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NO. 98280-5

**IN THE SUPREME COURT
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 public school district of the State of
Washington,

Respondent,

And

WILLIAM KLEIN and JANE DOE KLEIN, and the marital community
composed thereof,

Defendants.

**SUPPLEMENTAL BRIEF OF PETITIONER
FERNDAL SCHOOL DISTRICT**

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TABLE OF CONTENTS

Table of Authorities

I. Introduction1

II. Argument.....2

 A. *Schooley* provides the correct three-step framework.....2

 1. *Schooley* foreshadowed the error in this case2

 2. So why did the Court of Appeals re-conflate duty and legal cause here?4

 i. The Court of Appeals used *Lowman* as a model for methodology4

 ii. *Lowman* was correct but is not a “methodology case”6

 B. No different framework for schools than for other defendants 8

 C. A workable framework for the last element – the Arizona “unreasonable risk” test12

 D. Being in the Wrong Place at the Wrong Time: *Channel v. Mills* 17

III. Conclusion.....19

Appendix

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Soap Lake Sch. Dist.</i> , 191 Wn.2d 343, 423 P.3d 197 (2018)	9
<i>Channel v. Mills</i> , 77 Wn. App 268, 890 P.2d 535 (1995)	17, 18
<i>Christensen v. Royal Sch. Dist.</i> , 156 Wn.2d 62, 70, 124 P.3d 283, 287 (2005).....	12
<i>Collette v. Tolleson Unified Sch. Dist.</i> , 203 Ariz. 359, 54 P.3d 828 (Ariz.App. 2002).....	15
<i>Glaser ex rel. Glaser v. Emporia Unified Sch. Dist.</i> , 271 Kan. 178, 21 P.3d 573 (Kan. 2001).....	15, 16
<i>Hartley v. State</i> , 103 Wn.2d 768, 698 P.2d 77 (1985)	7
<i>Hendrickson v. Moses Lake Sch. Dist.</i> , 192 Wn.2d 269, 272, 428 P.3d 1197, 1199 (2018).....	9
<i>Kazanjian v. Sch. Bd. of Palm Beach County</i> , 967 So. 2d 259, 265, 268 (Fla.App. 4 Dist. 2007)	15, 16
<i>Keller v. City of Spokane</i> , 146 Wn.2d 237, 44 P.3d 845 (2002).....	5, 6, 7, 8
<i>Lowman v. Wilbur</i> , 178 Wn.2d 165, 168, 172-74, 309 P.3d 387, 389, 391-92 (2013)	1, 4, 5, 6, 7, 8, 19
<i>McLeod v. Grant County Sch. Dist.</i> , 42 Wn.2d 316, 322, 255 P.2d 360 (1953).....	9, 10
<i>Niece v. Elmview Grp. Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997)	10
<i>N.L. v. Bethel Sch. Dist.</i> , 186 Wn.2d 422, 378 P.3d 162 (2016).....	9
<i>Orlando v. Broward County</i> , 920 So. 2d 54 (Fla.App. 4 Dist. 2005)	15
<i>Rogers ex rel. Standley v. Retrum and Prescott Unified Sch. Dist.</i> , 170 Ariz. 399, 403-404, 825 P.2d 20 (Ariz.App. 1991)	13, 14, 15

<i>Schooley v. Pinch's Deli Mkt, Inc.</i> , 134 Wn.2d 468, 479-80 951 P.2d 749 (1998).....	1, 2, 3, 7, 8, 9, 12, 19
<i>Schooley v. Pinch's Deli Mkt., Inc.</i> , 80 Wn. App. 862, 876, 912 P.2d 1044, 1051-52 (1996), <i>aff'd</i> , 134 Wn.2d 468, 951 P.2d 749 (1998)	2, 3, 4
<i>Thompson v. Ange</i> , 83 A.D.2d 193, 197, 443 N.Y.S.2d 918 (1981)	16
<i>Tollenaar v. Chino Valley Sch. Dist.</i> , 190 Ariz. 179, 945 P.2d 1310 (Ariz.App. 1997).....	15
<i>Wick v. Clark County</i> , 86 Wn. App. 376, 936 P.2d 1201 (1997).....	5
<i>Wilson v. County of San Diego</i> , 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173 (Cal.App. 2001).....	15

Treatises

W. Keeton, D. Dobbs, R. Keeton & D. Owen, <i>Prosser and Keeton on the Law of Torts</i> § 42, at 275 (5th ed. 1984)	14
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I. Introduction

This Court's precedent requires judges to examine "mixed considerations of logic, common sense, justice, policy, and precedent" when addressing legal causation. *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 479, 951 P.2d 749 (1998). Logic dictates that where a school district does nothing to increase an ordinary – if remote – risk that we all face when walking on a public sidewalk, legal causation cannot extend. Common sense persuades us of the same thing. Justice abjures these plaintiffs' claims that school districts are subject to a different rule of law than everyone else in our society. Policy insists that schools must be permitted to make use of public facilities—including public sidewalks—for educational purposes. Otherwise, schools may become too timid to offer real-world learning opportunities to their students.

Precedent like *Schooley* requires this analysis. The trial court's ruling follows from doing so. The Court of Appeals' decision does not, instead taking an errant short cut under the inapposite and inapplicable *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013). That was error.

This Court should reiterate and reaffirm its proper legal analysis. Liability should not extend to a school for injuries a third-party driver inflicts on high school students walking on a public sidewalk under close supervision. Common sense and justice argue strongly for affirmance.

II. Argument

A. *Schooley* provides the correct three-step framework.

For years, *Schooley* has been Washington’s seminal case on legal causation. *Schooley* provides the framework to analyze legal cause correctly. As *Schooley* directs, “a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation.” *Schooley*, 134 Wn.2d at 479. Instead, as *Schooley* directs, legal cause analysis, done properly, is a three-step—not a two-step—analysis. It first requires an analysis of duty, then an analysis of foreseeability. But it also requires a third step—that of determining, according to “mixed considerations of logic, common sense, justice, policy, and precedent,” whether liability *should* extend to a particular harm. As this Court has been careful to point out, the same factors that help establish “duty” may be similar to, and also useful in analyzing, that third step—legal causation. But *they are not identical*, and finding a “duty” does not resolve the issue.

1. *Schooley* foreshadowed the error in this case.

In fact, *Schooley*’s own procedural history is a perfect example of the error that occurred here. In the Court of Appeals in *Schooley*, the intermediate court committed the same error that occurred here, stating:

‘legal cause’ and ‘duty’ are congruent if not identical. Regardless of which label is used, the real question is whether persons in the

defendant's position owe a legally enforceable, societally recognized obligation to persons in the plaintiff's position. This question can be posed by asking whether the defendant owes a duty to plaintiff, or whether the defendant is a "legal cause" of harm to the plaintiff. Thus, the Washington Supreme Court has said that "[t]he question of legal causation is so intertwined with the question of duty that the former can be answered by addressing the latter."

Schooley v. Pinch's Deli Mkt., Inc., 80 Wn. App. 862, 876, 912 P.2d 1044, 1051–52 (1996), *aff'd* 134 Wn.2d 468, 951 P.2d 749 (1998). In other words, the *Schooley* Court of Appeals conflated duty and proximate causation with legal causation, never reaching the independent third step.

Although this Court affirmed the outcome, it made very clear that it was error to conflate the existence of duty and legal cause:

This court has recognized that the issues regarding whether duty and legal causation exist are intertwined. * * * However, a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation.

Schooley, 134 Wn.2d at 479. This Court went on to clarify:

Thus, it is apparent that in some cases the policy considerations involved in determining whether a duty is owed to the plaintiff will be revisited in deciding whether legal causation is established. However, this does not mean that once a court finds a duty exists it need not analyze legal causation or that the result will automatically be the same. Thus, legal causation should not be assumed to exist every time a duty of care has been established.

Schooley, 134 Wn.2d at 479-480. This Court made the third, policy-based step *mandatory, even if* duty and foreseeability otherwise indicated liability.

2. So why did the Court of Appeals re-conflate duty and legal cause here?

The Court of Appeals apparently felt constrained by the methodology of *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013). It said so both at oral argument, and in its opinion. But *Lowman* was not a “methodology” case. Further, *Lowman* has nothing to do with the facts here—it is completely distinguishable.

i. The Court of Appeals used *Lowman* as a model for methodology

At pages 12-15 of its opinion, the Court of Appeals expressed the belief that *Lowman* allowed it to make the same “short-cut” or analytical leap that the *Schooley* Court of Appeals had made: “While duty and legal cause are not identical issues, Washington courts “have long recognized the interrelationship between questions of duty and legal cause.” *Meyers v. Ferndale Sch. Dist.*, No. 79655-1-I (Feb. 10, 2020) at 12-15. It cited *Lowman*, where this Court did partially conflate the duty analysis with the legal cause analysis. The Court of Appeals then used what it believed was the *Lowman* “methodology,” and jumped from finding duty and foreseeability directly to a conclusion of legal causation.

To understand the error involved in this analytical short-cut, background is required. In *Lowman*, the issue was the admittedly negligent placement of a power pole, installed too close to a roadway in

violation of county standards. The evidence also indicated that the driver, Wilbur, was intoxicated and speeding when her car left the roadway and struck the utility pole. Under a previous view of the law, espoused in *Wick v. Clark County*, 86 Wn. App. 376, 936 P.2d 1201 (1997), a municipality had no duty to provide a safe roadway for a negligent driver. But then, *Keller v. City of Spokane* was decided. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). *Keller* held that a municipality owes a duty to all persons, whether they are negligent or fault-free, to build and maintain its roadways in a condition that is reasonably safe for ordinary travel. Thus, *Keller* contained its own “logic, common sense, justice, policy, and precedent” statement of how far liability should extend—by holding that liability should extend even to accidents caused by a negligent driver.

Thus, when *Lowman* was presented, this Court did not have to separately engage in an analysis of whether liability *should extend* to the incorrect placement of the power pole. It could look at duty and foreseeability, and then apply the *Keller* holding as a short-cut, instead of re-engaging in analysis of logic, common sense, justice, policy and precedent. The only “grappling” with common sense, logic and policy that this Court had to do, in *Lowman*, was to say, “there is no rationale to negate the sound policy preference expressed in *Keller* for holding

municipalities and companies charged with maintaining utilities accountable[.]” *Lowman*, 178 Wn.2d at 172. This Court was correct in *Lowman*—it *could* skip the third step of legal causation on those facts, but only because *Keller* had recently already decided that liability *should extend* that far.

ii. *Lowman* was correct but is not a methodology case

In fact, Justice Madsen concurred in *Lowman*, specifically to caution that *Lowman* should not be used as a model for methodology or analysis:

Because the majority paints with a fairly broad brush, some of its general statements might be misinterpreted as standing for the incorrect conclusion that legal causation has no independent meaning as an element of a negligence action. For example, the majority says that the reasoning that underlies the holding in *Keller v. City of Spokane*, 146 Wash.2d 237, 44 P.3d 845 (2002), that the duty to design and maintain reasonably safe roadways extends to negligent and fault-free persons, applies equally to the issue of legal causation. Majority at 167. Therefore, the majority reasons, if the jury finds cause-in-fact in this context, then legal causation must exist as well. *Id.* Read out of context, this appears to say that legal causation is necessarily found if duty and cause-in-fact exist.

I write separately to emphasize, however, that the majority opinion should not be broadly read to mean that whenever duty exists and cause-in-fact is found, legal causation exists. Any such interpretation would involve an incorrect statement of law.

* * * * *

At the end of the day, there is no shortcut. Parties are advised that they cannot simply reduce this case to a formula of “duty plus

cause-in-fact equals legal causation.” Rather, duty and legal causation are separate elements that must be determined in accord with our cases. *E.g.*, *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wash.2d 468, 951 P.2d 749 (1998); *Hartley v. State*, 103 Wash.2d 768, 698 P.2d 77 (1985).

Lowman, *supra*, at 173-74. In short, this Court’s correct conclusion in *Lowman* was never intended to serve as a method for legal causation analysis.

Unfortunately, the Court of Appeals used *Lowman* that way. Even though *Lowman* had nothing to do with the facts of this case, the Court of Appeals, citing *Lowman* heavily, ultimately held, “Ferndale’s urging that we uncouple legal causation analysis from duty analysis runs counter to the Supreme Court’s teachings in *Lowman*.” (*Meyers* at 15). That is incorrect. *Lowman*, like *Schooley*, instructs that a court *must* at least partially “uncouple” legal causation analysis from duty analysis. *Lowman*, *supra*, at 168.

