Lake, through the Washington Interscholastic Activities Association, created an “Activities Code” and required the student athletes to sign it. If the student athletes and their parents did not sign the activities code, they were not allowed to participate in athletic events. Soap Lake created this contract of adhesion and they titled it as an “Activities Code”. Mr. Kevin McKemp, Soap Lake’s Principal/Athletic Director instructed coaches to have on file a signed copy of the activities code for each player and the school district did require that each student receive and sign a copy of it. CP 00362; CP 00420. The school district enforced the contract with students by supervision. CP 00362; CP 00399 – CP 00400; CP 00402.

In Zuver v. Airtouch Communications, Inc., 103 P.3d 753, 153 Wn.2d 293 (Wash. 2004), the Washington Supreme Court outlined three factors which help us

determine whether or not the Activities Code in this case is a contract of adhesion. First, the contract must be prepared by one party and submitted to the other on a “take it or leave it” basis. Such is the case here, where students were told to either sign the Activities Code as a condition for participating in sporting events. Second, the contract is printed on a standard form. Such is also the case here, where the schools submitted the form contract to all student athletes and their parents for signature. Third, whether there was ‘no true equality of bargaining power’ between the parties. Such is the case here, where there is absolutely no bargaining power on the students or their parents’ part when they are entering into an agreement with an authoritative school district employee. They must agree to the terms or they will be denied participation in school athletic programs. CP 00362; CP 00399 – CP00400; CP 00402.

"Tort law has traditionally redressed injuries properly classified as physical harm." Stuart v. Coldwell Banker Commercial Group, Inc., 109 Wash.2d 406, 420, 745 P.2d 1284 (1987). It "is concerned with the obligations imposed by law, rather than by bargain," and carries out a "safety-insurance policy" that requires that products and property that are sold do not "unreasonably endanger the safety and health of the public." Id. at 421, 420, 745 P.2d 1284. Contract law, in contrast, carries out an "expectation-bargain protection policy" that "protects expectation interests, and provides an appropriate set of rules when an individual bargains for a product of particular quality or for a particular use." Id. at 420-21, 745 P.2d 1284.

While the school district required students to submit to the terms of the contract, it did not extinguish its own duty to fulfill the contract. In Wagenblast v. Odessa School District, the Washington Supreme Court held that conditioning participation in public school interscholastic athletics on the student athletes and their parents releasing the school district from all potential future negligence claims violated public policy. Id. at 856, 758 P.2d at 973. Soap Lake must stand by its contract with Sheila, her mother and Pavel, and cannot extinguish their own liability because they do not like the outcome. They required by contract with student athletes to abstain from alcohol and contracted for consequences if student athletes did not abstain; however, instead of performing as contracted, student athletes were supplied alcohol by Coach Lukashevich while at events sanctioned by Coach Lukashevich, the person who was to hold these student athletes responsible for violations of the Activities Code (Contract).

Here, where an actual contract exists, “Courts...are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract.” Wagenblast v. Odessa School Dist. No. 105-157-166J, 758 P.2d 968, 110 Wn.2d 845 (Wash. 1988). School districts such as Soap Lake are included as those charged with a public duty and that duty includes the obligation to use reasonable care.

Soap Lake has a duty imposed by law to take certain precautions to protect their students from danger. This means that they must “anticipate” reasonably

foreseeable dangers. McLeod v. Grant Cy. Sch. Dist. No. 128, 42 Wn.2d 316, 319, 320, 255, P.2d 360 (1953). When a basketball coach is inviting young school basketball players to his house to drink alcohol on a regular basis, there is certainly a danger reasonably to be anticipated. A reasonable person in the same situation would stop that conduct and/or mitigate its results by ensuring alcohol is not being given to the students and that students are not driving home while intoxicated. These young minors and their parents relied upon the contract and their mentors, coaches, teachers and supervisors to take care of them, show them how to act as a good person outside of the walls of the high school, and make good decisions. When Soap Lake hired Coach Lukashevich and took no action to stop him from providing alcohol to members of the basketball team during team sanctioned events and/or bring minors into his home when alcohol was being served to others, Soap Lake was negligent and breached their duty of care. The Court of Appeals erred when they ruled there was no breach of duty and this with the contract of adhesion creates a substantial public interest.

