

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 14, 2016, 4:13 pm
BY RONALD R. CARPENTER
CLERK

E

No. 91775-2

SUPREME COURT
OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

by h

N.L.,

Respondent,

v.

BETHEL SCHOOL DISTRICT,

Petitioner.

**PETITIONER BETHEL SCHOOL DISTRICT'S ANSWER TO
AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR
JUSTICE FOUNDATION**

Francis S. Floyd WSBA No. 10642
John A. Safarli, WBSA No. 44056
FLOYD, PFLUEGER & RINGER, P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119
Telephone: (206) 441-4455
Facsimile: (206) 441-8484

*Attorneys for Petitioner Bethel School
District*

 ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT IN ANSWER TO AMICUS CURIAE WSAJ
FOUNDATION1

 A. New Issues May Not Be Raised for the First Time on
 Appeal by Amicus Curiae..... 1

 B. The Facts in this Case Place the Injury Outside the School’s
 Custody and Outside the General Field of Danger 3

 C. The “Time and Place” of Injury Suggests that Parents and
 Home Were the Proper Custodians..... 6

 D. Cause in Fact and Legal Causation Preclude the School
 District’s Liability Under the Facts in this case..... 8

IV. CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

<i>Bernethy v. Walt Failor's</i> , 97 Wn.2d 929, 653 P.2d 280 (1982).....	6
<i>Coates v. Tacoma School District</i> , 55 Wn.2d 392, 347 P.2d 1093 (1960).....	6,7, 8, 9
<i>Coburn v. Seda</i> , 101 Wn.2d 270, 677 P.2d 173 (1984).....	2
<i>Hertog v. City of Seattle</i> , 138 Wn.2d 265, 979 P.2d 400 (1999).....	3
<i>Long v. Odell</i> , 60 Wn.2d 151, 372 P.2d 548 (1962).....	2
<i>McLeod v. Grant County Sch. Dist.</i> , 42 Wn.2d 316, 255 P.2d 360 (1953).....	4, 5, 6, 7, 8
<i>N.K. v. Corp. of the Presiding Bishop of the Church of Latter-Day Saints</i> , 175 Wn. App. 517, 307 P.3d 730 (2013).....	4
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 781, 225 P.3d 213 (2009).....	2
<i>Scott v. Blanchet High Sch.</i> , 50 Wn. App. 37, 747 P.2d 1124 (1987).....	5, 6, 8
<i>Sheikh v. Choe</i> , 156 Wn.2d 128, P.3d 574 (2006).....	3

Treatises

RESTATEMENT (SECOND) OF TORTS § 319 (1965).....	<i>passim</i>
-------------------------------------------------	---------------

I. INTRODUCTION

The Court of Appeals opinion sharply departs from decades of precedent that imposes a duty of care on school districts only when the harm is foreseeable and occurs in a custodial setting. The opinion effectively eliminates the requirement of a custodial relationship. Washington State Association for Justice Foundation urges this Court to adopt the “take charge” duty in RESTATEMENT (SECOND) OF TORTS § 319 (1965). However, § 319 was never briefed by the parties at any level in this litigation. The Court should decline to consider arguments raised for the first time by amicus curiae.

In order to restore longstanding precedent that provides a terminus to a school district’s liability, this Court should reverse the Court of Appeals and affirm the dismissal of Bethel School District (“BSD”).

II. STATEMENT OF THE CASE

BSD rests on the Counter Statement of the Case set forth in its Response Brief filed with Division II of the Court of Appeals.

III. ARGUMENT IN ANSWER TO AMICUS CURIAE WSAJ FOUNDATION

A. **New Issues May Not Be Raised for the First Time on Appeal by Amicus Curiae.**

Amicus curiae WSAJ Foundation contends that the “take charge” relationship and its associated duty in RESTATEMENT (SECOND) OF TORTS §

319 (1965) should apply to school districts. *See* Br. of Amicus WSAJ Foundation at 5-7, 10-14. However, no mention of § 319 was made in the briefs presented to the Court of Appeals, the petition for review to this Court, or the answer to the petition for review.¹

Under the well-established rule that new issues may not be raised for the first time on appeal by amici curiae, the Court should decline to decide this case based on the issues and arguments presented by an analysis of § 319. *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213 (2009) (declining to consider an issue only raised by an amicus); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984) (refusing to consider argument raised only by amici curiae); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962) (declining to consider constitutional issues or a discussion of points raised only by an amicus).

