

67645-8

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No. 67645-8-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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N.K., an individual proceeding under pseudonym,

Appellant,

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.,

Respondents.

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BRIEF OF RESPONDENT BOY SCOUTS OF AMERICA

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## I. INTRODUCTION

The “bad actor” in this case is Dusty Hall, neither sued nor located by appellant N.K. It is undisputed that BSA did not know that Hall existed until, more than 30 years after the events, it was served with process in this action. It had no way of controlling or preventing the harm that Hall caused. N.K. offers little in the way of argument to the contrary, but attempts, instead, to impute Hall’s conduct to BSA through a tortured, and specious, application of the law of agency.

N.K.’s theory would make BSA an insurer of the safety of scouts against criminal acts committed by *anyone* with whom they might come in contact. This is not a case of *McLeod’s* “darkened room,” either actually or, as N.K. would have it, metaphorically.<sup>1</sup> It is, instead, an effort, properly rejected by the trial court, to make an end run around the Supreme Court’s specific, repeated injunction *against* the imposition of strict or insurer’s liability in cases where, as here, the plaintiff seeks to hold an organization liable for an individual’s intentional sexual assault. *C.J.C. v. Corporation of the Catholic Bishop*, 138 Wn.2d 699, 727, 985 P.2d 262 (1999) (stating that “[o]ur courts have never adopted such an approach [strict liability] in the present context and we decline to do so now”); *Niece v. Elmview Group Home*, 131 Wn.2d 39, 42, 929 P.2d 420 (1997) (rejecting vicarious and strict liability for employees’ sexual abuse).

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<sup>1</sup> *McLeod v. Grant County Sch. Dist.*, 42 Wn. 2d 316, 255 P.2d 360 (1953).

Pedophiles are a despicable subset of humanity, but recognition of this fact has not made it any easier to identify them before they act or to root them out of the youth-serving organizations, schools, and other places with children to which they are universally drawn. As even N.K. must admit, there is no profile, no litmus test, that will separate pedophiles from those sincere volunteers who join the scouts, Big Brothers, sports teams, and similar organizations. Because there is no profile or test to identify pedophiles in advance, the Supreme Court's knowledge requirement, which was not cut from whole cloth but which, rather, finds its origin in the *Restatement (Second) of Torts*, is essential to the maintenance of the fault-based duty that, in *C.J.C., Niece, Doe*,<sup>2</sup> and other cases, has been formulated to balance the rights of victims against those of entities that, without prior specific knowledge, cannot guarantee that they will be able to prevent pedophiles from entering their programs and causing harm.

Dusty Hall was not introduced to N.K. through scouting. Rather, Hall, clever pedophile that he was, ingratiated himself into the lives of N.K.'s parents and the small LDS community in Shelton without the knowledge, assistance, or approval of BSA. BSA knew nothing of him or his proclivities. Nor could it: the LDS Shelton ward did not select Hall to be the scoutmaster for its troop, and accordingly, Hall was not registered

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<sup>2</sup> *Doe v. Corporation of the Pres. of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 167 P.3d 1193 (2007), *review denied*, 164 Wn.2d 1009 (2008).

with BSA. The Superior Court correctly dismissed N.K.'s claims against BSA and its decision should be affirmed.

## **II. COUNTER-STATEMENT OF ISSUES**

1. Did the trial court properly grant summary judgment to BSA where no special relationship existed between BSA and either Hall or N.K.?
2. Did the trial court properly grant summary judgment to BSA where it was undisputed that BSA had no knowledge that the alleged perpetrator, Dusty Hall, posed a risk of harm to boys?
3. Should summary judgment be affirmed where no conceivable causal connection exists between BSA and Hall's presence in Shelton, Washington?

## **III. STATEMENT OF THE CASE**

### **A. Structure of the Scouting Movement.**

The scouting movement consists of three "layers" of distinct, separate, legal entities: BSA, councils, and local community organizations. CP 1058-1059. The first "layer" is BSA, a Congressionally-chartered corporation. CP 1059. BSA provides an educational resource program, and its federal charter provides that it is to make its educational scouting program available for use by other organizations. *Id.*; 36 U.S.C. § 30902 ("The purposes of [BSA] are to promote, through organization and cooperation with other agencies, the ability of boys to do for themselves and others . . ."). Accordingly, the scouting program is offered by BSA to local organizations for use as part

of their *own* youth programs. CP 1059, 1403. In 1977, BSA was headquartered in North Brunswick, New Jersey. CP 1059.

The second “layer” of the scouting movement is made up of individual councils (such as the Pacific Harbors Council). The councils are separate nonprofit or charitable corporations operating within a set geographic area. CP 1059, 1082. There are approximately 300 locally-incorporated councils in the United States established by local community leaders to serve their communities by providing guidance and support to the independent community organizations that operate scout troops. *Id.* The Pacific Harbors Council (the “Council”) has its own Board of Directors, and raises and allocates its own funds. CP 1082. Its purpose, like that of other councils, is to promote and support scout troops sponsored and operated by local community organizations within its geographic region. *Id.*; CP 1059. It does not itself sponsor or operate scouting units, with the exception of three “venturing” crews associated with its three camps. CP 1083.

The third “layer” is composed of independent community organizations. CP 1059. These organizations include civic and community groups such as Kiwanis International and Lions International, the armed forces branches, Granges, conservation clubs, fire departments, tribal councils and parent-teacher organizations, as well as churches across the full spectrum of religious denominations. CP 1081.

These organizations sponsor, own, and operate scouting units (such as scout troops and cub scout packs). CP 1060, 1082-83, 1404. They –

and not BSA or the councils – select scout leaders, and can discharge those leaders without any prior approval by BSA or the councils. *Id.* While BSA and the councils may provide recommendations and guidance to these organizations regarding procedures to follow in implementing the scouting program, neither is involved in the daily operations of scouting units. CP 1377-78.

**B. BSA’s Membership Standards and the Ineligible Volunteer Files.**

Although BSA does not select adult troop leaders, it does check the names of leaders submitted for registration against the names in its Ineligible Volunteer files (the “I.V. files”). CP 1060. These files contain information about people who have been declared ineligible under BSA’s leadership standards to register in a scouting program. *Id.* Some 90 years ago, BSA created the I.V. file system to help prevent registration by ineligible persons. *Id.* A person may be deemed ineligible to participate in a scouting program for many reasons, including criminal conduct, financial improprieties, gambling, alcoholism, inappropriate conduct with children, and conduct that reflects poor judgment. *Id.* BSA creates an I.V. file upon receipt of information from a council that alleges inappropriate or unlawful conduct. CP 103. It does not investigate or verify information provided by the councils. CP 104. BSA will not allow registration of a person whose name appears in the I.V. files. CP 1060.

Almost from its inception, BSA has made the I.V. files’ existence known to the public through nationally-distributed publications. CP 1390.

For example, a *New York Times* article published in 1935 explains that the I.V. files – then called the “Red Flag” files – were not a list of Communist infiltrators, but a list of adult leaders who were deemed unfit for a variety of reasons.<sup>3</sup> CP 1368.

In 1977 – as it has done throughout its history – BSA expected each local scouting unit to select and manage its leadership, and to submit, for its leaders (those on troop committees, those serving as leaders, and those participating in significant activities), registration applications to the appropriate council. CP 1388-89. The council reviewed the applications, requested additional information if needed, and then forwarded the applications to BSA, which checked the names of the applicants against the names in the I.V. files. CP 1389. An unregistered person allowed by a organization’s troop committee or leaders to assist with an activity conducted by its troop would, by definition, not have submitted a registration application, and BSA would not have been able to, and would have had no means to, check that person’s name against the I.V. files. *Id.* BSA does not consider persons who are not registered with it to be scouting volunteers. *Id.*

In its 1977 Annual Report, BSA reported to Congress that 1,877,947 adults were registered in scouting during the year. CP 1072.

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<sup>3</sup> N.K. accuses BSA of an I.V. file cover-up, while relying upon this same *seventy-seven-year-old* explanation of the files for data on the incidence of pedophilia in scouting. App. Br. at 16-17. He also mischaracterizes as an “admission” BSA’s *denial* that it was aware in 1977 of a need to take action beyond to the procedures already in place to protect youth. *See* App. Br. at 16, citing CP 1371 (BSA’s denial of N.K.’s Request for Admission No. 21).

N.K. claimed below that, on average, some 57.8 I.V. files were created nationwide each year between 1965 and 1985. CP 1127. This number is equal to .003 percent of the adults registered during 1977.<sup>4</sup> N.K. offered no evidence, below, and offers nothing now, to explain how this rate compares to the incidence of abuse in schools, other youth-serving organizations, or society in general.

