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Supreme Court No. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

APPEAL FROM THE COURT OF APPEALS

DIVISION II

No. 45832-2-II

N.L.,

Respondent,

v.

BETHEL SCHOOL DISTRICT,

Petitioner.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner, Bethel School District ("BSD"), is a municipal corporation that operates schools in Washington.

II. CITATION TO COURT OF APPEALS DECISION

BSD seeks review of a decision of Division II of the Court of Appeals filed on April 28, 2015, that reversed the Honorable Susan K. Serko of Pierce County Superior Court. The panel deemed the opinion suitable for publication under RCW 2.06.040. No motion for reconsideration was filed. The published opinion is attached as Appendix A to this petition.

III. ISSUES PRESENTED FOR REVIEW

(1) Whether a school district owes a student, who skipped an after-school activity and voluntarily left school property with another student, a duty of care to protect that student from the risk of injuries that did not occur on school property and did not occur in the course of any school-sponsored or school-supervised off-campus activity.

(2) Whether a school district's alleged failure to properly supervise a student while on-campus is a proximate cause of another student's injuries that did not occur on school property, did not occur in the course of any school-sponsored or school-supervised off-campus activity, and occurred after the two students skipped an after-school activity and voluntarily left school property together.

IV. STATEMENT OF THE CASE

In April 2007, N.L. was a 14-year-old female student at Bethel Junior High School in Spanaway, Washington. Clerk's Papers (CP) 38 at ¶ 12. She was a member of the junior high track team. CP 38 at ¶ 12. Nicholas Clark was an 18-year-old student enrolled at Bethel High School. CP 37 at ¶ 11. Clark was a member of the high school track team. *Id.* The junior high and high school teams shared the same field for practices. CP 38-39 at ¶ 13.

N.L. first met Clark on April 24, 2007. CP 47 at 48:9-15. They were introduced by a mutual friend. CP 47 at 47:17-21, 48:9-10. N.L. testified that she did not know Clark before this first meeting. CP 47 at 48:2-4; CP at 52-53 at 69:21-70:2. N.L.'s meeting with Clark took place somewhere on the track field during practice. CP 47 at 48:22-24; CP 48 at 53:7-14. N.L. testified in her deposition that the meeting "just took a couple seconds." CP 52 at 69:9-14. The mutual friend gave Clark's phone number to N.L., and Clark and N.L. subsequently exchanged phone calls and text messages. CP 48 at 50:15-17; CP 48 at 50:24-51:1, 51:9-16.

In these communications, Clark asked N.L. if she wanted to go to lunch with him. CP 48 at 51:17-19. The following day, April 25, 2007, N.L. skipped track practice. CP 49 at 56:14-16; CP 54 at 96:5-9. Clark also skipped track practice. CP 49 at 56:17-19. Around 2:00 P.M. that

day, N.L. met Clark in the parking lot of the high school. CP 49 at 56:24-57:2. N.L.'s friend walked with N.L. to the parking lot. CP 49 at 57:6-9. N.L. told her friend that she and Clark were going to get lunch at a nearby fast food restaurant. CP 49 at 57:15-20. N.L. then voluntarily got into Clark's car with him. CP 49-50 at 57:25-58:2.

In the car, Clark told N.L. that he had "forgotten something at his house and that [they] were just going to go grab it real quick." CP 50 at 58:3-7. After arriving at Clark's house, they went inside Clark's bedroom where he "put [N.L.] on his bed and [] started to take [N.L.'s] clothes off." CP 50 at 58:13-18. N.L. testified that she resisted Clark's efforts to take her clothes off and told him "no." CP 50 at 58:22-24, 59:13-15. Clark kissed N.L. and they had sexual intercourse. CP 50-51 at 61:24-62:4, 63:7-9. N.L. testified at her deposition that she had sex with Clark, but "[n]ot willingly." CP 51 at 63:5-6. Clark then drove N.L. back to school property and N.L. took the bus home. CP 54 at 96:10-16. N.L. and Clark did not have any further sexual contact. CP 54 at 97:1-4.

The following day, N.L. told a friend about the incident. CP 45 at 34:24-35:3. N.L.'s friend informed her mother, who called Bethel Junior High and N.L.'s mother. CP 45-46 at 37:15-38:9. The Pierce County Sherriff's Department investigated. CP 39 at ¶ 14. Clark pled guilty to Second Degree Assault. CP 60.

Clark was also charged with, and pled guilty to, the crime of Failure to Register as a Sex Offender. CP 60. In November 2004, approximately two-and-a-half years before the incident with N.L., Clark pled guilty to Attempted Indecent Liberties. CP at 64-69. That charge arose out of an encounter between Clark and a female student that occurred in June 2004 at Bethel Junior High when Clark was 15 years old. CP 64-69; CP 73. As a result of his guilty plea, Clark registered as a Level I sex offender and, in December 2004, the Pierce County Sherriff's Office sent a sex offender notification to Bethel High School's then-principal, Wanda Riley. CP 75-76; CP 79 at 115:1-12. When he was investigated for having sex with N.L., law enforcement apparently learned that he had failed to keep his residential address current.

