

No. 98280-5

No. 79655-1-I

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

BONNIE I. MEYERS, as personal representative of the estate of
GABRIEL LEWIS ANDERSON, a deceased minor, age 15, and on behalf
of the beneficiaries of the estate; and BRANDI K. SESTROM and
JOSHUA ANDERSON, individually;

Appellants,

v.

FERNDAL SCHOOL DISTRICT, a political
subdivision of the State of Washington;

Respondent,

and

WILLIAM KLEIN and JANE DOE KLEIN and the marital
community comprised thereof;

Defendants.

REPLY BRIEF OF APPELLANTS

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A. INTRODUCTION

Recognizing the weakness of its argument on duty, the Ferndale School District (“District”) attempts to shift the focus of the case from the trial court’s duty decision to legal causation, an issue the trial court never reached.

It is not surprising that the District would do this where foreseeability is a fact question or the jury and obvious fact questions on foreseeability abound in connection with the District’s broad common law duty to protect 15-year-old Gabriel Anderson, killed by a driver who fell asleep and ran off the road striking him and other students, while he was under the District’s care and custody. The trial court applied the wrong standard for foreseeability, invading the jury’s fact-finding function on a matter that is clearly a question of fact under Washington law.

In abandoning duty/foreseeability and relying essentially on its legal causation argument, the District ignores the well-qualified experts who testified on the District’s duty and causation, and blatantly misstates the factual record.

This Court should not tolerate such conduct and should reverse the trial court’s erroneous summary judgment ruling.

B. RESPONSE TO DISTRICT’S STATEMENT OF THE CASE

The District’s Statement of the Case, resp’t br. at 7-16, is *replete*

with argument, misstatements of the record, glaring omissions of what was in the record, and fanciful attempts to recharacterize the trial court's actual decision. The District should know better. *See Hurlbert v. Gordon*, 64 Wn. App. 386, 399-401, 824 P.2d 1238, *review denied*, 119 Wn.2d 1015 (1992) (counsel sanctioned for submitting patently flawed brief); RPC 3.3 (candor with the tribunal). This Court should disregard the District's Statement of the Case.

First, a Statement of the Case is designed to be a fair recitation of the facts and procedure below, "without argument." RAP 10.3(a)(5). Certainly latitude can be afforded parties to argue their position on appeal, but any objective reader of the District's brief would deem its Statement of the Case to be essentially an argument masquerading as a Statement of the Case in substantial part. *See, e.g.,* Resp't Br. at 13-16 (District argues cases).

Second, the Statement of the Case must be a "fair recitation" of the facts and procedure under RAP 10.3(a)(5). At its core, it must be *accurate*. The District's Statement is *not*. The material facts in the case, contrary to the District's claim at 9, *are* in dispute. There were distinctly different expert opinions on key issues, not even acknowledged anywhere in the District's brief. And there was a clear-cut dispute over the nature of the excursion on which Gabriel was killed that even the District itself

acknowledges. Resp't Br. at 11. When the District claims no District witness testified that parental permission for excursions was necessary, resp't br. at 10, it ignores the testimony of PE teachers Rick Brudwick and Jill Iwasaki. Appellants' Br. at 4. When the District claims in its brief at 10, without citation to the record, that Ritchie had permission from District administration for this excursion, that is *false*. See Appellants' Br. at 6 n.3. When the District claims (as it does repeatedly in its brief) that Gabriel's grandmother, Wanita Anderson, allowed him to regularly walk on the same street without supervision, resp't br. at 14, that *distorts* the different physical characteristics of the portion of W. Smith Road where Ritchie took the students and the walk to Greene's Corner store. Appellants' Br. at 32 n.25. The store is accessed by a crosswalk and is in lower speed school zone. *Id.*

Third, omitted from the District's discussion of the facts is any reference to the fact that the students on Ritchie's excursion were widely spread out, they were on the wrong side of the street, they had no adult chaperones, or that another student was killed and two others injured in the excursion.

Finally, the District desperately tries to transform the trial court's actual ruling that found Gabriel's death unforeseeable as a matter of law, CP 569-70, into a ruling on legal causation, which it decidedly was not.

Resp't Br. at 13-15. That the trial court's decision was not based on legal causation is evidenced by the fact that the District itself proposed an order on summary judgment that referenced legal causation as a basis for the trial court's decision. CP 578-79. But the trial court *rejected* that order and instead entered an order, in the form proposed by the Estate, that is silent on legal causation. CP 644-51. The court's letter ruling was based *solely* on the lack of foreseeability. CP 570 ("Viewing the facts in the light most favorable to the non-moving party, the Plaintiffs fail to establish that this tragic accident was foreseeable on the part of the Defendant school district.").