**C. The LDS Shelton Ward Troop.**

The LDS Shelton ward was the locally- chartered community organization which organized and ran Troop 155. CP 938-39. N.K., born in early 1965, was a member of the Shelton ward Troop for three years, from 1976 to 1978. CP 1085, 1088, 1091.

The LDS Shelton ward bishopric supervised the ward troop's scoutmaster, and was responsible for the troop itself. CP 905, 942-943. The bishopric is composed of the bishop, and his first and second counselors. CP 931. The second counselor was responsible for supervising the scoutmaster, and reported to the bishop regarding the scoutmaster and the troop. CP 905. The bishopric was "ultimately" responsible for the LDS Shelton ward troop. CP 942-43.

The bishopric selected scout leaders through a church process of "calling" a worthy candidate to that position. CP 913-14, 944-45. To

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<sup>4</sup> BSA reported 916,646 registered adult "Scouters" and 961,301 registered Cub Pack leaders, or a total of 1,877,947 registered adults, during 1977. CP 1072. At the end of the year, it reported a combined total of 1,272,251 registered adults. *Id.* Assuming that each of the 57.8 I.V. files as alleged by N.K. represented a confirmed (rather than a suspected) child molester, the rate using this year-end figure is equal only to .00461 percent.

“call” a new scout leader, the bishopric would first obtain candidate recommendations from the Young Men’s presidency. CP 913-914. The bishop would discuss the potential calling with his two counselors, then meet, pray, and agree on the person selected. *Id.*; CP 940. The bishopric would then interview the candidate. CP 914, 944. If satisfied with these interviews, the bishop would extend the “call” to the person to serve as scoutmaster or assistant scoutmaster. CP 914. The bishop would then “present” the called individual to the congregation. CP 940. The congregation would vote to “sustain” that person as scoutmaster or assistant scoutmaster by a show of hands. *Id.* N.K. admits that this is the procedure used in every LDS ward to which he has belonged, including the Shelton ward. CP 993-94, 1007.

It is undisputed that the LDS Shelton ward registered the individuals it selected through this process to serve as scoutmaster or assistant scoutmaster with BSA. CP 906, 951-952. Registration required completion of an application form, which was sent by the LDS Shelton ward to the Tumwater Council and forwarded on to BSA.<sup>5</sup> CP 941, 1060. As it would do with all registration applications, BSA compared the names on the application with names listed in its I.V. files. CP 1060.

At the end of each year, the LDS Shelton ward submitted a re-chartering application to the Tumwater Council for the upcoming year.

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<sup>5</sup> During the 1970’s, scout troops in Mason County were served by the Tumwater Council. CP 1083. In 1993, the Tumwater Council merged into the Pacific Harbors Council. *Id.*

CP 906, 941. The re-chartering application lists the scoutmaster, the assistant scoutmaster (if any), the troop committee members, and the troop members. CP 941, 1083. Only the names of those persons called, presented and sustained, and registered would appear on the rosters as scoutmaster or assistant scoutmaster. CP 949-50, 1083. This re-chartering application was the basis for the Tumwater Council's annual roster for the LDS Shelton ward troop. CP 1083. The Council would make handwritten changes to the roster during the year as it received new troop member and scoutmaster registrations. *Id.*; CP 1015-16. The rosters reflect that the LDS Shelton ward selected Benjamin Danford as Scoutmaster in 1977. CP 1083-89. The rosters do not list the name of the alleged perpetrator here, Dusty Hall, at all. *Id.*

Other than chartering and registration of members, BSA had no involvement with the LDS Shelton ward troop. The ward bishop testified as follows:

Q. During the time you served in the Shelton First Ward do you recall any involvement with the Boy Scouts of America, the national organization, apart from the chartering and registration process that we talked about earlier?

A. No.

CP 909. Mr. Danford, the 1977 LDS Shelton ward scoutmaster, did not recall any contact with the Council or BSA. CP 1740-41.

**D. In Spring, 1977, Hall Arrived in Shelton, Joined the LDS Shelton Ward and Became Friends with N.K.'s Parents.**

In January 1977, Dusty Hall lived in Juneau, Alaska, and he converted to the LDS church. CP 962. In February 1977, Hall left Juneau, and arrived in Shelton, Washington in the spring of 1977. CP 963.

Hall met N.K.'s parents at church soon after he arrived in Shelton. CP 968. N.K.'s mother subsequently invited him to dinner, and it was there that N.K. first met him. CP 978. Hall became good friends with N.K.'s father, frequently visiting N.K.'s home. CP 972-73. He also became engaged to N.K.'s mother's best friend, Geri Worthy. CP 844, 1033-34.

**E. Hall's Alleged Sexual Abuse of N.K.**

N.K. claims that Hall first abused him at home, a few days after Hall came for dinner. CP 978-80. Hall allegedly came to the home while N.K.'s parents were gone, and fondled N.K. outside of his clothing. CP 979. A few days later, Hall again came to the home and fondled N.K. CP 981-82. A third fondling incident occurred at Hall's apartment in Shelton. CP 982-83.

N.K. says that Hall fondled him once during a campout at a public park at Ocean Shores, CP 1009-10; three times during sleepovers at Hall's apartment, CP 987; once at Hall's place of employment, *id.*; and briefly fondled him at a cabin on LDS Shelton ward property used for storage and by the LDS troop for meetings. CP 1001. N.K. does not know how many

times Hall fondled him in this cabin, but it was “less than five times.” *Id.* N.K. also claims that Hall fondled him in Hall’s car. CP 987.

In total, N.K. alleges that Hall fondled him approximately 20 to 30 times in 1977. CP 981, 989. Half of these incidents occurred in his own home. CP 985.

**F. In Fall 1977, Hall Left Shelton After His Fiancée Discovered He Had Abused Her Young Son.**

On a Sunday in late summer or early fall, 1977, Hall’s fiancée, Geri Worthy, discovered that Hall had molested her six-year-old son. CP 1030. Ms. Worthy called the LDS Shelton ward bishop, Gordon Anderson. CP 1031.

Bishop Anderson testified that he was contacted by a person who informed him that Hall had inappropriately touched a boy at a sleepover birthday party. CP 917. The birthday party was not a scouting event. *Id.* Bishop Anderson attempted to find Hall, but discovered that Hall’s apartment was empty and Hall was gone.<sup>6</sup> CP 918. He then called the parents of the scouts together, and asked them to speak with their children regarding sexual abuse by Hall. CP 919-20, 967. The bishop contacted the parents of the scouts because he “wanted to make sure that the – this incident wasn’t spreading over to the scout troop.” CP 919. He met with the parents and their sons one by one and listened to the parents speak to their boys. *Id.*; CP 967. He then spoke privately with each boy, and

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<sup>6</sup> It is undisputed that Hall had left Shelton by early fall, 1977. CP 992, 1032. Hall was thus in Shelton for only a few months, from spring to fall, 1977. CP 997-98.

specifically asked if Hall had done anything to them. CP 919. N.K. denied any abuse to both his parents and the bishop. CP 852, 921, 977.

**G. Hall Was Not Registered as a Scoutmaster or Assistant Scoutmaster for the Shelton Ward Troop.**

The LDS Shelton ward bishopric did not select Hall to serve as a scoutmaster. The 1977 bishopric – Bishop Anderson, first counselor Edwin Savage, and second counselor Gary Gozart – all testified that they did not “call” Hall for this or any position in the church. CP 915 (Mr. Hall “did not have any callings”); CP 947, 1025. Instead, Benjamin Danford was called as scoutmaster. CP 909-10, 950. N.K., himself, admitted that Mr. Danford was his scoutmaster in 1977, CP 996, and that, in the LDS Church, the position of scoutmaster is a “calling.” CP 1007-08.

Not a single witness testified that Hall was called, presented and sustained. N.K. admits he did not know if Hall was ever called, presented or sustained as a scout leader. CP 1007-08. He admits that he does not recall the bishop ever referring to Hall as the scoutmaster. CP 999. He could only testify that Hall *acted* as if he was a scoutmaster. *Id.* Similarly, N.K.’s parents did not know what role Hall played in the troop. N.K.’s mother testified, “I don’t know [what role Hall had in the troop]. I don’t know if he was officially the scoutmaster or if he was just assistant [sic] or if he just helped. I don’t know.” CP 1174. His father was also in the dark. CP 1180 (“Q: So you don’t know what role he [Hall] had? A: No, I don’t.”) Hall’s fiancée, Geri Worthy, knew no more. CP 1211.

