

No. 43152-1-II

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

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WILLIAM REINERT and  
EVERGREEN SCHOOL DISTRICT,

Respondent,

v.

AMANDA BRADY

Appellant.

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BRIEF OF APPELLANT AMANDA BRADY

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## I. INTRODUCTION

On November 13, 2009, M.B. was struck by a vehicle driven by a substitute teacher, William Reinert, at Crestline Elementary School at approximately 3:06 p.m. M.B. was hit by Reinert while M.B. was escorting her two six year old step-brothers across a raised and marked crosswalk in front of Crestline Elementary School approximately 16 minutes after Crestline let out for the day. Although Crestline Elementary School had hired adult 'traffic safety monitors' and created a 'student safety patrol' to facilitate safe passage of students across the crosswalk in which M.B. was hit; the school safety patrol had left their posts approximately 10 minutes before M.B. was hit and injured.

The instant appeal arises from the trial court's legal finding that Evergreen School District 'had no legal duty to have crossing guards out at the time' M.B. was struck by Reinert, and the resulting grant of defendant's 'Motion for Summary Judgment.'

## II. ASSIGNMENT OF ERROR

The trial court erred in finding that Evergreen School District, which had hired adult 'traffic safety monitors' and created a 'school safety patrol' to facilitate the safe passage of students across two crosswalks immediate in front of Crestline Elementary School, had no legal duty to maintain the presence of the 'traffic safety monitors' and 'school safety patrol' at the crosswalks in question when children would normally be present and employing the aid of the 'traffic safety monitors' and 'student safety patrol.'

## III. STATEMENT OF CASE

### A. PROCEDURAL HISTORY

On or about June 3, 2010, Plaintiff, M.B., by and through her legal guardian, Amanda Brady filed a complaint for damages alleging that the negligence of William Reinert caused M.B.

injury. On or about July 16, 2010, Plaintiff filed an amended complaint adding Evergreen School District as a party. (CP 7) More specifically, the amended complaint alleged that Evergreen School District was negligent in the operation of its 'School Safety Patrol' which was a proximate cause of M.B.'s injuries. (CP 7) On or about August 11, 2012, Evergreen School District answered the complaint, denied any liability for M.B.'s injuries, and asserted a number of affirmative defenses. (CP 15)

On October 20, 2011, Evergreen School District filed a Motion for Summary Judgment, asserting that Evergreen School District owed no legal duty to M.B.; therefore, were entitled to judgment as a matter of law. (CP 23) Plaintiff responded to said motion. (CP 27) The matter was heard before the Honorable Scott Collier on December 8, 2011. On December 14, 2011, Judge Collier authored a memorandum of decision finding that Evergreen School District had "no legal duty for the District to have crossing guards out at the time of the incident; so therefore the claims brought by the Plaintiff against Evergreen School District are dismissed with prejudice." (CP 32) An order granting summary judgment was filed on February 21, 2012. (CP 34)

Plaintiff filed a timely appeal.

**B: STATEMENT OF FACTS**

**1. SUBSTITUTE TEACHER, REINERT, HITS M.B. IN CROSS-WALK IMMEDIATELY IN FRONT OF CRESTLINE ELEMENTARY SCHOOL WITHIN 17 MINUTES AFTER CLASS LET OUT**

On November 13, 2009, at 3:07 p.m., Clark Regional Emergency Services Center received a 911 call reporting that M.B. was struck by a vehicle at Crestline Elementary School located at 13003 SE 7<sup>th</sup> St., Vancouver, Washington.<sup>1</sup> M.B., 12 years old, was struck while

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<sup>1</sup> CP 131-140

walking northbound across SE 7<sup>th</sup> Street within a marked and raised crosswalk.<sup>2</sup> When struck, M.B. was escorting her two younger step brothers, home from Kindergarten at Crestline.<sup>3</sup> Also present near the crosswalk was 12 year old Adam Dreier.<sup>4</sup> Dreier, who had been standing at the south side of the cross-walk, observed the vehicle driven by Reinert strike M.B. while M.B. was in the middle of the crosswalk.<sup>5</sup>