In this case, where there is no “*Keller*-like” precedent, the trial court must separately engage in the final step-- analyzing “mixed considerations of logic, common sense, justice, policy and precedent,” to determine whether liability should extend this far. And here, the trial court correctly did so. It ruled that schools should not be liable for “exposing” students to risks that are common, everyday risks—risks that high school

students at Windward routinely encountered when they walked, biked and drove to and from school. The trial court took note that it was the same risks that they, and Anderson, encountered by leaving the school and walking on the public sidewalks and across Smith Road to eat lunch off campus. Under *Schooley*, *Keller*, and *Lowman*, the trial court was permitted to so limit liability, even if duty and foreseeability indicated liability could arise. The court “still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident.” *Keller*, 146 Wn.2d at 252. This Court should affirm the trial court’s correct ruling.

B. No different framework for schools than for other defendants

Plaintiffs argue that, for schools, there should be no legal cause defense. (Answer to Petition at 15). They rely heavily on the idea that, because the “zone of danger” test is so broad, schools should be liable for any risk that can be conceived by the human mind—regardless of how remote or unlikely the risk, and without regard for how “worthwhile” the reason for allowing students to encounter the risk. They point out that no published Washington “school case” has previously allowed a school to escape liability based on legal causation. (Answer to Petition at 15). But that is precisely why this Court should affirm the trial court’s ruling.

This Court has never, and should not now, adopt a rule that makes the availability of a legal causation defense turn on the identity or type of the defendant. Schools, like any other defendant, are entitled to *Schooley*'s holding that legal causation may still limit liability for a risk that is simply too remote. This Court has already articulated a duty of reasonable care for schools toward students in their custody. *See, e.g., Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 272, 428 P.3d 1197, 1199 (2018); *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 423 P.3d 197 (2018). Reiterating that schools do not have a "heightened duty," Washington courts have nonetheless defined a fairly rigorous duty to prevent foreseeable harm. The school district's duty of ordinary care is well established and is not contested.

Furthermore, in its "foreseeability" analysis in the context of schools, Washington courts have made almost every conceivable risk "foreseeable" by adoption of the "general field of danger" test. *See, e.g., McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 255 P.2d 360 (1953); *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016). Under the "general field of danger" test, if the risk can be imagined, it is within the general field of danger that a school must protect against. Under *McLeod*, "The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected * * * [a]nd yet, if the harm suffered

falls within the general danger area, there may be liability, provided other requisites of legal causation are present.” *McLeod, supra*, at 322. Under the “general field of danger” test, schools are *already* subjected to a more rigorous foreseeability standard, matched only by other “custodial” defendants; e.g., nursing homes (*Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 929 P.2d 420 (1997) (describing the heightened burden within “special relationship” cases)).

When one combines a school’s special relationship custodial duty, and the “general field of danger” foreseeability test, schools are tasked with an incredible job laid on very few other entities—to foresee, plan against, and take reasonable steps to prevent every conceivable harm. That is already a rigorous standard. If the gate-keeper role long held by trial courts—to apply legal causation as a defense—is eliminated, there would be *no risk* that a school could take—no matter how beneficial—without facing almost-automatic liability. Field trips requiring transportation by bus would likely end—because it is clearly foreseeable that a car might hit the bus *even if* the bus was proceeding safely. The school’s “negligence” would lie in “exposing” the student to the risk of a not-at-fault collision, rather than just staying on campus. Shop classes involving power tools would likely end—because it is foreseeable that an accident could occur, even if students were properly instructed and supervised, had parental

consent, and were using full safety precautions. Chemistry experiments would probably cease—because it is conceivable that chemicals provided by a reputable lab could nonetheless be adulterated and alter the intended effect. None of these harmful events are at all likely, nor frequent.

Conversely, all of these activities have beneficial educational purposes. And, they are commensurate with risks that society deems acceptable for high school students to encounter in daily life. But, if a school would have liability simply because it has a duty of reasonable care and the potential for *some type* of harm is conceivable, all such “risks” will have to be avoided. The only viable option for schools will be closed campuses, in-classroom activity with no enrichment, and no departures therefrom. This is not a policy we want to promote. It is the responsibility of schools, along with parents, to teach students and then gradually release them to the world as they get older, even if doing so involves encountering risks that are not present while sitting behind a desk in a classroom.

Schools are not insurers of safety. Society is prepared to recognize that many activities, inherent in ordinary living, contain certain, acceptable levels of risk. Allowing a high school student to walk, supervised, along a public sidewalk, in broad daylight, is one such risk. No one deems it negligent to do so, even given the (infinitesimal) chance that a driver might fall asleep in the middle of the day, jump the curb and hit them.

This should not be different in the school context. Societal expectations about “acceptable risk” *should* inform liability, even in the “in loco parentis” context. *See, e.g., Christensen v. Royal Sch. Dist.*, 156 Wn.2d 62, 70, 124 P.3d 283, 287 (2005). That is precisely why “legal cause” analysis must remain as the mandatory third step, even in the school context.

Given the long-standing caselaw on a school’s duty, and the well-established precedent about “general field of danger,” the only means by which a court can serve its gate-keeper role, and limit liability for an occurrence like this one, is “legal causation.” Plaintiffs’ argument that schools should not be allowed to avail themselves of a “legal causation” defense would subject schools to a duty *higher* than what society imposes on *anyone else* as “reasonable care.” There must be some “outer limit” to the scope of liability of a school. The trial court correctly determined that the facts of this case are beyond that outer limit. *Schooley*, applied correctly, allows for affirming that decision.

C. A workable framework for the last element – the Arizona test

Washington law on the outer limits of a school’s “legal causation” liability is scarce. Looking to other jurisdictions can be useful in terms of how to apply the “logic, common sense, justice, policy, and precedent” factors. For example, Arizona has adopted an “unreasonable risk” test.

Arizona’s test disclaims liability if the school’s act or omission does not heighten or increase the risk, but instead, simply does not “shield” the student from an ordinary risk—*e.g.*, *traffic*—they would otherwise face.

In *Rogers ex rel. Standley v. Retrum and Prescott Unified Sch. Dist.*, 170 Ariz. 399, 825 P.2d 20 (Ariz.App. 1991), Rogers, a high school junior, completed a test anticipating a good grade. The teacher publicly gave him a failing grade even though Rogers had passed the test because he wanted to teach him “to know what it felt like to fail.” Humiliated and upset, Rogers left in the middle of class with a friend, punching a wall and kicking trash cans on his way to the friend’s car. Both the school and the teacher had a policy of allowing students to leave class early and permitting them to come and go as they pleased. They left campus by car, where the driver accelerated at a speed exceeding 90 miles per hour before losing control. The car struck an embankment. Rogers was ejected and sustained injury. He sued the school district for “allowing” him to encounter the risks of driving away from school with a friend, permitted under the teacher’s / school’s policy.

The court acknowledged the existence of both an “in loco parentis” duty, and the foreseeability that a teen driver might crash, but then applied an “unreasonable risk” test, as part of legal cause analysis:

Members of our mobile society face the risk of collision whenever they are in cars. This risk is arguably higher for teenage passengers of teenage drivers. The school in this case, however, did nothing to increase this general risk. It did not, for example, leave students inadequately supervised or instructed in a driver's education class. It did not tolerate drinking at a school affair. **It simply chose not to restrict students to campus during the school day and thereby shield them from the ordinary risk of vehicular harm that they would face when out of school.** We conclude that “the standard of reasonable conduct [did] not require the defendant[s] to ... take precautions against” that risk. Prosser and Keeton, *supra* § 42, at 275. More simply stated, the defendants' omission did not create an unreasonable risk of harm.

Rogers, 170 Ariz. at 403 (emphasis added). In other words, the Arizona “unreasonable risk” test would not extend legal causation to an injury unless the school’s act or omission generated a risk *beyond* what the student would already encounter in ordinary, daily life.

The *Rogers* court was clear that its holding was premised on the “policy” piece of legal causation analysis. It said:

We do not mask the element of policy in our choice. * * * First, the question of the legal consequences of an open campus high school policy is not a random judgment best left to case-by-base assessment, but a question likely to recur and one on which school boards need some guidance. * * * Second, policy considerations appropriate to local school boards — local transportation options, inter-school transfer arrangements, and extracurricular activity locations, for example — are pertinent to the decision whether restrictions should be placed on high school students coming and going from the campus during ordinary hours. Finally, and most significantly, we decline to make high school districts that adopt an open campus policy insurers against the ordinary risk of vehicular injury that students face in driving off school grounds.

Id. at 403-404. Of particular note, the District here did grapple with the policy questions, like what the *Rogers* court referenced: Windward’s small student enrollment, lack of an age-appropriate outdoor track, its modified open campus policy (which allowed students to cross the same roadway for lunch without supervision), and Windward’s unique posture as a choice school, calling for physical education teaching methods that would engage otherwise-recalcitrant non-athlete students. The trial court, here, honored those “policy considerations appropriate to local school boards.” That was proper.

Since *Rogers*, Florida applied the “unreasonable risk” standard in *Kazanjian v. Sch. Bd. of Palm Beach County*, 967 So. 2d 259 (Fla.App. 4 Dist. 2007) (District action or inaction “did not increase the risk of accident in any way; that risk existed regardless of any rule.” *Id.* at 265). In doing so, the Florida court traced a number of cases involving students who were injured under variations of “open campus” policies. None of them imposed liability on the schools, for injuries to teen/high schoolers who were off campus, whether under an “open campus” or while violating a closed-campus rule.¹ Notably, in one case, the court ruled:

¹ *Kazanjian*, 967 So. 2d at 268 (discussing *Collette v. Tolleson Unified Sch. Dist.*, 203 Ariz. 359, 54 P.3d 828 (Ariz.App. 2002); *Tollenaar v. Chino Valley Sch. Dist.*, 190 Ariz. 179, 945 P.2d 1310 (Ariz.App. 1997); *Glaser ex rel. Glaser v. Emporia Unified*

A high school may have sound educational reasons for wanting to treat its students with the dignity which comes with freedom of movement, rather than as young children or prisoners. * * * The decision whether to have an open campus, a “fortress,” or something in between, is a policy decision that should be left to school professionals and not second-guessed by civil juries.

Kazanjian, supra, at 268.

New York applied the rule in *Thompson v. Ange*, 83 A.D.2d 193, 443 N.Y.S.2d 918 (1981) (“The risk that Graziano would be involved in an automobile accident was no greater than the risk incurred by the operation of an automobile by any average 17-year-old driver. Violation of the no-driving rule did not increase the risk of accident in any way; that risk existed regardless of any rule.” *Id.* at 197.)

As has occurred in some past Washington cases, these cases are not terribly precise in identifying whether they are “lack of duty” cases, “breach” cases, or legal causation cases. Nonetheless, they all turn on the concept that as a matter of common sense, justice and policy, we as a society simply do not deem it negligent to “allow” high schoolers to encounter the ordinary risks that they are exposed to in everyday life. The risk of walking on a safe, public sidewalk under a teacher’s supervision, where students routinely walk to and from school every day, is more

Sch. Dist., 271 Kan. 178, 21 P.3d 573 (Kan. 2001); *Wilson v. County of San Diego*, 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173 (Cal.App. 2001); *Orlando v. Broward County*, 920 So. 2d 54, (Fla.App. 4 Dist. 2005)).

compelling to limit liability than instances where students are injured in vehicles while truant or off campus without permission.

Adopting Arizona’s “unreasonable risk” analysis would be one way to inform the “logic, common sense, justice, policy, and precedent” piece of Washington’s existing legal cause test. This Court has not previously provided a tool for how to apply logic and common sense as part of legal causation. When this Court re-instructs on the error of conflating duty/foreseeability with legal causation, it should either adopt the “unreasonable risk” rule, or provide an alternative for applying “logic, common sense, justice, policy, and precedent” to an activity like this one.

D. Being in the Wrong Place at the Wrong Time: *Channel v. Mills*

Finally, Plaintiffs are dismissive of *Channel v. Mills*, 77 Wn. App 268, 890 P.2d 535 (1995), as just a “proximate cause” case. Plaintiffs admit that one party’s alleged negligence (*e.g.*, excessive speed) is not a proximate cause of a collision if it does nothing more than bring the favored and disfavored drivers to the same location at the same time. Here, any alleged omissions by the District—*i.e.*, not having a signed permission slip—simply “allowed” Anderson to be at a location where Klein’s negligence occurred.