On August 30, 2012, more than five years after the incident, N.L. filed a negligence claim against BSD. CP 34-42. Her complaint alleged that (1) BSD owed N.L. a duty of care; (2) BSD breached this duty by failing to adequately supervise Clark; (3) BSD's breach proximately caused the off-campus incident with Clark; and (4) N.L. suffered injuries as a result of the incident. CP 40-41 at ¶¶ 19, 23. Under the duty element, N.L. claimed it was "reasonably foreseeable" that BSD's supposed failure to monitor Clark while he was on school property would cause a sexual assault to occur off school property. CP 41 at ¶ 22. N.L. asserted this

was "reasonably foreseeable" because Clark was a registered sex offender and had a "lengthy [disciplinary] history of offending against students, and sexually offending against female students." CP 40 at ¶ 18.

On December 12, 2013, BSD moved for summary judgment dismissal. CP 17-92. BSD argued that, as a matter of law, N.L. failed to establish the duty element of her negligence claim. BSD contended that when the incident occurred, N.L. was not in BSD's custody and no special relationship applied because she had skipped track practice and voluntarily left campus with Clark. As such, her injuries were not within the general field of danger that BSD could have reasonably anticipated.

BSD also argued that both components of proximate cause—cause in fact and legal causation—were absent from N.L.'s claim. Under cause in fact, BSD contended that N.L.'s decision to skip track practice and voluntarily leave campus with Clark was an independent act that interrupted the chain of causation. BSD further argued that N.L. could not establish legal causation because the connection between the school district's alleged breach and her injuries was too remote, and holding otherwise would impose an enormous and unworkable burden on school districts.

At oral argument on BSD's summary judgment motion, the Honorable Susan K. Serko admitted that "this is a disturbing case."

Verbatim Report of Proceedings ("VRP") at 1:16. However, she remarked that a school district's duty of care does not extend to noncustodial settings, and "the fact that this occurred off site that is the pivotal factor in the case." VRP at 16:12-19, 17:25 to 18:2. In dismissing the case, Judge Serko stated that she did "not believe that the schools are guarantors of safety; and certainly a teacher, an administrator, a coach is not in the role of a CCO, a community corrections officer." VRP at 18:2-4. She concluded that "the issue is not so much the duty as the causation element, and on that basis I'm going to dismiss the case and grant summary judgment for the defense." VRP at 18:5-7; CP 500-01.

N.L. appealed to Division II of the Court of Appeals. CP 502-05. In a published opinion filed April 28, 2015, the panel reversed Judge Serko. Writing for the panel, the Honorable Lisa L. Sutton concluded that there were genuine issues of material fact regarding the duty element of N.L.'s negligence claim. Specifically, the panel held that "the question of whether NL's harm was foreseeable is a question for the jury." Slip Op. at 9, 11. The panel reasoned that "Clark's sexual assault of NL was closely related to and of the same character as BSD's knowledge of Clark's sexual conduct at school." Slip Op. at 11. However, the panel did not provide any analysis as to why on-campus sexual conduct is "closely related to and of the same character" as off-campus sexual conduct, or how a school

district could reasonably foresee an event that was entirely outside of its control.

Next, the panel concluded that "NL presented sufficient evidence to create a genuine issue of material fact as to whether BSD's breach was a proximate cause of injury to her." Slip Op. at 12. The panel determined that the record indicated a failure by BSD to properly monitor Clark, which precluded summary judgment on cause in fact. Slip Op. at 13. As for legal causation—the second element of proximate cause and the basis for Judge Serko's ruling—the panel addressed the issue with a one-sentence conclusion: "[W]e cannot say the harm to NL was 'so highly extraordinary or improbable' that no reasonable person could be expected to anticipate it." Slip Op. at 13 (quoting *Seeberger v. Burlington N. R.R.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999)).[1]

This Petition for Review now follows in a timely manner within 30 days after the filing of the panel's decision. RAP 13.4(a).

[1] The panel also concluded that N.L. "presented evidence of a genuine issue of material fact as to whether BSD breached its duty in the way it monitored Clark." Slip Op. at 11. The panel addressed this issue even though BSD did not seek summary judgment on the breach element of N.L.'s claim and Judge Serko did not dismiss BSD on that ground.

V. ARGUMENT

This Court should accept BSD's Petition for Review because the panel's decision (1) is in conflict with decisions of this Court; (2) is in conflict with decisions of the Court of Appeals; and (3) involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b).