**C. The Court Should Accept Review Because Public Policy And The School District's Contract Of Adhesion With Student Athletes Created A Heightened Duty Between Student Athletes, Parents And The School District.**

In addition to Soap Lake's duty of reasonable care, they created a heightened duty pursuant to the Activities Code. From a public policy standpoint, the citizens of Washington have a reasonable expectation that when a school acts *in loco parentis*, the school will do everything in its power to protect the children under their charge.

Michele Anderson, Sheila's mother, expected the school district to uphold their end of the Activities Code and not supply Sheila or Pavel with alcohol, as it totally contradicts the purpose of the Activities Code. The "Activities Code" not only places an expectation of performance on the students and parents it places an expectation of performance on the school district and their employees.

Soap Lake's own contract with the basketball players, parents and coach expanded their control and supervision of players beyond school grounds. They required players to never engage in activities where alcohol is present and never consume alcohol or be punished. Then they allowed their players to go from a basketball workout session at the school gym to the basketball coach's house to get drunk. Washington case law is clear that the school district owed a duty to protect these students from danger and they failed to do that by hiring and/or improperly training or supervising an individual who caused Sheila Rosenberg and Pavel Turchik's horrific and untimely deaths. (CP \_\_\_\_\_ Copy of Contract).

**D. The Court Should Accept Review Because the Ruling of the Lower Court Ruling That a School District Is Not Liable for Negligent Supervision, Hiring, and Training Of A Basketball Coach That Serves Players Alcohol And Allows Them To Drive Home Is An Issue of Substantial Public Interest.**

Soap Lake School District should be held liable for its negligent supervision, hiring, and training of girls' basketball coach, Igor Lukashevich, because the school district should have known he was unfit at the time of hiring/retention and serving minors alcohol and allowing them to drive was the proximate cause of Sheila

Rosenberg's death. Soap Lake may be liable to a third person for negligence in hiring or retaining an employee who is incompetent or unfit. Peck v. Siau, 65 Wn.App. 285, 288, 827 P.2d 1108 (1992). In order to prove negligent hiring or retention, the Plaintiff needs to show that Soap Lake knew or should have known (in the exercise of ordinary care) of Coach Lukashevich's unfitness at the time of hiring or retention and that Coach Lukashevich proximately caused Sheila's injuries. Carlsen v. Wackenhut Corp., 73 Wn.App. 247, 252-53, 868 P.2d 882 (1994); Peck, 65 Wn.App. at 288-89.

The Court of Appeals ruled that "SLSD (Soap Lake School District) had no way to anticipate the danger or exercise its supervision over Shelia Rosenberg at midnight on a Friday." *Anderson v. Soap Lake Sch. Dist.*, No. 33889-4-III, November 22, 2016. "The gathering at Lukashevich's home was so distant in time and place from any normal school activity that it was outside the district's authority, precluding its liability for any harm." *Id.* However, the record on review shows that Soap Lake School District did nothing to train, supervise, or advise Mr. Lukashevich on school policies.

The supervisor of Coach Lukashevich, and the person responsible for his hiring, supervision, training and retention, was Kevin Kemp. Mr. Kemp was Soap Lake's Athletic Director and Principal. At the time of hiring, Coach Lukashevich was recommended for the job by Mr. Kemp, and Coach Lukashevich's sole qualifications for the position of Head Coach of the girls' basketball team was that he had

participated in basketball while a student at Soap Lake previously. CP 00360; CP 00368 at Lines 20-21; CP 00393 at Lines 12-23.

Mr. Kemp did not recall ever contacting Coach Lukashevich's references or reviewing Coach Lukashevich's employment application. CP 00361; CP 00369 to CP 00372; CP 00393 at Lines 12-23 Mr. Kemp could not provide any written policies on the hiring process, nor could he recall what any of the procedures and policies were. CP 00361; CP 00366 to CP00367; CP 00371 to CP 00372 Mr. Kemp could not recall the written duty guidelines for Mr. Lukashevich and could not provide them. CP 00361; CP 00376. Mr. Kemp did not know if Coach Lukashevich ever performed any training activities other than meetings with Mr. Kemp to meet his coaching requirements for the WIAA. CP 00361; CP 00374 to CP 00376; CP 00411 to CP 00413. Mr. Kemp was unfamiliar with the Employee Handbook for school year 2010/2011, did not know if coaches were required to be provided with a copy of it, did not provide Mr. Lukashevich with an Employee Handbook and does not know if any other party did so. CP 00361; CP 00377 to CP 00380.