Plaintiffs want to hone in on the *Channel* court’s dicta, stating that nothing in its opinion foreclosed other proof—for example, 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.” (Answer to Petition at 11-12). But here, there are no such facts. The type of facts that Plaintiffs point to—*i.e.*, lack of a permission slip, the fact that the students had previously (several minutes earlier) crossed at an unmarked crosswalk, and that students were not bunched up together—are, again, only facts that happened to bring Anderson to the location where Klein fell asleep and left the road. They are akin to the immaterial “speed”-type fact—they are not akin to evidence of “could have braked or swerved.” The only evidence here—conceded by Plaintiffs’ own expert—is that even if the District’s act “caused” Anderson to be on a public sidewalk, instead of within the confines of campus—there was absolutely no time for anyone to have avoided being hit by Klein. Only one second elapsed from the time that Klein hit the curb and the time he struck the pedestrians on the sidewalk.

In short, the District’s alleged negligence was not the cause of the collision because the alleged negligence simply brought Anderson to a place he was otherwise completely lawfully occupying—a public sidewalk. Beyond bringing Anderson to that location, there is no evidence

nor any other proof that the District could have done anything to prevent Klein from impacting the group of students. Under *Channel*, that is insufficient to establish proximate cause.

III. Conclusion

The Court of Appeals should be reversed because of its misapplication of *Lowman*, in contradiction to *Schooley*. This Court is respectfully asked to clarify that, with regard to schools, *even if* an “in loco parentis” duty applies *and* the potential for some harm is foreseeable, legal cause may, in the right circumstances, still prevent a school district’s liability. This is such a case.

Accordingly, the trial court’s grant of summary judgment should be reinstated.

DATED THIS 8th DAY OF September, 2020.



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APPENDIX

Collette v. Tolleson Unified Sch. Dist., 203 Ariz. 359, 54 P.3d 828 (Ariz.App. 2002)

Glaser ex rel. Glaser v. Emporia Unified Sch. Dist., 271 Kan. 178, 21 P.3d 573 (Kan. 2001)

Kazanjian v. Sch. Bd. of Palm Beach County, 967 So. 2d 259, 265, 268 (Fla.App. 4 Dist. 2007)

Orlando v. Broward County, 920 So. 2d 54 (Fla.App. 4 Dist. 2005)

Rogers ex rel. Standley v. Retrum and Prescott Unified Sch. Dist., 170 Ariz. 399, 403-404, 825 P.2d 20 (Ariz.App. 1991)

Thompson v. Ange, 83 A.D.2d 193, 197, 443 N.Y.S.2d 918 (1981)

Tollenaar v. Chino Valley Sch. Dist., 190 Ariz. 179, 945 P.2d 1310 (Ariz.App. 1997)

Wilson v. County of San Diego, 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173 (Cal.App. 2001)

[3] ¶ 8 The real parties in interest argue that Shepard's actions constitute permissible self-representation, see *Connor v. Cal-Az Prop., Inc.*, 137 Ariz. 53, 56, 668 P.2d 896, 899 (App.1983), because he has a future interest in his mother's property. This argument lacks merit. Shepard is not a party. Neither his familial relationship nor his speculative interest as a prospective heir entitles him to represent Suarez. See *Haberkorn v. Sears, Roebuck & Co.*, 5 Ariz.App. 397, 399, 427 P.2d 378, 380 (1967) (non-lawyer husband may not represent wife in a court of law, despite any community interest); *Bloch v. Bentfield*, 1 Ariz.App. 412, 417, 403 P.2d 559, 564 (1965) (non-lawyer plaintiff could represent self but not co-plaintiff family members).

[4] ¶ 9 They further argue that Suarez requires her son's assistance because she speaks little English and suffers from a partial hearing loss. First, these limitations do not require the legal assistance which the court authorized. See *Lisbon v. Merino*, No. 95CO67, 1997 WL 433530, at *3 (Ohio App. Jul. 30, 1997) (discussing trial judge's ethical duty to prevent the unauthorized practice of law and upholding a ruling forbidding defendant's husband to sit with, assist or advise her during a hearing). Second, these circumstances do not necessitate assistance from Shepard. A court interpreter has been appointed in this case. The hearing loss appears to be raised for the first time in this special action. We decline to address issues not raised in the trial court. See *Martin v. Super. Ct.*, 135 Ariz. 258, 261, 660 P.2d 859, 862 (1983). Moreover, the record indicates that Suarez has been able to respond during pretrial hearings, and the suggestion that Suarez suffers from hearing loss requiring assistance is thus not supported by the record before us.

[5] ¶ 10 Finally, the real parties in interest contend that the trial court's order must be upheld to ensure Suarez's due process right to be heard. We disagree. Suarez may represent herself. Suarez may hire a lawyer. The fact that she may not be able to

Bar Committee on Professional Conduct has concluded that a lawyer who negotiates or participates in arbitration with one engaged in the unauthorized practice of law violates Ethical

afford a lawyer in this civil action does not violate due process. See *State ex rel. Corbin v. Hovatter*, 144 Ariz. 430, 431, 698 P.2d 225, 226 (App.1985) (an indigent's right to appointed counsel is recognized only where the litigant may lose his physical liberty if he loses the litigation (citing *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981))); *In re Kory L.*, 194 Ariz. 215, 217-18, 979 P.2d 543, 545-46 (App. 1999) (same).

¶ 11 The court's order exceeded its jurisdiction. Accordingly, we grant relief and vacate the order.

CONCURRING: JON W. THOMPSON,
Presiding Judge, and DANIEL A.
BARKER, Judge.



203 Ariz. 359

Barbara C. COLLETTE and Scott E. MacFarland, wife and husband; Holly L. Scofield, a single woman, Plaintiffs-Appellants,

v.

TOLLESON UNIFIED SCHOOL DISTRICT, NO. 214; Stephen Knight and Joyce Lee Knight, husband and wife; Kino Flores and Anna Flores, Defendants-Appellees.

No. 1 CA-CV 01-0490.

Court of Appeals of Arizona,
Division 1, Department B.

Sept. 12, 2002.

Injured motorists brought action against school district for injuries suffered in automobile accident with student who left school in violation of its modified closed-campus pol-

Rule 5.5(b). Op. Ariz. State Bar I99-07. Participation in litigation is as problematic as participation in arbitration.

icy and caused accident. The Superior Court, Maricopa County, Nos. CV99-019845, CV99-020434, CV99-020524, Michael J. O'Melia, J., granted summary judgment in favor of school district, and motorists appealed. The Court of Appeals, Rayes, Judge Pro Tempore, in a matter of first impression, held that: (1) legal relationship between district and its student did not impose a duty upon the district to control student; (2) district's modified closed-campus policy was not a duty assumed for the protection of third persons; and (3) district was not liable to injured motorists based upon student lunch-hour time schedules.

Affirmed.

1. Schools ⇌89.8(1)

Legal relationship between school district and its student did not impose a duty upon the district to control student, who left school in violation of its modified closed-campus policy and caused automobile accident; school district had no power to restrain student from leaving campus or to control student's operation of his motor vehicle, it only had power to impose discipline after student had violated the modified closed-campus policy, and injured motorists presented no evidence that a high school student who was off campus in violation of school rules posed an unreasonable risk of harm.

2. Negligence ⇌210, 1692

A negligence action may not be maintained in the absence of a duty recognized by law, and the existence of a duty is a question of law for the court.

3. Negligence ⇌211, 214

"Duty" is a concept that arises from the recognition that relations between individuals may impose upon one person a legal obligation for the benefit of another; it is an expression of the sum total of those policy considerations that lead the law to grant protection to a particular plaintiff from a particular defendant.

See publication Words and Phrases for other judicial constructions and definitions.

4. Negligence ⇌210

Courts will find a duty, in general, if reasonable persons would recognize it and agree that it exists.

5. Negligence ⇌214

The relationship between individuals that results in a legal obligation is usually a direct one between the plaintiff and defendant.

6. Negligence ⇌213, 214

There is no requirement that a foreseeable plaintiff be personally known to the defendant for a duty to exist.

7. Negligence ⇌220

There is no common law duty to control the conduct of a third person so as to prevent harm from befalling another. Restatement (Second) of Torts § 314.

8. Negligence ⇌210, 212

Knowledge of a risk of harm and the ability to take some action to ameliorate that risk do not alone impose a duty to act. Restatement (Second) of Torts § 314.

9. Schools ⇌89.8(1)

School district's modified closed-campus policy was not a duty assumed for the protection of third persons, and thus, district was not liable to motorists who were injured by student who left school in violation of its modified closed-campus policy and caused automobile accident, where the district's duty in promulgating and enforcing a modified closed-campus policy for its students was not voluntarily assumed, but already existed.

10. Schools ⇌169

High school students are not persons of dangerous propensities who are likely to cause bodily harm if not controlled.

11. Schools ⇌169

Students are not the prisoners of the school; they are members of the community who regularly come and go among us in the activities of daily life.

12. Schools ⇌89.8(1)

School district was not liable to motorists, who were injured in automobile accident by student who was allegedly hurrying back

to school from off-campus lunch, based upon student lunch-hour time schedules, even if such schedules were negligently imposed, because school had no duty to the injured motorists.

13. Schools ⇐89.8(1)

Even if school owed duty to motorists who were injured in automobile accident with student who had left school in violation of its modified closed-campus policy, motorists failed to establish a breach of duty because student's sneaking off campus did not increase the ordinary risk of vehicular harm that motorists would have faced if student left campus with permission, and imposing a time limit on lunch, as done by virtually all schools and most employers, did not create an unreasonable risk of harm.

Shughart Thomson Kilroy Goodwin Raup, P.C. By Brian M. Goodwin, Rudolph J. Gerber, Lori V. Berke, Phoenix, Attorneys for Appellants Collette and MacFarland.

Herzog and O'Connor, P.C. By Mark O'Connor, Jody Buzicky, Scottsdale, Attorneys for Appellant Scofield.

Sanders & Parks, P.C. By Steven D. Leach, J. Steven Sparks, Michele L. Forney, Phoenix, Attorneys for Defendant-Appellees.

OPINION

RAYES, Judge Pro Tempore.*

¶1 This appeal stems from three consolidated actions. Barbara Collette and Scott MacFarland, wife and husband, and Holly L. Scofield ("appellants") appeal from the trial court's grant of summary judgment to defendants-appellees Tolleson Unified School District No. 214, Stephen Knight, and Kino Flores (collectively "the District").¹ For the reasons that follow, we affirm.

*The Honorable Douglas L. Rayes, Judge Pro Tempore of the Court of Appeals, Division One, has been authorized to participate in this appeal by order of the Chief Justice of the Arizona Supreme Court pursuant to Arizona Constitution, Article 6, Section 31 and A.R.S. §§ 12-145 through 12-147 (1992 and Supp.2001).

STANDARD OF REVIEW

¶2 Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Orme Sch. v. Reeves*, 166 Ariz. 301, 305, 802 P.2d 1000, 1004 (1990). Our review of summary judgment is de novo. *Great Am. Mortgage, Inc. v. Statewide Ins. Co.*, 189 Ariz. 123, 125, 938 P.2d 1124, 1126 (App.1997). In conducting our review, we view the facts in the light most favorable to the party against whom summary judgment was entered. *Id.* at 124, 938 P.2d at 1125.

FACTUAL AND PROCEDURAL HISTORY

¶3 Appellants were injured in an automobile accident on November 19, 1998, at approximately 12:10 p.m., when the car Scofield was driving was struck by a car operated by Zachary Thomason, a student at Westview High School. Four other students were passengers in Thomason's car. The students were returning to school from Desert Sky Mall, about five miles away, where they had driven during their school lunch break. The scheduled lunch period for these students began at 11:20 a.m. and ended fifty minutes later at 12:10 p.m.

¶4 Westview had a modified closed-campus policy. That is, students were not to leave campus during the day without checking out and, in order to check out, needed specific parental permission. Students who violated the policy were subject to disciplinary action. Freshmen were not permitted to leave during school hours, including lunch; sophomores, juniors, and seniors with at least a 3.0 grade point average and their parents' permission were permitted to leave campus at lunch. An identification card or "lunch pass" was required to be presented by the students upon leaving and re-entering campus. The policy was intended to reward

1. Stephen Knight was the principal of Westview High School, a school within the District, and Kino Flores was the superintendent of the District.

students for academic achievement and good behavior.

