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Court of Appeals, Division I, No. 67645-8-I

SUPREME COURT  
OF THE STATE OF WASHINGTON

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N.K., an individual proceeding under a pseudonym,

Respondent/Cross Petitioner,

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF  
JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole  
registered to do business in the state of Washington, *et al.*,

Petitioner/Cross Respondents.

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**CROSS RESPONDENT PACIFIC HARBORS COUNCIL'S  
ANSWER TO N.K.'S CONDITIONAL PETITION  
FOR "CROSS REVIEW"**

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 ORIGINAL

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**A. IDENTITY OF CROSS RESPONDENT**

The Cross Respondent is Pacific Harbors Council, a defendant in the trial court and Respondent in the Court of Appeals.

**B. COUNTER-STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the Court of Appeals decision is harmonious with appellate precedent from the Supreme Court and Court of Appeals when it affirmed summary judgment dismissal of N.K.'s claims against Pacific Harbors Council ("the Council") because, as a matter of law, the Council never had custody of N.K., and therefore had no special protective relationship with him?

2. Whether the Court of Appeals decision is harmonious with appellate precedent from the Supreme Court and Court of Appeals when it affirmed summary judgment dismissal of N.K.'s claims against the Council because the Council lacked the ability to control the alleged perpetrator, Dusty Hall, and had no knowledge that Hall posed a risk of harm to boys?

3. Whether the Court of Appeals decision is harmonious with appellate precedent from the Supreme Court and Court of Appeals when it affirmed summary judgment dismissal of N.K.'s claims against the Council because: (a) N.K. neglected to raise the issue of "agency" in the

Court of Appeals; (b) well-established Washington law contradicts N.K.'s newly raised legal arguments; and (c) N.K. fails to establish that the Council consented to an agency relationship with chartered organizations, much less that it exercised the requisite control over the day-to-day operations of such organizations?

**C. RESTATEMENT OF THE CASE**

**1. Pacific Harbors Council Is a Distinct and Separate Legal Entity Within the Scouting Movement.**

Pacific Harbors Council ("the Council") is the chartered local council of Boy Scouts of America, covering the southern region of the Puget Sound, namely parts of King and Pierce County, and all of Mason, Thurston, Grays Harbor, and Lewis counties.<sup>1</sup> (CP 1082) The Council is a separate, distinct nonprofit corporation, with its own board of directors and officers. The Council also raises, allocates, and disburses its own funds. (CP 1059; 1082)

The Council's purpose is to help the youth within its communities through promotion of the Scouting program to other organizations. (CP 1059; CP 1082) For example, the Council promotes "scoutcraft, patriotism, courage, self-reliance, and kindred virtues" as expressed in the

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<sup>1</sup> In 1993, the Tumwater Council merged with the Mount Rainier Council (which served Tacoma and Pierce County). (CP 1083) The merged entity became Pacific Harbor Council. (CP 1083)

scouting program. (CP 101)

The Council does not create, administer, sponsor, operate, or organize Scout troops.<sup>2</sup> (CP 102; CP 1083) Rather, the individual troops are organized, created and run by local independent community organizations, including churches, schools, parent-teacher associations, and civic organizations. (CP 1060; CP 1083)

The local, independent community organizations actually “own” and operate the troops, and supervise and control the scouting activities. (CP 101) Likewise, the local, independent community organizations select their Scout leaders and may also discharge those leaders without any approval by the Council. (CP 1060)

A person selected by the local, independent, community organization to serve as a Scout leader must complete a registration application, which the local organization then sends to its local council. (CP 1060) Here, the local community organization is Petitioner LDS, and the geographic local council is the Council. Then, the Council forwards the registration information to BSA. (CP 1060) If, for any reason, the applicant’s identification is referenced in BSA’s “Ineligible Volunteer” files; the applicant does not meet BSA’s membership standards; or BSA is

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<sup>2</sup>The Council has three “venturing crews” associated with the three council camping operations, which are not the subject of this lawsuit. (CP 1083)

concerned that the applicant would jeopardize the health and safety of BSA youth or adult members, then BSA denies registration. (CP 102-03)

The Council maintains the troop rosters for troops within its geographic area, which are updated regularly. (CP 1083; CP 1018; CP 1092) These rosters are created based on the chartering or re-chartering documents submitted by the local independent community organization that sponsors and operates the troops. (CP 1083)