When interviewed by police, Reinert told police that he had worked as a substitute teacher at Crestline Elementary School that day and had just left the school.<sup>6</sup> He had exited Crestline Elementary School via the east exit and proceeded westbound onto SE 7<sup>th</sup> Street.<sup>7</sup> After turning westbound, he noticed a group of kids crossing the street in front of him.<sup>8</sup> He swerved to the left to try to avoid them, but struck the last one in the group before stopping.<sup>9</sup> Reinert told police he could not explain what had distracted his attention from the children and that he just “spaced it.”<sup>10</sup> M.B. suffered a broken right femur, broken left tibia and fibula.<sup>11</sup>

After the collision, M.B. told police that she had finished school at Wy-East Middle School and then walked to Crestline Elementary School to pick up her two six year old step brothers and walk them home as she had on several prior occasions.<sup>12</sup> M.B. lived directly across the street from Crestline Elementary School with her mom and two brothers at 618 131<sup>st</sup> Court.<sup>13</sup> As she approached the crosswalk at SE 7<sup>th</sup> Street, she checked for traffic.<sup>14</sup> She noticed a white

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<sup>2</sup> CP 142-144

<sup>3</sup> Id.

<sup>4</sup> CP 147-148

<sup>5</sup> CP 150

<sup>6</sup> CP 158-164

<sup>7</sup> Id., See also CP 146-156

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> CP 158-164

<sup>11</sup> CP 158-164

<sup>12</sup> Id., See also CP 187

<sup>13</sup> Id., CP 174, 180

<sup>14</sup> Id.

car leaving the east exit of Crestline Elementary School parking lot.<sup>15</sup> She was familiar with the distances and felt comfortable that the vehicle was a sufficient distance away for the group of children to cross the street.<sup>16</sup> When the group got a little more than half way across the intersection, M.B. noticed that the white care was getting close and not slowing down to stop.<sup>17</sup> M.B. gave her brothers a push on the shoulder and yelled for her brothers to run.<sup>18</sup> Being last in the group, she did not think she had time to get across so she turned back south and was struck by Reinert's vehicle.<sup>19</sup>

The Vancouver Police Department mapped the scene with a total station diagram and took photographs of the scene.<sup>20</sup>

## 2. CRESTLINE ELEMENTARY SCHOOL

Crestline Elementary School is located at 13003 SE 7<sup>th</sup> Avenue, in Vancouver, Washington, within the Evergreen School District and services grades kindergarten through fifth grade.<sup>21</sup> In the 2009/2010 school year, Crestline Elementary had 420 children between the ages of 5 and 11 enrolled in school.<sup>22</sup> Doors open to the Crestline at 8:20 a.m., classes begin at 8:30 a.m., and the last class of the day lets out at 2:50 p.m.<sup>23</sup>

Crestline Elementary School Principal, Bobbi Hite, acknowledges that it is a reasonable expectation for a school district to take reasonable steps to ensure that students can safely cross the street to get to and from their school.<sup>24</sup> According to Ms. Hite, providing safe ingress and

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<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> CP 166, 168-170, 34-35

<sup>21</sup> CP 191

<sup>22</sup> CP 193

<sup>23</sup> CP 191

<sup>24</sup> CP 203

egress to and from the school is a priority; however, no written materials or training manuals were provided to adult traffic safety monitors and/or the student traffic safety patrol members.<sup>25</sup>

### 3. CRESTLINE ELEMENTARY: TRAFFIC SAFETY MONITORS AND SCHOOL SAFETY PATROL

Crestline Elementary School employs two adult ‘traffic safety monitors’ to supervise the ‘student traffic safety patrol.’<sup>26</sup> The job description of a ‘traffic safety monitor’ is “to provide safe support for the educational process by providing safe access to and from school.”<sup>27</sup> As a routine, two adult traffic safety monitors and ten student students serving on the traffic safety patrol are to arrive at school between 7:50 and 8:05 in the morning and be stationed at the crosswalks in front of Crestline Elementary School on SE 7<sup>th</sup> until school starts at 8:30 a.m.<sup>28</sup> In the afternoon, children on the ‘school safety patrol’ are allowed to leave class early and report to the traffic safety room by 2:40, suit up, and deploy to their respective cross-walks by 2:45.<sup>29</sup> The ‘traffic safety monitors’ and ‘traffic safety patrol’ facilitate student-pedestrian traffic until the school buses depart at 2:55 p.m.<sup>30</sup> Once the school buses depart, the staff, the adult traffic monitors and student safety patrol kids, move back into the school buildings.<sup>31</sup> As a routine, the departure of the school buses trigger when the ‘traffic monitors’ and the ‘student safety patrol’ vacate their positions at the cross-walks and return to the school buildings.<sup>32</sup> Parents of the student traffic safety patrol are expected to pick up their children no later than 3:00 p.m., 10 minutes after the last bell.<sup>33</sup> Although SE 7<sup>th</sup> Street, which serves as the primary ingress and egress for Crestline Elementary, is considered an ‘active school zone’ between 2:45 p.m. and