¶5 Thomason did not have a lunch pass and neither did two other members of the group. After the students decided to drive to the mall for lunch, Thomason went to get his car, which was parked off campus. He proceeded to a campus entrance where a security guard was stationed. When the guard asked Thomason for his pass, he admitted he did not have one. As Thomason continued to walk on, the guard told him he could not leave. Thomason told the guard he needed some books from his car for his next class. The guard again told him he could not leave campus, and Thomason replied, "Well, I need the books, so, basically, I'm going off." The guard made no further attempt to stop Thomason, but did admonish him to come back quickly. The other members of the group left campus through an unguarded gate and joined Thomason, who drove to the mall.

¶6 The students ate lunch at the mall food court and then began the trip back to campus. The students gave conflicting testimony as to whether they were in a hurry to get back to class on time. Because we must view the record most favorably to appellants, we accept as true that Thomason was in a hurry. The accident happened while Thomason was driving westbound on Thomas Road when he pulled into the eastbound lane to pass other westbound vehicles. As he attempted to return to his lane of travel, he lost control of his vehicle, which then collided with Scofield's eastbound car. The investigating officer estimated Thomason's speed prior to impact was approximately seventy-two miles per hour.

¶7 The District sought summary judgment, alleging a lack of duty to appellants, and the trial court agreed. Appellants timely appealed.

DISCUSSION

¶8 Appellants contend the trial court erred by granting summary judgment, and raise two arguments on appeal. First, they claim that the District, by virtue of its modified closed-campus policy, had a duty to pro-

tect the general public from the negligent driving of students who left campus. Second, they argue that the District created an unreasonable risk of harm to the motoring public by placing rigid time constraints on student lunch breaks. We first consider the duty issue.

Determining the Existence of a Duty

[1-4] ¶9 A negligence action may not be maintained in the absence of a duty recognized by law, and the existence of a duty is a question of law for the court. *Markowitz v. Arizona Parks Bd.*, 146 Ariz. 352, 354, 706 P.2d 364, 366 (1985). "Duty" is a concept that arises from the recognition that relations between individuals may impose upon one person a legal obligation for the benefit of another. *Ontiveros v. Borak*, 136 Ariz. 500, 508, 667 P.2d 200, 208 (1983). It is an expression of the sum total of those policy considerations that lead the law to grant protection to a particular plaintiff from a particular defendant. *Id.* Courts will find a duty, in general, if reasonable persons would recognize it and agree that it exists. *Id.*

[5] ¶10 The relationship between individuals that results in a legal obligation is usually a direct one between the plaintiff and defendant. *Id.* In this case, appellants do not contend that they had any direct relationship with the District. They maintain, however, that the parties need not be connected or know each other for a duty to arise, citing *Rudolph v. Arizona B.A.S.S. Federation*, 182 Ariz. 622, 898 P.2d 1000 (App.1995).

[6] ¶11 This argument misconstrues *Rudolph*. Admittedly, there is no requirement that a foreseeable plaintiff be personally known to the defendant for a duty to exist. *Id.* at 624, 898 P.2d at 1002. For example, when one motorist negligently injures another on a public highway, liability is obviously not dependent upon whether they know each other. *Id.* at 625, 898 P.2d at 1003. Their relationship begins with their joint status as motorists, which places them within the foreseeable risk of negligent driving by other motorists. The general duty of reasonable care arises from this relationship and becomes fixed when it is breached and causes damage. The result is a direct relationship

between tortfeasor and injured victim. *Id.* *Rudolph* applied these concepts to find that the organizer of a fishing tournament had a duty to exercise reasonable care in designing and conducting the tournament so as not to injure other users of the lake. *Id.*

¶ 12 In this case, the District did not directly injure appellants; they were injured by Thomason, one of the District's students. We therefore must determine whether to recognize a legal relationship between appellants and the District that gives rise to a duty. Appellants contend that the District's special relationship with Thomason imposed a duty upon the District to control Thomason's conduct so as to prevent injury to them under the circumstances of this case.

[7, 8] ¶ 13 There is no common law duty to control the conduct of a third person so as to prevent harm from befalling another. Restatement (Second) of Torts ("Restatement") § 314 (1965); *Davis v. Mangelsdorf*, 138 Ariz. 207, 208, 673 P.2d 951, 952 (App.1983). Knowledge of a risk of harm and the ability to take some action to ameliorate that risk do not alone impose a duty to act. Restatement § 314; *see also Markowitz*, 146 Ariz. at 356, 706 P.2d at 368 (no consequences for negligence even in light of foreseeable risk if there is no duty).

¶ 14 Section 315 of the Restatement provides an exception to the general rule of non-liability when "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." Restatement § 315 (1965); *Cooke v. Berlin*, 153 Ariz. 220, 224, 735 P.2d 830, 834 (App.1987), *disapproved on*

2. Appellants cite *Grimm v. Arizona Board of Pardons & Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977), for the proposition that a custodian must take affirmative measures to avoid increasing danger to third persons from the known conduct of persons under the custodian's control. *Grimm*, however, applied Restatement § 319 (1965) governing the duty of "those in charge of persons having dangerous propensities," that is, individuals likely to cause bodily harm to others if not controlled. *Id.* at 267, 564 P.2d at 1234. There is no evidence that Thomason had any dangerous propensities or that the District knew or should have known that he was likely to cause bodily harm if not controlled.

other grounds by Dunn v. Carruth, 162 Ariz. 478, 481, 784 P.2d 684, 687 (1989).

¶ 15 Appellants do not argue that they had a special relationship with the District that gave them a right to the District's protection. Rather, their claim is predicated upon section 315(a) of the Restatement—the special relationship between the District and its *students*. Appellants ask us to find that relationship as one which imposed a duty upon the District to control Thomason and prevent him from harming them.² Appellants argue, and we agree, that a school district has a statutory and common law duty to its students.³ While the standard of care that must be met to fulfill that duty has been the subject of several Arizona cases, no reported Arizona case has yet considered the question raised here.

¶ 16 The only conduct of the District at issue here is the alleged negligent enforcement of its modified closed-campus policy. Nothing happened to Thomason while at school that affected his ability to drive a car. Nor was Thomason's driving part of any school activity. *Cf. Bishop v. State Dep't of Corrections*, 172 Ariz. 472, 476, 837 P.2d 1207, 1211 (App.1992) (because school recruited students for youth conference, it thereby assumed a duty of care to them). The car Thomason was driving had not been provided to him by the District and the District had no reason to believe Thomason was an incompetent or dangerous driver. Thomason was driving on a public street with a valid driver's license for a personal purpose.

¶ 17 Plainly, the District had no power to control Thomason's actual operation of his vehicle. Appellants are really arguing that the District's duty to supervise its students

3. Arizona Revised Statutes ("A.R.S.") § 15-341(A)(13), (14), and (17) (Supp.2001) requires the governing board of the school district to hold students to strict account for disorderly conduct on school property; discipline students for disorderly conduct on the way to and from school; and provide for adequate supervision over pupils in instructional and noninstructional activities. The duty of ordinary care owed by a school district and teacher to students while under their charge is recognized in *Chavez v. Tolleson Elementary*, 122 Ariz. 472, 475, 595 P.2d 1017, 1020 (App.1979).

gave rise to a duty to appellants to keep Thomason from driving his car at the particular time this accident happened. We do not believe reasonable persons would agree that such a duty exists, and decline to impose such a duty in this case for both practical and policy reasons.

¶ 18 As a practical matter, we see no benefit in imposing a duty upon a school district concerning the conduct of students over which it has no control. The District has no power or authority to decide which students are authorized to operate motor vehicles on public highways. Nor does it have the power to prevent, revoke, or restrict a student's off-campus driving privileges, or even to prevent a student from choosing to drive without a license. The most the District can do is to impose discipline upon a student for the violation of school rules involving motor vehicles in and around campus or prohibit a student from driving a motor vehicle onto the school campus.

¶ 19 The ability to impose discipline after the fact is significantly different from the power to control a student's conduct before the fact.⁴ Once a student removes himself from school grounds, with or without permission, his decision to drive is outside the supervisory power of school officials. This court has recognized, in another context involving the control of the conduct of a minor, the futility of imposing a duty when there is no concomitant power to discharge it. *Pfaff By and Through Stalcup v. Ilstrup*, 155 Ariz. 373, 373-74, 746 P.2d 1303, 1303-04 (App. 1987) (recognizing that a non-custodial parent living 120 miles away lacked power to control his child).

¶ 20 Moreover, appellants' argument proposes an unreasonable duty on schools with potentially broad ramifications. The duty of control that appellants seek to impose here—to prevent student driving at any time that a student is supposed to be in school—could, if recognized, encompass an even broader range of potential student conduct. School districts might thereby be called upon to

defend their student supervision policies and actions in a variety of other contexts and settings, and all other aspects of a school's schedule could be subject to challenge. We do not believe a school district should be under a duty to anticipate and protect against such eventualities.

¶ 21 The Arizona cases relied upon by appellants that address the liability of schools and school districts are inapposite because they are based upon the undisputed duty of care or supervision owed to a student. This court has twice held, in automobile accident cases, that a school or school district does not, as a matter of law, breach the duty of student supervision by failing to have, or to enforce, a closed campus policy. *Rogers By and Through Standley v. Retrum*, 170 Ariz. 399, 403, 825 P.2d 20, 24 (App.1991); *Tollenaar v. Chino Valley Sch. Dist.*, 190 Ariz. 179, 180, 945 P.2d 1310, 1311 (App. 1997). The basis for these decisions was that the students were not exposed to an unreasonable, or increased, risk of harm simply by driving during school hours as opposed to non-school hours.

¶ 22 Appellants' analogy to *Rudolph* is also misplaced. In that case, the organizer of a fishing tournament, as a user of the lake, was held to have a duty to design the tournament and make rules for the conduct of its members so as to avoid increasing the risk of harm to all other users of the lake. Here, the District was not a user of the highway. Thomason was not involved in any school activity in which the District made rules for use of the public highway which would affect other motorists such as appellants. Thomason's driving was governed by the general laws regulating the operation of a motor vehicle, which were in turn unaffected by any school rule.

¶ 23 Reported cases from other jurisdictions that have considered similar arguments for the imposition of a duty upon a school district for the negligence of a student driver have declined to find such a duty. In the first of these, *Thompson v. Ange*, 83 A.D.2d

4. For example, school officials are not authorized to physically restrain a high school student to prevent that student from leaving campus. A.R.S. § 15-843(b)(3) (Supp.2001) (physical

force by certificated or classified school personnel is permitted only in self-defense, defense of others, and defense of property).

193, 443 N.Y.S.2d 918, 920 (1981), the court refused to impose liability upon school authorities for the negligence of a licensed student driver while driving his own car on a public road. The student was traveling from his high school to a vocational training center, during school hours and in violation of school rules. *Id.* In finding no duty, the court noted that the violation of school rules did not increase the risk of an accident; indeed, the risk existed regardless of any school rule: "With or without rules, neither [the school board nor the district] has any duty to members of the driving public to keep their student . . . off the public highways with his automobile during school hours." *Id.* at 921.

¶24 The Indiana Court of Appeals followed *Ange* in *Wickey v. Sparks*, 642 N.E.2d 262 (Ind.Ct.App.1994). *Wickey* also involved an automobile accident caused by a high school student. *Id.* at 264. After completing morning vocational classes, students were allowed to drive to the high school for afternoon classes if they had parental permission and a valid driver's license. *Id.* The student handbook required safe driving and compliance with all traffic laws. Students were required to return to school by a certain time and were instructed to use a route that was deemed "safer" by school officials. *Id.* at 264-65.

¶25 Finding no duty to the motorist injured by the student's driving, the Indiana court balanced three factors: the relationship of the parties, the reasonable foreseeability of harm, and public policy. *Id.* at 266-68. First, the court found no legal relationship between school authorities and the general public. *Id.* at 266. Second, there was no evidence that a student driving during school hours created the foreseeability of increased harm to the public any more than if that student, or any other licensed driver for that matter, had been driving on the public highway at any other time for any other reason.

5. One justice specially concurred in the result to make clear that he would have ended the court's analysis with the determination that the school district's duty could not exceed a parent's duty. He would not have taken the additional step of establishing an analogy to the parent-child relationship because doing so might impose unwar-

Id. at 267. Finally, as a matter of public policy, the court did not believe that schools should be insurers of their students' conduct or be liable for students' negligent acts away from school. *Id.*

¶26 The California Supreme Court reached a similar result in *Hoff v. Vacaville Unified School District*, 19 Cal.4th 925, 80 Cal.Rptr.2d 811, 968 P.2d 522, 525 (1998), in which a pedestrian was struck by a student motorist when the student, who was exiting a high school parking lot, jumped the curb with his car. The pedestrian sued the school district and advanced the same argument as appellants, that the special relationship between the school district and the student imposed upon the district a duty to exercise reasonable care to control the student so as to protect all persons who were foreseeably endangered by his conduct. *Id.* 80 Cal. Rptr.2d 811, 968 P.2d at 527.