**2. “Dustin Hall” Is Not Listed on the Troop Roster.**

The Council is the custodian of the troop rosters maintained by the Tumwater Council. (CP 1083) The LDS Shelton Ward Troop in Mason County, Troop No. 155, was one of the troops served by the Tumwater Council. (CP 1083) The troop rosters for the LDS Shelton Ward Troop for the years 1976 (CP 1085-86), 1977 (CP 1088-89), and 1978 (CP 1091-92) do not list, designate, reference, or identify the name “Dustin Hall” in any of these rosters. “Dustin Hall” is not listed as a registered Scoutmaster or Assistant Scoutmaster for Shelton Ward Troop #155.

**3. The Council Had No Knowledge of Dustin Hall or of Any Threat that He Posed to Scouts.**

- Hall is not listed as a registered volunteer in any of the LDS Shelton Ward troop rosters for 1976, 1977, or 1978. (CP 1083)
- The Council did not employ Hall.



- There is no evidence that Hall ever submitted a registration application to the Council or that the Council “selected” Hall.
- The Council routinely updated the troop roster whenever LDS forwarded changes (CP 860; CP 1018; CP 1088; CP 1092), but Dustin Hall’s name was never added to the roster.
- As a separate, legal nonprofit corporation, the Council did not and does not create, administer, sponsor, operate, or organize Scout troops. (CP 102; CP 1083)
- The Council does not and did not supervise and control the scouting activities at the LDS Shelton Ward. (CP 101)

N.K.’s contention that “the [church] worked for the local council” is misleading. (Cross Petition for Review at 11) Although the citation to the Clerk’s Papers (CP 1694) is to the deposition testimony of Paul Ernst, the term “worked” is taken out of context from Mr. Ernst’s response.

The local, independent organizations do not “work” for the local chartering council; the council seeks to help the youth in their communities through promotion of the Scouting program to other organizations within the councils’ geographic areas. (CP 1059; CP 1082-83) The local organizations are entirely independent and separate from the Council; organizations such as LDS sponsor, own, and operate the scouting units.

(CP 1059-60; CP 1082-83)

**4. The Council Did Not Assume Care of N.K.**

N.K. was listed on the troop roster that LDS sent to the Council, along with the names of other troop members on the roster. (CP 1085) The Council then forwarded the troop roster to BSA. (CP 1060) However, at no time did the Council ever voluntarily assume the “care” of N.K., nor was N.K. “entrusted” to the Council. NK has submitted no evidence to the contrary throughout this litigation.

**5. The Council Incorporates By Reference Subsections of BSA’s Statement of Facts.**

To avoid redundancy, PHC adopts and incorporates as if fully set forth herein BSA’s Statement of the Case, contained in section IV, subsections A-E.

**D. REASONS WHY CROSS REVIEW SHOULD BE DENIED**

**1. The N.K. Decision Is Consistent with Well-Established Precedent.**

N.K.’s cross petition is divorced from the criteria in RAP 13.4(b)(1-2), (4) and should be denied. In *N.K. v. LDS et al.*, 175 Wn. App. 517, 307 P.3d 730 (2013), the Court of Appeals correctly considered and applied thirteen years of modern and consistent jurisprudence that began with *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d

699, 985 P.2d 262 (1999) In *C.J.C.*, the Court addressed the threshold questions of *if*, *when*, and *how* a duty arises to protect victims of abuse. As N.K. argued in the trial court, “the law is not murky” and “C.J.C. has been the guide in terms of what the law” is in Washington.<sup>3</sup>

The trial court granted summary judgment dismissal, pursuant to *C.J.C.*, ruling that N.K. lacked any material evidence to establish that Respondents Pacific Harbors Council and Boy Scouts of America<sup>4</sup> had (1) a “special relationship” with victim N.K. or perpetrator Mr. Hall; (2) prior specific knowledge of Mr. Hall’s proclivities; and (3) a causal connection between the existence of Mr. Hall in Shelton and the resulting harm to N.K.<sup>5</sup> Likewise, the Court of Appeals affirmed the trial court’s dismissal of N.K.’s negligence claim due to the absence of a special relationship that would trigger a duty to protect N.K.