None of the former scouts and scouts' parents deposed in this action could state what Hall's position was with the troop. CP 1807, 1245, 1257, 1287.

**H. N.K.'s Parents Trusted N.K. with Hall Because He Was Their Friend.**

N.K.'s mother testified that she let her son interact with Hall because he was a family friend, not because of a scouting connection:

Q: Is one of the reasons you let Dusty – or you let [N.K.] stay at Dusty Hall's apartment is because he was affiliated or he was connected with the Boy Scouts?

....

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

CP 854. She let Hall come alone to her house "because he and [N.K.'s father] were friends." CP 845. N.K.'s father also trusted his children with Hall based upon his personal assessment of Hall as trustworthy and likeable, and *not* because Hall had any role in scouting. CP 836.

Although N.K.'s parents were good friends with Hall, and spent time with him, they had no idea that he was capable of sexual abuse. His mother thought Hall "was great" and had "no inkling of any kind" that he was a pedophile. CP 852-53. His father was one of the last to find out about "the rumors" about Hall, and until then, thought Hall was "a good guy." CP 835-836. Hall's Shelton fiancée, Geri Worthy, was "appalled and shocked" when Hall's proclivities came to light, and couldn't believe that such a "really nice guy" could do such a thing. CP 872-73.

**I. BSA Had No Knowledge of Hall or Any Threat That Hall Posed to Scouts.**

BSA had no knowledge of Hall's existence. It has no records of Hall. CP 1061. Hall was not a BSA employee. *Id.* He is not listed in BSA's I.V. files. *Id.* There is no evidence that Hall ever submitted a registration application to BSA. Hall is not listed as a registered volunteer in the LDS Shelton ward troop rosters. CP 1083. Nor could he be, as he was never selected to be a scoutmaster or registered as a scoutmaster. CP 947-50.

N.K. offers no evidence to the contrary. He admits that BSA did not select Hall to be a scoutmaster of the Shelton ward Troop:

Q. Do you have any reason to think that the national Boy Scouts of America personally selected Dustin Hall to be your troop leader?

....

A. I don't believe that they selected him.

CP 1004. More important, N.K. admits that he has *no* evidence that BSA knew that Hall posed a risk to Scouts:

Q. . . . At the time you were being abused, do you have any proof or evidence as you sit here today to suggest that the national Boy Scouts of America knew that Mr. Hall was a pedophile?

....

A. Not that I am aware of.

CP 1006. N.K. also admits that he has *no* evidence that BSA knew that Hall was abusing him at the time the alleged abuse occurred. CP 1005.

He admits that he never told anyone at BSA of the alleged abuse prior to filing this lawsuit. CP 1002-1003.

**J. Procedural History.**

On July 15, 2011, BSA filed a motion for summary judgment, as did Defendant Corporation of the President of the Church of Jesus Christ of Latter-Day Saints (“COP”). CP 1036-55, CP 702-25. The Council joined in BSA’s motion. CP 892-95. On August 12, 2011, the Honorable Brian Gain, King County Superior Court, heard oral argument. The trial court granted summary judgment to BSA and the Council, ruling that neither had a special relationship nor knowledge of the risk posed by Hall:

Secondly, I am satisfied that, not only did they – is there not evidence to show that they had knowledge of the perpetrator, but there’s no specific knowledge that this individual was a danger to young boys participating at any level in the scouting activities. So I am satisfied that there is no special relationship that has been established that there was any knowledge of the Boy Scouts of America or the Council that Mr. Hall was in any way involved in scouting or any way a danger to the plaintiff or any other individual. So I am granting the motion.

RP 25. *See also* CP 1950-51, 1962. The trial court denied N.K.’s motion for reconsideration of the order granting summary judgment to BSA and the Council. CP 1963-74, 2030.

**IV. ARGUMENT**

**A. STANDARD OF REVIEW.**

In reviewing a summary judgment ruling, this Court conducts the same inquiry as the trial court and reviews the order *de novo*. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). Summary judgment in

favor of the defendant is proper if the plaintiff fails to make a prima facie case concerning an essential element of his or her case. *Id.*, at 676.

The threshold question in this case, as in any negligence action, is whether the defendant owed a duty of care to the plaintiff. *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988). Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

**B. NO DUTY EXISTS TO PREVENT A THIRD PARTY'S CRIMINAL ACTS, UNLESS THE DEFENDANT IS IN A SPECIAL RELATIONSHIP AND HAD SPECIFIC PRIOR KNOWLEDGE OF THE DANGER POSED BY THE THIRD PARTY.**

No duty exists to protect another from a third party's criminal acts. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223, 802 P.2d 1360 (1991) ("The general rule at common law is that a private person does not have a duty to protect others from the criminal acts of third parties"). This rule "is an expression of the policy that 'one is normally allowed to proceed on the basis that others will obey the law.'" *Kim v. Budget Rent A Car Systems*, 143 Wn.2d 190, 195, 15 P.3d 1283 (2001) (quoting *Hutchins*, 116 Wn.2d at 236).

A narrow exception to this rule exists if the defendant is in a "special relationship" with either the third party actor, or the victim:

Generally, our cases, involving a duty to protect a party from the criminal conduct of another, have fallen into one of two categories. We have found a duty where there is a "special relationship" with

the victim. And second, we have imposed a duty where there is a “special relationship” with the criminal.

. . . The consistent theme in these cases is that *no duty exists absent a special relationship with either the criminal or victim.*

*Kim*, 143 Wn.2d at 196-97 (citations omitted; emphasis added); *see also Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983) (recognizing special relationship between psychiatrist and patient and adopting *Restatement (Second) of Torts* § 315).<sup>7</sup>

A special relationship is not coterminous with a duty, however. The Supreme Court has cautioned that a defendant in a special relationship is not “an insurer against all harm occasioned by its agents simply because the work situation fortuitously provides an opportunity to perpetrate the harm.” *C.J.C. v. Corporation of the Catholic Bishop*, 138 Wn.2d 699, 727, 985 P.2d 262 (1999); *see also id.* at 719 (affirming dismissal of strict liability claim against defendant church for sexual abuse by priests; “[o]ur courts have never before adopted such an approach in the present context and we decline to do so now”); *Niece v. Elmview Group Home*, 131

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<sup>7</sup> *Restatement (Second) of Torts* § 315 states the general rule of nonliability for another’s criminal acts, and the two types of special relationships that may trigger an exception:

There is *no duty* so to control the conduct of a third person as to prevent him from causing physical harm to another *unless*

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.

*Restatement (Second) of Torts* § 315 (1965) (emphasis added).

Wn.2d 39, 42, 929 P.2d 420 (1997) (refusing to “impose essentially strict liability for an employee’s intentional or criminal conduct”).

Instead, the scope of the resulting duty to prevent third-party criminal acts is limited to control of, or protection from, persons that the defendant knows or should know are dangerous. *See Hertog v. City of Seattle*, 138 Wn.2d 265, 288, 979 P.2d 400 (1999) (no duty exists to control a third-party actor unless the defendant “knows or should know of the danger to others posed by the individual,” citing *Restatement (Second) of Torts* § 319); *Doe v. Corporation of the Pres. of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 445, 167 P.3d 1193 (2007), *review denied*, 164 Wn.2d 1009 (2008) (no duty to protect existed because defendant did not know of stepfather’s dangerous propensities); *C.J.C.*, at 724 (stating that Washington cases recognize a “duty to prevent intentionally inflicted harm where the defendant is in a special relationship with either the tortfeasor or the victim, and where the defendant is or should be aware of the risk”).

Additionally, no duty arises unless the plaintiff can establish that a causal connection exists between the harm and the third-party criminal actor’s position with the defendant organization. *C.J.C.*, 138 Wn.2d at 724 (stating that, in addition to a special relationship and knowledge, a duty may arise because of the “the alleged causal connection between [the abuser’s] position in the [defendant] Church and the resulting harm”).

N.K. lacks any material evidence of *any* of these three elements – *no* special relationship, *no* prior specific knowledge, and *no* causal

connection. He proffered no evidence of a relationship between BSA and either the alleged abuser Dusty Hall or N.K. He admits that no evidence exists that BSA knew of the risk posed by Hall (or, for that matter, that it knew of Hall in the first instance). CP 1006. Nor is there any evidence of the third element, a causal connection. It is undisputed that Hall had no registered position with BSA. The LDS Shelton ward did not select him to serve as scoutmaster, or in any formal position. It is undisputed that Hall was not registered with BSA. The causal link between Hall's abuse and N.K. was N.K.'s parents' friendship with Hall, not BSA.