¶27 The California Supreme Court rejected the existence of such a broad duty, finding that the district's duty to supervise students did not run to the off-campus, non-student, pedestrian. *Id.* 80 Cal.Rptr.2d 811, 968 P.2d at 528-29. The court held that the relationship of the district to its student was analogous to that of a parent to a child. Thus, any duty school employees owed to off-campus students could not be greater than the duty the students' parents would owe to those same individuals, and there could be no liability when school personnel neither knew, nor reasonably should know, that a particular student had a tendency to drive recklessly. *Id.*⁵

¶28 The most recent court to consider this issue was *Gylten v. Swalboski*, 246 F.3d 1139 (8th Cir.2001) (applying Minnesota law). In *Gylten*, the student, a licensed driver, had been asked to drive himself and another member of the football team to practice at another school because the usual school bus transportation was not available. *Id.* at 1141. The student driver had an accident en route,

ranted liability in cases where district employees knew or should have known of a child's tendencies to behavior that might injure a non-student in these same circumstances. *Id.* For the same reasons of caution, we also decline to establish that analogy as law in this case.

and the injured motorist sued the school district. In affirming the district court's finding that no duty existed, the appeals court cited with approval the *Ange*, *Wickey*, and *Hoff* cases. *Id.* at 1143–44. As in those cases, the court found no special relationship between the district and the non-student plaintiff. There was no evidence the district knew or should have known that the student was anything but an average licensed driver with parental permission to drive to school. There was no evidence that he had a history of careless driving, and the district did not provide the vehicle. *Id.* at 1144.

¶ 29 In each of these four cases, the nexus between student driving and a school activity or educational function was even stronger than it is in this case. The no-duty decisions of these courts reflect the unwillingness as a matter of policy to extend a school district's responsibility to persons in the position of appellants. We agree with these decisions for the reasons discussed above, and we also find, as in *Ange*, that imposing a duty here would extend the legal consequences "beyond a controllable degree." 443 N.Y.S.2d at 921. *Accord Rodriguez v. Besser Co.*, 115 Ariz. 454, 460, 565 P.2d 1315, 1321 (App.1977) (recognizing that a determination as to duty involves a multitude of policy considerations and a finding of no duty means the burden of holding otherwise is too great).⁶

¶ 30 We also base our decision upon another requirement for the imposition of a duty that we find lacking here and that is a finding that Thomason posed an "unreasonable" risk of harm. See *Alhambra Sch. Dist. v. Superior Court (Nichols)*, 165 Ariz. 38, 41, 796 P.2d 470, 473 (1990) (duty requires the

exercise of care for protection against *unreasonable* risks of harm). Here, appellants presented no evidence that a high school student who is off campus in violation of school rules poses an unreasonable risk of harm. We hold that the legal relationship between the District and its student Thomason did not impose a duty upon the District to control Thomason so as to prevent him from injuring appellants under the facts of this case.

Assumption of Duty

[9] ¶ 31 Appellants also argue that the District's modified closed-campus policy was a duty assumed by the District for appellants' protection as described in Restatement § 324A (1965), which provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or third person upon the undertaking.

Appellants contend that the District "recognized that enforcement of its modified and supervised closed-campus policy was necessary for the protection of students and other motorists."⁷ However, as discussed previ-

6. The extent of the potential burden which appellants seek to place upon the District is best illustrated by their own expert's view of the undertaking necessary for the District to meet the standard of care before it could set a simple lunch break policy: "undertake a comprehensive study of traffic conditions near and surrounding the campus to ascertain the impact of their modified closed campus policy on nearby traffic volumes and roadway capacities [and] . . . evaluate and study distances of actual student destinations during the lunch period."

7. Although we will accept for purposes of argument that the District did recognize this, we note that the record does not support so broad a

construction. Appellants cite the deposition testimony of a representative of the District to support their argument that the District knew its policy was intended to protect the public. The excerpt quotes an assistant principal to the effect that the school practices a "good neighbor policy" towards the neighboring community whereby it attempts to provide protection to the general public against certain risks. In the excerpt quoted by appellants, the assistant principal was addressing the school's concern for student conduct that might not be that of a "good neighbor;" she was not discussing student driving. Indeed, the assistant principal clearly recognized the impossibility of the District controlling off-campus conduct and repeatedly emphasized that the Dis-

ously, the District's "recognition" that enforcement of its student supervision policies also acted to protect the public is not, by itself, enough to impose a *duty* to act for the protection of the public. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368.

¶ 32 In any case, § 324A is inapplicable here. This section operates to create a duty from a voluntary undertaking by one who otherwise has no duty to act. See *Barnum v. Rural Fire Prot. Co.*, 24 Ariz.App. 233, 237, 537 P.2d 618, 622 (1975) (applying Restatement § 323, a related aspect of voluntary undertakings). The District's duty in promulgating and enforcing a modified closed-campus policy for its students was not voluntarily assumed, but already existing.

[10, 11] ¶ 33 In addition, because appellants do not argue that subsections (b) or (c) of § 324A apply in this case, a duty under § 324A could be found only if the District's failure to exercise reasonable care to keep students confined to campus at specific times increased the risk of harm from their conduct. Appellants' argument is tantamount to asking us to find that a high school student, when not at school and under the school's supervision, poses an increased risk of harm to the community as a matter of law. We see no basis for such a determination. High school students are not persons of "dangerous propensities" who are "likely to cause bodily harm" if not controlled. There is no evidence that students who sometimes break attendance rules are a danger to the public. Students are not the prisoners of the school; they are members of the community who regularly come and go among us in the activities of daily life.

¶ 34 Moreover, no necessary connection has been established here between a student who leaves campus in violation of the rules and negligent driving. No evidence was presented that a student who leaves *with* permission is less likely to be involved in an automobile accident than one who does not. Many students drive to and from school, to and from jobs, for errands, and for pleasure.

trict's policy was to discipline only that conduct which affected the entire student body.

In so doing, they expose themselves and others to the risk of motor vehicle accidents, and it cannot be said as a matter of law that student driving is qualitatively more risky during a daytime school lunch break than at any other time a student driver might be on the road. We are unwilling to hold that students outside the reach of school supervision pose an increased risk of harm to the general public.

"Rush Hour" Mentality

[12] ¶ 35 Appellants contend that the District's "rigid time limit" for lunch created a "rush-hour" mentality for student drivers. They claim that the District should have known that students were regularly driving to Desert Sky Mall for lunch and that not enough time was allocated for them to make such a trip safely. They further contend that the time schedule issue makes this case similar to *Bishop* and *Rudolph*.

¶ 36 Again, we disagree. The time schedules in both *Bishop* and *Rudolph* were relevant to whether a duty had been breached, not whether one existed. Because we hold that the District had no duty to appellants, the District cannot be liable to them based upon student lunch-hour time schedules, even if such schedules might be "negligently" imposed. *Markowitz*, 146 Ariz. at 356, 706 P.2d at 368.

No Breach of Duty

[13] ¶ 37 Even if this court accepted appellants' argument that the District owed them a duty, summary judgment would nonetheless be appropriate. The evidence viewed most favorably to appellants fails to establish a breach of duty. Thomason's sneaking off campus did not increase the ordinary risk of vehicular harm that appellants would have faced if Thomason left campus with permission. Imposing a time limit on lunch, as done by virtually all schools and most employers, did not create an unreasonable risk of harm.⁸ This case is indistinguishable from *Rogers* and *Tollenaar*. Here, as in those

8. As discussed above in note 6, the burden appellants would have us impose on the District in determining the length of the lunch break is not reasonable.

cases, appellants were exposed only to the ordinary risks of vehicular collision that “members of our mobile society face . . . whenever they are in cars.” *Rogers*, 170 Ariz. at 403, 825 P.2d at 24.

CONCLUSION

¶ 38 The judgment of the trial court is affirmed.

CONCURRING: WILLIAM F. GARBARINO, Presiding Judge and EDWARD C. VOSS, Judge.



203 Ariz. 368

Jeremy FLANDERS, a single man, Plaintiff–Appellee, Cross–Appellant,

v.

MARICOPA COUNTY, a political subdivision of the State of Arizona; The Maricopa County Sheriff’s Office, an administrative agency of Maricopa County; Joseph M. Arpaio and Ava Arpaio, husband and wife, both individually and in his capacity as chief administrative officer of the Maricopa County Sheriff’s Office, Defendants–Appellants, Cross–Appellees.

No. 1 CA–CV 01–0239.

Court of Appeals of Arizona,
Division 1, Department A.

Sept. 26, 2002.

Inmate brought action against sheriff, sheriff’s office, and county for negligence and § 1983 violations after inmate was attacked by other inmates at jail facility. The Superior Court, Maricopa County, No. CV 97-008668, Jeffrey S. Cates, J., granted county’s motion for summary judgment on § 1983 action but entered judgment on a jury verdict for inmate against all defendants on negligence

action and entered judgment against sheriff and sheriff’s office on § 1983 action. Sheriff, sheriff’s office, and county appealed, and inmate cross-appealed. The Court of Appeals, Lankford, J., held that: (1) sheriff, sheriff’s office, and county were not entitled to mistrial based on jury verdict forms that contained inconsistent compensatory damages awards for inmate on both claims of negligence and civil rights violations; (2) evidence indicated that sheriff and sheriff’s office knew that all prisoners of particular jail facility were subjected to a substantial risk of violence to support finding that sheriff and sheriff’s office acted with deliberate indifference to inmate; (3) evidence was sufficient to support punitive damages award against sheriff in § 1983 action; and (4) county was liable as a matter of law for § 1983 action.

Affirmed in part; reversed and remanded in part.

1. Appeal and Error ⇔930(1), 1001(1)

An appellate court must review the evidence in a light most favorable to sustaining the jury verdict and affirm the judgment if substantial evidence supports it.

2. Appeal and Error ⇔989

An appellate court must not take the case away from the jury by combing the record for evidence supporting a conclusion or inference different from that reached by the trial court.

3. Appeal and Error ⇔1003(2)

Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

4. Trial ⇔358

Sheriff, sheriff’s office, and county were not entitled to mistrial in action brought by inmate for negligence and civil rights violations, based on jury verdict forms that contained inconsistent compensatory damages awards for inmate on both claims of negligence and civil rights violations, where court reinstructed jury that amount on each verdict form had to be the same, and as a result

Todd M. GLASER, a minor, by and through his next friends, Leland and Pagan GLASER, Appellants,

v.

EMPORIA UNIFIED SCHOOL DISTRICT NO. 253, Board of Education; Douglas EPP, in his capacity as an individual and as a representative or employee of Emporia Unified School District No. 253; and Patricia Gould-Lipson, Appellees.

No. 84,726.

Supreme Court of Kansas.

April 20, 2001.

Middle school student, who was injured when struck by a car after he ran off school grounds into public street before classes began, brought personal injury action against driver, school district, and teacher. After student settled with driver, the District Court, Lyon County, John O. Sanderson, J., entered summary judgment to school district and teacher. Student appealed. Following transfer from the Court of Appeals, the Supreme Court, Allegrucci, J., held that student could not recover in negligence against school district and teacher, absent any evidence that school assumed a duty to render services calculated to protect or supervise student, either by affirmative acts or by a promise to act.

Affirmed.

1. Schools \S 89.8(1)

Student who was struck and injured by a car, after he ran off the school grounds, across a parking area, and into a city street before classes began, could not recover in negligence against school district and teacher, absent any evidence that school district assumed a duty to render services calculated to protect or supervise student, either by affirmative acts or by a promise to act.

2. Appeal and Error \S 842(4)

Negligence \S 1692

Whether a duty exists is a question of law, and the Supreme Court's review of questions of law is unlimited.

3. Judgment \S 185(6)

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. K.S.A. 60-256(c).

4. Negligence \S 218

One who does not, by an affirmative act, assume an obligation to render services does not owe a duty to third persons. Restatement (Second) of Torts \S 324A.

5. Schools \S 89.2

A school district is under no duty to supervise or protect students who are not in its custody or control, unless it has assumed the duty to do so by an affirmative act or promise.