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<sup>25</sup> CP 193

<sup>26</sup> Id.; See also CP 213

<sup>27</sup> CP 193

<sup>28</sup> CP 196; see also CP 213

<sup>29</sup> CP 194

<sup>30</sup> CP 193

<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> CP 196

3:10 p.m.; the Crestline Elementary adult ‘traffic safety monitors’ and student ‘safety patrol’ only monitor the crosswalks between 2:50 p.m. and 2:55 p.m.<sup>34</sup>

Students serving on the traffic safety patrol wear bright florescent orange and yellow vests with green reflector top.<sup>35</sup> If it is raining, students wear bright yellow ‘ducky’s.’<sup>36</sup> Students are also given long flag poles with yellow handles and florescent orange flags emblazoned with reflector material spelling the word “STOP.”<sup>37</sup> As a routine at Crestline Elementary, one adult traffic safety monitor escorts four children to one of the two crosswalks in front of the School.<sup>38</sup> Once at their respective crosswalks, the adult traffic safety monitor will position each uniformed student into position on each side of the crosswalk.<sup>39</sup> When student-pedestrian traffic approaches the cross-walk and accumulates, the adult traffic monitor waits until there is no visible traffic, walks to the center of SE 7<sup>th</sup> Street, holds out her hands, then instructs the traffic safety patrol students “signs out,” the kids walk into the crosswalk with “signs out,” and remain in that position until pedestrian traffic has passed.<sup>40</sup> The student traffic safety patrol members maintain their positions with flags extended until the student pedestrian’s safely cross the road.<sup>41</sup> Once the pedestrian traffic has passed, the traffic safety monitor will instruct students “back” and traffic monitor and student safety patrol students return to the side of the road and allow traffic to pass.<sup>42</sup> The process is repeated with the accumulation of student-pedestrian traffic.<sup>43</sup>

In her deposition, Bobbi Hite, the principal at Crestline Elementary, testified that student safety is of paramount importance at Crestline, that it is a reasonable for parents of students

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<sup>34</sup> CP 264-267

<sup>35</sup> CP 196, 214

<sup>36</sup> CP 214

<sup>37</sup> Id.

<sup>38</sup> CP 213

<sup>39</sup> CP 196

<sup>40</sup> Id., See also CP 214

<sup>41</sup> CP 097

<sup>42</sup> CP 214

<sup>43</sup> Id.

attending Crestline to believe that their children will return from school in one piece, and that the school district should take reasonable steps to ensure that kids can get to and from school in a safe manner.<sup>44</sup> Furthermore, Hite testified that in order to effectuate that goal, the school district should establish student-pedestrian safety policies, establish student-pedestrian walk routes, publish the walk routes for students and parent, educate students about student-pedestrian safety, and set up policies and procedures for how a school safety patrol should operate.<sup>45</sup>

Hite, who is responsible for supervising the adult traffic safety monitors and the student safety patrol, also testified that she has received no training from Evergreen School District with regard to the management of student-pedestrian walk routes.<sup>46</sup> Furthermore, Crestline Elementary did not have any communication with parents about student-pedestrian safety, nor does Crestline have any policies or procedures with respect to student-pedestrian safety, other than the routine operation of the traffic safety patrol.<sup>47</sup>

Tom Nadal, Executive Director of Elementary School Education for ESD 112, Bobby Hite's supervisor, echoes Ms. Hite's testimony.<sup>48</sup> According to Nadal, to employ an adult traffic safety monitor costs the school district \$12.00 an hour.<sup>49</sup> Whether to employ such a person is the decision of the principal of the school.<sup>50</sup> With that said, Nadal agrees with the proposition that a school has a responsibility of ensuring that children can get home from school safely.<sup>51</sup> The responsibility does not end at the school grounds.<sup>52</sup> Furthermore, the school district should take reasonable steps to make sure kids can get to and from school in a safe manner, and that it would

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<sup>44</sup> CP 225

<sup>45</sup> Id.

<sup>46</sup> CP 223-224

<sup>47</sup> Id.