A. The Panel's Decision Conflicts with this Court's Precedent

More than 60 years ago, this Court articulated the principles underlying the duty of care owed by a school district to its students. First, a duty of care arises when a school district has "custody" of a student. *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953). Because students are compelled to attend school, "the protective custody of teachers is mandatorily substituted for that of the parent" when the student is on campus. *McLeod*, 42 Wn.2d at 319. This principle results from the school's physical custody over students. Therefore, the school's duty to protect its students from harms is coextensive with its physical custody and control over its students.

The second principle articulated by this Court was "foreseeability." *McLeod*, 42 Wn.2d at 321. The foreseeability inquiry does not ask "whether the actual harm was of a particular kind which was expectable."

Id. Instead, "the question is whether the actual harm fell within a general field of danger which should have been anticipated." *Id.*

In *McLeod*, this Court applied these two principles to a case involving a 12-year-old female student who was forcibly raped by several male students. *Id.* at 317-18. The incident took place during recess in an unlocked and darkened room underneath the bleachers in a gym. *Id.* at 317. The students were permitted to play in the gym during recess, but the teacher who was appointed to supervise the students in the gym was not present. *Id.* at 317-18. This Court concluded that the school district had a special custodial relationship with the student because she was on campus when the injuries occurred. This Court further held that there was "room for a reasonable difference of opinion as to whether the school district should reasonably have anticipated that the darkened room might be used for acts of indecency." *Id.* at 324. Accordingly, the existence of a duty of care was left "for the jury to decide." *Id.*

Seven years later, this Court applied the two *McLeod* principles in *Coates v. Tacoma School District*, 55 Wn.2d 392, 398-99, 347 P.2d 1093 (1960), but reached a different result. In *Coates*, a student was injured after a vehicle driven by a fellow student crashed into a telephone pole. Both students had consumed alcohol "during the initiation ceremonies into a club organized with the alleged consent and sponsorship of the school

district." *Id.* at 393. This Court held that the school district did not owe the student a duty of care because the injuries occurred off-campus on a weekend, and the initiation ceremonies "had no curricular or no representative extra-curricular connection with the school." *Id.* at 396-97. After comparing the facts of *Coates* to those of *McLeod*, this Court explained:

> [T]ranscending these differences [between *Coates* and *McLeod*] is the insistence in the *McLeod* case that the injured child was compelled to attend school and that she was in the protective custody of the school district while on the school premises for that purpose; *whereas, here, the time and place of the plaintiff's injury would normally suggest that the responsibility for adequate supervision of what he and his associates did . . . was with the parents and the institution known as the home.*

Id. at 398-99 (emphasis added).

The panel's decision in this case departs from the rules established by *McLeod* and *Coates*. At the time of her injuries, N.L. was not on campus and therefore not within the physical custody of BSD. She had skipped track practice and voluntarily left school property with Clark. The incident occurred at a private residence that was not hosting any school-sponsored or school-supervised activity. Accordingly, "the time and the place of the plaintiff's injury" establishes that the "responsibility for adequate supervision" of N.L. "was with the parents and the institution known as the home," not with BSD. *Coates*, 55 Wn.2d at 389-99. The

panel's decision cannot be reconciled with this Court's precedent, and review should be granted to correct this error.

The panel's decision will also create confusion among trial and appellate courts because it calls into question the dichotomy established by *McLeod* and *Coates*. Unmoored by traditional principles of custody and foreseeability, lower courts may apply a duty of care on school districts for off-campus injuries in a varying and inconsistent manner. This Court should address the panel's far-reaching decision, which will likely impose an enormously broad and unpredictable duty of care on school districts.

B. The Panel's Decision Conflicts with Decisions of the Court of Appeals

The panel's decision is also inconsistent with opinions from the Court of Appeals. In *Scott v. Blanchet High School*, 50 Wn. App. 37, 45, 747 P.2d 1124 (1987), Division I followed *Coates* and held that a school was not liable for a sexual relationship between a female student and a teacher because none of the sexual encounters took place on school property or during school-supervised activities. Like N.L., the plaintiff in *Scott* tried to "locate the tort within the [school's] authority" by alleging that the school "fail[ed] to take adequate precautions at school." *Id.* at 45. Division I rejected this argument and held that the "responsibility for supervision" had "shifted away" from the school. *Id.*

The panel in this case did not adequately distinguish this case from *Scott*. The panel reasoned that the school prevailed in *Scott* because it "did not have any knowledge to reasonably foresee the plaintiff student's harm." Slip Op. at 10. Not so. In *Scott,* the time and location of the injuries was dispositive. *Scott*, 50 Wn. App. at 45 ("At some point, however, the event is so distant in time and place that the responsibility for adequate supervision is with the parents rather than the school.") (citing *Coates*, 55 Wn.2d at 399). The panel's decision is not faithful to the reasoning of *Scott* and *Coates*.