By attempting to alter the actual basis for the trial court's decision, the District affectively *admits* the trial court erred on duty/foreseeability; it states in its brief at 15: "Despite the *admitted fact* that a vehicle leaving the roadway is within the zone of danger that one could encounter while using any public sidewalk, liability does not attach for lack of legal cause. (CP 569-70)."¹ (emphasis added).

C. ARGUMENT

(1) Standard of Review

The District asserts that the Estate "misstated" the standard of

¹ The District's citation to CP 569-70 does not help it. That is nothing more than a cite to the trial court's letter ruling. The court did not address proximate cause or legal causation *anywhere* in that ruling. This argument in the District's Statement of the Case is yet another example of its disregard for RAP 10.3(a)(5).

review. Resp't Br. at 7-8. That is *false*. As the Estate correctly noted in its brief at 11, the standard of review with regard to trial court decisions on summary judgment is *de novo*.

What the District loosely describes as “standard of review” is its burden on summary judgment. Under CR 56(c), it had to demonstrate the absence of a genuine issue of material fact and an entitlement to judgment as a matter of law. It seemingly does not dispute that summary judgment is available only where a trial would be “useless,” or that on summary judgment, this Court must construe all facts and reasonable inferences from those facts in a light most favorable to the Estate, credibility issues are for the jury, and where experts differ on key factual points, a genuine fact issue is present for the jury. Appellants’ Br. at 10-11.

As it must, the District seemingly *concedes* that foreseeability and proximate cause are fact questions for the jury. It does not contest the authority cited in the Estate’s opening brief at 18-27 that foreseeability is a fact question and it explicitly acknowledges that proximate cause is a fact question. Resp’t Br. at 20.

The bulk of its discussion on standard of care relates to legal causation, resp’t br. at 8, an issue the Estate will discuss in greater detail *infra*.

(2) The District Apparently Concedes that the Trial Court Erred in Basing Its Decision on a Lack of Duty on the Alleged Unforeseeability of Gabriel’s Death

The District does not take issue with the Estate’s assertion (Appellants’ Br. at 12-18) that it owed a broad protective duty to students under its care and custody, standing *in loco parentis* to them. In fact, it *concedes* the existence of such a duty. Resp’t Br. at 17 (“The School District acknowledges that duty remains to this day.”).

Notwithstanding this concession, the District hopes to persuade this Court that *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 428 P.3d 1197 (2018) and *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 423 P.3d 197 (2018) somehow diluted that broad protective duty. Resp’t Br. at 32-33. The District is wrong.

As noted in the Estate’s opening brief at 17-18, those decisions merely clarified the scope of a school district’s duty to its students. The *Hendrickson* court made clear that a “heightened” duty is not owed, but the duty is, nevertheless, a broad protective one:

... it is helpful to think of a school district’s duty of care as existing within a pool of risk. Ordinarily, parties operate within a limited pool of risk – they are not required to take affirmative action to protect others from harm unless the object causing harm is within the party’s direct control. However, when parties have a special custodial relationship, like the relationship between a school district and its students, they enter a larger pool of risk and are required “to take affirmative precautions for the aid or

protection of the other.” *See id.* § 314 cmt. a. This duty extends to all reasonably foreseeable harm even when that harm is caused by third parties. *Id.* § 314A cmt. d. As a result, school districts have a duty “to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers.” *McLeod*, 42 Wash.2d at 320, 255 P.2d 360.

192 Wn.2d at 277.

Similarly, the District tries to argue for the first time on appeal² that it is essentially immune from suit because its duty is *in loco parentis* and parental liability in Washington is “limited,” citing *Carey v. Reeves*, 56 Wn. App. 18, 781 P.2d 904 (1989) and *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008) for this radical restriction of school district duty. Resp’t Br. at 29-32. This Court should reject the District’s effort to raise this argument for the first time on review; if it reaches the merits of the argument, the Court should reject the District’s plea for immunity in the guise of its duty argument. Cases like *Cox v. Hugo*, 52 Wn.2d 815, 329 P.2d 467 (1958) and *Carey v. Reeve*, *supra*, cited by the District predate the recent decisional law eroding parental immunity.³

In *Zellmer*, 164 Wn.2d at 147, our Supreme Court made clear that

² The District *nowhere* advanced this argument below in its motion pleadings. CP 26-47, 528-36. It should be foreclosed from doing so on appeal. RAP 2.5(a).