Further, § 319 has never been applied in the school context in a civil case and is, therefore, neither dispositive nor necessary to this appeal. Instead, the “take charge” aspect of special relationship liability has been consistently applied to probation counselors and pretrial release counselors

¹ Amicus curiae concede this point. *See* Br. of Amicus WSAJ Foundation at 13 n.8. Nevertheless, amicus curiae posits that raising “the issue of BSD’s duty to protect N.L. from Clark” basically invites a detailed explication of Restatement (Second) of Torts § 319. This position is at odds with the well-established rule that new issues may not be raised for the first time on appeal by an amicus curiae. WSAJ Foundation’s invitation should be declined.

because those counselors are “clearly in charge of monitoring the probationer to ensure that the conditions of probation are being followed and has a duty to report violations to the court.” *Hertog v. City of Seattle*, 138 Wn.2d 265, 281, 292, 979 P.2d 400 (1999).

In analyzing the continuum of “take charge” cases, the Supreme Court has declined to impose a duty on non-criminal justice agencies, such as the Department of Social and Health Services. *See Sheikh v. Choe*, 156 Wn.2d 441, 128 P.3d 574 (2006) (noting that criminal justice agencies “supervise and impose conditions on criminals *because they are criminals* in order to protect the public”). Here, Clark was not in a juvenile detention facility and the school teachers were not probation officers who were required to deploy a “take charge” duty under § 319. For the foregoing reasons, the Court should refuse to address it in this case.

B. The Facts in this Case Place the Injury Outside the School’s Custody and Outside the General Field of Danger.

The WSAJ Foundation contends that “a school’s failure to fulfill its loco parentis obligation may have foreseeable consequences on or off campus.” *See* Br. of Amicus Curiae at 18. Likewise, WSAJ Foundation states that limiting a school’s duty “based on ‘custody’ is arbitrary.” *Id.* But amicus curiae fail to consider Washington’s well-established principles underlying the duty of care owed by a school district to its students. First,

a duty of care arises when a school district has “custody” of a student. This is not arbitrary; it falls squarely within the ambit of RESTATEMENT (SECOND) OF TORTS § 320 (1965). *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953).²

Because students are compelled to attend school, “the protective custody of teachers is mandatorily substituted for that of the parent” when the student is on campus. *McLeod*, 42 Wn.2d at 319. This principle results from the school’s physical custody over students. Therefore, the school’s duty to protect its students from harm is coextensive with its physical custody and control over its students. The custodial relationship between students and school districts is “the essential rationale for imposing a duty.” *N.K. v. Corp. of the Presiding Bishop of the Church of Latter-Day Saints*, 175 Wn. App. 517, 532, 307 P.3d 730 (2013); *see also* RESTATEMENT (SECOND) OF TORTS § 320 cmt. b (1965).

Applying this principle to *the facts of this case*, a school district does not owe a duty of care for a non-custodial harm committed off school property. N.L.’s injury did not occur on school property and did not occur in the course of any school-sponsored or school-supervised off-campus activity. This fact has consistently limited the types of harms that school

² *McLeod* relies on RESTATEMENT (FIRST) OF TORTS § 320 (1934), which does not differ from the RESTATEMENT (SECOND) OF TORTS § 320 (1965).

districts must protect students against. *See, e.g., Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 45, 747 P.2d 1124 (1987).

Abandoning this limitation would have an enormous impact on school district liability because school districts would be liable for off-campus injuries to students provided that the school district had some notice of related behavior occurring on-campus. For example, a school district that is aware of a student's violent propensities would be potentially liable for off-campus brawls. If the school district was aware of a student's problem with substance abuse, it would be potentially liable for a student's drug overdose that occurs at a private residence. Division I acknowledged the danger in abandoning this limitation in *Scott*: "By the [plaintiffs'] logic, a school which failed to monitor student relationships and provide adequate sex education would also be liable for teen pregnancies, regardless of the circumstances, because teen pregnancies are 'within a general field of danger which should have been anticipated.'" *Scott*, 50 Wn. App. at 45.