<sup>48</sup> CP 229

<sup>49</sup> CP 231

<sup>50</sup> CP 229

<sup>51</sup> CP 230

<sup>52</sup> Id.

be a good practice for a school district to implement written policies, procedures, and protocols for the administration of traffic safety monitors and traffic safety patrols, and designate the times traffic monitors and safety patrols should be present.<sup>53</sup>

Conversely, Nadal candidly concedes that no such policies exist in Evergreen School District, nor has Evergreen School District ever implemented any systematic education for student-pedestrian traffic, or taken any measures to improve safety for student-pedestrian traffic.<sup>54</sup>

#### 4. WY-EAST MIDDLE SCHOOL

Wy-East Middle School is located at 1112 SE 136<sup>th</sup> Avenue, Vancouver, Washington, in close proximity to Crestline Elementary School.<sup>55</sup> Wy-East Middle School services grades six through eight, children from twelve to fourteen years old.<sup>56</sup> Geographically, the school services children living between I-205 on the west, to a line near 164<sup>th</sup> Avenue on the east, south to SR-14, and north to Mill Plain Boulevard.<sup>57</sup> In the 2009/2010 school year, 900 children attended Wy-East Middle School.<sup>58</sup> Classes start at 7:55 a.m. and school lets out at 2:30 p.m.<sup>59</sup> Roughly half of the 900 students walk to Wy-East Middle School on a daily basis.<sup>60</sup> Within the last 17 years, 5 to 10 Wy-East Middle School Students have been injured walking to or from school.<sup>61</sup> In fact, within the 12 months preceding M.B.'s injury, a Wy-East Middle School student suffered

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<sup>53</sup> CP 230, 232

<sup>54</sup> CP 231

<sup>55</sup> CP 201, 253

<sup>56</sup> CP 235

<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Id.

<sup>60</sup> CP 236

<sup>61</sup> CP 237; See also CP 204

severe permanent injuries while riding his bike home from school at the intersection of 136<sup>th</sup> Avenue and SE 7<sup>th</sup> Street.<sup>62</sup>

Although Wy-East Middle School Principal, Gary Tichenor, acknowledges that student safety is of paramount importance, Tichenor maintains an opinion inconsistent with Hite and Nadal. According to Tichenor his responsibility for student safety ends at the campus borders.<sup>63</sup> Although Tichenor acknowledges that the school district should take reasonable steps to ensure student safety, in his 17 years of experience, Wy-East Middle school has never employed a traffic safety monitor, or established 'student-pedestrian walk routes.'<sup>64</sup> Despite the significant number of serious injuries suffered by student-pedestrians coming to and from Wy-East Middle School, Tichenor candidly admits that in his 17 years as principal, Wy-East Middle School has taken no measures to improve student-pedestrian safety nor does Wy-East Middle School have any policies or procedures to ensure the safety of its students walking to or from school.<sup>65</sup>

It is universally known by both teachers and administrators from Wy-East Middle School and Crestline Elementary School that students attending Wy-East regularly walk through Crestline Elementary to get to and from school.<sup>66</sup> M.B. was one of those students. She lived directly across from the school on 131<sup>st</sup> Court and utilized the crosswalk in front of Crestline on a daily basis to get to and from Wy-East Middle School.<sup>67</sup>

At approximately 3:06, while 7<sup>th</sup> Street was an 'active school zone,' M.B. walked across the west cross walk in front of Crestline Elementary School without the supervision or aid of a

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<sup>62</sup> CP 237; See also CP 204

<sup>63</sup> CP 235-236

<sup>64</sup> CP 236-237

<sup>65</sup> CP 238, 240-241

<sup>66</sup> CP 201; see also CP 248-249

<sup>67</sup> CP 181

‘traffic safety monitor’ or ‘student safety patrol.’ M.B. was struck by a vehicle driven by a substitute teacher at Crestline who was technically still on the clock.<sup>68</sup>

## ARGUMENT

### A. STANDARD OF REVIEW

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). When reviewing a summary judgment, we consider all facts and reasonable inferences from them in the light most favorable to the non-moving party. *Vallandigham*, 154 Wn.2d at 26; *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997).