³ Indeed in *Cox*, the issue was purely one of parental supervision where a five-year-old was severely burned by a fire at a neighbor’s house where there was no evidence the parents had any knowledge of the fire and the child had been gone from the parents’ house for less than five minutes. In *Carey*, Division I rejected application of immunity where a grandparent allowed a four-year-old child briefly out of his sight to burn another child while playing with matches.

parental immunity was confined to situations involving negligent parental upbringing of a child, but not to intentional harms, wanton or willful misconduct, or situations where the parent stands outside the parental role such as in the operation of an automobile. *Accord, Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017).

Illustrative of the application of these decisions is Division II's opinion in *Woods v. H.O. Sports Co., Inc.*, 183 Wn. App. 145, 333 P.3d 455 (2014). There, the court declined to apply the liability limiting rule in a son's lawsuit against his father for injuries occasioned by the father's negligent operation of a boat while towing the son in an inflatable inner tube. Division II drew the distinction between the negligent parental conduct, as in the operation of a boat or car, and negligence associated with parental control, discipline, or discretion.

In any event, our courts held that under a school district's broad protective duty, a district has "the responsibility of reasonable supervision." *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 18, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014). A district must exercise reasonable care when supervising students under its supervision. *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994). Here, it is the affirmative negligence of the District under its broad protective duty to Gabriel and the other students that is the

gravamen of the harm, not negligence in allowing students to engage in conduct.

In sum, the District owed Gabriel a broad protective duty of care while he was under its care and custody.

As with the Estate's articulation of duty, the District has no real answer to the Estate's assertion in its opening brief that such duty is constrained by only foreseeability principles or that foreseeability is a *question of fact*. *Anderson*, 191 Wn.2d at 369 n.19; Appellants' Br. at 18-23. Of course, the foreseeability analysis requires that the risk fall within the "general field of danger," and need not involve a specific harm. *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 430-31, 378 P.3d 162 (2016). A risk is not foreseeable unless it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953).

Recognizing that it has no answer to the fact that Gabriel was within the zone of danger presented by the Ritchie excursion, and having no answer to the Estate's experts or decisions cited in the Estate's brief like *Berghund v. City of Spokane Cty.*, 4 Wn.2d 309, 103 P.2d 355 (1940); *Rikstag v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969); *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 380 P.3d 584, *review denied*, 186 Wn.2d 1029 (2016), or *Quynn v. Bellevue Sch. Dist.*, 195 Wn.

App. 627, 383 P.3d 1053 (2016), the District is forced to recast the trial court's decision. It claims that the trial court really meant to decide the case on the basis of legal causation, using the term "foreseeability" for both "zone of danger" and "legal cause." Resp't Br. at 14. That is insulting to the trial court. The court fully understood that "foreseeability" is a limitation on *duty*, and has nothing to do with "causation." CP 569-70.

Simply put, the trial court erred in its duty/foreseeability analysis, as the District now *admits*. Resp't Br. at 15 ("the admitted fact that a vehicle leaving a roadway is within the zone of danger that one could encounter while using any public sidewalk..."). This Court should reject the District's invitation to reformulate the trial court's erroneous analysis. *Id.* (this Court "should take the second step of analysis and should review legal cause separate and apart from zone of danger foreseeability discussed in McLeod.").

(3) The Trial Court Erred in Ruling that the Estate Failed to Establish Proximate Cause as a Matter of Law

The District has no real answer to the Estate's contention in its opening brief at 28-38 that proximate cause in Washington is a question of fact or that ample evidence below supported the proposition that the District's negligence proximately resulted in Gabriel's death. Instead, it

resorts to fiction yet again, claiming that the trial court properly concluded that its negligence was not the cause of Gabriel's death, resp't br. at 19, when *the trial court never ruled on proximate cause*. CP 569-70.

As the Estate noted in its opening brief at 28-29, cause-in-fact in Washington is ordinarily a jury question. *See also, Mehlert v. Baseball of Seattle Inc.*, 1 Wn. App. 2d 115, 404 P.3d 97 (2017) (genuine issue of material fact was present as to whether absence of handrails on ramp leading to Mariners team store caused plaintiff's fall); *Tessema v. Mac-Millan Piper, Inc.*, 5 Wn. App. 2d 1047, 2018 WL 5251954 (2018) (question of fact present as to whether staircase was unsafe due to icy conditions of which defendant had notice causing plaintiff's slip and fall, particularly in light of expert testimony).⁴ The District *concedes* that proximate cause is ordinarily a fact question, as it must. Resp't Br. at 20.