The second principle articulated by this Court was "foreseeability." *McLeod*, 42 Wn.2d at 321. The foreseeability inquiry does not ask "whether the actual harm was of a particular kind which was expectable." *Id.* Instead, "the question is whether the actual harm fell within a general field of danger which should have been anticipated." *Id.*

Here, the injury occurred after both N.L. and Nick Clark voluntarily skipped track practice. CP 49 at 56:14-17; CP 54 at 96:5-9. Although N.L. acknowledged that she should have been at track practice, she did not allege that BSD breached any duty *by failing to monitor her*. Nor did N.L. present any evidence in the trial court that BSD knew of her propensity to skip classes or afterschool activities. According to N.L., however, the injury in this case was foreseeable even though it was precipitated by her failure to fulfill her obligations as a student.

N.L.'s injury was the result of *intentional* criminal conduct (*i.e.*, Second Degree Assault), which is "usually not reasonably foreseeable." *Bernethy v. Walt Failor's*, 97 Wn.2d 929, 934, 653 P.2d 280 (1982).

C. The "Time and Place" of Injury Suggests that Parents and Home Were the Proper Custodians.

WSAJ Foundation criticizes BSD for arguing that "its duty is limited to the time and place when the school has 'custody' of its students" and urges this Court to reject this limitation. *See* Br. of Amicus Curiae at 14, 18. But the facts of this case, in tandem with common sense, justice, policy and precedent are consistent with a "time and place" limitation.

In *Coates v. Tacoma School District*, 55 Wn.2d 392, 398-99, 347 P.2d 1093 (1960), a student was injured after a vehicle driven by a fellow student crashed into a telephone pole. Both students had consumed alcohol

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

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

Id. at 398-99 (emphasis added).

Applying the law to the facts in this case, at the time of her injuries, N.L. was not on campus and therefore not within the physical custody of BSD. She had skipped track practice and voluntarily left school property with Clark. The incident occurred at a private residence that was not hosting any school-sponsored or school-supervised activity. Accordingly, “the time and the place of the plaintiff’s injury” establishes that the “responsibility for

adequate supervision” of N.L. “was with the parents and the institution known as the home,” not with BSD. *Coates*, 55 Wn.2d at 389-99.³

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

In *Scott*, the time and location of the injuries was dispositive. *Scott*, 50 Wn. App. at 45 (“At some point, however, the event is so distant in time and place that the responsibility for adequate supervision is with the parents rather than the school.”) (citing *Coates*, 55 Wn.2d at 399).

D. Cause in Fact and Legal Causation Preclude the School District’s Liability Under the Facts in this Case.

In two paragraphs WSAJ Foundation analyzes the “cause in fact” requirement for liability, but under the lens of RESTATEMENT (SECOND) OF TORTS § 319. *See* Br. of Amicus Curiae at 19. First, § 319 was never briefed

³ WSAJ Foundation distinguishes *Coates* by applying—a heretofore unbriefed—“§ 319-type analysis.” *See* Br. of Amicus Curiae at 17 n.12.

by the parties in Division II or before this Court. This Court should decline to consider it here, for the first time. Second, amicus curiae fails to consider that BSD argued to the trial court and on appeal that both components of proximate cause—cause in fact and legal causation—were absent from N.L.’s claim. Under cause in fact, BSD contended that N.L.’s decision to skip track practice and voluntarily leave campus with Clark was an independent act that interrupted the chain of causation. BSD further argued that N.L. could not establish legal causation because the connection between the school district’s alleged breach and her injuries was too remote, and holding otherwise would impose an enormous and unworkable burden on school districts.

At oral argument on BSD’s summary judgment motion, the Honorable Susan K. Serko admitted that “this is a disturbing case.” Verbatim Report of Proceedings (“VRP”) at 1:16. However, she remarked that a school district’s duty of care does not extend to noncustodial settings, and “the fact that this occurred off site that is the pivotal factor in the case.” VRP at 16:12-19, 17:25 to 18:2. In dismissing the case, Judge Serko stated that she did “not believe that the schools are guarantors of safety; and certainly a teacher, an administrator, a coach is not in the role of a CCO, a community corrections officer.” VRP at 18:2-4. She concluded that “the issue is not so much the duty as the causation element, and on that basis I’m

going to dismiss the case and grant summary judgment for the defense.”
VRP at 18:5-7; CP 500-01.