A party opposing summary judgment "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having [her] affidavits considered at face value." *Seven Gables Corp. v. MGM/UAEntm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986) (emphasis added). Instead, after the moving party meets its initial burden and submits adequate affidavits, the nonmoving party, "must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Seven Gables Corp.*, 106 Wn.2d at 13. If the nonmoving party fails to meet this burden, summary judgment, if appropriate, will be entered against her. *Seven Gables Corp.*, 106 Wn.2d at 12-13. [The court of review] will affirm summary judgment only if, after reviewing all of the evidence, reasonable persons could reach but one conclusion. *Vallandigham*, 154 Wn.2d at 26.

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<sup>68</sup> CP 202

B. ESD 112 OWED A DUTY

1. COMMON LAW DUTY

A school district is liable for the tortious acts or omission of its officers, agents, or servants, according to the normal rules of tort law. *Travis v. Bohannon*, 128 Wn.App. 231 (2005). A showing of negligence requires proof of the following elements: 1) the existence of a legal duty, (2) breach of that duty, (3) an injury resulting from the breach, and (4) proximate cause. *Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62, 66 (2005). The existence of a legal duty is question of law and “depends on mixed considerations of logic, common sense, justice, policy, and precedent.” *Id.*, at 67

A general rule is that schools have a duty to protect students in their custody from reasonably foreseeable harm. *Travis v. Bohannon*, 128 Wn.App., at 238. A school district is not the insurer of the safety of its pupils but it will be held liable for the injuries arising from the foreseeable wrongful acts of a third party. *Id.* Harm is foreseeable if the risk from which it results was known or in the exercise of reasonable care should have been known. *Id.*

Actual custody or compulsory attendance on the premises is not required; liability may attach when a school supervises and exercises control over extracurricular activities. *Id.* Schools are expected to anticipate dangers that may reasonably be anticipated and to take reasonable precautions. *Id.* Two factors determine the scope of a school’s legal duty: the student-school relationship and the general nature of the risk. *Id.*

Although the respective parties have not found controlling authority directly on point with respect to the school district’s duty owed in the matter at bar, the Division III Court of Appeals references the existence of ‘duty’ in a matter similar to the claim at bar in *Chhuth v. George*, 43 Wn.App. 640, (1986). In *Chhuth*, a seven year old boy was struck while crossing a

street on the way home from school. The Division Three Court of Appeals acknowledged that a School District's negligent implementation and supervision of bus procedures, breach of duty by the school principal, breach of duty by the first grade teacher or school bus supervisor, and/or *the school district' failure to maintain crossing guards at a street the school knew or should have known were not utilizing bus services* were all viable theories of negligence where the school district could be found liable under circumstances similar to the matter at bar. *Chhuth v. George*, 43 Wn.App., at 650. In so finding, the Court of Appeals implicitly acknowledged the school's common law 'duty' to its students to maintain crossing guards at streets and at times the school knew or should have known were being utilized by student pedestrians. Applying the rationale enunciated by *Chhuth v. George*, Evergreen School District owed a common law duty to M.B.

Other states have addressed the existence of 'duty' in similar context to the matter at bar as well. In *Barnes v. Bott*, 571 So.2d 183, (1990), a six year old child was struck by a vehicle and killed while attempting to cross the street within a school zone. *Barnes v. Bott*, 571 So.2d, at 184. Parents of the child appealed the trial court's dismissal of their claim against the school district. *Id.* On appeal, the contested issue was whether the School Board owed a duty of care to its students to protect against the risks involved, i.e., being struck by a vehicle at this intersection when no crossing guard was present. *Id.*, at 184. The Louisiana Court of Appeals reversed the trial court, stating:

We next turn to the issue of whether the School Board owed a duty of care to insure the safety of its students while crossing streets which are regularly supervised by a crossing guard. The standard of care of school teachers and administrators is that of a reasonable person in such a position acting under similar circumstances.

In the instant case, the School Board actively participated in the school guard crossing program which had been instituted by the City. The schools accepted the guards, allowed them to cross students at designated corners on a daily basis, and monitored the attendance of the guard in the school office. The School Board

also had some input as to which locations were most in need of a crossing guard. The parents of school children were notified of the existence of the crossing guards at these designated locations. . .

. . . By participating in and accepting the benefits of the program, we find that the School Board voluntarily assumed the duty of verifying that the crossing guard would be present at designated intersections during normal duty hours. . .

