Supreme Court No. 99143-0
Court of Appeals, Division I, No. 80218-6-I
[Consolidated With No. 80310-7-I]

SUPREME COURT OF THE STATE OF WASHINGTON

HALEY A. ANDERSON, DEAN ANDERSON, and JODIE ANDERSON,

Plaintiffs/Petitioners,

v.

SNOHOMISH SCHOOL DISTRICT NO. 201, a municipal corporation, PETER WILSON and JANE DOE WILSON, husband and wife and their marital community, WENDY NELSON and JOHN DOE NELSON, wife and husband and their marital community,

Defendants/Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Haley Anderson and her parents appeal from a grant of summary judgment on their negligence claim against Snohomish School District. Haley suffered a blow to the head while on a school trip to Disney Land. Plaintiffs do not allege the District is responsible for the original injury—but for failing to obtain a medical assessment for Haley in California.

The Andersons failed to provide any evidence that Haley's reported symptoms constituted an emergency. Their own expert testified that Haley's symptoms did *not* merit emergency treatment. Nor did any expert testify the District should have sought non-emergency medical care. The lower courts held that the District fulfilled its duty to obtain emergency treatment *if* needed and then to notify parents, who assume responsibility for further treatment.

Haley asserts a RAP 13.4(b)(1) "conflict" with cases holding that factual disputes should typically be resolved by a jury. Of course, no case holds that *all* cases must go to a jury. Nor is there any *material* factual dispute here because Haley did *not* need emergency care, and she *did* notify her parents. In short, the District's duty was properly defined and there *was no* countervailing evidence. Nor does RAP 13.4(b)(4) warrant review, because there is no "open question" about schools providing non-emergency medical treatment. Review should be denied.

II. STATEMENT OF THE CASE

The District accepts the Court of Appeals' factual findings. The recitation, below, is taken largely from the appellate opinion.

Haley, age 17, went on a band-sponsored field trip to California on Spring Break 2014, including a trip to Disney Land on April 8. According to Haley's then-boyfriend, Mitchell Gibbs, the two got on the Matterhorn ride between 1:30 p.m. and 2:00 p.m. (Unpub. Op. at 2). Gibbs sat in front of Haley. After they got off, Haley told Gibbs that she hit her head and did not feel well. They say down, and Gibbs got Haley something to drink. After resting a bit, he asked Haley if she was feeling better. Haley said "Yes," and they went to meet friends at another ride. They then went on several other rides throughout the later afternoon and evening. (Unpub. Op. at 2).

However, when they went to the chaperone station at 10:30 p.m., Haley fell asleep and had trouble waking up. Gibbs gave her a piggy-back ride to the hotel and told another student to tell Wendy Nelson, a parent volunteer on the trip, about Haley hitting her head. Nelson was also the trip coordinator, but was not one of Haley's assigned chaperones. Up until then, neither Gibbs, Haley, nor anyone else, had told any adults on the trip about her injury. (Unpub. Op. at 2).

According to Haley, she and Gibbs rode the Matterhorn around 9:00 p.m. She testified that as the ride went around a corner, she struck her head on the headrest/bar. After the ride, she sat on a bench and told Gibbs that she hit her head and did not feel well. (Unpub. Op. at 3). She recalled going to dinner, checking in at the chaperone station, and not telling any of the chaperones about any symptoms. According to Haley, another student told Nelson about Haley's injury, and Nelson came to Haley's hotel room. Haley told Nelson she hit her head. Haley testified that Nelson pulled her out of her room, evaluated her, and told her that she looked okay. (Unpub. Op. at 3). Haley testified that Nelson told her to take some pain medication, to call her parents, and that Nelson would check on her in the morning. (Haley had standing written permission to bring ibuprofen on the trip because of a history of chronic headaches). So, just after midnight, Haley sent her father, Dean, this text:

> Hey, I hit my head pretty hard while I was on the Matterhorn today about 2-3 hours ago. I'm just texting to let you know in case you get a call from [band director Peter] Wilson or [Nelson] tomorrow about me. I didn't call because I don't want to wake you all up. I'm sure I'm fine, but I wanted to let you know just in case. Good night. I love you all and I'll call you tomorrow.

This is the same information Haley had shared with Nelson—that she hit her head but was fine. (Unpub. Op. at 4). Haley then forwarded the

same text on to her mother, also around midnight. (Unpub. Op. at 4).