But the Court of Appeals reversed, reasoning that the injury was not “so highly extraordinary or improbable that no reasonable person could be expected to anticipate it.” *N.L.*, 187 Wn. App. at 474 (internal quotation omitted). As demonstrated above in the discussion regarding foreseeability within the element of duty, the injury in this case was too attenuated as a matter of law. The policy considerations related to foreseeability of duty and legal causation “overlap” and warrant the same result: reversal of the Court of Appeals and affirmance of the trial court’s dismissal of BSD.

IV. CONCLUSION

Injuries that do not occur on school property and do not occur during any school-sponsored or school-supervised activity are not within the control of school districts. The Court should decline to impose tort liability on school districts for these injuries. BSD respectfully requests that the Court affirm the trial court’s summary judgment dismissal of BSD.

Dated this 14th day of January, 2016.

FLOYD, PFLUEGER & RINGER, P.S.

By: *Abel Pierce 3/16/26 for*
Francis S. Floyd, WSBA No. 10642
John Safarli, WSBA No. 44056
*Attorneys for Petitioner Bethel School
District*

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that SOPHEARY SANH, Legal Assistant, on the 14th day of January, 2016, e-filed (via email) with the Supreme Court of Washington the foregoing document:

1. Bethel School District's Answer to Amicus Curiae Washington State Association for Justice Foundation.

A copy of the above has been served upon the following counsels:

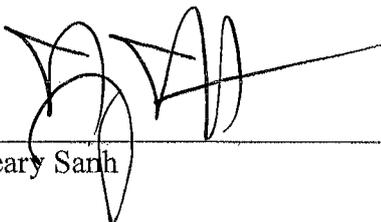
John R. Connelly, Jr.
Julie Anny Kays
Connelly Law Offices
2301 N 30th St.
Tacoma, WA 98403-3322
jconnelly@connelly-law.com
jkays@connelly-law.com
Counsel for Respondent N.L.
[X] Via Email
[X] Via Legal Messenger

Jerry J. Moberg
Jerry Moberg & Associates, P.S.
P.O. Box 130
124 3rd Avenue SW
Ephrata, WA 98823
[X] Via Email
[X] Via Regular Mail

George M. Ahrend
16 Basin St. SW
Ephrata, WA 98823
[X] Via Email
[X] Via Regular Mail

Bryan P. Harnetiaux
517 E 17th Ave.
Spokane, WA 99203
[X] Via Email
[X] Via Regular Mail

Valerie D. McOmie
4549 NW Aspen St
Camas, WA 98607
[X] Via Email
[X] Via Regular Mail



Sopheary Sanh

OFFICE RECEPTIONIST, CLERK

To: Sopheary Sanh
Cc: Yalda Biniazan
Subject: RE: N.L. v. Bethel School District, Cause No. 91775-2

Received on 01-14-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sopheary Sanh [mailto:ssanh@floyd-ringer.com]
Sent: Thursday, January 14, 2016 4:11 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Yalda Biniazan <yalda@floyd-ringer.com>
Subject: N.L. v. Bethel School District, Cause No. 91775-2

Case Name: N.L., Respondent, v. BETHEL SCHOOL DISTRICT, Petitioner.	Cause No. 91775-2 Attorney for: Respondent BETHEL SCHOOL DISTRICT
Attorney: Amber L. Pearce, WSBA No. 31626 for John A. Safarli, WSBA No. 44056 jsafarli@floyd-ringer.com	Document: Petitioner Bethel School District's Answer to Amicus Curiae Washington State Association For Justice Foundation

SOPHEARY SANH
LEGAL ASSISTANT
FLOYD, PFLUEGER & RINGER, P.S.
200 WEST THOMAS STREET, STE. 500
SEATTLE, WA 98119
P (206) 441-4455 || F (206) 441-8484
[SSANH@FLOYD-RINGER.COM](mailto:ssanh@floyd-ringer.com)

Confidential Attorney Work Product/Attorney-Client Privileged Communication. This message is confidential, attorney work product and subject to the attorney-client communication privilege. It is intended solely for the use of the individual named above. If you are not the intended recipient, or the person responsible to deliver it to the intended recipient, you are hereby advised that any dissemination, distribution or copying of this communication is prohibited. If you have received this email in error, please immediately notify the sender by reply email or delete and/or destroy the original and all copies of the email message.