The issue answered in *Barnes v. Bott*, is almost identical to the question posed in the matter at bar: whether Evergreen School District owed a duty to its students to have traffic safety monitors or the school safety patrols present at the designated crosswalks when the school zone was active. Plaintiff submits that the factual similarity bodes toward a similar analysis and conclusion, e.g., Evergreen School District, having instituted and accepted the benefits of the ‘school safety patrol program,’ has a duty to operate the program in a reasonable manner. More specifically, Evergreen School District has the duty to maintain the ‘traffic safety monitors’ and/or ‘school safety patrol’ at the designated crosswalks when children would normally be present or when the cross-walks are considered within an ‘active school zone.’ In the matter at bar, Evergreens School District breached said duty, by instituting an unreasonable procedure that called for the ‘traffic safety’ monitors’ or ‘school safety patrol’ to abandon their positions ‘when the buses departed’ which was typically as little as five minutes following the close of school.

The testimony of Evergreen School District’s own administrators dove-tales the *Chhuth* and *Barnes* opinions. Bobbi Hite and Gary Tichenor both acknowledge that the school district has a duty to ensure students can get to and from school safely. The simple fact that Crestline Elementary School employed a traffic safety monitor to facilitate the safe ingress and egress, to and from campus across SE 7<sup>th</sup> Street is also evidence of the fact that the duty exists. The effort was simply inadequate to discharge the duty assumed. Assuming the facts in the light most

favorable to Plaintiff, Crestline traffic safety monitors and safety patrol supervised the crossing of SE 7<sup>th</sup> Street for only 5 minutes every afternoon; between 2:50 and 2:55. The traffic monitors and safety patrol were only present for five minutes of the twenty-five minutes the area was considered as an ‘active school zone.’ “Logic, common sense, justice, policy, and precedent” bode toward the existence of duty in the matter at bar.

The ‘foreseeable harm’ principals enunciated in *Travis v. Bohannon*, 128 Wn.App. 231 (2005), bodes toward a finding of ‘duty’ as well. With respect to the ‘general nature of the risk,’ Evergreen School District and Wy-East Middle School have a long history of students being injured while walking to and from school. Possibly as many as ten students over a 17 year period have been injured walking to or from Wy-East Middle School.<sup>69</sup> Without question, Evergreen School District was on notice of the risk in question. In addition, Crestline employed traffic monitors and school safety patrols to aid the crossing of SE 7<sup>th</sup> Street. The basic acknowledgement by the School District that traffic safety monitors and school safety patrols are required for the safe crossing of SE 7<sup>th</sup> Street is tacit acknowledgement of the risk in question. Without question, the nature of the risk in question was foreseeable to ESD.

As for the second prong of the *Travis v. Bohannon* analysis, ‘the school-student relationship,’ Crestline Elementary School had a firm policy that Kindergarten student’s not riding buses had to be picked up from class to be walked home.<sup>70</sup> M.B.’s twin step-brothers attended kindergarten at Crestline. They were known student-pedestrians, and were required by policy to remain in the Kindergarten classroom until picked up by an adult or sibling. Since school policy mandated parent/sibling pickup of a kindergartner, commons sense would dictate

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<sup>69</sup> CP 237

<sup>70</sup> CP 187

that the protections afforded by the traffic safety monitors and student safety patrol would flow to the parent/sibling picking up the kindergartner as well as the kindergartner himself.

Furthermore, the physical and temporal proximity between the Crestline Elementary School and M.B.'s injury bode toward the existence of a duty. M.B. was struck by Reinert's vehicle literally a few steps from the Crestline campus and within as little as sixteen minutes after school let out while the school zone was 'active.'<sup>71</sup> "Logic, commons sense, policy, and justice" bode toward a finding that Crestline Elementary School owed a 'duty' to provide safe passage across 7<sup>th</sup> Avenue.

## 2. ESD 112 ASSUMED DUTY

Alternatively, Plaintiff submits that the school district voluntarily assumed the responsibility to help children cross SE 7<sup>th</sup> Street before and after school; therefore, under Washington's 'voluntary rescue doctrine' the school district had a duty to do so with reasonable care. Under traditional tort law, absent affirmative conduct or a special relationship, no legal duty to come to the aid of a stranger exists. *Folsom v. Burger King*, 135 Wn.2d 658, 674 (1998). An exception to this general rule is the voluntary rescue doctrine, which "may arise if a defendant takes steps to assist a person in need and acts negligently in rendering that assistance." *Id.* A duty arising under the voluntary rescue doctrine is not based on a previously established relationship . . . , rather, the duty arises when one party voluntarily begins to assist an individual needing help. *Folsom*, 135 Wn.2d at 675. The Washington State Supreme Court stated in *Folsom*:

We recognize that liability can arise from the negligent performance of a voluntarily undertaken duty. A person who undertakes, albeit gratuitously, to render aid to or warn a person in danger is required by Washington law to exercise reasonable care in his or her efforts. If a rescuer fails to exercise such care and consequently increases the risk of harm to those he or she is trying to

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<sup>71</sup> CP 264-267, CP 131-140, CP 142-144

assist, the rescuer may be liable for physical damage caused. A person who voluntarily promises to perform a service for another in need has a duty to exercise reasonable care when the promise induces reliance and causes the promisee to refrain from seeking help elsewhere. When a defendant undertakes a rescue, a special relationship develops, giving rise to actionable negligence if a defendant breaches the duty of care by failing to act reasonably. *Folsom*, 135 Wn.2d at 676.

In the matter at bar, Evergreen School District assumed the duty to provide supervised controlled passage across SE 7<sup>th</sup> Street for the benefit for students, and presumably parents and siblings picking up students. The problem is that the school district provided the said services for only five minutes of the 25 minutes the school zone was active. Simply put, the school district was derelict in the discharge of the duty undertaken. Under Washington's, 'rescue doctrine' Evergreen School District discharged the duty assumed in an unreasonable and negligent manner.

3. STATUTORY DUTY - RCW 5.40.040

RCW 46.61.385 provides for the statutory authority for the implementation of 'School Patrols.' In pertinent part, the statute provides:

The superintendent of public instruction, through the superintendent of schools of any school district, or other officer . . . , may cause to be appointed voluntary adult recruits as supervisors and, from the student body of any . . . school, students, who shall be known as members of the 'school patrol' . . .

The members of such school patrol shall wear an appropriate designation or insignia identifying them as members of the school patrol when in performance of their duties, and they may display "stop" or other proper traffic directional signs or signals at school crossings or other points where school children are crossing or about to cross a public highway. . .

WAC 292-151 provides the administrative school districts are expected to follow in the administration of school safety patrols. WAC 392-151-003 provides in pertinent part:

- 1) The authority for this chapter is RCW 46.61.385 which authorizes the

appointment and operation of school patrols by any public or private school subject to the conditions, procedures, and considerations required by this chapter . . .

WAC 392-151-050 states, “The purpose of this chapter is to implement RCW 46.61.385 and provide for safe operation of school patrols.” WAC 392-151-010 clarifies the purpose of school a ‘school patrol.’ The code states, “The purpose and function of a school patrol are to assist and aid members of the student body in the safe and proper crossing of street, highways, and roads adjacent to the school and other crossings areas... ”

WAC 392-151-020 speaks to the question of civil liability arising out of the negligent operation of a school patrol. More specifically, the code provides:

The fear of potential liability for injuries sustained by pupils, employees, or patrols is present in the minds of school board members and school administrators. Both a school district and its individual employees or agents are liable for damages sustained by students or others as the result of negligence.

Of note, the section goes on to state: “[S]chools should periodically conduct a complete review of the entire school patrol program, including the following: . . (c) Training of both supervisors and patrol members, (d) the determination of the street which are to be used and those which are not to be used, . . . and (f) *the time schedule when the patrol will be on duty.*” (Emphasis added) According to Bobbi Hite, who is delegated with the responsibility of supervising traffic safety monitors and school safety patrols, she has received no training referencing school safety patrols.<sup>72</sup> Other than the departure of the buses in the afternoon, there is no policy, procedure, or guideline for when the patrol was expected to remain on duty.<sup>73</sup>

WAC 392-151-025 provides:

Suggested route plans shall be developed for each elementary school that has students who walk to and from school. It shall recommend school routes based on consideration of traffic patterns, existing traffic controls, and other crossing

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<sup>72</sup> CP 203, 205

<sup>73</sup> CP 193, 204

protection aids such as school patrols. These route plans shall limit the number of school crossings so that students move through crossings in groups, allowing only one entrance-exit from each block to and from the school. The route to school plan shall be distributed to all students with instructions that it be taken home and discussed with parents.

Examining the testimony of Bobbi Hite and Gary Tichenor, neither school even had a 'suggested route plan' for their students, let alone distributed it to the students and their parents. In fact, neither Hite nor Tichenor even know what a 'suggested route plan' is. In fact, Evergreen School District doesn't have a single 'suggested route plan' for even one of the twenty-one elementary schools within the district. That fact that Evergreen School District has willfully ignored the administrative directive is telling as to the School District's commitment toward student-pedestrian safety.