The panel relied heavily on *J.N. v. Bellingham School District*, 74 Wn. App. 49, 871 P.2d 1106 (1994), a case in which a student was assaulted by a fellow student in the boy's restroom at the school during recess periods. The school district's duty of care "flowed from the arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised rest rooms." *Id.* at 60. The school district also had notice of the perpetrator's "assaultive propensity," which placed the incident "within the general ambit of hazards which should have been anticipated by the District." *Id.*

The panel analogized this case to *J.N.* because "BSD had a lengthy discipline record of Clark's sexual behavior." Slip Op. at 10. But the decision in *J.N.* was based on two factors: (1) the location of the injuries

(*i.e.*, rest rooms located on school property) and (2) the school district's notice of the perpetrator's previous behavior. While this case arguably has the second factor in common with *J.N.*, the panel discounted the vital difference in the nexus between the injuries and BSD's noncustodial relationship with N.L.. In so ruling, the panel dramatically expanded the scope of what a school district is expected to foresee.

Until the panel's decision in this case, the Courts of Appeals applied *McLeod* and *Coates* consistently: School districts did not owe a duty of care to prevent injuries that were unforeseeable or occurred in a noncustodial setting.[2] The panel's decision deviates from this well-established precedent. As such, review by this Court is warranted.

C. The Panel's Decision Involves an Issue of Substantial Public Interest that Affects School Districts, Parents, and Students

This case represents an enormous expansion of school district liability, as school districts may now be liable for off-campus injuries to students as long as the school district had some notice of related behavior

[2] Although not relied on by the panel, N.L. cited *C.J.C. v. Corporation of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 727, 985 P.2d 262 (1999) in her summary judgment opposition brief for the proposition that a school district may be liable for off-campus injuries. *C.J.C.* has never been applied in the context of a student's relationship with a school district, much less in a case involving a student-on-student injury that occurred on private property and not during any school-sponsored or school-supervised activity. Moreover, this Court imposed a duty of care on the defendant in *C.J.C.* because it placed an agent into association with the plaintiff that allowed injuries to occur off church property. *Id.* at 724. Here, Clark was not an agent of BSD, which distinguishes this case from *C.J.C.*

occurring on-campus. For example, a school district that is aware of a student's violent propensities will now potentially be liable for a fight that occurs off-campus or for a student's drug overdose that occurs at a private residence if the school district knew of the student's problems with substance abuse. Division I recognized this same slippery slope in *Scott*: "By the [plaintiffs'] logic, a school which failed to monitor student relationships and provide adequate sex education would also be liable for teen pregnancies, regardless of the circumstances, because teen pregnancies are 'within a general field of danger which should have been anticipated.'" *Scott*, 50 Wn. App. at 45.

Other courts around the country have recognized the similar radical consequences that may flow from the panel's decision in this case. Upholding the panel's decision would, as the Supreme Court of Idaho has stated, "impose" an "enormous burden on school districts" that would require "indefinite monitoring" of students while they are off-campus. *Stoddart v. Pocatello Sch. Dist.*, 239 P.3d 784, 792 (Idaho 2010). Appellate courts in New York and Florida have also limited the liability of school districts because of the same public policy concerns. *Kazanjian v. Sch. Bd. of Palm Beach Cnty.*, 967 So. 2d 259, 268 (Fla. Dist. Ct. App. 2007); *Hansen v. Westhampton Beach Union Free Sch. Dist.*, 900 N.Y.S. 2d 365 (N.Y. App. Div. 2010).

Further, the panel's decision does not further the goal of incentivizing behavior with tort liability. Injuries that do not occur on school property and do not occur during any school-sponsored or school-supervised activity are not within the control of school districts. Imposing tort liability on school districts for these injuries will not encourage or discourage conduct, as school districts are not in a position to prevent the injuries to begin with. Allowing the panel's decision to stand would create open-ended liability that will be deleterious to the finances of school districts and will not meaningfully serve any function of tort law traditionally recognized by this Court.[3] A sweeping decision of this magnitude warrants careful consideration by this Court.

[3] These policy considerations also support Judge Serko's dismissal of BSD due to the absence of legal causation, which is a "much more fluid concept" than cause in fact; legal causation asks "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Tyner v. Dep't of Soc. and Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). As the panel acknowledged, legal causation is a question of "'mixed considerations of logic, common sense, justice, policy, and precedent.'" Slip Op. at 12 (quoting *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013)). Yet the panel erroneously concluded, in a one-sentence holding, that N.L.'s injuries were not "so highly extraordinary or improbable that no reasonable person could be expected to anticipate it." Slip Op. at 13 (internal quotation omitted). As matter of policy, legal causation is absent from this case because the connection between N.L.'s injuries and any alleged breach by BSD was too attenuated.