Mr. Kemp's sole methods for ensuring compliance with employee policies were to provide a copy of the handbook and to make impromptu drop-ins at practices, yet Mr. Kemp could not recall the practice schedule or how often he would drop in. CP 00361; CP 00379 to CP 00382; CP 00385; CP 00380. Mr. Kemp did not go through the information contained in the employee handbook with Mr. Lukashevich and could not find a signed copy of the Coach's employee handbook. CP 00361; CP

00382 to CP 00383. Mr. Kemp's sole method of enforcement of the drug and alcohol free workplace policy was to have a meeting with coaches at the beginning of the season where they discussed their goals and a "positive culture", which he described as a "supporting culture". CP 00362; CP 00386 to CP 00388. He does not recall ever having specifically addressed the drug and alcohol free workplace policy at those meetings and only remembers addressing at coach meetings the portion of the activities code dealing with academic performance and attendance. CP 00362; CP 00388; CP 00390 to CP 00391. He did give coaches instructions to have on file a signed copy of the activities code for each player and the school district did require that each student receive and sign a copy of it. CP 00362; CP 00931; CP 00420. Mr. Kemp stated that he and Mr. Lukashevich also had a one on one meeting. No documentation exists of that. There was a sign in sheet for the group coach meeting but that was never provided in this litigation.

There were no policies regarding investigation of alleged violations of the activities code. CP 00362; CP 00397. The only discipline provided for in the activities code for violations is suspension of varying lengths and severity. CP 00362; CP 00400. Mr. Kemp stated that he would only document discipline if it was a suspension. CP 00362; CP 00399 to CP 00400; CP 00402. He could not identify what other discipline would be meted out. No reports were provided for any instances of disciplining students for violations of the activities code. CP 00362; CP 00402.

The firing of Mr. Lukashevich after the deaths of Pavel and Sheila was directed to be put on the school board agenda for the meeting on July 26, 2011. Minutes are taken of board meetings; however, no minutes have been provided. CP 00362; CP 00407; CP 00408 to CP 00410. Mr. Kemp recommended that Mr. Lukashevich's employment not be renewed due to "poor culture" but expressed that he was not concerned about any misbehavior on Mr. Lukashevich's part. CP 00362; CP 00410, CP 00418 to CP 00419. Mr. Kemp only described training activities with coaches for first aid and CPR. He did not recall any training for Mr. Lukashevich. *Id.* Kemp had only three scheduled meetings with Mr. Lukashevich over the course of the season, two at the beginning and one at the end. CP 00363; CP 00411 to CP 00413.

The deposition of Kevin Kemp continues, and concludes, in a similar fashion—he knows nothing, remembers nothing and did nothing. Mr. Kemp's inaction alone supports a theory of negligence as it relates to the employment of Coach Lukashevich. As in all tort law, inaction, failure to act or an omission when there is a duty to do something may impose liability. Banks v. Nordstrom, Inc., 57 Wn.App. 251, 258, 787 P.2d 953 (Wash.App. Div. 1 1990). Kevin Kemp's inactions as it relates to the hiring, retention, supervision and training of Coach Lukashevich was negligent. The Court should accept review because the finding that a school district is not vicariously liable for negligently hiring, supervising, and training a basketball coach that subsequently has a party with under aged players, serves them alcohol, and allows them to drive away is against public policy.