**C. BSA DID NOT OWE A DUTY TO N.K. TO PREVENT HALL'S ABUSE BECAUSE BSA DID NOT HAVE A SPECIAL RELATIONSHIP WITH EITHER HALL OR N.K.**

**1. BSA Did Not Have a Special Relationship with Hall.**

A special relationship imposing a duty to control another's criminal acts requires a "definite, established and continuing relationship between the defendant and the third party." *Hertog*, 138 Wn.2d at 276 (quoting *Taggart v. State*, 118 Wn.2d 195, 219, 822 P.2d 243 (1992) (quoting *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988))).<sup>8</sup>

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<sup>8</sup> Relations between the defendant and the third party (who causes the harm) which give rise to a duty are described in *Restatement (Second) of Torts* §§ 316 through 319. *Restatement (Second) of Torts* § 315 cmt. c. Thus, under certain specified circumstances, a parent may have a duty to control the conduct of a minor child, *id.* § 316, a master may have a duty to control a servant acting outside the scope of employment, *id.* § 317, a possessor of property may have a duty to control a licensee, *id.* § 318, and an actor who has taken charge of a third party having dangerous propensities may have a duty to control the actions of that third party, *id.* § 319. All of these relationships involve relationships in which the actor has an established relationship, and the authority and ability to control the third-party actor. None of these relationships existed between BSA and Hall. BSA did not employ Hall, did not possess land on which Hall was a

The defendant must also have the actual ability to control the third party's conduct (and thus, the ability to conceivably satisfy a duty to control). *Couch v. Dep't of Corr.*, 113 Wn. App. 556, 568, 54 P.2d 197 (2002), *review denied*, 149 Wn.2d 1012 (2003) (defendant Department of Corrections did not owe a duty of care to prevent offender's future crimes because department only supervised offender's financial obligations and had no authority to supervise "the general run of an offender's activities"); *Osborn v. Mason County*, 157 Wn.2d 18, 24, 134 P.3d 197 (2006) (no special relationship existed between defendant county and released sex offender "because it had no authority to control him").

As the trial court recognized, N.K. offers no evidence of *any* relationship between BSA and Hall, much less a definite, established and continuing relationship involving an ability to control Hall. N.K. admits that BSA did not select Hall to be scoutmaster. CP 1004. He admits that the LDS Shelton ward – not BSA – selected the scoutmasters for its troop. CP 993-94, 1007. He further admits that he cannot recall if the Shelton ward bishopric selected Hall for *any* formal troop-related function. CP 988, 1008. Nor could any other witness: no one, including N.K.'s mother, father, and Hall's fiancée, testified that the bishopric called Hall to serve as scoutmaster. CP 1174, 1180, 1211. The troop rosters do not

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licensee, and did not "take charge" of Hall. In fact, BSA did not know Hall existed until this litigation was filed in November, 2009.

identify Hall's name in any volunteer capacity. CP 1083. There simply is no evidence of any relationship at all between BSA and Hall.<sup>9</sup>

N.K.'s entire argument regarding the alleged "special relationship" between BSA and Hall is one paragraph in length and devoid of record or case citations. Brief of Appellant ("App. Br.") at 41. There simply is no evidence of any relationship at all between BSA and Hall.

Conceding in effect that he has no evidence, N.K. asserts, instead, that the LDS Church and Mr. Danford were "the Scouting Defendants" agents, allegedly tasked with choosing and supervising scout volunteers.<sup>10</sup> App. Br. at 41. But, "agency does not come into existence out of thin air." *Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968). N.K. must first establish its essential prerequisites:

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<sup>9</sup> The sole evidence offered by N.K. for a connection between Hall and the troop is an inadmissible newspaper article, "Troop 155 Float Takes Festival Trophy," published in the *Mason County Journal* on June 9, 1977. Neither the author nor the source(s) for this article are identified. The article contains statements made by either the reporter or individuals interviewed by the reporter that were not made under oath, and N.K. offered them to prove the truth of the matters asserted. As such, the statements constitute hearsay. *See* ER 801 and 802; *Stewart v. Wachowski*, 574 F. Supp. 2d 1074, 1090 (C.D. Cal. 2005) (holding that statements of belief by unknown declarants reiterated in a newspaper article constituted hearsay within hearsay). Inadmissible hearsay may not be considered on a summary judgment motion. *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) ("A court cannot consider inadmissible evidence when ruling on a motion for summary judgment").

<sup>10</sup> N.K. cites to no legal authority for this proposition, contrary to the requirements of RAP 10.3(a)(6). *See* RAP 10.3(a)(6) (an appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record"); *In re Estates of Foster*, 165 Wn. App. 33, 56, 268 P.3d 945 (2011) (refusing to consider argument unsupported by legal authority).

We have repeatedly held that a prerequisite of an agency is control of the agent by the principal. . . .

We have frequently cited the Restatement of Agency for the proposition that an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control. . . .

Consent and control are the essential elements of an agency. . . .

*Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969) (citations and footnote omitted). The burden of establishing an agency rests upon the one who asserts it – here, N.K. *Id.* at 403.

Washington, like jurisdictions nationwide, recognizes that BSA does not control local chartered organizations (here, the LDS Shelton ward) or the individual troops operated by those organizations. *Mauch v. Kissling*, 56 Wn. App. 312, 783 P.2d 601 (1989). In *Mauch*, an airplane piloted by a scoutmaster and carrying a Scout crashed, killing both. *Id.* at 314. The scout’s mother sued BSA alleging that the scoutmaster was its agent. *Id.* at 313. After the trial court granted summary judgment to BSA, the appellate court affirmed, ruling that apparent authority can only be inferred from the acts of the principal, not from the acts of the agent, and that there must be evidence that the principal had knowledge of the acts committed by its agent. *Id.* at 316. The court then cited a similar California case that discussed the structure of BSA and the local councils:

The national organization and the local council furnish a program, train leaders in boys’ work and encourage individuals in the various communities to carry on certain work of local benefit, but

these organizations do not directly carry out these activities. The local councils assist along these lines but the actual work in the respective communities is performed by local scoutmasters under the direction of local troop committees. *A scoutmaster is appointed on the recommendation of this troop committee and not on the recommendation of the local council, and he is responsible solely to this local committee. The troop committee and the scoutmaster are volunteer workers whose services are given to the community rather than to the organization which is, in practical effect, merely an adviser rather than an employer.*

*Id.* at 317 (quoting *Young v. Boy Scouts of Am.*, 9 Cal. App. 2d 760, 765, 51 P.2d 191 (1935) (emphasis added). The court ruled that there was no legal basis on which to hold BSA or the local council liable for the actions of the scoutmaster, Mr. Kissling, on a theory of ostensible agency.<sup>11</sup>

N.K. attempts to dispense with the niceties of agency and other applicable law by asserting that *all* of the defendants constitute a single, inter-related entity which “controlled” the ward scouting program. This is an absurdity, and N.K.’s exhortations that “no dispute” exists regarding

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<sup>11</sup> *Mauch* is consistent with decisions nationwide that recognize that BSA does not control the independent entities that use the scouting program to sponsor troops. See, e.g., *Wilson v. United States*, 989 F.2d 953, 959 (8<sup>th</sup> Cir. 1993) (no evidence “that BSA manifested that it had direct control over the specific activities of individual troops or that it had a duty to control, supervise or train volunteer leaders,” and discussing *Mauch*); *Mitchell v. Hess*, 2010 U.S. Dist. LEXIS 27302, \*16-17 (E.D. Wis. Mar. 23, 2010) (recognizing that “most other courts” “have concluded that the BSA, the Council, and the community organizations that own and operate the individual troops are distinct corporate entities and that Councils do not have a duty to monitor or supervise individual Scouts or their leaders,” collecting cases and citing *Mauch*); and *Glover v. Boy Scouts of Am.*, 923 P.2d 1383, 1388-89 (Utah 1996) (“We note that our decision today is in accord with the vast majority of jurisdictions which have held as a matter of law that under the organizational structure described above, neither the BSA nor a local council has a right to control the conduct of scoutmasters in connection with troop activities that are not directly sponsored or supervised by the BSA or a local council” and citing *Mauch*).

his agency argument do not make it so. *See, e.g.*, App. Br. at 20. In this same vein, he alleges that the “Scout Defendants” purportedly authorized “their Scoutmaster” and LDS to select and supervise scout volunteers for the Shelton ward troop. *Id.* at 41. No part of this statement is correct. It is uncontroverted that BSA and the Council are separate entities, a fact that N.K. ignores. CP 1082. As N.K. admits, the LDS Church selects its scout leaders through a religious process of calling and sustainment. CP 933-94. BSA and the Council have no role whatsoever in whom the bishopric selects through its interview and prayer process, nor whom the congregation votes to sustain as scoutmasters.<sup>12</sup> CP 913-14.