VI. CONCLUSION

For the foregoing reasons, BSD respectfully requests that this Court accept review of this Petition for Review.

Dated this 28th day of May, 2015.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.

By _____

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APPENDIX

A. Copy of the published opinion of Division II of the Court of Appeals

CERTIFICATE OF SERVICE

I, Yalda Biniazan, hereby certify that I filed the foregoing with the Supreme Court of Washington, and served same upon the following counsel of record via U.S. mail, email and/or legal messenger below:

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Pursuant to Rule of Appellate Procedure 13.4(a), I have also filed the foregoing with the Court of Appeals, Division II, and paid the statutory filing fee to the Clerk.

DATED this 28th day of May, 2015 at Seattle, Washington.

Yalda Biniazan, Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

N. L., Appellant, v. BETHEL SCHOOL DISTRICT, Defendant	No. 45832-2-II PUBLISHED OPINION

SUTTON, J. — NL[1] appeals the superior court's summary judgment dismissal of her negligence claim against Bethel School District (BSD). NL sued BSD after she was sexually assaulted by a registered sex offender BSD student, Nicholas Clark, while the two were off school grounds. NL has asked us to determine whether BSD, which knew of Clark's sex offender status, owed a duty of care to protect NL and, if so, whether as a matter of law NL's sexual assault was within the general field of danger that BSD could have or should have reasonably anticipated. We hold that (1) BSD owed a duty of reasonable care to protect NL and monitor Clark, and (2) genuine issues of material fact exist as to whether BSD breached its duty and whether that breach was a proximate cause of NL's injury. We reverse and remand.

[1] We use initials in this opinion to protect the confidentiality of the juvenile involved.

FACTS

I. CLARK'S INITIAL CONTACT WITH NL

In April 2007, NL, age 14, attended eighth grade at Bethel Junior High School. Clark, age 18, attended the twelfth grade at Bethel High School. Both schools were part of BSD. The track and football fields link the two school campuses together. Clark and NL were members of their respective school's track teams. Both track teams held practices on the same track field at the same time at the end of the school day during track season.

At the end of April, a mutual friend introduced NL to Clark while they were on the track field for team practice. Clark lied to NL about his age, telling her that he was 16 years old. Clark and NL exchanged cell phone numbers and began sending text messages to each other that day.

The day after meeting NL, Clark urged her to skip track practice to go to nearby Burger King for lunch with him. Once in the car, Clark told NL he had forgotten something at home and needed to retrieve it. NL went into the house after Clark invited her inside, and once they were inside his bedroom Clark sexually assaulted NL. Clark returned NL to school so she could catch the school bus. NL told a friend that she had had sex with Clark and that information reached the junior high school who notified the police. A year later, in July 2008, Clark pleaded guilty to second degree assault and to failure to register as a sex offender.

II. BSD's RECORDS ON CLARK

Clark attended school within BSD from kindergarten through twelfth grade. BSD's records show that it disciplined Clark more than 78 times and suspended him on 19 separate occasions.[2] BSD documented Clark's sexually inappropriate conduct in seventh, eighth, and ninth grades. During Clark's ninth grade year, Clark grabbed a girl in the hallway, kissed her on her mouth and breast area, grabbed her buttocks, and pulled her pelvis into him. Clark was convicted of attempted indecent liberties due to this conduct, and BSD suspended him for the remainder of the school year over this incident. As part of Clark's sentence, he was put on probation for 12 months and required to register as a level one sex offender, which he did.

Following his conviction and registration as a sex offender, Clark continued to engage in disruptive and inappropriate conduct at school. Two months after BSD received notice of Clark's sex offender status, while Clark was still on probation in his tenth grade year, he sexually assaulted a female student on the bus. In the twelfth grade, Clark physically assaulted one student, verbally harassed another student, yelled obscenities in class, went inside the girl's bathroom, assaulted two students on two different occasions, and left class and did not return.

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[2] BSD's original file on Clark has been destroyed. Because it received a pre-suit Public Records Act request, BSD scanned Clark's entire file and returned it to the High school, which retained the file in accordance with its retention schedule. The file was later shredded in accordance with that retention schedule because the high school was not instructed to preserve the file. NL received the scanned version in April 2012. Some of the documents were not readable. *See* Clerk's Papers (CP) at 457-486.

III. BSD's Monitoring of Clark

Wanda Riley-Hordyk served as the high school's principal while Clark was a student there. On December 7, 2004, Riley-Hordyk received notice from Pierce County that Clark was a level one registered sex offender. BSD policy required Riley-Hordyk to inform Clark's teachers and other personnel of his sex offender status, but she never did so.[3] Riley-Hordyk did not tell the high school's teachers the names of any registered sex offenders in attendance; she told them only that some students were registered sex offenders "but [she was] not at liberty to [disclose those students'] names." CP at 333. BSD's Assistant Superintendent, Michael Brophy, testified that it is "absolutely best practice" and consistent with written policy for the principal to tell the registered sex offender's teachers, who come into contact with that student regularly, about the student's status. CP at 394.