**E. The Court Should Accept Review Because the Ruling of the Lower Court That A Basketball Coaches Sanctioned Activity Did Not Impute Liability To His Employer Is An Issue of Substantial Public Interest and in Conflict With Another Court of Appeals Decision.**

Sporting events play a pivotal role in the development and growth of the lives of many students. In turn, the coaches of student athletes also play a pivotal role in the high school years of student athletes. As the Washington Supreme Court has noted, “[a]s a natural incident to the relationship of a student athlete and his or her coach, the student athlete is usually placed under the coach’s considerable degree of control.” Wagenblast v. Odessa School District, 110 Wn.2d 845 (Wash. 1988). “A school district must protect students in its custody from reasonably anticipated dangers.” Jachetta v. Warden Joint Consolidated School Dist., 142 Wn.App. 819, 824, 176 P.3d 545 (2008). This duty “can extend to off-campus extra-curricular activities only if those activities are under the supervision of district employees such as athletic coaches, band directors and debate coaches.” See, Travis v. Bohannon, 128 Wn.App. 231, 239, 115, P.3d 342 (2005).

Here, the “ice cream” party at Coach Lukashevich’s house on the night of February 18, 2011 was directly related to his role as the coach of the girls’ basketball team at Soap Lake and within the scope of his employment, as testified to by the Athletic Director and Principal, Kevin Kemp. Ruby Langley testified at Page 47 and 48 of her deposition that while at Coach Lukashevich’s house on the night of February 18, 2011, she was present and witnessed Pavel, Sheila and Coach Lukashevich all take

shots of liquor together. The ice cream is the reason Sheila was at Coach Lukashevich's house. Coach Lukashevich invited his basketball player, Shelia Rosenberg, to his house as a treat for her role on the basketball team, then got her and her boyfriend drunk, and allowed them to drive home. He owed a duty to protect Sheila. Soap Lake owed a duty to Sheila to also protect her; in this instance, to protect her from her own basketball coach. Both Coach Lukashevich and Soap Lake failed in their respective duties.

The liability of a school is not limited to situations involving school hours, property, or curricular activities. Sherwood v. Moxee School Dist. No. 90, 58 Wash.2d 351, 363 P.2d 138 (1961). A school district can be liable for non-school sponsored activities if a school employee is present at the activity or in the planning of the activity. Rhea v. Grandview School Dist. No. JT 116-200, 39 Wash.App. 557, 560, 694 P.2d 666 (1985). "Even when students are not in 'custody' or compulsory attendance, Carabba, 72 Wash.2d at 956-57, 435 P.2d 936, liability may nevertheless attach when schools supervise and exercise control over extracurricular activities." Rhea v. Grandview School Dist. No. JT 116-200, 694 P.2d 666, 39 Wn.App. 557 (Wash.App. Div. 3 1985)(citing Sherwood v. Moxee Sch. Dist. 90, 58 Wash.2d 351, 363 P.2d 138 (1961)).

Soap Lake doesn't much care for this authority and will make an attempt to persuade this Court that the Plaintiff is trying to stretch the rule discussed in Rhea. However, the reality is that this Court has consistently held that when a school

function is occurring, whether or not that school function occurs on school property, so long as a responsible adult from the district is present, liability will attach. Here, Sheila and her boyfriend Pavel went to a basketball coach's house for ice cream because of her role as a student athlete and his role as her basketball coach. Coach Lukashevich then served her and Pavel alcohol and she took shots of alcohol with her coach.

In determining whether a tort was committed within the scope of the school's authority Chappel v. Franklin Pierce School District 402, 71 Wn.2d 17, 20-24, 426 P.2d 471 (1967) lists ten factors to aid in the Court's determination and this Court has previously held that pursuant to Chappel "the nexus between an assertion of the school district's authority and potential tort liability springs from the exercise or assumption of control and supervision over the organization and its activities by appropriate agents of the school district." Rhea, 39 Wn. App. 557 at 561 (citing Chappel, supra). Following the ten factors outlined in Chappel at 426 P.2d 474, here Coach Lukashevich was the appropriate agent of the school district. The following facts in this case are applied to the ten factors outlined in Chappel:

- (a) It was Coach Lukashevich who authorized the extra-curricular activity Sheila attended on the night of February 18, 2011;
- (b) It was Coach Lukashevich who was the faculty advisor who regularly attended and supervised the basketball activities, and in fact was the sole planner of the activity on February 18, 2011;
- (c) There is no doubt that the girls' basketball team possessed educational and cultural value;
- (d) Soap Lake forbid alcohol consumption by its student athletes, as set forth in their Activities Code and assumed and asserted