Despite that concession, the District then simply argues its version of the facts in its brief at 20-24, ignoring the extensive contrary evidence the Estate offered below on proximate cause, including the crucial expert testimony of former Superintendent of Public Instruction Judith Billings,

⁴ The District cites *Cho v. City of Seattle*, 185 Wn. App. 10, 341 P.3d 309, (2014), *review denied*, 183 Wn.2d 1007 (2015) in support of its position on causation. Resp't Br. at 23. But there, this Court found no proximate cause because even if a pedestrian island or signal had been installed by the city, as plaintiff contended was necessary to make a crosswalk safe, it would have made no difference. The drunk driver who struck the defendant was not paying attention and was too impaired to make the island or signal effective. Other traffic had stopped at the intersection even without the island or signal.

Dr. Dennis Smith, and accident reconstructionist Steven Harbinson. Appellants' Br. at 30-38. As this Court is well aware, on summary judgment, it is not the District's rendition of the facts that controls, but whether the Estate's factual assertions, reviewed in a light most favorable to the Estate, including reasonable inferences from those facts, creates a genuine issue of material fact for the jury. The Estate met that standard.

Contrary to the District's assertion in its brief at 21 that the Estate's "major contention" on causation was the lack of any parental permission for this excursion, that was but one of the grounds advanced by the Estate.

Ritchie's impromptu excursion was conducted in a cavalier, dangerous fashion that resulted in the students' deaths and injuries. Appellant's Br. at 34-38. Harbinson's expert testimony was point blank on that issue – the excursion violated numerous safety rules putting Ritchie's students squarely in harm's way. *E.g.*, CP 393, 395. The District's rejoinder to this testimony is in a mere footnote, resp't br. at 20 n.2, evidencing the weakness of the District's position.

At that, the District tries to ignore the implication of RCW 46.61.250(2) that requires pedestrians on roadways to use the road's left side. Its citation of *Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 535 (1995) in its footnote is unavailing to its position. There, Division II held

that speed is not the proximate cause of an automobile accident if it does no more than bring the favored and disfavored drivers to the same location at the same time. The *Channel* court hastened to note that nothing in its opinion foreclosed proof that but for excessive speed, “the favored driver, between the point of notice and the point of impact, would have been able to brake, swerve or otherwise avoid the point of impact.” *Id.* at 278-79. But that case has no bearing on the Estate’s proximate cause argument here. RCW 46.61.250(2) set forth a general policy on safe pedestrian practices. As Steven Harbinson testified, Ritchie’s conduct of his excursion was not only unsafe because it violated that general policy, it was unsafe because the students were spread out, allowed to cross W. Smith Road wherever they chose, at other than designated crosswalks within the lower speed school zone and were unchaperoned. CP 395. His cavalier operation of the excursion caused the students to be struck by an inattentive driver like Klein.

The District devotes the lion’s share of its causation argument to the question of whether Ritchie’s ill-fated excursion with the students required parental permission in accordance with Policy 2320. Resp’t Br. at 21-23. It contends that the Estate somehow “misrepresented” the testimony of Scott Brittain. *Id.* at 22. That is *false*.

The Estate merely quoted the language of the Policy and the

testimony of the District's witnesses. Appellants' Br. at 2-5. The District's own personnel were confused about the nature of Ritchie's action. Appellants' Br. at 31 n.22. Taken at its face value, Brittain's testimony quoted in the District's brief at 22, would mean that Ritchie's excursion was not a "field trip" nor was it an "excursion" under Policy 2320, but the District's brief is devoid of what it actually *was*.⁵

The District has *no answer* for the testimony of Rick Brudwick and Jill Iwasaki that District staff believed Policy 2320 applied to classes leaving the WHS campus, requiring parental permission. Appellants' Br. at 4-5. Nor does the District have any answer to the expert testimony of Superintendent Billings and Dr. Smith that a spur of the moment excursion without parental permission was unwise and negligent on the District's part. *Id.* at 5 n.2. In particular, Superintendent Billings testified that if Policy 2320 did not apply, as Brudwick and Iwasaki believed it did, then the District's leadership failed to tell District principals like Keigley, as it should have done. CP 380.