BSD did not have a specific policy requiring that the athletic coach of a registered student sex offender be informed of the student's status if that sport involved the student sex offender intermingling with younger students. If a coach were a certified teacher, it may have been the responsibility of the principal to disclose the name to the coach as well, but Brophy testified that was not a "solid practice" at the time. CP at 395-96. Clark's track coach, a certified teacher, did not recall Riley-Hordyk informing him of Clark's sex offender status nor of any other student's

[3] BSD policy #3143 mandates principals to inform teachers of sex offender registration as follows: "District Notification of Juvenile Offenders: A court will notify the common school in which a student is enrolled if the student has been convicted . . . for any of the following offenses: a sex offense . . . . The principal must inform any teacher of the student and any other personnel who should be aware of the information." CP at 335.

sex offender status. Nor did Riley-Hordyk inform the junior high school track coach that Clark was a registered sex offender.

In 2007, BSD did not have any established policy or procedure for monitoring students who were registered sex offenders. Riley-Hordyk testified that she had an "unwritten" process in place to monitor student sex offenders that included a meeting between the counselor for the student sex offender and the assistant principals who are involved in monitoring students. CP at 319-330. None of the other high school or BSD administrators were aware of or involved in this process, including BSD's Assistant Superintendent Brophy; BSD's Athletic Director and Director of Campus Safety, Dan Heltsley; or the high school's other assistant principals.

Riley-Hordyk did not routinely formulate a safety plan procedure with registered sex offenders, but she met with the sex offender students individually to review the high school's code of conduct and had them affirm by their signature that those students (1) knew that the school was aware of his or her offender status, and (2) understood the code of conduct. BSD did not have a policy that required school administrators to formulate safety plans with sex offender students. Riley-Hordyk did not create a written safety plan for supervising Clark during his probation in tenth grade or after she received notice of Clark's registration as a sex offender.

IV. PROCEDURE

NL sued BSD, alleging negligence because BSD had a duty to protect her from the dangerous propensities of a fellow student and it breached that duty by failing to monitor Clark. BSD moved for summary judgment and dismissal. In opposition to BSD's motion, Judith Billings, former Washington State Superintendent of Public Instruction, provided unrebutted expert opinion on the standard of care for a school district, its duty to monitor and develop a safety plan for Clark,

and inform administrators of his sex offender status to protect its students. Billings opined that "[b]ut for the indifference and inaction of Bethel School District, NL would more probably than not, not have been taken by Nicholas Clark to his home, [sexually assaulted] and suffered the documented, extensive consequence of that event." CP at 303 (capitalization omitted).

The superior court granted BSD's motion, ruling that (1) BSD's duty did not extend to NL's harm because the harm occurred off school grounds, and (2) the harm was not reasonably foreseeable as a matter of law. NL appeals.

ANALYSIS

We review an order granting summary judgment de novo and perform the same inquiry as the trial court. *Durland v. San Juan County*, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We view all facts and inferences in the light most favorable to the nonmoving party. *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 17, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014). To prove a negligence claim, a plaintiff must show (1) that the defendant owed a duty to him or her, (2) the defendant breached that duty, (3) injury, and (4) a proximate cause between defendant's breach and plaintiff's injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013).

NL argues that the trial court erroneously granted BSD summary judgment because she presented sufficient evidence that (1) BSD owed a duty of reasonable care to protect her and monitor Clark, and (2) genuine issues of material fact existed as to whether BSD breached its duty to protect her and whether BSD's breach was a proximate cause of her injury. We agree.

I. DUTY AND BREACH

The existence of a legal duty is a question of law that we review 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). Admissible expert opinion testimony on an ultimate issue of fact is sufficient to create an issue as to that fact, precluding summary judgment. *J.N. v. Bellingham Sch. Dist.*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

When a student is at school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent. *J.N.*, 74 Wn. App. at 57. A school district has a duty to exercise reasonable care, as a reasonably prudent person would under the circumstances, to protect students in its custody. *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953); *Briscoe v. Sch. Dist. 123*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949). Because a school district holds mandatory custody of a child, it has a duty to protect its students from harm by a third party that the district (1) knows or has reason to know that it has the ability to control the third party's conduct, and (2) "'knows or should know of the necessity and opportunity'" to exercise that control. *McLeod*, 42 Wn.2d at 320 (quoting RESTATEMENT OF TORTS § 320 (1934)). In determining whether BSD owed a duty to NL, we look at (1) the relationship between BSD and its students, NL and Clark, and (2) the general nature of the risk.[4] *McLeod*, 42 Wn.2d at 319.