- authority over activities involving the consumption or presence of alcoholic beverages, to the detriment of the student athlete;
- (e) The faculty advisor assigned to the team, Coach Lukashevich, clearly indifferently enforced the rules of Soap Lake relating to student alcohol consumption;
  - (f) The faculty advisor, Coach Lukashevich, planned, executed, attended and supervised the activity on February 18, 2011, and indeed the activity occurred at his house ;
  - (g) The existence of alcohol at the activity was known and its potential part in the activity discussed by Coach Lukashevich, Pavel and Sheila when the activity was planned;
  - (h) Physical injuries are foreseeable when underage students consume alcohol and then get into a car to drive;
  - (i) The designated faculty advisor, Coach Lukashevich, did attend the activity but failed to provide a properly advised and informed substitute who would comply with the Activities Code; and,
  - (j) The lack of appropriate supervision at the activity at Coach Lukashevich's house proximately caused the death of Sheila Rosenberg and Pavel Turchik.

The general danger here is that when underage students socialize with adult school district employees at the employee's residence, there is a reasonable expectation that the students could engage in activities with the adult that could produce harm. Certainly, most reasonable people could conclude that it is inappropriate for an underage student to socialize with an adult school district employee late at night when alcohol is present and that harm could result therefrom. As in McLeod, safeguarding Sheila from general danger, by disallowing socialization between students and adult employees, especially when alcohol is being served, would likely have protected her from the particular harm that she suffered.

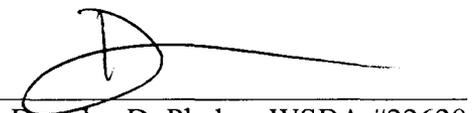
Allowing underage students to socialize with an adult school district employee breaches the school district's duty to exercise reasonable care as an ordinarily

reasonable and prudent person would exercise under the same or similar circumstances. Because Sheila and Pavel were intoxicated and consumed alcoholic beverages at Coach Lukashevich's residence, Coach Lukashevich exercised the same responsibility to take care of her and Pavel as he would have if they were on the basketball court and should have ensured that at the very least they did not get into a car intoxicated and drive home. Coach Lukashevich's negligence is also Soap Lake's negligence.

## VI. CONCLUSION

The case law provides for a duty of care to Sheila, Pavel and their parents, a contract of adhesion entered into between the parties further expanded that duty, and the defendants were negligent when they breached their duties to Sheila and her mother, Mrs. Anderson. The Estate of Sheila Rosenberg respectfully requests this Court reverse the decision of the trial court and remand this case for trial.

Respectfully submitted this 11<sup>th</sup> day of January, 2017 ~~December, 2016.~~

  
\_\_\_\_\_  
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**Appendix A**  
**Court of Appeals Decision**



No. 33889-4-III  
*Anderson v. Soap Lake Sch. Dist.*

students and their parents or guardians were required to sign the SLSD Activities Code Agreement (Activities Code). It outlined the expected code of conduct for student athletes.

During the 2011 basketball season, Ms. Rosenberg and her boyfriend, Pavel Turchik, both age 17, were killed when Turchik wrecked the vehicle they were in while driving 99 m.p.h. Shortly before the accident, the teens were socializing at the home of the 22-year-old Lukashevich. According to witnesses, Sheila and Pavel arrived at Lukashevich's home just after midnight. He allegedly provided them with liquor.

Ms. Anderson and the estate of Sheila Rosenberg filed a complaint for damages due to wrongful death against several defendants, including SLSD. The claims against the other defendants were dropped or settled. The trial court then granted summary judgment to SLSD. This appeal followed.

#### ANALYSIS

Appellants contend that factual questions prevent summary judgment. They allege that SLSD breached its duty of care to Ms. Rosenberg, that the Activities Code is a contract of adhesion creating a heightened duty on SLSD to protect student athletes, and that SLSD was negligent in hiring, supervising, and training Lukashevich.

A motion for summary judgment presents a question of law reviewed de novo. *Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006). A court will “construe the evidence in the light most favorable to the nonmoving party and grant

No. 33889-4-III  
*Anderson v. Soap Lake Sch. Dist.*

summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *Id.* (citation omitted). However, “the existence of duty is a question of law, not a question of fact.” *Id.* at 23 (quoting *Tae Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001)).