Syllabus by the Court

1. Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

2. Whether a duty exists is a question of law. This court's review of questions of law is unlimited.

3. One who does not assume an obligation to render services does not owe a duty to third persons.

4. A school district is under no duty to supervise or protect students who are not in its custody or control, unless it has assumed the duty to do so by an affirmative act or promise.

Michael C. Helbert, of Law Offices of Michael C. Helbert, of Emporia, argued the cause and was on the brief for appellants.

J. Steven Pigg, of Fisher, Patterson, Saylor & Smith, L.L.P., of Topeka, argued the cause, and Michelle R. Stewart, of the same firm, was with him on the brief for appellees.

The opinion of the court was delivered by ALLEGRUCCI, J:

This is a personal injury action brought on behalf of Todd Glaser, a seventh-grader at Lowther Middle School in Emporia, Kansas. When he was chased by another student, he ran off school grounds into a public street. He was injured in a collision with a car driven by Patricia Gould-Lipson. Glaser settled his claims against the driver, and the district court granted summary judgment in favor of Emporia School District No. 253 (school district) and Douglas Epp, a teacher. Glaser appeals from the trial court's entry of summary judgment. The case was transferred from the Court of Appeals pursuant to K.S.A. 20-3018(c).

In its memorandum decision granting the summary judgment motions of the school district and the teacher, the district court reviewed a number of controverted factual issues. The only factual findings the district court determined to be necessary to its decision are the following:

"1. The plaintiff was injured when he collided with an automobile on the 22nd day of December 1993.

"2. Prior to the collision, the plaintiff was on school property that was unsupervised by Emporia Unified School District No. 253 employees.

"3. The collision between the plaintiff and an automobile driven by Patricia Gould-Lipson occurred prior to classes beginning, and the collision occurred on a public street adjacent to school property."

The district court also noted that it was undisputed that the school district "does not exercise supervision before school until a student is in the building."

On appeal, both parties supply additional facts with references to the record. The following "additional facts" are not disputed:

On December 22, 1993, Glaser was a 12-year-old seventh-grade student at Lowther South. He lived approximately a 15- to 20-

minute walk from school, and he normally got to school by walking. School began at 8:10 a.m. On the day he was injured, Glaser arrived at school between 7:30 a.m. and 7:45 a.m.

A school district policy, which was approved June 22, 1993, provided: "Teachers who observe students in a potentially dangerous situation should attempt, as they are reasonably able, either to halt or prevent injury to students or property."

[1] The sole issue on appeal is whether the school district owed a duty to Glaser under the circumstances.

The school district and Epp sought summary judgment on several grounds, including immunity from liability under the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.*, the statute of repose, K.S.A.2000 Supp. 60-513(b), and the absence of an attractive nuisance. The ground on which the district court sustained the summary judgment motions of the school district and Epp is that, in the circumstances, neither had a duty to supervise Glaser. On appeal, duty is the only issue. Glaser complains of the district court's conclusions that the school district did not owe a duty to supervise him and that the school district had not assumed a duty to supervise him.

[2, 3] Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. K.S.A.2000 Supp. 60-256(c). On appeal, we apply the same rules. Where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Saliba v. Union Pacific R.R. Co.*, 264 Kan. 128, 131-32, 955 P.2d 1189 (1998). Whether a duty exists is a question of law. *Nero v. Kansas State University*, 253 Kan. 567, Syl. ¶ 1, 861 P.2d 768 (1993). This court's review of a question of law is unlimited.

In concluding that the school district and Epp owed no duty to supervise Glaser in the

circumstances of this case, the district court cited *Honeycutt v. City of Wichita*, 251 Kan. 451, 836 P.2d 1128 (1992). The district court stated: “In the instant case, the plaintiff has not shown that a duty exists. While the facts are not identical to the *Honeycutt* case, they are similar in that USD 253 does not exercise supervision before school until a student is in the building.”

Honeycutt also was a personal injury action brought on behalf of a minor in which summary judgment was granted in favor of the school district. This court affirmed. Jeremy Honeycutt attended morning kindergarten. Railroad tracks ran between his house and the school. He usually was taken or escorted to school by an adult, but on March 5, 1987, Jeremy and another student were walking home after school unaccompanied by an adult. Jeremy ran alongside a moving train and fell under the wheels.

Jeremy argued that the school district owed him three duties: “(1) to retain him until an authorized adult took custody of him, (2) to retain him on school property through a ‘hold back’ policy in the event of a train operating off school property, and (3) to establish a safety patrol at the railroad crossing.” 251 Kan. at 463, 836 P.2d 1128. His bases for arguing that the school district owed him those duties were that the student-school district relationship created a duty and that the school district assumed a duty by its conduct and written policies.

The court flatly rejected the argument that a duty was created by the student-school district relationship. Jeremy relied on *Fudge v. City of Kansas City*, 239 Kan. 369, 720 P.2d 1093 (1986), and *Cansler v. State*, 234 Kan. 554, 675 P.2d 57 (1984), which the court readily distinguished.

For his theory that the school district assumed a duty, Jeremy relied on Restatement (Second) of Torts § 324A (1964). Jeremy argued that school district documents showed its assumption of duty, but the court concluded to the contrary that Jeremy’s argument was undermined by a school board policy that stated: “[S]chool personnel ‘are neither legally liable nor legally responsible for pupils en route to and from school if the pupils walk or furnish their own transporta-

tion.’” *Honeycutt*, 251 Kan. at 466, 836 P.2d 1128. Likewise, the court viewed a school district policy “restricting the area of teacher responsibility to ‘the building’ and ‘the school site’” as a detriment to the claim that the school district affirmatively assumed a duty to ensure Jeremy’s safety before and after school. 251 Kan. at 466–67, 836 P.2d 1128.

With regard to the claim that the school district assumed a duty, the court reviewed a number of cases from other jurisdictions. The court’s discussion of the foreign cases is quoted here in full:

“Both parties cite authority from other jurisdictions. Jeremy cites *Jefferson County School Dist. R-1 v. Justus*, 725 P.2d 767 (Colo.1986), and *Brown v. Florida State Bd. of Regents*, 513 So.2d 184 (Fla. [1st] Dist.App.1987). In *Justus*, a first-grade student was struck by a car off school premises when he rode his bicycle home from school. The Supreme Court of Colorado stated:

‘A plaintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook to render a service that was reasonably calculated to prevent the type of harm that befell the plaintiff. . . . Second, a plaintiff must also show either that he relied on the defendant to perform the service or that defendant’s undertaking increased plaintiff’s risk.’ 725 P.2d at 771.

“The court concluded that

‘respondent has raised a genuine issue as to whether by distributing the handbook and by placing teachers at the front of the school, the school district undertook the task of enforcing a rule that students in the lower grades were not eligible to ride bicycles to and from school. Where, as here, a plaintiff presents some evidence of an affirmative act or promise to act sufficient to create an inference that the defendant undertook a service that would have prevented plaintiff’s injuries, that factual question precludes summary judgment on the issue of whether the defendant undertook such a service.’ 725 P.2d at 772.

“The case at hand can be distinguished from the *Brown* case, in which the dece-

dent drowned in a lake maintained and controlled by the Board of Regents. For *Brown* and the instant case to be similar, the question in *Brown* would have had to have been whether the Board had assumed a duty to maintain and control the lake.

“U.S.D. No. 259 cites cases from New York and California. We believe this line of cases to be more persuasive than the Colorado case. Upon similar facts, the New York courts have held a school does not have a legal duty to supervise students who are beyond the school’s lawful control and custody. See *Pratt v. Robinson*, 39 N.Y.2d 554, 384 N.Y.S.2d 749, 349 N.E.2d 849 (1976); *Patella v. Ulmer*, 136 Misc.2d 34, 518 N.Y.S.2d 91 (S.Ct.[Sup.]1987).

“The school’s duty is thus coextensive with and concomitant to its physical custody and control over the child. When that custody ceases because the child has passed out of the orbit of its authority in such a way that the parent is perfectly free to reassume control over the child’s protection, the school’s custodial duty also ceases [citations omitted].’ *Pratt*, 39 N.Y.2d at 560 [, 384 N.Y.S.2d 749, 349 N.E.2d 849]. “To hold otherwise would create an intolerable burden for the school. *Patella*, 136 Misc.2d at 37 [, 518 N.Y.S.2d 91].

“The California courts also have held that ‘[a] school district is under no duty to supervise, or provide for the protection of its pupils, on their way home, unless it has undertaken to provide transportation for them.’ *Kerwin v. County of San Mateo*, 176 Cal.App.2d 304, 307, 1 Cal.Rptr. 437 (1959); see *Gilbert v. Sacramento Unified School Dist.*, 258 Cal.App.2d 505, 65 Cal. Rptr. 913 (1968); *Wright v. Arcade School Dist.*, 230 Cal.App.2d 272, 40 Cal.Rptr. 812 (1964).

“The New York and California cases are consistent with the rationale and policy expressed in *Hackler v. U.S.D. No. 500*, 245 Kan. 295, 777 P.2d 839 (1989). In *Hackler*, a nine-year-old student was struck by a vehicle while crossing a busy street after getting off the school bus at his designated stop. The school district provided bus stops on both sides of the road. The parents decided which bus the

student would ride and selected the bus route that stopped on the other side of the road. The student sued, alleging the school district owed him the following duties:

‘1. To instruct him to cross the street in front of the school bus;

‘2. to unload him on that side of the street on which he lived;

‘3. to require him to cross the street in front of the school bus; and

‘4. to prohibit him from being unloaded at a bus stop on the side of [the road] opposite that on which he lived.’ 245 Kan. at 297 [, 777 P.2d 839].

“This court held the school district did not breach a duty owed to the student, reasoning that

‘parents are in the best position to determine which bus their child should ride. This decision may hinge on where the child is to go after school. The [school district] is not in a position to know where each child is to go after school and the location of those various places.’ 245 Kan. at 300 [, 777 P.2d 839].

“Although no school-supplied transportation was involved in the instant case, the rationale still applies. Parents are in the best position to determine their children’s transportation needs to and from school.” 251 Kan. at 468–70 [, 836 P.2d 1128].

In the present case, according to Glaser, it necessarily follows from the district court’s ruling that the school district’s duty to supervise students does not begin until classes are in session. It does not necessarily, or even logically, follow from the district court’s ruling that the school district’s duty to supervise students does not begin until classes are in session. Because his inaccurate assertion is the springboard for most of his argument, it requires little comment.

Glaser argues that this court rejected the notion that supervision need not begin before commencement of classes in *Sly v. Board of Education*, 213 Kan. 415, 516 P.2d 895 (1973). Glaser’s view of *Sly* is inaccurate. Sly was injured in a fight with two other students, which occurred outside a junior high school before classes began in the morning. The

school grounds were unsupervised. In a negligence and nuisance action, the district court granted summary judgment against Sly and in favor of the school district and school officials. This court affirmed.

Glaser cites *Greider v. Shawnee Mission Unified School D.* 512, 710 F.Supp. 296 (D.Kan.1989), on the subject of this court's view of a duty to protect students. In a discussion of the discretionary function exception to the Kansas Tort Claims Act, the federal district court stated:

"The Kansas Supreme Court has never addressed the question of whether public schools and teachers owe a duty to properly supervise students and to take reasonable steps to protect students' safety. However, it is likely that the court would recognize such a duty if the question were presented to it. This is apparent from dicta in at least two cases. See *Paulsen v. Unified School District No. 368*, 239 Kan. 180, 717 P.2d 1051 (1986) (court assumed that a duty to properly supervise and provide a safe environment to students existed, but affirmed the trial court's dismissal on the grounds that no breach of the duty had been shown); *Sly v. Board of Education*, 213 Kan. 415, 516 P.2d 895 (1973) (court assumed that the duty to exercise due care for students existed and affirmed the trial court's finding that no evidence of breach of the duty existed). The duty is generally recognized in those jurisdictions which have addressed the question. See Annotation, *Tort Liability of Public Schools and Institutions of Higher Learning for Injuries Resulting from Lack of Insufficiency of Supervision*, 38 A.L.R.3d 830 (1971)." 710 F.Supp. at 299.

Cases cited by Glaser from other jurisdictions include *Raymond v. Paradise Unified School Dist.*, 218 Cal.App.2d 1, 31 Cal.Rptr. 847 (1963); *Tymkowicz v. San Jose, Etc. Unified School Dist.*, 151 Cal.App.2d 517, 312 P.2d 388 (1957); *Bauer v. Minidoka School Dist. No. 331*, 116 Idaho 586, 778 P.2d 336 (1989); *Titus v. Lindberg*, 49 N.J. 66, 228 A.2d 65 (1967); and *Rice v. School District No. 302, Pierce Co.*, 140 Wash. 189, 248 Pac. 388 (1926). The general principle for which Glaser cites these cases is that schools and

school personnel have a duty to protect the safety of students.