[4] A duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the tortfeasor that imposes a duty to control the third person's conduct *or* it may arise where the defendant has a special relationship with the other which gives the other a right to protection. RESTATEMENT OF TORTS § 315.

A school district's duty to exercise reasonable care extends only to foreseeable risks of harm. *J.N.*, 74 Wn. App. at 57. A school district's duty "is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." *McLeod*, 42 Wn.2d at 320. The particular sequence of events that led to the plaintiff's injury need not be foreseeable for a defendant school district to owe a duty to its students. *McLeod*, 42 Wn.2d at 322. Foreseeability 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 323. "'If . . . there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.'" *McLeod*, 42 Wn.2d at 323 (quoting RESTATEMENT OF TORTS § 453 cmt. a (1934)).

A school district's knowledge of one of its student's dangerousness may give rise to a jury question of foreseeability. Here, BSD insists that its duty does not extend to Clark's sexual assault of NL committed off school grounds and the sexual assault was not within the general field of danger that BSD could have anticipated. We disagree. Our Supreme Court in *McLeod* held that the fact that the harm was caused by an intervening intentional criminal act did not "of itself exonerate a defendant from negligence." *McLeod*, 42 Wn.2d at 320. Rather, it was "a fact to be considered in determining whether such act was reasonably foreseeable." *McLeod*, 42 Wn.2d at 321. "[T]he pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated." *McLeod*, 42 Wn.2d at 321; *see also Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

This case is analogous to *J.N.*, where Division One of this court held that JN, a first grader who was sexually assaulted at recess by a fourth grader, presented a genuine issue of material fact by demonstrating that the school district knew about the fourth grader's dangerousness. *J.N.*, 74 Wn. App. at 60. Based on reports of assaultive and aggressive behavior toward other students, sexual language, and "some kind of trauma" that the fourth grader had experienced, the school knew that the fourth grader had the "propensity to assault." *J.N.*, 74 Wn. App. at 52-53, 60. "[W]here the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the protection of other children from the potential for harm caused by such behavior." *J.N.*, 74 Wn. App. at 60. Thus, even if the fourth grader's sexual assault was outside the general field of danger, summary judgment was inappropriate because J.N. presented sufficient evidence that the school district had notice of the possibility of the specific harm inflicted. *J.N.*, 74 Wn. App. at 60.

Like the school district in *J.N.*, BSD owed NL a duty of reasonable care to protect her from reasonably foreseeable harm. NL presented evidence that BSD had a lengthy school discipline record on Clark with multiple instances of sexual conduct, including the incident that led to Clark's registration as a sex offender. Clark's sexual and assaultive behavior continued into the eleventh and twelfth grades, leading up to his sexual assault of NL. This evidence suggests that BSD was on notice of the possibility for the specific harm to NL, and BSD could have and should have reasonably anticipated that Clark would reoffend. Thus, it had a duty to reasonably protect NL from Clark's reasonably foreseeable acts.

In contrast, in *Kok*, we held that the school district's duty to exercise reasonable care did not extend to a student who was fatally shot at school by another student because the school district

could not have reasonably anticipated the harm that occurred. *Kok*, 179 Wn. App. at 13-14. At the time of the shooting in that case, none of the offending student's teachers or other professionals who had evaluated or treated the offending student had notified the school district that he was at risk of assaulting or killing another student at school. *Kok*, 179 Wn. App. at 20. Neither the offending student's behavior at school nor his medical records indicated "any assaultive behavior or tendencies." *Kok*, 179 Wn. App. at 20.

A school district does not owe a duty as a matter of law to a student when the nexus between the harm and the school district's alleged negligent action is too remote. *Coates v. Tacoma Sch. Dist.*, 55 Wn.2d 392, 396-97, 347 P.2d 1093 (1960); *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 44-45, 747 P.2d 1124 (1987). In *Coates*, our Supreme Court held that a defendant school district did not owe a duty of reasonable care when a student was involved in an accident on her way to a club initiation that was connected to the school only through an advisor. *Coates*, 55 Wn.2d at 394-95. Similarly, in *Scott*, Division One of this court held that a defendant school district did not owe a duty to a student who engaged in a romantic relationship with a teacher because the alleged sexual activities between the teacher and student did not occur at school, during afterhours counseling, or with the school's knowledge or consent. *Scott*, 50 Wn. App. at 41-42, 45.