Washington recognizes that the special relationship between a school district and students gives rise to a duty to protect students from harms committed within the district’s scope of authority. *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953); *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 45, 747 P.2d 1124 (1987). A school district can be held liable even though school officials are unaware of the risks to the student. *McLeod*, 42 Wn.2d at 321-322. Districts have the responsibility “to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers.” *Id.* at 320. A district has the duty of reasonable supervision over its students while they are in school or engaged in school activities, that is, when it has the “power to control the conduct of its students.” *Peck v. Siau*, 65 Wn. App. 285, 292, 827 P.2d 1108 (1992).

As a matter of law, a school district does not owe a duty to a student when the link between the harm and the alleged negligent action is too remote. *Coates v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 392, 399, 347 P.2d 1093 (1960). There is no duty established if “the event causing the injuries is so distant in time and place from any normal school activity.” *Id.* Likewise, a district cannot be liable under a theory of respondeat superior

No. 33889-4-III  
*Anderson v. Soap Lake Sch. Dist.*

for a teacher's alleged conduct when the district is unaware of any inappropriate behavior and does not authorize such conduct. *Scott*, 50 Wn. App. at 42-43; *Chappel v. Franklin Pierce Sch. Dist.*, No. 402, 71 Wn.2d 17, 22-23, 426 P.2d 471 (1967).

Appellants' argument that the gathering at Lukashevich's was within the scope of the district's authority fails since SLSD had no way to anticipate the danger or exercise its supervision over Sheila Rosenberg at midnight on a Friday. *McLeod*, 42 Wn.2d at 320; *Scott*, 50 Wn. App. at 45. The mere presence of Lukashevich does not transfer authority over the party to the district. *Scott*, 50 Wn. App. at 42-43. There was no evidence produced suggesting that the gathering at Lukashevich's was a school-sponsored team event or that any other member of the SLSD women's basketball team was present on the night in question. Viewing all of the evidence in favor of the appellants, SLSD still did not owe a duty to Sheila on the night of the party. *Coates*, 55 Wn.2d at 398-399. The gathering at Lukashevich's home was so distant in time and place from any normal school activity that it was outside the district's authority, precluding its liability for any harm. *Id.*

Appellants next argue that the Activities Code is a contract of adhesion that created a heightened duty on SLSD to protect student athletes. "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.'" *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 531, 424 P.2d 290 (1967) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1

No. 33889-4-III  
*Anderson v. Soap Lake Sch. Dist.*

(1932)).<sup>1</sup> “A unilateral contract consists of a promise on the part of the offeror and performance of the requisite terms by the offeree.” *Multicare Med. Ctr. v. Dept. of Soc. & Health Servs.*, 114 Wn.2d 572, 583, 790 P.2d 124 (1990), overruled in part by statute on other grounds as stated in *Neah Bay Chamber of Commerce v. Dep't of Fisheries*, 119 Wn.2d 464, 832 P.2d 1310 (1992) (citing *Higgins v. Egbert*, 28 Wn.2d 313, 317, 182 P.2d 58 (1947)). The party asserting the existence of a unilateral contract has the burden of proving each essential element of a unilateral contract. *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 129, 279 P.3d 487 (2012).

Exculpatory clauses in agreements between student athletes and school districts that purport to release districts from negligence, are invalid because they violate public policy. *Wagenblast v. Odessa Sch. Dist. No. 1*, 110 Wn.2d 845, 848, 758 P.2d 968 (1988). “An action sounds in contract when the act complained of is a breach of a specific term of the contract.” *Bank of Am. NT & SA v. Hubert*, 153 Wn.2d 102, 124, 101 P.3d 409 (2004).

SLSD cannot be held liable for “breach of contract.” *Id.* Though the Activities Code is an *agreement* between SLSD and its student athletes, it bears none of the hallmarks of a legal *contract*. If a student athlete fails to follow the Activities Code, she is suspended from team play. Meanwhile, SLSD’s implied obligation under the

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<sup>1</sup> The word “contract” does not carry the same meaning as the word “agreement.” *Corbit*, 70 Wn.2d at 531.