N.K. acknowledges this lack of control, arguing illogically that, because BSA does not control local community organizations and cannot therefore prevent these organizations from allowing unregistered volunteers to associate with their scouting unit, it therefore somehow controlled their choice of unregistered volunteers. App. Br. at 12, citing CP 1401. N.K. also relies on BSA’s discovery responses that it could only

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<sup>12</sup> None of N.K.’s record citations regarding BSA’s supposed control over the LDS church and Mr. Danford actually support that assertion. For example, N.K. cites to CP 1134-37, 1621-22, 1732, 1735 and 1749. App. Br. at 22. CP 1134-37 are pages 24-27 of N.K.’s opposition to BSA’s summary judgment motion. CP 1621 is an excerpt from the Cubmaster’s Packbook, which contains the obvious statement that cubmasters are concerned with the Cub Scout’s safety and should set a good example. CP 1732 is page 29 of Benjamin Danford’s declaration, wherein he testified that Hall did not attend troop meetings but that he may have been at a scout jamboree. (Mr. Danford clarified that he did not know if Hall was at the jamboree, but if he was, it was only because N.K.’s father asked Hall to come along. CP 764.) CP 1735 is Mr. Danford’s testimony that he did not trust Hall. CP 1749 is Mr. Danford’s testimony that he considered it his responsibility to protect the boys from harm. Simply claiming that the record supports a statement does not make it so.

make recommendations to community organizations such as the LDS Shelton ward regarding implementing the scouting program as (paradoxically) “proof” that BSA somehow controlled the LDS Shelton ward. App. Br. at 23, citing 1141. In other words, according to N.K., BSA controlled the LDS Shelton ward because it did *not* control it.

N.K.’s “agency” argument is premised on the sole, inapposite fact that BSA reserves the right to deny registration to a leader selected by a chartered organization, if it determines that that person does not meet its leadership standards (because, for example, such persons are felons, addicts, or actual or suspected child molesters). App. Br. at 21. N.K. offers no case authority for the startling proposition that a voluntary association’s exercise of its First Amendment associational rights creates a principal-agency relationship with all of its members. BSA’s ability to deny registration has no bearing at all on whether it controls the LDS Church or Mr. Danford, as Judge Martinez recently pointed out:

The Court rejects Plaintiffs’ contention that BSA is estopped from arguing that it does not control its scout leaders. BSA submitted a brief in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) in which it claimed that it retained the ability to refuse to register scoutmasters that did not meet its leadership standards. BSA can retain control over the registration process while not retaining control over the day to day activities of scout leaders.

*Boy 1, et al. v. BSA*, 2011 U.S. Dist. LEXIS 53742, \*12-13 n.2 (W.D. Wash. May 19, 2011). *See also Glover* at 1389 n.3 (Utah 1996) (“[W]e fail to see how the right to discharge on these specific grounds would in

any way manifest the BSA's right to control the day-to-day operations of regular troop meetings").

BSA's ability to deny registration is not evidence that BSA controls the manner of performance, *i.e.*, how the chartered organizations select and supervise their scoutmasters. Its ability to deny registration is broadly analogous to a franchisor's ability to set standards for franchisees. In *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), two Burger King employees were murdered during a restaurant robbery, and their estates sued the franchisee and the restaurant franchisor, Burger King. The Supreme Court rejected the plaintiffs' argument that because Burger King allegedly retained the right to control and supervise the franchisee restaurant, it owed them a duty to prevent the murders. The Court followed the approach of *Hoffnagle v. McDonald's Co.*, 522 N.W.2d 808 (Iowa 1994), in which the Iowa Supreme Court ruled that McDonald's did not owe a duty of protection to the franchisee's employees because it only had the authority to require the franchisee to adhere to the "McDonald's system" and did not control its day-to-day operations. *Folsom*, 135 Wn.2d at 672. The Washington Supreme Court therefore ruled that, because Burger King's authority over the franchisee was similarly limited to maintaining the uniformity of the Burger King system, it, too, did not owe a duty. *Id.* at 673. So too here. BSA may have the right to require certain broad uniform leadership standards, but it does not control the day-to-day operations of a chartered organization's

scouting units. The trial court correctly ruled that N.K. had no evidence of a special relationship between BSA and Hall.

## **2. BSA Had No Special Relationship with N.K.**

The second type of special relationship, that between a defendant and the victim, requires “an element of ‘entrustment,’ i.e., one party is, in some way, entrusted with the well-being of another.” *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 440, 874 P.2d 861, *review denied*, 125 Wn.2d 1006 (1994)). Washington courts have recognized special relationships between common carriers and their passengers, hotels and their guests, hospitals and their patients, business establishments and their customers, jailers and inmates, and public schools and their students.<sup>13</sup> *Hutchins*, 116 Wn.2d at 228. For example, *C.J.C.* held that a special relationship existed between the defendant church and the children of the congregation, because those children “may be delivered into the custody and care of a church and its workers . . . .” *C.J.C.*, 138 Wn.2d at 722.

Here, BSA did not have custody or care of N.K. In 1977, BSA was located in New Jersey. CP 1059. It had no authority over N.K. and no ability to dictate his activities. N.K. offers no evidence of any contact whatsoever with *any* BSA employee while he was a Shelton ward troop

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<sup>13</sup> Examples of the relations between the actor and the victim which may give rise to a duty to protect are described in *Restatement (Second) of Torts* §§ 314A and 320. *Restatement (Second) of Torts* § 315 cmt. c. These relations include that between common-carrier and passenger, innkeeper and guests, landowners and invitees, and “one who is required by law or who voluntarily takes custody of another under circumstances which deprive the other of his normal opportunities for protection.” *Id.*, §§ 314A and 320. None of these relationships are implicated here.

member from 1976 to 1978. Nor did BSA have control over the premises where the abuse allegedly occurred: N.K.'s home; the church property; Hall's apartment, workplace and truck; and a public campground. CP 985-87.

Lacking any evidence of BSA's custody or care, N.K. resorts again to unsupported, attenuated allegations of agency. However, he has no evidence that the bishopric and Mr. Danford were BSA's "agents" tasked with "safeguarding" N.K. Nor is there any evidence of either consent or control. Mr. Danford does not remember any contact with the Council or BSA. CP 1740-41. Similarly, Bishop Anderson does not remember any BSA or Council involvement with the ward, aside from the annual re-chartering documents sent by the ward to the Council. CP 909.

Given the paucity of evidence that BSA either "took charge" of Hall or custody of N.K., no special relationship can be said to exist. And, absent a special relationship, BSA had no duty as a matter of law to prevent Hall from harming N.K. *See, e.g., Blenheim v. Dawson & Hall, Ltd.*, 35 Wn. App. 442, 435, 667 P.2d 125, *review denied*, 100 Wn.2d 1025 (1983) ("[a]bsent a special relationship between the parties, one does not have a duty to protect another from criminal acts of a third person"). The trial court properly granted summary judgment to BSA on this basis.

**D. BSA DID NOT OWE A DUTY TO N.K. BECAUSE IT HAD NO PRIOR, SPECIFIC KNOWLEDGE THAT HALL POSED A RISK TO CHILDREN.**

Even if a special relationship existed, N.K.'s negligence claim against BSA would still fail. Washington courts limit the duty owed by a defendant in a special relationship to control of, or protection from, persons that the defendant *knows* or should know pose a danger. N.K. admits that he has no evidence that BSA knew that Hall posed a risk to boys. CP 1006.

**1. BSA Owed No Duty to Control Hall or to Protect N.K. Because It Had No Knowledge That Hall Posed a Danger.**

Under Washington law, the concept of legal foreseeability – “whether the duty imposed by the risk embraces that conduct which resulted in injury” – is contained within the element of duty. *Boy I*, 2011 U.S. Dist. LEXIS 53742 at \*16 (quoting *Mauch v. Kissling*, 56 Wn. App. at 318). N.K. urges that this is a question for the jury, quoting *Christen v. Lee*, 113 Wn.2d 479, 491,780 P.2d 1307 (1989) for the principle that “[f]oreseeability is normally an issue for the jury, but it will be decided as a matter of law where reasonable minds cannot differ.” App. Br. at 28-29. N.K. neglects to point out, however, that *Christen* demonstrates that third-party criminal conduct is unforeseeable *as a matter of law* if the defendant did not know of the criminal actor’s dangerous propensities. *Christen*, 113 Wn.2d at 498. *Christen* involved two consolidated cases that raised the question of the liability, if any, of a public drinking establishment for a criminal assault committed by one of its intoxicated patrons. *Id.* at 483.