Justice has been done. N.K.’s cross petition should be denied because the issues on cross review do not transcend the particular

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<sup>3</sup> Verbatim Report of Proceedings at 14:22-23.

<sup>4</sup> N.K. erroneously refers to PHC and BSA “collectively” as “the Boy Scouts.” (Cross Petitioner’s Br. at 1) However, PHC and BSA are separate legal entities with different executive directors; functional duties; board of directors and officers; offices and headquarters; responsibilities and obligations. (CP 1059; CP 1082) N.K.’s failure to segregate the alleged duties and breaches of each separate entity in his Statement of Facts and Legal Arguments is a fatal error. Discretionary review should be denied.

<sup>5</sup> Verbatim Report of Proceedings at 24:23 to 25:1-14.

application of the law to the facts in this case.

**2. There Is No Causal Connection Between the Council and Hall's Harm of N.K.**

*C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 724, 985 P.2d 262 (1999) sets forth four factors that together establish the existence of a duty. The Supreme Court held "we find the conjunction of four factors present in the case before us decisive to finding the existence of a duty is not foreclosed as a matter of law:"

- (1) the special relationship between the Church and deacon Wilson;
- (2) the special relationship between the Church and the plaintiffs;
- (3) the alleged knowledge of the risk of harm possessed by the Church; and;
- (4) the alleged causal connection between Wilson's position in the Church and the resulting harm.

*Id.* at 724. One factor focuses "on whether the Church or its individual officials negligently caused the harm *by placing its agent into association with the plaintiffs* when the risk was, or should have been, known." *Id.* (emphasis added)

Here, N.K. presents no admissible evidence that the Council had a special relationship with Hall or N.K.; had knowledge of a risk of harm; or that the Council placed Hall in association with N.K.

In fact, N.K.'s mother testified *that even she did not know whether Hall had a position with the troop.* (CP 1922 at 35:13-16) She also testified that Hall would sometimes come alone to their family's home because "him and Richie [her husband and N.K.'s stepfather] were friends." (CP 1923 at 37:6-9)

When N.K.'s mother was asked why she allowed N.K. to interact with Hall, she states as follows:

Q: (By Mr. Pfau) Is one of the reasons you let Dusty -- or you let Kevin stay at Dusty Hall's apartment is because he was affiliated or he was connected with the Boy Scouts?

MR. ROSENBERGER: Object to the form.

MS. KASTAMA: Same.

Q: (By Mr. Pfau) You may answer.

A: *Because he was becoming a friend with all of us.*

(CP 854)

When N.K.'s mother was given the opportunity to state affirmatively that it was Hall's alleged position with the Scouts that led her to allow her son to interact with Hall, she states that it is because they were becoming friends. (CP 854) She did not mention Hall's alleged position with the Scouts or a purported position with PHC.

The Court of Appeals decision affirming the trial court's summary

judgment dismissal was properly decided and grounded in well-established precedent. There were no genuine issues of material fact on the casual connection element. Further, there are absolutely no facts supporting N.K.'s contention that the Council or BSA placed Hall in association with N.K.

The facts here are similar to the facts in *Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 445, 167 P.3d 1193 (2007). "Taylor (abuser), although a high priest, was not placed by the LDS Church in the plaintiff's home." *Id.* at 444-445. Taylor was in the home because he married the plaintiff's mother, and the church "had nothing to do with that." *Id.* at 445.

Likewise, Hall was allowed to interact with N.K. based on a friendly relationship with his parents, not because Hall was "placed" in association with N.K. by the Council or BSA. No admissible facts exist to indicate that Hall's alleged role with the Scouts led N.K.'s parents to allow their child in his presence or even facts indicating that the Council or BSA placed Hall in association with N.K. on their own volition.

N.K.'s cross petition for review should be denied.

**3. *Robb v. City of Seattle* Does Not Apply to the Facts in N.K., thus Discretionary Review Should Be Denied.**

N.K.'s contention that the Court of Appeals decision is "inconsistent"

with *Robb v. City of Seattle*, 176 Wn.2d 427, 433-39, 295 P.3d 212 (2013) is unavailing and does not change the outcome in *N.K. v. LDS et al.* *N.K. v. LDS et al.*, 175 Wn. App. 517, 307 P.3d 730 (2013). (Cross Petition at 16) In *Robb*, the Supreme Court acknowledged the general rule, that “in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another.” *Id.* at 433 (internal quotes omitted).

