

ORIGINAL

No. 35251-6-II

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

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

Appellant,

vs.

TACOMA SCHOOL DISTRICT,

Respondent.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 05-2-10969-1

REPLY BRIEF

Wayne C. Fricke

LAW OFFICES OF MONTE E.
HESTER, INC., P.S.
Attorneys for Appellant
1008 South Yakima Avenue
Suite 302
Tacoma, Washington 98405
(253) 272-2157

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STATEMENT OF THE CASE

Appellant adopts the statement of the case set forth in her opening brief.

ARGUMENT

A. THE TRIAL COURT'S ORAL OPINION IS PROPERLY BEFORE THE COURT.

The School District characterizes the trial court's opinion as evidence as opposed to a justification for its ruling. Obviously, the rulings, oral or written, are not evidence. Additionally, plaintiffs are aware that assignments of error are not directed to a trial court's oral decision. And while the oral decision cannot be used to impeach the court's judgment, when at variance with the written findings "if the court's oral decision is consistent with the findings and judgment, it may be used to interpret them." Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

In this case, the written order entered by the trial court contains no findings at all and simply grants the District's motion for summary judgment. CP 198-99. As such, the oral findings are consistent with the order and this court may

use them to interpret the basis of the lower court's decision.¹

B. IMPLIED ASSUMPTION OF THE RISK DOES NOT APPLY TO THIS SITUATION.

The School District argues that Mr. Benally's conduct constitutes implied primary assumption of the risk thereby completely barring any possibility of recovery against the School District. First, in order for the doctrine to apply:

("[The participant] must know that the risk is present, and he [or she] must further understand its nature; and . . . his [or her] choice to incur it must be free and voluntary."). "In the usual case, his [or her] knowledge and appreciation of the danger will be a question for the jury; but where it is clear that any person in his [or her] position must have understood the danger, the issue may be decided by the court." Prosser and Keeton § 68, at 489

Brown v. Stevens Pass, Inc., 97 Wn.App. 519, 523, 94 P.2d 448 (1999) (citing 109 Wn.2d at 553 citing Prosser & Keeton § 68 at 489). The doctrine is

¹The School District indicates in its responsive brief that "the trial court based its decision on implied primary assumption of the risk." Respondent's brief at 20. There is nothing in the written order to indicate that this is the basis for its decision. Presumably the District is interpreting the trial court's oral decision in making this statement.

more accurately described as a way of defining the defendant's duty. 119 Wn.2d at 498.

The Washington Supreme Court, as well as the Courts of Appeals, have consistently refused to apply this doctrine on numerous occasions in situations similar to the facts presented here. See Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992); Kirk v. Washington State University, 109 Wn.2d 448, 746 P.2d 285 (1987); Brown v. Stevens Pass, Inc., 97 Wn.App. 519, 94 P.2d 448 (1999). All of these cases stand for the proposition that even when an individual participates in an activity with risk inherent in the activity, the doctrine will not apply if the injuries are partially caused by a risk not assumed by the plaintiff. The issue, thus, is "whether all the risks which caused plaintiff's injuries were inherent in the [activity]." Brown at 525 (citing Scott at 501).

As both Kirk and Scott held, while an individual may assume the risk inherent in a particular sport the individual does not assume the risk created or caused by defendant's negligent provision of dangerous facilities or

improper construction or supervision. Id. at 498-99. And the defendant "owes a duty to discover dangerous conditions as to the reasonable inspection, and repair that condition or warn the invitees, unless it is known or obvious." Id. at 500.

Likewise, the School District owed Derek Benally the duty to discover the dangerous condition in which it left the staircase in this situation, repair that condition, or warn Mr. Benally of this situation. It failed in all of these aspects. Here, the testimony is not that Derek Benally simply fell by losing his balance, but that the defective staircase caused the fall. The School District cannot argue with any integrity that a defective staircase was an inherent part of the activity engaged in by Derek Benally. Unfortunately, like Judge Stolz, it apparently believes that this court should simply ignore this fact² and consider it a red herring.

²The District continues to refer to the cap as decorative only without any evidence suggesting that, in fact, is the case. However, even if it is, it still cannot be maintained in a dangerous condition.

Yet, throughout its argument it simply ignores the evidence of causation, concluding only ". . . that Derek's actions in intentionally sitting precariously on a hand railing located above a steep sheer drop to a concrete landing below, constitutes an implied primary assumption of the risk of falling that bars recovery of damages." District's brief at 22.

Again, the evidence provided refutes the District's argument and the cases decided by this court and the Washington Supreme Court have refused to apply the doctrine under the circumstances of this case.

CONCLUSION

Based on the files and records herein and the briefs previously submitted to the court, appellants Amy and Derek Benally request that the

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court reverse the trial court's decision in this matter and remand for trial.

RESPECTFULLY SUBMITTED this 27 day of December, 2006.

LAW OFFICES OF MONTE E.
HESTER, INC. P.S.
Attorneys for Appellant

By: Wayne C. Fricke
Wayne C. Fricke
WSB #16550

CERTIFICATE OF SERVICE

Kathy Herbstler, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of reply brief to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Charles P. E. Leitch
Christina L. Smith
Lee Smart Cook Martin & Patterson
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

Amy Benally
3819 East "G" Street
Tacoma, WA 98404

Signed at Tacoma, Washington this 27th day
of December, 2006.



Kathy Herbstler