When asked about the symptoms that Haley disclosed on April 8-9, Haley's treating physician, Dr. Osorio, stated that Haley's symptoms on April 8 did not warrant a trip to the emergency room. (Unpub. Op. at 12). Dr. Osorio testified:

> Q. If you had only those two symptoms to go on, would you have recommended that Plaintiff needs to go to an emergency room?
>
> A. No.

(CP at 1132). In fact, neither Glass, the child neurologist who served as plaintiffs' expert, nor Osorio testified that Haley's reported symptoms required any type of immediate treatment. (Unpub. Op. at 12).

According to phone records, Haley then texted and had voice calls with her parents throughout the next day, April 9. All of them testified that they probably did talk about her injury, her symptoms, and how she was doing, but "could not recall" the substance of those conversations. Neither parent made an attempt to contact any adult on the trip, despite the District's pre-trip provision of a phone list with all the adult chaperones' contact information. Jodie testified that from what she heard from Haley and her husband, there did not appear to be a problem. (Unpub. Op. at 4). (Jodie also spent as many as 61 minutes

talking on the phone with Haley over the next five days, while Haley was still in California. Dean and Haley talked for at least 8 minutes by voice call as well). (CP 1344-45, 1347-1353).

Meanwhile, Nelson also checked on Haley the next morning at breakfast, before any activities. Haley did have a headache, but did not disclose that to Nelson—Haley told Nelson she was fine. (Unpub. Op. at 4). Throughout the remainder of the trip—five more days--Haley then continued to go on rides at amusement parks. She developed new symptoms like nausea and dizziness. After one ride in particular, on April 12, she developed much more severe symptoms. (Unpub. Op. at 4-5). However, Haley concedes, she did not report any symptoms she experienced after April 8 to any adult on the trip. She disclosed them to fellow students and especially Gibbs, who urged her to tell her chaperone. (CP 1159, 1163). She did not do so.

After she returned home, Haley was seen at Everett Clinic, diagnosed with a concussion, and began modifying her school schedule and activities. This suit now claims that she continues to have head injury symptoms, even six years later. It claims that the cause of the long-lasting effects is the District's failure to seek non-emergency assessment of her injury in California. She argues that if the District had taken her for a non-emergency evaluation, a California doctor

likely would have diagnosed concussion, and "benched" her from ongoing participation on the trip.[1] Her expert testified that ongoing activities after the initial blow likely caused "secondary impact" injury, worsening the original blow.

There are two erroneous statements of fact in plaintiff's Petition. The first is at the bottom of page 4 and top of page 5. Plaintiff asserts that Gibbs told Nelson about five specific concussion symptoms Haley was experiencing. This is false. In reality, Gibbs first testified about what symptoms *he* knew regarding Haley's condition (CP 1156), but when asked specifically what he told the adults on the trip, he could confirm sharing only one of them. (CP 871-872).

Secondly, the evidence does not support an assertion on page 12 of plaintiff's Petition that "Haley was concussed when she encountered Nelson on April 8, 2014." There is no such evidence. In fact, plaintiff's own doctor acknowledged that, even a week later, after Haley had allegedly sustained the original blow to the head *plus* a week of ongoing activity, "her neurologic exam was normal." (CP at

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[1] In direct contradiction of her own theory of the case, plaintiff's own doctor acknowledged that, even a week later, after Haley had allegedly sustained the original blow to the head *plus* a week of ongoing activity, "her neurologic exam was normal." (CP at 1331 ("Is there anything in his neurologic exam findings that, to you, shows potential or indications of concussion? A. According to this, her neurologic exam [on April 14] is normal." (CP 1331).

1331). She was diagnosed on the basis of disclosing symptoms on April 14 that she did *not* disclose while in California.

III. ARGUMENT

Plaintiff's Petition does not state either a RAP 13.4(1) or (4) basis for review, and should be denied.