In the New Jersey case, a 9-year-old student named Titus was on the grounds of his school, headed for the rack to put up the bicycle that he had ridden there, when he was struck by a paper clip shot from an elastic band by 13-year-old Lindberg. The principal of Titus' school "stated flatly that he maintained 'supervision outside the building on the grounds between eight and 8:30.'" 49 N.J. at 72, 228 A.2d 65. For the reason that the principal "assumed the responsibility for supervising the school grounds beginning at 8 a.m.," the New Jersey court rejected the argument that his responsibilities did not begin before 8:15. 49 N.J. at 74, 228 A.2d 65. The New Jersey court gave an additional reason:

"They customarily began coming at 8 a.m. and that was reasonable. Smith[, the principal,] undoubtedly knew of their coming and of their 'keep away' games. When all this is coupled with the fact that Fairview was also a pickup site for the older students, the dangers and the need for reasonable supervision from 8 a.m. on were entirely apparent. [Citation omitted.]" 49 N.J. at 75, 228 A.2d 65.

Titus could be distinguished from the present case on the ground that Lowther Middle School was not a designated pickup site for older students. In addition, in contrast with the position taken by this court in *Sly*, the deliberate conduct of the student who actually inflicted the injury was not considered to be the proximate cause. See 49 N.J. at 76, 228 A.2d 65.

In *Tymkowicz*, a 10-year-old student died from injuries sustained on the school grounds while he was engaged in a game with other students. The object of the game was to render a participant unconscious. The principal admitted knowing that the game was played, and there was no evidence of any efforts by school authorities to stop the game. The California Education Code contained a provision requiring that "[e]very teacher in the public schools shall hold pupils to a strict account for their conduct . . . on the playgrounds, or during recess." 151 Cal. App.2d at 522, 312 P.2d 388. The distinction

with the present case is obvious. The injury occurred during recess, on school grounds, and we have no comparable statute.

In *Bauer*, the Idaho court rejected the claim that that state's recreational use statute immunized the school district from liability to a student who was injured on school property shortly before school began. The Idaho court believed that the "special relationship that a student has to a school district would be substantially impaired if the recreational use statute were applied to injuries children suffered while on school premises as students." 116 Idaho at 588-89, 778 P.2d 336. In contrast, this court in *Jackson v. U.S.D. 259*, 268 Kan. 319, 995 P.2d 844 (2000), held that the recreational use statute immunized the school from liability for an injury occurring to a student in a school gymnasium during a required physical education class. See *Boaldin v. University of Kansas*, 242 Kan. 288, 747 P.2d 811 (1987).

In *Raymond*, a 7-year-old boy waited on the grounds of the high school for the school bus that took him to his elementary school. He was injured when he ran toward the bus before it came to a halt, placed his left hand on the side of the bus, and fell backward on the sidewalk. The jury found that the school district was negligent in failing to provide for supervision of the bus boarding area. A basis on which the appellate court affirmed the judgment were statutory provisions obliging the school district, once it furnished transportation for students, to provide a reasonably safe system. 218 Cal.App.2d at 9, 31 Cal.Rptr. 847. Other considerations were: (1) that supervision of the bus stop on the grounds of the high school rather than in an isolated place was a practical possibility for the school district, (2) that it was a very busy stop, with up to three busloads of students arriving and departing there at peak periods, and (3) that small children were present. 218 Cal.App.2d at 10, 31 Cal.Rptr. 847.

Although there are some similarities between the present case and *Raymond*, differences prevail. The injured student in the California case, Raymond, was 7, and Glaser was a seventh-grader. Raymond was injured at a school district designated bus stop, and

Glaser was injured when he ran off school grounds into a public street.

In *Rice*, an 11-year-old student was severely shocked and burned on the school grounds before classes began when he pulled on a radio aerial wire, which had broken after being installed for a PTA entertainment, and the radio wire dropped on electric wires. Earlier, several teachers passed by, saw Rice and other boys tugging on the broken wire, and told them to play elsewhere. In response, Rice played football for awhile before returning to the wire. School policy provided playground supervision for one-half hour before classes, but there was no supervision at the time of the injury. There was disputed evidence about whether the injury occurred within the period that should have been supervised. The disposition of the case in the student's favor, however, did not turn on the issue of supervision. The school district was charged with the duty "from the time the defendant had knowledge that the wire was dangling down and reaching the ground where pupils might take hold of it" to put the school grounds in a reasonably safe condition. 140 Wash. at 192, 248 P. 388.

The present case does not involve an extraordinary, dangerous condition on the school grounds such as the one that existed in *Rice*. Nonetheless, Glaser quotes Section 364 of the Restatement (Second) of Torts, Creation or Maintenance of Dangerous Artificial Conditions (1964). Generally stated, § 364 provides that a landholder is subject to liability for injuries caused by a structure or other artificial condition created by the landholder or with his permission. Proximity to the public street and the absence of a fence seem to be the conditions complained of by Glaser. Neither would seem to be a structure or other artificial condition within the meaning of § 364. With regard to this claim, the trial court stated that Glaser "provides no evidence that would meet the duty announced in *Bacon v. Mercy Hosp. of Ft. Scott*, 243 Kan. 303, 756 P.2d 416 (1988)."

Glaser relies on *Jackson*, 268 Kan. 319, 995 P.2d 844, and *Boaldin*, 242 Kan. 288, 747 P.2d 811, for the proposition that the school district has a duty to maintain the school

grounds in a condition that is safe for uses that can reasonably be anticipated. As we have seen, however, the decisions in *Jackson* and *Boaldin* were based on the recreational use exception to liability under the Kansas Tort Claims Act.

Glaser asserts that his classroom was locked at the time of his injury, thus forcing him to remain outside on the unsupervised school grounds. There is nothing in the district court's findings of fact that would support the assertion. Nor does Glaser supply a reference to the record where his assertion is supported. The school district, on the other hand, furnished a reference to the record where there is evidence that Glaser had the option of waiting inside the school building where the school provided supervision before classes began. Moreover, the trial court stated in its Memorandum Decision that "USD 253 does not exercise supervision before school *until a student is in the building.*" (Emphasis added.)

The district court found that neither the school district nor Epp had assumed a duty to supervise Glaser. Glaser's contention that they had assumed a duty to supervise rests on written school district policies, including the following provisions: "Students shall be under the supervision of appropriate school personnel at all times when they are under the jurisdiction of the school," and "[t]eachers who observe students in a potentially dangerous situation should attempt, as they are reasonably able, either to halt or prevent injury to students or property." Glaser contends that the policies constitute "clear evidence" that the duty to prevent injury was not limited to the interior of the building or the time when classes are in session. He further contends that the policies demonstrate that the school district assumed a duty to protect students in any potentially dangerous situation. We disagree.

In the trial court, the school district included in its motion for summary judgment the following statements of fact:

"13. The District provided no supervision before school outside the building. (Citation omitted.)

"14. The District policy does require teachers to intervene if dangerous activity

is observed even if the teacher is not specifically assigned to supervision. (Citation omitted.)"

In his response, Glaser admitted both statements and added the following to No. 14:

"Plaintiff would add that on December 22, 1993, Unified School District No. 253 had in effect a policy requiring teachers 'who observe students in a potentially dangerous situation [to]attempt, as they are reasonably able, either to halt or prevent injury to students or property.' [Citation omitted.] Prior to the accident, a teacher for Lowther Middle School, Douglas Epp, observed Todd and Justin playing and running in an area not ten feet away from Congress street. [Citation omitted.] Despite observing the students in a potentially dangerous situation, he took no action. He simply kept walking, even though he would later admit to Pagan Glaser that he thought 'somebody was going to run out in that street and get hit by a car.' [Citation omitted.]"

In its reply, the school district countered that "Epp's testimony was that he did caution the boys from playing around the cars near the street." The school district characterized Glaser's additional comments as "extraneous" and provided no record cite for Epp's asserted testimony. In other words, the school district was trying to avoid a dispute as to a material fact that might preclude summary judgment. The trial court, it seems, agreed with the school district that the question of an assumption of duty could be based strictly on the language of the policies without reference to the particular facts of the incident in which Glaser was injured. The district court's Memorandum Decision contains no mention of this factual basis. Thus, the issue for this court is simply whether the school district, by adopting its written policies, assumed to protect the safety of students gathered on the school grounds before classes began. Epp's presence and conduct are not relevant to the court's review of the trial court's entry of summary judgment on the assumption of duty question.

[4, 5] The legal basis for Glaser's contention is Restatement (Second) of Torts § 324A (1964), and its interpretation in *Honeycutt*, 251 Kan. 451, 836 P.2d 1128, and *McGee v. Chalfant*, 248 Kan. 434, 806 P.2d 980 (1991). Section 324A, which involves liability to third persons for negligent performance of an undertaking, provides:

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

"(a) his failure to exercise reasonable care increases the risk of such harm, or

"(b) he has undertaken to perform a duty owed by the other to the third person, or

"(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

In *Honeycutt*, the court engaged in an extensive discussion of § 324A and its application, which is instructive and, therefore, is quoted here:

"This court has accepted § 324A's theory of liability and established the following principles:

"The threshold requirement for the application of the Restatement (Second) of Torts § 324A (1964) is a showing that the defendant undertook, gratuitously or for consideration, to render services to another. In order to meet this requirement, the evidence must show the defendant did more than act, but *through affirmative action* assumed an obligation or intended to render services for the benefit of another."

'A duty is owed to third persons by one who undertakes, *by an affirmative act*, to render aid or services to another and then is negligent in the performance of that undertaking.' *McGee*, 248 Kan. 434, Syl. ¶ 5, 6 [, 806 P.2d 980]. (Emphasis added.) 'For a defendant to meet the threshold requirements of § 324A, the defendant must not only take affirmative action to render services to another, but the person

to whom the services are directed *must accept such services* in lieu of, or in addition to, such person's obligation to perform the services.' *Gooch*, 246 Kan. at 676 [, 792 P.2d 993]. (Emphasis added.)

'The extent of the undertaking should define the scope of the duty.' *McGee*, 248 Kan. at 442 [, 806 P.2d 980].

'[O]ne who does not assume an obligation to render services does not owe a duty to third persons.' *Anderson v. Scheffler*, 248 Kan. 736, Syl. ¶ 3, 811 P.2d 1125 (1991).

"In *Gooch*, 246 Kan. at 669-70 [, 792 P.2d 993], this court reviewed recent cases applying § 324A:

'In each of the Kansas cases imposing liability under § 324A, it was clear that [the threshold] requirement was met. In *Schmeck v. City of Shawnee*, 232 Kan. 11, 651 P.2d 585 (1982), KCPL agreed to and was hired to render traffic engineering services to the City. In *Ingram v. Howard-Needles-Tammen & Bergendoff*, 234 Kan. 289, 672 P.2d 1083 (1983), the Kansas Turnpike Authority hired Howard Needles as its consulting engineers to make safety inspections of the turnpike and thus render services to the KTA. In *Cansler v. State*, 234 Kan. 554, 675 P.2d 57 (1984), there was evidence the county agreed with Kansas State Penitentiary officials and other law enforcement agencies to notify these agencies of escapes from the penitentiary. In *Fudge v. City of Kansas City*, 239 Kan. 369, 720 P.2d 1093 (1986), the police were obligated by a general police department order to take certain incapacitated persons into custody. Further, in the cases not finding a duty, it was clear there was no undertaking. In *Hanna v. Heur[Huer], Johns, Neel, Rivers & Webb*, 233 Kan. 206, [662 P.2d 243 (1983),] the court found the defendant architects did not agree to be responsible for safety practices on the job-site and took no actions indicating they assumed any such responsibility. In *Meyers v. Grubaugh*, 242 Kan. 716, 750 P.2d 1031 (1988), the State simply allowed the intoxicated employee to leave work. Thus, in all cases where it was found that the parties undertook to render services to another, they agreed to or were obligated

to perform services for another that were accepted and thus the initial requirement of § 324A was met; and, in all cases where liability was not imposed, the defendants had no agreement and took no affirmative action that could be construed as an intentional undertaking to render services to another.’ “ 251 Kan. at 464–65, 836 P.2d 1128.