The Supreme Court held that a drinking establishment owes no duty to protect its patrons from harm at the hands of other patrons, unless it had “some notice of the possibility of harm from prior actions of the person causing the injury, either on the occasion of the injury, or on previous occasions.” *Id.* at 498.

So, too, in other special relationships: neither a duty to control or to protect arises absent specific, prior knowledge of the risk posed by the criminal actor. In duty to control cases, no duty arises “unless the defendant knows that the specific third-party actor is dangerous.” *Hertog*, 138 Wn.2d at 288. In *Hertog*, the guardian ad litem for a six-year-old girl who was raped by a King County probationer, Barry Krantz, brought a claim against the County, alleging negligent supervision. *Id.* at 269. Krantz had a known history of substance abuse and offenses involving sexual deviancy. *Id.* at 270. The Supreme Court stated that no duty arises to prevent third-party criminal acts, unless both a special relationship and notice exist:

Absent a “definite, established and continuing” relationship between a pretrial release counselor and the releasee, no duty arises. The duty under section 319 does not arise, either, unless the actor knows or should know of the danger to others posed by the individual.

*Hertog*, at 288 (citations omitted); *see also id.* at 280 (“under section 319 [of the *Restatement (Second) of Torts*] the issue is whether a *particular* individual poses such a risk of harm” (emphasis added)). The defendants owed a duty to prevent Krantz’s dangerous acts because (1) the city

probation officer and the county pretrial release counselors had a ‘take charge’ relationship with Krantz and (2) knew that Krantz was dangerous. *Id.* at 281 and 290. *See also Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 318, 119 P.3d 825 (2005) (holding that “relevant threshold questions are whether the State had a take charge relationship with the offender and whether the State knew or should have known of the offender's dangerous propensities”).

Similarly, no duty to *protect* arises unless the defendant knows of the risk posed by the criminal actor. The seminal cases regarding the duty to protect are *C.J.C.*, 138 Wn.2d 699 and *Doe*, 141 Wn. App. 407. In *C.J.C.*, the plaintiffs, two sisters, claimed that the defendant church had prior knowledge of a church volunteer’s abuse of other young girls but negligently failed to prevent their own subsequent abuse. *C.J.C.*, 138 Wn.2d at 270. A church elder had been warned before the abuse of the plaintiffs that the abuser had assaulted other young girls. *Id.* Despite this knowledge, the church elder did nothing to prevent the church from promoting the abuser into leadership positions that provided extensive interaction with church youth. *Id.* The Supreme Court ruled as a matter of first impression that a special relationship existed between the church and the children of its congregation. *Id.* at 721. However, the plaintiffs’ abuse did not occur at the church, during church activities, or when they were in its protective custody. *Id.* at 722. Given this, the “more difficult question” for the Supreme Court was whether, under the facts of the case, the molestation fell within the scope of the church’s duty. *Id.*

The Supreme Court ruled that “a duty was not foreclosed as a matter of law,” because the scope of the duty owed was not governed by where or when the abuse occurred, but by the church’s knowledge of the risk posed by the abuser: “Under these facts, the focus is not on where or when the harm occurred, but 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.*” *C.J.C.* at 724 (emphasis added; footnote omitted). The Court stated that “[t] his approach is consistent with our cases recognizing a duty to prevent intentionally inflicted harm where the defendant is in a special relationship with either the tortfeasor or the victim, and where the defendant is or should be aware of the risk.” *Id.* at 724 (collecting cases; emphasis added). N.K. urges this Court to misread the Supreme Court’s language as imposing a duty to protect if there is either a special relationship or knowledge of the risk. App. Br. at 33. As is apparent from *C.J.C.*’s express language, the Supreme Court did not speak disjunctively. Indeed, Washington decisions squarely contradict N.K.’s argument here. A special relationship is an essential prerequisite to a duty to prevent third-party criminal acts, not one of two alternate conditions as N.K. argues. *Hutchins*, 116 Wn.2d at 277 (“this court has recognized the general rule that there is usually no duty to prevent a third party from causing physical injury to another, unless ‘a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party’s conduct’” (quoting *Petersen v. State*, 100 Wn.2d at 426). If no

special relationship exists in the first place, an actor's knowledge of the risk is irrelevant.<sup>14</sup>

*Doe* also demonstrates the futility of N.K.'s argument that knowledge of the risk is not a prerequisite to a duty to protect. Two sisters sued the LDS Church for negligence, alleging that it had owed them a duty to protect them from molestation by their stepfather,<sup>15</sup> a high priest in the LDS church. *Id.* at 414. The trial court dismissed plaintiffs' negligence claim on directed verdict, and this Court affirmed. *Id.* The Court ruled that although the LDS church had a special relationship with plaintiffs, no duty to protect attached because – unlike the church in *C.J.C.* – the LDS church had no knowledge that the stepfather was a child abuser:

There are two important distinctions between *C.J.C.* and the case at hand. The first is the lack of a causal connection between the LDS Church and [the stepfather]'s presence in the family home. . . . although the trial court found that there was a special relationship between the LDS Church and the plaintiffs because of their church membership, it also noted that, unlike *C.J.C.*,

Mrs. Osborne [plaintiffs' mother] married Mr. Taylor [the stepfather] of her own free will. . . .

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<sup>14</sup> *Restatement (Second) of Torts* § 315 cmt. b (“In the absence of either one of the kinds of special relations described in this Section, the actor is not subject to liability if he fails, either intentionally or through inadvertence, to exercise his ability so to control the actions of third persons as to protect another from even the most serious harm”).

<sup>15</sup> It should be noted that if a general risk of abuse is enough to impose liability on an organization such as BSA, the well-established general risk of abuse by a stepparent or “boyfriend” should have been enough to change the outcome in *Doe*.

Second, the LDS Church, unlike the church in *C.J.C.*, had not been warned that Taylor had previously abused children or made inappropriate advances towards them.

*Doe*, at 445.

Lacking any basis to distinguish *Doe*, N.K. asserts that *Doe* held that the church owed no duty not only because it had no knowledge of the stepfather's dangerous proclivities, but because it *also* did not "know of any dangerous situation over which [it] had control." App. Br. at 36. This language is entirely N.K.'s creation. Nowhere in the opinion is there any discussion of some "dangerous situation" other than that squarely addressed by the Court – did the church know that the stepfather posed a risk of abuse? The answer to that question was "no" and thus, no duty existed.

Relying on *C.J.C.* and *Doe*, the Western and the Eastern Districts of Washington have recently ruled in two cases directly on point that BSA owed no duty to protect absent proof that it knew or had reason to know that the third-party abuser posed a risk to children. In *Boy 1*, 2011 U.S. Dist. LEXIS 53742 at \*17-18, Judge Martinez dismissed plaintiffs' complaint for their failure to plead an essential element of their claim against BSA: that BSA knew or had reason to know that the plaintiffs' perpetrator had previously abused other scouts or children or made inappropriate advances towards them. *Id.* at \*17. Instead, they alleged (as N.K. does here) only that BSA had generalized knowledge of a non-specific risk of abuse in scouting. *Id.* at \*2-4. Judge Martinez ruled that,

as a matter of law, these generalized allegations failed to state a claim under Washington law:

Even if Plaintiffs had adequately alleged that a special relationship existed between BSA and Plaintiffs and their scout leaders, they have not alleged the fourth factor – that BSA knew or should have known that the individual scout leaders who molested Plaintiffs were likely to do so. Plaintiffs allege that by the time Plaintiffs’ were abused, BSA had been made aware of thousands of instances of sexual abuse taking place within their organization. However, Washington has yet to impose liability on a church for the abuse of a member of the congregation at the hands of a church worker absent evidence that the church knew or should have known of that worker’s deviant propensities. Given this precedent, this Court is reticent to hold that the BSA could owe a duty to all boy scouts to protect them from sexual abuse at the hands of any scout leader, based solely on generalized knowledge that some proportion of former BSA scout leaders had engaged in inappropriate behavior with other scouts.