This case is more like *J.N.*, where the nexus between the school district's failure to take action in response to its knowledge of potential danger and the plaintiff's specific injury were closely connected and not too remote. *J.N.*, 74 Wn. App. at 60. Unlike the defendant school districts in *Coates*, *Scott* and *Kok*, who did not have any knowledge to reasonably foresee the plaintiff student's harm, BSD had a lengthy discipline record of Clark's sexual behavior. BSD received notice of Clark's sex offender status more than two years before he assaulted NL. Yet

BSD took no action to monitor Clark or prevent further sexual assaults by Clark after receiving that notice with knowledge of Clark's other instances of sexual conduct. Clark's sexual assault of NL was closely related to and of the same character as BSD's knowledge of Clark's sexual conduct at school. NL's harm is not too remote from BSD's inaction to conclude that BSD did not owe NL a duty as a matter of law. We do not need to decide whether the specific sequence of events that resulted in NL's harm was reasonably foreseeable. *McLeod*, 42 Wn.2d at 322. NL presented sufficient evidence to have a jury determine whether Clark's risk to reoffend was within the general field of danger that BSD could have or should have reasonably foreseen. Thus, the question of whether NL's harm was foreseeable is a question for the jury.

Furthermore, viewing the facts in a light most favorable to NL, she also presented evidence of a genuine issue of material fact as to whether BSD breached its duty in the way it monitored Clark. Riley-Hordyk did not formulate a safety plan with Clark after BSD received notice of his sex offender registration status; BSD did not have a policy requiring her to do so. BSD did not have an established policy for monitoring registered sex offender students in 2007, either. Even though BSD policy instructed a principal to inform teachers of sex offender registration, Riley-Hordyk did not do so. The junior high school and high school track teams practiced on the same field that adjoined both schools at the same time of day, but Riley-Hordyk did not inform the junior high of Clark's sex offender status. Riley-Hordyk also failed to inform Clark's track team coach at the high school about Clark's status. NL's expert, Billings, testified on the ultimate issue of fact here that BSD had a responsibility to monitor and develop a safety plan for Clark. Billings' unrebutted expert opinion itself is sufficient to preclude summary judgment. *J.N.*, 74 Wn. App. at 60-61. Thus, the trial court should not have granted BSD's summary judgment motion.

II. PROXIMATE CAUSE

NL also argues that she presented sufficient evidence to preclude summary judgment that BSD's breach was a proximate cause of her injury. We agree.

A school district is liable only if its breach of a duty was a proximate cause of a plaintiff's injuries. *Travis v. Bohannon*, 128 Wn. App. 231, 240, 115 P.3d 342 (2005). Proximate cause has two elements: (1) Cause in fact, and (2) legal causation. *Lowman*, 178 Wn.2d at 169. Cause in fact or "but for" causation refers to the "physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact is usually a question for the trier of fact. *Hartley*, 103 Wn.2d at 778.

Legal causation is grounded in policy considerations as to how far the consequences of a defendant's action should extend. *Lowman*, 178 Wn.2d at 169. To determine whether a defendant's breach of duty is too remote to hold the defendant liable as a matter of law, we evaluate "'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Lowman*, 178 Wn.2d at 169 (quoting *Hartley*, 103 Wn.2d at 779). An injury may have more than one proximate cause and a jury is to determine whether a third party's act is a superseding or a concurring cause. *Travis*, 128 Wn. App. at 242. The intervening act of another person may be an *additional* cause of the plaintiff's injury and does not necessarily relieve the defendant of liability if the harm was foreseeable from the defendant's original breach. *Travis*, 128 Wn. App. at 242. The existence of legal causation is a question of law. *Taylor v. Bell*, ___ Wn. App. ___, 340 P.3d 951, 960 (2014).

Taken in a light most favorable to NL, NL presented sufficient evidence to create a genuine issue of material fact as to whether BSD's breach was a proximate cause of injury to her. As to

cause in fact, NL presented evidence that BSD had not adopted any policies to create safety plans or to specifically monitor the activities of registered sex offender students in its schools. Contrary to BSD's policy, Riley-Hordyk failed to inform Clark's teachers of Clark's status. NL also presented Billings' expert opinion that BSD's failure to adopt policies to monitor and supervise sex offenders attending their schools was a proximate cause of NL's injuries.[5] As to legal causation, we cannot say that the harm to NL was "'so highly extraordinary or improbable'" that no reasonable person could be expected to anticipate it. *Seeberger v. Burlington N. R.R.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod*, 42 Wn.2d at 323.)

We hold that (1) BSD owed a duty of reasonable care to protect NL and monitor Clark, and (2) genuine issues of material fact exist as to whether BSD breached its duty and whether that breach was a proximate cause of NL's injury. We reverse and remand.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, J.

Melnick, J.
MELNICK, J.

[5] "But for the indifference and inaction of [BSD], [NL] would more probably than not, not have been taken by Nicholas Clark to his home, raped and suffered the documented, extensive consequence of that event." CP at 303 (capitalization omitted).