A. Since there is no conflict, there is no basis for review under RAP 13.4(1).

Plaintiff's first claimed basis for review is RAP 13.4(1))—conflict with existing case law. The only asserted conflict is, effectively, that it is typically for the jury to determine whether a duty is breached. (Petition at 11-14). There are scores of cases holding that while breach is *typically* a jury question, summary judgment is appropriate where, as here, reasonable minds can reach only one conclusion. *Sherman v. State*, 127 Wash.2d 164, 183, 905 P.2d 355 (1995). Both the lower court's correctly concluded this is such a case. Any contradictory versions of testimony from Haley and Nelson about what happened in the hotel room on the night of April 8 are simply not *material,* in light of the District's duty to obtain emergency medical care *if needed* and for any other injuries, to ensure parental notification. *See Blakely v. Hous. Auth. of King Cty.*, 8 Wash. App.

204, 209, 505 P.2d 151, 155 (1973) ("the facts shown must be material, *i.e.,* facts upon which the outcome of the litigation depends."); *citing Capitol Hill Methodist Church of Seattle v. City of Seattle*, 52 Wash. 2d 359, 360, 324 P.2d 1113, 1115 (1958) (the disputed facts must be material to the outcome of the litigation).

Plaintiffs raise factual allegations that, they say, a jury could resolve in several different ways. But none of those factual allegations are *material*, in light of the duty here. Both lower courts diligently examined each source of duty alleged by plaintiffs. As to the common law, they both held that Nelson's "duty to Haley was one of reasonable ordinary care under the circumstances. As a chaperone, her duty to Haley is to speak to the child, assess the issue, and inform her to call her parents—which she did." (CP at 773-779 (Trial Court Order at 5)).

As to duties created by District policies, the lower courts properly identified Snohomish's Policy 3431—"Student Illness/Injury"-- as primary. They nonetheless looked at other District policies urged by plaintiff, and rejected the idea of a duty to notify *the teacher* as a material duty—because the teacher's role was then to notify the parents. They also rejected the materiality of a duty to notify the school nurse and Principal—because it was Spring Break. No Principal or nurse were available. Further, the overarching goal of

notifying nurse and Principal was, again, to accomplish parental notification, "which is exactly what Mrs. Nelson accomplished." (CP at 773-779) (Trial Court Order at 5).

Both lower courts also considered and rejected the applicability of RCW 28A.600.190 ("Zackery Lystedt Law") statutory duties, because Haley was not a student-athlete.

Finally, both courts carefully guarded the parental role in decision-making for non-emergency illness or injury ("Haley's parents were in contact with her and were aware of her injury.") CP at 773-779 (Trial Court opinion at 5). This duty analysis was all correct.

Then, having clearly identified the four corners of the District's duty, both courts then held that there were no genuine issues of material fact, because:

a. Haley's situation was undisputedly not an emergency and did not require the procurement of emergency medical care;

(CP at 773-339 (Trial Court Opinion at 6); Unpub. Op. at 12);

And

b. Her parents were "notified of her injury," "had an opportunity to inquire of Haley," "did so," and "did not inquire further of the District, direct a medical evaluation, or instruct that Haley be held out of further activities." (Unpub. Op. at 16).

Both lower courts correctly ruled any dispute was immaterial. *Blakely*,

8 Wash. App. at 209.

There was no RAP 13.4 magnitude "conflict" with existing law in taking this case away from the jury. The only "factually conflicting" evidence did not put into question whether this injury required a trip to the emergency room (it undisputedly did not); nor create a question of whether parental notification was accomplished (it admittedly was). There is no RAP 13.4(1) basis for review.

B. Foreseeability is Not at Issue

Plaintiff's second basis for review is argued at Petition page 14-16. In it, plaintiffs assert that the trial and appellate court erroneously declined to apply RCW 28A.600.190/Zackery Lystedt Law to establish, as a matter of law, that every student's head injury, no matter how seemingly minor, could indicate a more serious injury. Plaintiffs argue that the lower courts "did not take into account evidence * * * of foreseeable harm." (Petition at 15). They rely on evidence that the District hands out concussion forms to student athletes and their parents, which discuss the potential for developing a serious injury following a seemingly minor head injury. And, they argue that, as a result, the District is charged with record notice, or "foreseeability," that without medical treatment, Haley's seemingly minor head injury might worsen into something more serious. (Petition

at 15-16).