*Boy 1* at \*17-18 (citation to *Doe* omitted).<sup>16</sup>

In *Boy 7 v. BSA*, 2011 U.S. Dist. LEXIS 63212 at \*8 (E.D. Wash., June 13, 2011), Judge Whaley also dismissed a plaintiff’s claim for failure to allege that BSA had prior, specific knowledge that his alleged abuser posed a risk to plaintiff. Like Judge Martinez, Judge Whaley ruled that “Washington law does not impose a duty on BSA where there has been no

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<sup>16</sup> The district court allowed plaintiffs to replead their claims to correct this and other deficiencies. *Boy 1*, \*26. BSA subsequently moved to dismiss the amended complaint. On January 17, 2012, the district court dismissed with prejudice Boys 1 and 5’s claims because they failed to allege any facts that BSA knew, or should have known, of the dangers posed by their respective alleged abusers. *Boy 1, et al. v. Boy Scouts of America*, No. C10-1912-RSM, Dkt. No. 31. The Ninth Circuit dismissed Boys 1 and 5’s appeal of that dismissal for lack of jurisdiction. *Boy 1 and Boy 5 v. Boy Scouts of America*, No. 12-35117, Dkt. No. 9 (9<sup>th</sup> Cir., April 18, 2012).

allegation that BSA knew or had reason to know that Plaintiff's perpetrator had previously abused other scouts or children or made inappropriate advances towards them."<sup>17</sup> *Id.* at \*8. Given leave to replead, Boy 7 again failed to allege that BSA knew or should have known of the risk posed by his alleged abuser, and the district court again dismissed his claim, this time with prejudice. *Boy 7 v. BSA*, 2011 U.S. Dist. LEXIS 110681 (E.D. Wash. Sept. 28, 2011), *appeal docketed*, No. 11-35861 (9<sup>th</sup> Cir. October 19, 2011) ("For the same reasons stated in the Court's prior order, this is fatal to his claims of negligence and intentional infliction of emotional distress").<sup>18</sup>

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<sup>17</sup> In a third Washington federal court decision, *R.D. v. BSA*, 2011 U.S. Dist. LEXIS 96760 (W.D. Wash. August 29, 2011), Judge Leighton granted BSA's motion for a protective order and denied discovery of the I.V. files. The plaintiffs' stated reason for seeking the files was to show that BSA had generalized knowledge of sexual abuse. However, as the district court recognized, BSA's generalized knowledge of a risk of sexual molestation is unrelated to whether BSA owed a duty to plaintiffs: "Washington law requires evidence of knowledge of the individual abuser's proclivities, not merely general knowledge of an unspecified risk of abuse." *Id.* at 3, *citing Boy 1* at \*17.

<sup>18</sup> In *Boy 7*, the federal district court rejected Boy 7's argument that this Court's decision in *M.H. v. Catholic Archbishop of Seattle*, 162 Wn. App. 183, 252 P.3d 914 (2011), stands for the proposition that an entity that has a duty to protect children based on a "special relationship" need not have previous knowledge of a sexual assailant's dangerous propensities. *Boy 7*, 2011 U.S. Dist. LEXIS 110681 at \*2. The court recognized that the facts in *M.H.* were "readily distinguishable":

In that case, the Archdiocese assigned a priest, with a known history of sexual misconduct with children, to be the associate pastor. *Id.* at 186. The complaint alleged facts that demonstrated that the priest knew that an unidentified man planned to sexually abuse the victim and was instrumental in arranging the opportunity for the man to do so. The Court of Appeals held that the sexual molestation of the victim was not "wholly beyond the range of expectability," especially given the Archdiocese prior knowledge of the priest's history of sexual misconduct, and thus was foreseeable. Plaintiff's complaint fails to

**2. *McLeod v. Grant County School District Is Inapposite.***

N.K. does not even attempt to distinguish *Boy 1* and *Boy 7*. Nor could he: the federal district courts addressed the precise issue before the Court here, and are persuasive authority. He instead argues that their decisions are wrong. App. Br. at 37. Specifically, he urges the Court to disregard the entire *C.J.C.* line relied upon by the federal district courts and reverse the trial court below based upon his claim that BSA owed him a duty to protect from general, nonspecific society-wide dangers.<sup>19</sup> N.K. premises his theory upon an early Washington case, *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953). *McLeod* predates significant developments in Washington law, including the *Restatement (Second) of Torts* (1965), Washington's adoption of that Restatement's "special relationship" doctrine in *Petersen*, 100 Wn.2d 421, 426 (1983), and the *C.J.C.* line.

In *McLeod*, the court considered whether the plaintiff had sufficiently pled a claim against the school district. *McLeod*, 42 Wn. 2d at 317. She alleged that she was raped by other students in an unlocked room during an unsupervised noon recess in the school gymnasium. *Id.* at 318. The court acknowledged that school districts owe a duty to

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allege any facts that would establish that it was reasonably foreseeable that this particular Scout Leader would abuse Plaintiff.

*Boy 7*, at \*2-\*3 (citations omitted). So, too, here: N.K. does not allege, and no facts exist, that BSA *knew* that *Hall* posed a specific risk of abuse.

<sup>19</sup> Below, N.K. acknowledged that *C.J.C.* controlled, stating, "[f]or the last 15 years, *C.J.C.* has been the guide in terms of what the law here is in Washington State" and "*C.J.C.* is the law." R.P. at 14, ll:23-24; 22, l:18.

reasonably anticipate dangers to students, because “the protective custody of teachers is mandatorily substituted for that of the parent.” *Id.* at 319. It concluded that the facts as pled created a jury question as to whether the school district should have anticipated that known conditions – unsupervised students and unlocked, dark rooms – could lead to students using the room for indecent acts. *Id.* at 323.

N.K. makes much of the court’s rejection of the school district’s argument that it could not foresee the specific crime committed – forcible rape – or that these particular boys would commit such a crime. *McLeod*, 42 Wn.2d at 321. The court did *not* rule that a duty exists regardless of knowledge of the dangerous propensities of the attacker. The court merely found that it was not unexpected, as a matter of law, that unsupervised teenagers might use unlocked rooms for inappropriate behavior. *Id.* at 321-22. What the specific indecent act might be did not matter, if the act was the type of behavior (indecent behavior) that the school should have anticipated, knowing of the specific on-site hazards. *Id.*

*McLeod* does not control the issue before the Court here: whether BSA owed a duty to prevent the criminal acts of Dusty Hall, a person with whom BSA had no relationship and about whom it knew nothing. Under the *C.J.C.* line of cases, the answer is “no.” None of the cases in that line – *C.J.C.*, *Doe*, *Boy 1*, *Boy 7*, or *M.H.* – cite *McLeod* for the position urged here by N.K. Instead, all recognize that no duty arises absent specific knowledge of the abuser’s proclivities. So, too, do modern Washington decisions involving the school-student special relationship. *Peck v. Siau*,

65 Wn. App. 285, 827 P.2d 1108 (1992), for example, involved a school librarian who molested a student. The student sued the school district alleging negligent hiring and supervision of the librarian and negligent supervision of himself, as a student. *Id.*, at 288, 292. The court affirmed summary judgment in favor of the school district on both theories because no evidence existed that the district knew or should have known that the teacher posed a risk to the student. *Id.* at 292. Addressing the plaintiff's claim that the school district negligently failed to supervise him, the court had this to say:

A school district's duty requires that it exercise reasonable care to protect students from physical hazards in the school building or on school grounds. More to the point in this case, it also requires that the district exercise reasonable care to protect students from the harmful actions of fellow students, a teacher, or other third persons. *However, the district is not liable merely because such activities occur.* Rather, the district will be liable only if the wrongful activities are foreseeable, and the activities will be foreseeable *only if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.*

*Peck*, 827 P.2d at 293 (citations omitted; emphasis added). The key inquiry regarding the district's duty to the student was "[d]id the District know, or in the exercise of reasonable care should it have known, that [the librarian] was a risk to its students?" *Id.* No such evidence existed, and accordingly, the court affirmed summary judgment to the district on plaintiff's negligent supervision claim. *Peck* (like the *C.J.C.* case line) is directly relevant here: as in *Peck*, BSA had no reason to suspect the motives or proclivities of Hall (someone it did not and could not know

even existed). *McLeod* addresses a different scenario entirely: unlike *Doe, Peck*, and here, the school in *McLeod* knew of specific conditions on school premises that presented a risk to the students in its custody (and thus, had the opportunity and ability to remove those conditions).