No. 33889-4-III  
*Anderson v. Soap Lake Sch. Dist.*

Activities Code is to provide the athlete a team on which to play—and student participation in sports is not a fundamental right that the law recognizes as a district’s duty. *See Wagenblast*, 110 Wn.2d at 853-854. Ultimately, though adhesive, the Activities Code does not disclaim SLSD’s liability for negligence and therefore does not violate public policy.

Appellants also argue SLSD was negligent in hiring, supervising, and training Lukashevich. It is a basic principle of the law of agency that “an employer may be liable to a third person for the employer’s negligence in hiring or retaining [an employee] who is incompetent or unfit.” *Peck*, 65 Wn. App. at 288 (quoting *Scott*, 50 Wn. App. at 43). For school districts, the controlling criterion is, considering all the facts and circumstances, whether in the exercise of reasonable care the district knew or should have known the employee “constituted a risk or danger to its students.” *Id.* at 294.

SLSD’s hiring, supervision, and training of Lukashevich as head coach was not negligent. SLSD’s athletic director interviewed Lukashevich for the coaching position and found him qualified to coach. Lukashevich attended SLSD, played basketball as a middle and high school student, and SLSD provided Lukashevich the oversight typical for coaches in his position. During Lukashevich’s earlier tenure as an assistant coach, there was no evidence to indicate any unfitness.

Appellants have failed to establish that SLSD is liable for Ms. Rosenberg’s tragic death. The trial court correctly granted summary judgment in SLSD’s favor.

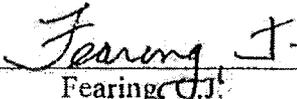
No. 33889-4-III  
*Anderson v. Soap Lake Sch. Dist.*

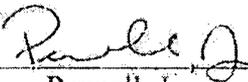
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Korsmo, J.

WE CONCUR:

  
Fearing, J.

  
Pennell, J.

**Appendix B**  
**Soap Lake School District Activities Code**

## SOAP LAKE SCHOOL DISTRICT ACTIVITIES CODE

The Soap Lake School District expects participants in all co-curricular activities to display and promote pride in the school and the community. The purpose of this activities code is to provide guidelines for coaches, advisors, parents, and participants in the areas of:

1. School, community climate,
2. Academic excellence,
3. Participant behavior,
4. Sportsmanship,
5. Fair discipline

This code applies to participants in any Soap Lake Middle School or Soap Lake High School co-curricular activity. This code applies to participants in or out of season for the duration of their middle school career and again for the duration of their high school career.

Coaches / Advisors are required to review the Soap Lake School District Activities Code with participants at the beginning of each school year, season, program, or activity.

The Washington Interscholastic Activities Association (WIAA) standards apply to all participants in Soap Lake School District co-curricular activities. Any WIAA standard, which exceeds an element of this activities code, takes precedence.

1. School / Community Climate:
  - Participants will be positive ambassadors for the school and community.
  - Participants are expected to promote a program which attracts additional participants and spectators; and promotes a positive learning environment.
  - Participants are expected to practice good citizenship and demonstrate respect for rules, authority, and other participants
2. Academic Excellence:
  - A. Academic eligibility
    - Participants are expected to strive for attaining their individual potential in co-curricular activities as well as regular academic programs and classes.
    - Participants must pass six classes during each grade check to maintain their academic eligibility. Participants enrolled in the alternative school, "Running Start", or less than six classes will meet with the school counselor and athletic director to set case specific requirements.
      1. Grade checks are conducted at the mid-quarter, quarter, and semester dates.
      2. Students passing six or more classes are academically eligible until the next regular grade check; no weekly grade checks are required.
      3. Students who are passing less than six classes are ineligible for seven days beginning on the Monday following the grade check. These students will have grade checks conducted weekly, until the next regular grade check, to determine their eligibility for the following seven day period (Monday through Sunday).
      4. Additionally, for the semester grade checks only: Students who are passing less than five classes are ineligible for the first five weeks of the next semester. Following the five week ineligible period, these students will have grade checks conducted weekly to determine eligibility until the regular grade check at the following quarter.
    - Parents are encouraged to set additional academic standards which they believe are appropriate for their student(s). Coaches and staff will support the parent in upholding the parent established requirements.
  - B. Attendance
    - Participants must be in all scheduled classes in order to participate in a practice, game, or performance. Excused absences, per the student handbook, are allowed.
    - Fifteen absences constitute irregular attendance by the WIAA standards and results in ineligibility for the semester following the irregular attendance

3. Participant Behavior:

A. Transportation

- Participants are required to travel in school district vehicles to and from contests.
- Participants may travel home with their parent(s), if their parent(s) make arrangements with the head coach or advisor.
- Participants may travel home with an adult other than their parent(s), if arrangements have been made in writing and approved by the school principal prior to the departure of the group from school. The head coach or advisor must have the approved written arrangements in hand prior to the departure from Soap Lake for the event. Other Soap Lake District students, regardless of age, are not considered adults for the purposes of this paragraph.