In sum, fact questions abound on cause-in-fact. Ritchie's impromptu excursion to discuss summer plans was unnecessary and not agreed to by parents, as Policy 2320 commands. That it occurred along a

⁵ This is classically a credibility issue that forecloses summary judgment. Appellants' Br. at 10.

roadway where cars could travel up to 40 miles per hour without regard to traffic-related dangers was also a matter for the jury.

(4) The District's Argument on Legal Causation Does Not Sustain Summary Judgment in Its Favor

The central focus of the District's brief is legal causation, resp't br. at 24-28, an issue it raised only in passing in the trial court. CP 41-43, 333-35. Yet again, however, the District misrepresents the record when it avers that the trial court "properly ruled" on legal causation, resp't br. at 24, when the trial court never even reached the issue, despite acknowledging that the District had raised it. CP 569 ("The defendant school district here argues that the accident was not foreseeable, and further argues that the Plaintiffs cannot establish legal cause or proximate cause.").

Legal causation is closely associated with duty – whether, as a matter of policy, the connection between the defendant's misconduct and the plaintiff's ultimate harm is too remote or insubstantial to permit liability to attach. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). Our Supreme Court has routinely rejected legal causation arguments in the school district setting. *E.g., McLeod*, 42 Wn.2d at 365;⁶ *N.L.*, 186 Wn.2d at 437-38.⁷ Indeed, the District fails to

⁶ The *McLeod* court indicated that issues of foreseeability and legal causation revolve around the same principle of whether the harm is within the general field of

cite a single case in the school district liability setting that applies legal causation to deny liability, given the school districts' broad protective duty owed to students under their care and custody.

Our Supreme Court rejected a similar type of legal causation argument in *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013). Noting the connection between duty and legal causation, *id.* at 171, the Court held that where the jury found that the plaintiff passenger's injuries sustained when the driver lost control of her vehicle, left the road, and struck a utility pole placed too close to the roadway were within the scope of a municipality's duty to roadway users, the plaintiff's injuries were not too remote and legal causation did not foreclose liability.

Applying principles of logic, common sense, justice, policy, and precedent, as dictated by the *Schooley* court, 134 Wn.2d at 479, the

danger:

Having given full consideration to the factor of foreseeability in discussing the allegations as to negligence, it is not necessary to cover the same ground in dealing with proximate cause. We have held that it is for the jury to decide whether the general filed [sic] of danger should have been anticipated by the school district. If the jury finds respondent negligent in not having anticipated and guarded against this danger, then it is not for the court to say that such negligence could not be a proximate cause of a harm falling within that very field of danger.

Id. at 365.

⁷ In *N.L.*, our Supreme Court rejected a school district's legal causation argument where an 18-year-old student who was a registered sex offender persuaded a 14-year-old he met at joint middle school-high school track practice to leave campus with him and took her to his house where he raped her.

connection between the harm to Gabriel and the District's negligence is not too tenuous or remote. This is particularly true in the setting of the District's protective duty owed to Gabriel, a duty that even extends to *anticipating* harms to students in its care and custody. It is also true where the District has essentially *conceded* foreseeability, recognizing that Gabriel was in the zone of danger presented by an excursion that had not been the subject of his grandmother's permission and was negligently conducted by Ritchie.

This Court should reject the District's legal causation argument.

D. CONCLUSION

Under Washington's broad protective duty (*in loco parentis*) for school districts with respect to students under their charge extending to off-campus activities, Gabriel was owed a duty of care, contrary to the trial court's ruling.

The trial court here erred in ruling as a matter of law on foreseeability; it applied an incorrect standard for foreseeability at that. Gabriel Anderson died tragically, and unnecessarily, as a result of the District's disregard for his protection by violating its own policy on off-campus excursions, failing to secure his grandmother's permission for the unnecessary excursion, and disregarding traffic safety standards so that the Klein vehicle could strike him and other students. Legal causation

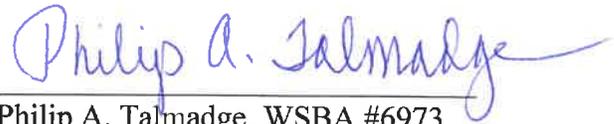
principles do not bar the Estate's action.

This Court should reverse the trial court's order on summary judgment and remand the case to the trial court for judgment on the merits.

Costs on appeal should be awarded to the Estate.

DATED this 13th day of June, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the following document: ***Reply Brief of Appellants*** in Court of Appeals, Division I Cause No. 79655-1-I to the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: June 13, 2019, at Seattle, Washington.



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