Furthermore, no facts establish the central premise underlying N.K.'s "darkened room" analogy, that adults in scouting pose a higher risk to boys than exists in society at large or in other youth-serving organizations. N.K.'s own numbers show that only 58 of over 1.87 million registered adult volunteers in 1977 were alleged to have molested children, a tiny fraction equal to .003 percent. N.K. offered no evidence comparing this rate to that of other youth-serving organizations or society in general. N.K. merely posits that a small percentage projected on a very large, nationwide number will result in a number that may appear, itself, large. This is, of course, a truism and in any event, does not address N.K.'s burden to establish that there is, indeed, an unreasonably high risk.<sup>20</sup> Finally, N.K.'s flawed analogy violates Washington's prohibition against strict liability for the sexual abuse of third parties. N.K. wants to hold BSA responsible whenever a scout is molested by anyone, because it knew that there are child molesters in society and, by extension, in youth

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<sup>20</sup> N.K. argues that if the commercial airline industry, with 800 million passengers, were to experience an equivalent rate of injuries the public would consider air travel "unreasonably dangerous." App. Br. at 31, n.4. This is a specious comparison, and highlights the lack of *relevant* evidence regarding the rate of abusers in youth-serving organizations, schools, or society. It also begs the question: how can BSA be held to owe a duty to prevent the acts of persons it knows nothing about, and, as a result, has neither basis nor means to control?

organizations. N.K. does not and cannot allege that pedophiles can be identified in advance. BSA's knowledge that such people exist in the world is no different from that of any other person or youth-serving entity. The cases teach that with specific knowledge may come an enforceable duty. To impose responsibility in the absence of such knowledge, however, is to make the youth-serving organization – be it BSA, the local soccer team, or a neighborhood school – an insurer against the general risk of abuse. Washington specifically rejects this sort of strict liability. *See C.J.C.*, 138 Wn.2d at 718-19 ([n]either Washington case law nor considerations of public policy favor the imposition of respondeat superior or strict liability for an employee's intentional sexual misconduct, and so the court declines to adopt such an approach"); *Niece*, 131 Wn. 2d at 41 (refusing to impose strict liability for an employee's intentional or criminal conduct).

**3. *Niece v. Elmview Group Home Is Inapposite.***

N.K.'s reliance on *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), is also misplaced. N.K. argues that, pursuant to *Niece*, BSA owed him a duty of complete protection from all dangers, limited only by their foreseeability. App. Br. at 34. *Niece* involved a very different relationship from that alleged here. In *Niece*, the plaintiff suffered from cerebral palsy and had profound developmental disabilities, including difficulty with mobility and communication. *Niece*, at 42. Her mother placed her at Elmview, a group home for persons with similar disabilities. *Niece v. Elmview Group Home*, 79 Wn. App. 660, 662, 904

P.2d 784 (1995). She relied entirely upon Elmview for her complete care, 24 hours a day. *Id.* A staff member at the group home repeatedly raped her. *Id.*

The Supreme Court ruled that the home owed her a duty of complete protection, limited only by the foreseeability of the danger:

Given Niece's *total inability* to take care of herself, Elmview was responsible for *every aspect of her well being*. This responsibility gives rise to a duty to protect Niece and other similarly vulnerable residents from a *universe of possible* harms. This duty is limited only by the concept of foreseeability.

*Niece*, 131 Wn.2d at 50 (emphasis added). Having ruled that a duty exists, the court held that specific facts – including prior sexual assaults at the group home and a lapsed policy forbidding unsupervised contact with residents – demonstrated that sexual assault in the group home might be a foreseeable hazard. *Id.* at 42, 50. At the same time, and as noted above, the court *refused* to make the group home's responsibility a part of its general liability in respondeat superior. *Id.* at 55 ("Vicarious liability for intentional criminal acts of employees would be incompatible with recent Washington cases rejecting vicarious liability for sexual assault, even in cases involving recognized special relationships"). The court, thus, limited the reach of *Niece* to circumstances that fell within the limits of an individualized negligence analysis. *Id.* at 47.

*Niece* has not been expanded beyond its unusual facts to other, less dependent special relationships. As N.K. acknowledges, the courts in *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 184 P.3d 646 (2008)

and *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 224 P.3d 808 (2009), *review granted*, 168 Wn.2d 1039 (2010), *appeal withdrawn*, 249 P.2d 182 (2011), rejected the plaintiffs' arguments that, like the group home in *Niece*, the defendant hospitals owed them a duty to protect against all foreseeable harms. *See, e.g., Smith* at 545 (distinguishing *Niece* because the plaintiffs, two psychiatric patients, were not "totally helpless" like the *Niece* plaintiff); *Kaltreider* at 766 (plaintiff, a patient at an alcohol dependency clinic, was not a "vulnerable adult"). More directly relevant here, the *Smith* and *Kaltreider* courts ruled that the hospitals owed no duty to protect because the plaintiffs made no showing that *the hospital knew or should have known* that the third party would sexually abuse these patients. *Smith* at 546 ("Specifically, the question here is whether it was foreseeable that Mr. Judici [the nursing assistant] would commit a tort against Ms. Hamilton and Ms. Smith [the plaintiffs]"); *Kaltreider*, at 767 (the nurse's abuse was legally unforeseeable because the hospital "did not have knowledge of prior misconduct at the hospital or by [the nurse]" and thus there was no duty to protect).

As *Boy 1* and *Boy 7* recognized, *Niece* involved a very different situation from that here. *See Boy 1*, at \*19; *Boy 7*, 2011 U.S. Dist. LEXIS 63212 at \*7 n.3. In *Niece*, the group home had taken complete custody of the severely disabled plaintiff, thus depriving her of her mother's protection, and was responsible to protect against all foreseeable hazards. *Niece* at 51. As discussed above, N.K. was not in BSA's custody, was not deprived of his parents' protection, and was not "totally helpless."

Washington courts implicitly recognize that the vulnerability of children is different from that of the profoundly disabled *Niece* plaintiff, and therefore do not impose the same duty to protect against the universe of potential harms, such as sexual abuse by unknown assailants. Instead, as *C.J.C.* and *Doe* recognized, a defendant church owes a duty to protect children from those persons that the defendant knows, or should know, pose a risk to them. *See C.J.C.*, at 724 (duty to protect was “not foreclosed” because, among other factors, the church had actual knowledge the risk posed by the abuser); *Doe* at 445 (no duty to protect arose because the church had no knowledge of the abuser’s dangerous proclivities).<sup>21</sup>

**E. No Causal Connection Exists Between BSA and Hall’s Presence in Shelton.**

Finally, a plaintiff alleging a duty to protect must, in addition to a special relationship and knowledge, establish that a causal connection existed between the alleged abuser’s position with the defendant and the abuse.

In *C.J.C.*, the fourth factor required by the Supreme Court to establish a duty was “the alleged *causal* connection between [the abuser’s] position in the Church and the resulting harm.” *C.J.C.*, 138 Wn.2d at 724 (emphasis added). The focus is not on where the harm occurred, but “on

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<sup>21</sup> Here, there is no dispute that BSA did not know of Hall, and thus could not have known of his proclivities. Indeed, even the people close to Hall – N.K.’s parents and Geri Worthy, Hall’s fiancée – were shocked to learn of Hall’s abuse and had no idea that he was capable of such acts. CP 852-52, 835-36, 872-73.

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.* In *C.J.C.*, the church knew that its volunteer had abused children in the past, but nonetheless gave him a position of authority over children. *Id.* at 725-26. In contrast, the defendant church in *Doe* did not owe a duty because it did not place the abuser in association with plaintiffs. Instead, the abuser married the plaintiffs’ mother, and the church “had nothing to do with that.” *Id.* at 445.

Like the defendant church in *Doe*, BSA “had nothing to do” with Hall’s association with N.K. Hall held *no* position in scouting. Instead, he interacted with N.K. because of his friendship with N.K.’s parents, and not because he was “placed” in association with N.K. by BSA.<sup>22</sup> CP 836, 854. Therefore, N.K.’s negligence claim also fails as a matter of law for want of causation.

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<sup>22</sup> N.K.’s mother testified that she allowed N.K. to interact with Hall, not because he was “connected with the Scouts” but because “he was becoming a friend with us all.” CP 854. She also testified that she did not know what role Hall played in the troop. CP 1174. After her deposition, N.K.’s mother submitted a declaration stating that the “only reason” she allowed Hall to interact with N.K. was because he was “the Scout leader of Troop 155.” CP 1364; App. Br. at 11. This declaration is inadmissible. Washington law holds that “[s]elf-serving affidavits contradicting prior sworn testimony cannot be used to create an issue of material fact. *Jones v. State*, 170 Wn.2d 338, 242 P.3d 825 (2010).

**V. CONCLUSION**

For all the foregoing reasons, Respondent Boy Scouts of America respectfully requests that this Court affirm the decision of Judge Brian Gain of the King County Superior Court.

DATED this 18<sup>th</sup> day of May, 2012.

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