B. Alcohol

- Participants may not possess, imbibe, or ingest, alcohol in the form of beer, wine, liquors, or distilled spirits.
- Participants may not attend an event where alcohol is present.
- Arrangements can be made by the parent(s) of participants for family or religious events involving alcohol, which are directly supervised by the parent(s).

C. Tobacco

- Participants may not possess, use, inhale, or ingest, tobacco in any form.

D. Illegal Drugs

- Participants may not possess, use, inhale, imbibe, ingest, or inject illegal drugs.
- Participants may not attend an event where illegal drugs are present.

E. Theft

- Participants may not steal.

F. Crimes against the School District or School District Personnel

- Participants may not commit crimes against the school district or school district personnel.

4. Sportsmanship

- A. Participants are to abide by the principles of justice, fair play, and sportsmanship.
- B. Participants are to abide by the team and/or organizational rules established by the coaches and advisors.

5. Fair Discipline

A. Team or Organizational Rules Violations

- The head coach or advisor will determine the disciplinary action necessary for violation of team or organizational rules.

B. Activities Code Violations

- First violation during the participant's career:
  1. Twelve (12) day suspension from co-curricular activities. Participants are required to attend all practices, but may not travel or participate in contests or performances.
- Second violation during the participants career:
  1. Thirty (30) day suspension form co-curricular activities. Participants are required to attend all practices, but may not travel or participate in contests or performances.
- Third violation during the participant's career:
  1. One (1) calendar year suspension from co-curricular activities.
- Additional recommendations for alcoholism, abuse, or anger management may be required prior to the end of any suspension. These will be at the expense of the student.
- Incidents of theft or crimes against the school district will require restitution be paid in full prior to participation in any co-curricular activity.

C. Other Violations

- WAC 392-183-005 thru 030 and RCW 69.41 (State Law) criminal conviction of possession, use or sale of legend drugs, including anabolic steroids, will disqualify a student from participation in WIAA programs.
  1. First violation: Immediate ineligibility for remainder of the season.
  2. Second violation: Immediate ineligibility for a period of one calendar year.
  3. Third violation: Prohibited from participation in any WIAA member school program for the duration of their eligibility.
- D. Out of School and In School Suspensions
  - Co-curricular participants who have been placed in out-of-school suspension may not attend practices, travel, or participate in contests or performances.
  - Co-curricular participants who have been placed in in-school suspension are required to attend all practices, but may not travel or participate in contests or performances.

6. Appeal Process

- E. A co-curricular activities review board, made up of the athletic director or principal and two members of the co-curricular staff not directly involved in the incident (one selected by the student) will meet in a timely manner and review violations of the activities code.
- F. The suspended student who wishes to appeal a disciplinary action by the board may appeal to the superintendent. An appeal to the superintendent must be submitted, in writing, within five (5) business days of the decision of the co-curricular activities review board.
- G. If further appeal yet is necessary, appeal can be made to the school district board of directors. An appeal to the school board must be submitted, in writing, within five (5) business days of the decision of the superintendent.

**SOAP LAKE SCHOOLS ACTIVITY CODE AGREEMENT**

Activity			
Participant Signature	Date	Activity Advisor	Date
Parent Signature	Date	Filed	Init.

**FILED**

JAN 11 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 33889-4-III

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

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**Michele Anderson, a single person, individually and as the administrator of  
the Estate of Sheila Rosenberg,  
*Petitioner***

v.

**Soap Lake School District, et al,  
*Respondents.***

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Appeal from the Court of Appeals Division III

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*DECLARATION OF SERVICE*

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**ORIGINAL**