This case does not present that question. It is foreseeable in *every* case where parents do not seek medical treatment for their injured child, that the child's injury may worsen. That does not change the nature of the District's duty. Foreseeability of a possible worsening does not convert a non-emergency student injury into an emergency. *This injury* undisputedly did not merit a trip to the emergency room. Haley told her parents "the exact same statements" that she told Nelson. (CP at 773-779 (Trial Court Opinion at 5)). The decision about whether to request, or seek, further non-emergency treatment for Haley belonged to the parents. *Whether or not* the District could foresee that Haley's injury might get worse without treatment, the District's duty simply does not extend to taking Haley for non-emergency medical treatment, without parental directives to do so.

Plaintiff's arguments are otherwise a backdoor attempt to apply Lystedt-law statutory duties to all students, when the Legislature expressly limited them to student-athletes. RCW 28A.600.190; *Swank v. Valley Christian School*, 188 Wash 2d 663, 398 P3d 1108 (2017). For obvious reasons, both lower courts rejected that proposal. Foreseeability does not create a reviewable issue here.

C. This Case Does Not Present a Substantial Question of Public Interest to Warrant Review under RAP 13.4(b)(4).

Finally, plaintiffs argue that the "substantial public interest" at stake is the "safety of children in the custody of public school districts." (Petition at 16-18). But there is no shortage of case law on the issue of the safety of students in public school. This Court frequently provides detailed analysis of that issue. *See, e.g., Hendrickson v. Moses Lake Sch. Dist.*, 192 Wash. 2d 269, 428 P.3d 1197 (2018); *Anderson v. Soap Lake Sch. Dist.*, 191 Wash. 2d 343, 423 P.3d 197 (2018).

The real gist of plaintiff's argument at Petition page 17-18 is that the gravity of the resulting harm, here, was serious. But this Court does not accept review simply because the resulting harm of an event was serious. "To determine whether a case involves the requisite public interest, we consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination to provide future guidance to public officers, and (3) the likelihood that the question will recur. *Thomas v. Lehman*, 138 Wash.App. 618, 622, 158 P.3d 86 (2007) (*citing In re Pers. Restraint of Mines*, 146 Wash.2d 279, 285, 45 P.3d 535 (2002)). Here, there is

no "open question" with any immediate affect on significant segments of the population or a direct bearing on commerce, finance, labor, industry, or agriculture." *State v. Watson*, 155 Wash. 2d 574, 578, 122 P.3d 903, 905 (2005).

For decades, students who become ill or injured in school custody have been instructed to "call home." Parents or guardians have then either picked up the child from school, requested that the school call an ambulance, or have provided instructions to have the child remain at school. Absent parental instructions, schools have *never* had a duty to unilaterally transport children for medical treatment of a non-emergency illness or injury. Unless this Court is prepared to undercut parental autonomy over medical decision-making, and to impose an incredible new medical/financial burden on school districts, there is no substantial public issue here. There is no RAP 13.4(b)(4) basis for review.

IV. CONCLUSION

This case does not present any novel issues. It was decided by reiterating that a school district's duty of ordinary care toward an injured student turns on the nature of an injury. A District has a duty to procure emergency medical care for injuries that require emergency medical treatment, until a parent can assume responsibility.

Conversely, a District's duty toward a non-emergency student injury is to ensure parental notification. After parental notification occurs, medical decision-making power over such injuries and treatment belongs to the parent. The District's duty can, and must, end with notifying the parent—any other rule regarding non-emergency care is completely unworkable.

Here, once the scope of the District's duty was identified, and the non-emergency nature of Haley's injury was established, there simply was no evidence of a breach of that duty. Haley's injury was not an emergency and her parents were notified but chose not to request or direct further medical assessment.

This Court should deny review.

DATED THIS 20th DAY OF November, 2020.

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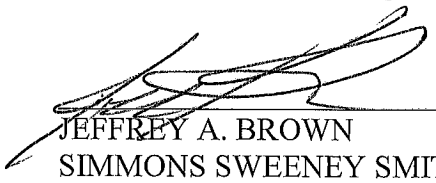
CERTIFICATE OF SERVICE

JEFFREY BROWN, hereby declares:

On November 20, 2020, I caused to be served, by electronic service via Washington State Appellate Court's Portal- E-Filing/Service to counsel for Appellants/Plaintiffs to their counsel of record and via e-mail: Brandon K. Batchelor, Russell & Hill, 3811A Broadway, Everett, Washington 98201 the Answer to Petition for Review.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing statement is true and correct.

Dated this 20th day of November, 2020 at Bellingham, Washington



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