Robb alleged that police officers acted negligently by failing to remove nearby shotgun shells when they stopped a person suspected of burglary. *Id.* at 430. The *Robb* Court, relying on Restatement § 302B, recognized that a duty to third parties may arise “in the limited circumstances that the actor’s own affirmative act creates a recognizable high degree of risk of harm.” *Id.* However, the Court held that failing to pick up nearby shells was not an affirmative act. “The police officers in this case did not affirmatively create a new risk when they stopped [the suspect] and failed to pick up the nearby shells.” *Id.* at 437. The Court stated that “[t]his is more properly considered a case of omission than affirmative action.” *Id.*

Here, N.K. dogmatically concludes that the Council created a risk of harm to him by some sort of affirmative act, but neglects to provide

evidence of this conclusion. In fact, his examples of BSA's purported "affirmative acts" conflate nonfeasance with misfeasance. (See Cross Petition at 16-17)

The Council did not know that Hall existed, much less that he posed a risk of harm. Accordingly, it was impossible for the Council to warn N.K. about Hall; control Hall; or prevent Hall's criminal acts at N.K.'s residence. *Robb* does not apply to the facts in *N.K.*, and does not change the Court of Appeals decision. N.K.'s cross petition (as alternative relief) should be denied.

**4. The *N.K.* Decision Is Consistent With Supreme Court and Court of Appeals Precedent.**

N.K. contends that the Court of Appeals decision is inconsistent with prior precedent. (Cross Petition at 17) However, in *N.K. v. LDS et al.*, 175 Wn. App. 517, 307 P.3d 730 (2013), the Court of Appeals decision with respect to BSA and the Council's duties was anchored in a thoughtful and exhaustive analysis of special protective relationships, including this Court's holdings in *C.J.C.*, *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) and *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953).

Here, N.K. fails to conscientiously trace a purported conflict between *N.K. v. LDS et al.* and other decisions in the Court of Appeals or



Supreme Court. The *N.K.* Court correctly held, consistent with Washington's jurisprudence, that a special protective relationship requires that the defendant have a custodial relationship with the victim. The Council did not have such a relationship with N.K., nor did not exercise control of the Shelton ward troop's operations. In sum, it did not have a duty to protect N.K. from Hall's intentional criminal acts.

**5. The Council Incorporates by Reference Subsections of BSA's Argument.**

To avoid redundancy, the Council adopts and incorporates as if fully set forth herein BSA's Argument, contained in section V, subsections 3-4.

**E. CONCLUSION**

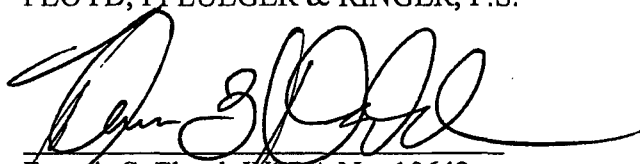
The Court of Appeals, following a long line of precedent, correctly applied the facts to the law. The *N.K.* Court properly held that under the general rule and the exception thereto, the Council and BSA: (1) had no duty to control the conduct of Hall, (a third person) to prevent him from causing harm to another, N.K.; and (2) under the facts in this specific case, neither the Council nor BSA had a special protective relationship with the victim or a special relationship with the criminal that triggered a duty.

In sum, N.K.'s petition for cross review should be denied because it does not comport with the requirements of RAP 13.4(b)(1)-(2), and (4).

Dated this 21<sup>st</sup> day of October, 2013.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

A handwritten signature in black ink, appearing to read 'Francis S. Floyd', written over a horizontal line.

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**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that on the \_\_\_\_ day of October, 2013, I caused to be served a true and correct copy of the foregoing via messenger or U.S. mail, postage prepaid, and addressed to the following:

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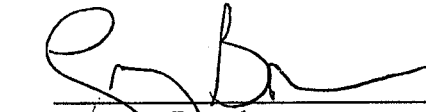
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Please file the attached **Cross Respondent Pacific Harbors Council's Answer to N.K.'s Conditional Petition for "Cross-Review"** in the following matter:

- N.K. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, et al.
- Case No. 89210-5
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