The School District cites *Estate of Templeton v. Daffern*, 98 Wn.App. 677 (2000), for the proposition that the School District breach of duty imposed by statute and administrative rule does not give rise to a duty owed to M.B. Conversely, Division II Court of Appeals saw it differently in *Thompson v. Devlin*, 51 Wn.App. 462 (1988). In *Thompson v. Devlin*, 51 Wn.App. 462, decided two years after the amendment to RCW 5.40.050, the court found that the operation of an adult safety patrol in violation of the WAC's could give rise to civil liability.

In *Thompson*, a young girl was struck in a crosswalk while she was escorted from a daycare toward a school. *Thompson v. Devlin*, 51 Wn.App. at 463. The Plaintiffs alleged that the crossing guard employed by Tacoma Public Schools was negligent in the manner in which she handled the pedestrian traffic. *Id.*, at 466. More specifically, the plaintiffs alleged that provisions of the Washington Administrative Code were breached by an adult crossing guard employed by the school district, thus the School District was guilty of negligence per se. *Id.*

The Division Two Court of Appeals reversed the trial court's ruling granting summary judgment for the school district, stating:

Negligence per se is a concept that permits a court to impose a standard of conduct based on a particular statute or administrative regulation. . . . If the regulation or statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard from which it is negligent to deviate. . .

We believe the regulation of WAC 392-151 clearly satisfy the test adopted in *Kness v. Truck Trailer Equip. Co.*, and should be adopted as the standard of care of a reasonable person, because the regulations were intended to:

- (a) To protect a class of persons which includes the one whose interest is invaded;
- (b) To protect the particular interest which is invaded, and
- (c) To protect that interest against the kind of harm which has resulted, and
- (d) To protect that interest against the particular hazard from which the harm results.

These regulations clearly were intended to protect young students such as Holly and Patrick from bodily injury and/or death by traffic accident. . . The kind of harm Holly sustained is exactly the kind against which the regulations were designed to operate, and a violation should be considered negligence per se.

When all of the evidence and the reasonable inferences therefrom are viewed in a light most favorable to plaintiffs, genuine issues of fact were created with regard to these defendants' breach of the duties imposed by these regulations. It was error to grant summary judgment.

***We also agree with plaintiffs' contention that the evidence raised a genuine issues of common law negligence. Thompson v. Devlin, 51 Wn.App. at 467 – 469. (emphasis added)***

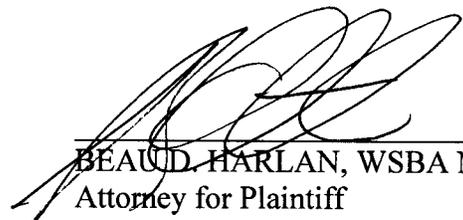
Regardless of whether or not the doctrine of negligence per se was abandoned in 1986, the ultimate question to be asked is whether it is reasonable for a school district to employ adult traffic safety monitors and student safety patrols for the specific purpose of providing safe ingress and egress for students to and from a school campus, but only require the presence for as

little five minutes after school lets out, when the school zone is active for 25 minutes. Basic common sense dictates that such a practice does not serve its stated goal nor is it reasonable.

### CONCLUSION

Taking the facts, and reasonable inferences therefrom, in the light most favorable to the Plaintiff, under *Travis v. Bohannon*, 128 Wn.App. 231, *Chhuth v. George*, 43 Wn.App. 640, *Barnes v. Bott*, 571 So.2d 183, *Folsom v. Burger King*, 135 Wn.2d 658, 674 (1998) *Thompson v. Devlin*, 51 Wn.App. 462, RCW 46.61.385, and WAC 292-151, Evergreen School District had a duty to facilitate the crossing of SE 7<sup>th</sup> Street by Evergreen School District students at 3:06 p.m. on November 13, 2009 when M.B. was struck. Considering the facts and reasonable inferences therefrom in the light most favorable to the Plaintiff, Evergreen School District acted unreasonably in the discharge of that duty by failing to maintain the presence of the traffic safety monitors and school safety patrol at the crosswalks in question while the school zone was 'active,' e.g., between 2:45 p.m. to 3:10 p.m.

Dated this 19<sup>th</sup> day of September, 2012

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

# HARLAN LAW FIRM

September 19, 2012 - 3:09 PM

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