In *Honeycutt*, the court rejected plaintiff’s argument that the school district assumed a duty by its written policies. 251 Kan. at 464–68, 836 P.2d 1128.

Within the discussion of *Honeycutt* in Glaser’s brief, he quotes from a Colorado case that the court quoted in *Honeycutt*. In *Jefferson County School Dist. R-1 v. Justus*, 725 P.2d 767 (Colo.1986), the school district had a rule that young students were not eligible to ride bicycles to and from school. A first-grade student was injured when he was struck by a car off school premises riding his bicycle home from school. The Colorado court concluded that summary judgment was precluded by the factual issue whether “by distributing the handbook and by placing teachers at the front of the school, the school district undertook the task of enforcing” the bicycle rule. 725 P.2d at 772. Although Glaser seems to rely on *Justus*, that case actually highlights a weakness in Glaser’s argument. In *Justus*, the Colorado court found a question of fact relating to an assumption of duty rather than an assumption of duty. Moreover, it was not merely the school district’s having a written policy that created the question of assumption of duty. Instead, it was affirmative acts taken by the school district in furtherance of enforcing the bicycle rule that gave rise to the question of whether a duty had been assumed. In this regard, the Colorado court stated: “A plaintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook to render a service that was reasonably calculated to prevent the type of harm that befell the plaintiff.” 725 P.2d at 771.

Here, as in *Honeycutt*, the injury occurred off school premises and at a time when the student was not on school property or in school custody. Todd was injured after he

ran off the school grounds, across a parking area and into a city street. The school district never undertook to render services calculated to protect or supervise Todd, either by affirmative acts or promise to act, nor was Todd under the control or in the custody of the school district. Thus, as in *Honeycutt*, there has been no showing that a student-school district duty existed.

Affirmed.



**In the Matter of the ADOPTION
OF BABY GIRL T.**

No. 85,224.

Court of Appeals of Kansas.

March 23, 2001.

Child’s birth mother moved to revoke her consent to child’s adoption. The District Court, Saline County, Jerome P. Hellmer, J., denied motion, and birth mother appealed. The Court of Appeals, Rulon, C.J., held that: (1) finding that no agreement existed between birth mother and proposed adoptive parents for unlimited post-adoption visitation was supported by substantial evidence; (2) finding that no promise of visitation had influenced birth mother’s decision to sign adoption consent was supported by substantial evidence; (3) misunderstanding regarding post-adoption visitation did not constitute fraud, misunderstanding, or duress invalidating birth mother’s consent; (4) attorney’s dual representation of both birth mother and prospective adoptive parents did not render birth mother’s consent to adoption invalid; (5) birth mother was not denied due process of law in connection with her consent; and (6) statutory waiting period did not violate equal protection.

Affirmed.

Grover M. Moscovitz, for appellant.

A. Margaret Hesford, Margate, for appellee.

Before GERSTEN, C.J., and SHEPHERD and ROTHENBERG, JJ.

PER CURIAM.

Affirmed. *See Gaylis v. Caminis*, 445 So.2d 1063, 1065 (Fla. 3d DCA 1984).



1

Kai Uwe THIER, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D06-2643.

District Court of Appeal of Florida,
Third District.

Sept. 19, 2007.

Rehearing Denied Nov. 9, 2007.

An Appeal from the Circuit Court for Miami-Dade County, Mark King Leban, Judge.

Kai Uwe Thier, in proper person.

Bill McCollum, Attorney General, and Michael C. Greenberg, Assistant Attorney General, for appellee.

Before GREEN and SUAREZ, JJ., and SCHWARTZ, Senior Judge.

PER CURIAM.

Because the Miami-Dade Circuit Court properly held that, although the petitioner was imprisoned in the county, it had no jurisdiction by habeas corpus to consider the validity of a Broward County conviction,

see *Johnson v. State*, 947 So.2d 1192 (Fla. 3d DCA 2007); *Broom v. State*, 907 So.2d 1261 (Fla. 3d DCA 2005), the order of denial below is affirmed.

Affirmed.



2

John S. KAZANJIAN, as Personal Representative of the Estate of Kaitlin Ashley Kazanjian, deceased, Appellant,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, Carlos Pozo and Jorge Fernando Pozo, Appellees.

No. 4D05-4371.

District Court of Appeal of Florida,
Fourth District.

Sept. 19, 2007.

Rehearing Denied Nov. 2, 2007.

Background: Estate of minor passenger, who was killed when driver crashed his car into trees after both passenger and driver had left school's campus without authorization, brought negligence action against school board, alleging that passenger and driver were habitually truant and that the school board failed to follow habitual truancy policies which might have prevented the accident. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Timothy P. McCarthy, J., entered summary judgment for school board, and estate appealed.

Holdings: The District Court of Appeal, Taylor, J., held that:

- (1) driver and passenger who had 7 to 8 absences in a ninety-day period were not habitually truant; and
- (2) school board owed no duty to lessen the risk of injuries by preventing high school students from leaving campus without authorization.

Affirmed.

1. Appeal and Error ◊893(1)

A summary judgment presents a pure question of law, which is subject to de novo review.

2. Schools ◊72, 161

Primary purpose of Florida's truancy laws is the promotion of academic success, and these statutes are distinguishable from the more recently adopted closed campus policies, which are intended, at least in part, to promote student safety. West's F.S.A. §§ 1003.01(8), 1003.26.

3. Schools ◊161

By statute, a "habitual truant" was a student who accumulated 15 unexcused absences within 90 calendar days, and thus, students who had 6, 7, or 8 absences, respectively, in a ninety-day period were not habitually truant, as a matter of law, and therefore, the principal had no duty to report them to the school board or Department of Highway Safety and Motor Vehicles (DMV) or to file truancy petitions. West's F.S.A. §§ 1003.01(8), 1003.27(2).

4. Schools ◊89.8(1)

In the context of a negligence action seeking damages for injuries sustained by high school student in a car crash that occurred after student had left school's campus without authorization, the school board owed no duty to lessen the risk of such injuries by preventing high school students from leaving campus without authorization.

5. Schools ◊89.2

A public school, at least through the high school level, owes a general duty of supervision to the students placed within its care, and this duty is based on the school's standing partially in place of the student's parents.

6. Schools ◊89.2

While Florida recognizes a general duty of supervision, a school has no duty to supervise all movements of all pupils all the time.

7. Negligence ◊215, 1692

In determining the existence of a legal duty, which is a question of law, a court allocates risk by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.

8. Schools ◊89.8(1)

School rules relating to a student's presence on campus do not impose a legal duty of care running from the school board to third parties who are injured as a result of the negligent driving conduct of a student who has violated the school's policies.

9. Schools ◊89.2

Whether there is a duty to prevent a student from leaving campus without authorization depends on the age of the student; such a duty seems clear at the elementary school level, yet is anything but clear at the high school level.

10. Schools ◊89.2

For a high school student, skipping school is simply not so dangerous as to pose an "unreasonable risk" of harm, and thus should create no duty of care.

11. Schools ◊89.2

Off-campus dangers confronting high school students are risks that should be confronted by students and their parents.

12. Schools ⇔89.2

In the context of a negligence cause of action brought on behalf of a student injured off campus, a school may not be held liable for injuries suffered by a student who has violated the school's campus attendance policies.

13. Schools ⇔89

School board is immune from suit for its discretionary planning level policies regarding parking permits, student parking, and penalties for student breaches of school attendance and parking rules.

14. Schools ⇔89.8(1)

Sovereign immunity barred negligence suit brought against school board by estate of high school student, who was killed when car in which she was riding crashed into trees after both student and car's driver had left school's campus without authorization; school board was immune from suit for its discretionary planning level policies regarding penalties for student breaches of school attendance and parking rules, and the decision whether to have an open campus, a "fortress," or something in-between, was a policy decision that should be left to school professionals and not be second-guessed by civil juries.

Judy F. Hyman of Robert M. Montgomery, Jr. & Associates, P.L., West Palm Beach, for appellant.

Mark Hendricks and Elizabeth L. Pedersen of Panza, Maurer & Maynard, P.A., Fort Lauderdale, for appellee School Board of Palm Beach County.

TAYLOR, J.

John S. Kazanjian, as personal representative of the estate of Kaitlin Ashley Ka-

zanjian, appeals an adverse summary judgment on his negligence claims against the School Board of Palm Beach County. This case involves the tragic death of a Dwyer High School student in a car crash that occurred after she left campus without authorization. Kazanjian claims that his daughter and the driver in the fatal crash were habitually truant and that the School Board failed to follow habitual truancy policies, which might have prevented the accident. He also argues that the School Board owed a duty to prevent high school students from leaving campus without authorization.

We affirm the summary judgment, holding (1) the students were not habitually truant, as a matter of law; (2) in the context of a negligence action seeking damages for injuries sustained in a car crash away from school grounds, the School Board owed no duty to lessen the risk of such injuries by preventing high school students from leaving campus without authorization; and (3) in any event, the decision as to the appropriate campus security measures was a policy decision as to which the School Board enjoys sovereign immunity.

In November 2003, after their first-period class, eleventh-graders Courtney Lawrensen, Kaitlin Kazanjian, Carlos Pozo, Danny Shaw, and Chris Roon decided to skip school and go get breakfast. The students had no passes. They simply walked to their cars and left school grounds without being stopped. Kaitlin and Lawrensen left in Lawrensen's car. They all met up at a Mobil station and Kaitlin got into Pozo's car. They were planning to stop at Pozo's house to get money and then drive on to the restaurant.

On the way to his house, Pozo was driving between 72 and 74 m.p.h. on wet roads in a residential area with a speed limit of 35 m.p.h. While fiddling with the radio,

Pozo failed to navigate a curve in the road. He crashed his car into two trees, killing Kaitlin. The traffic homicide investigator, Officer Jeffery Main, described the accident as "horrific," indicating that it had a larger debris field than any accident he had investigated in eighteen years.

Dwyer High School has 1,900 students in eight buildings on a 60-acre campus. The school has two police officers and one police aide. There is a fence around the campus with many entrances and exits. There are parking gate restrictions as to when students can come and go. A police aide monitors the parking area and staff members monitor the front gate of the campus. During the day, the gates leading to the athletic fields are open because ingress and egress is necessary to the fields.

The school is not a fortress; gates are open and it is possible to get out. Students are permitted to leave campus during the school day with prior permission of a parent. If a parent sends a note that the student has permission to leave during the day, the school issues an off-campus pass to leave. Also, some students do not have classes every school period; they are allowed to leave during school hours. Students exiting the school parking lot during the day are sometimes stopped by the police aide on the way to their cars for passes or schedules showing they are not supposed to be in class. One student testified that it is easy to forge a pass. If students are stopped trying to leave when they should be in class, they are taken to the campus police or an administrator. The campus police call the student's parents. The students are not physically restrained; if a student wants to go, he or she can go. But, if administrators are aware of a student leaving without authorization, they will call his or her parents.

The Palm Beach County School Board has a written truancy policy, Policy 6Gx50-5.187. It defines an "absence" as not being present when attendance is checked, unless the student arrives in time to be counted "tardy." "Habitual truancy" is defined as a child having fifteen unexcused absences within ninety calendar days. According to Dwyer High School Assistant Principal William Basil, this policy refers to fifteen full days of absence without excuse before the habitual truancy procedures are invoked. Under the policy, principals have the duty to report habitually truant students to the School Board and to the Department of Highway Safety and Motor Vehicles, as required by section 1003.27(2), Florida Statutes (2005). The DMV notification is automatic when a student accumulates fifteen unexcused absences in a ninety-day period. The policy also requires the filing of a truancy petition under section 984.151 or a child-in-need-of-services petition under section 1003.27(3) in all cases of habitual truancy.

Attendance is taken in every class. If a student does not attend a class, he or she is marked absent on a computerized form, and at the end of the day, a phone dialer places a call reporting the absence to the student's home. The calls are placed even if a student misses only a single class. The calls are generally received at about 6:00 p.m. The message indicates that the student has been absent from one or more classes. Parents must write a note to get an absence excused. Notes from parents are periodically followed-up by phone calls to parents to verify their authenticity, but not every note is checked in this way. If the absence is unexcused, some teachers will allow the work to be made up, but others will not. Attendance is also indicated on the student's grade card, which is sent home to parents.

When students are caught skipping school, the punishment can range from a call to the parents to suspension. The punishment is typically detention or in-school suspension. Parents are notified any time a student is disciplined in any manner. Teachers are asked to contact the assistant principal if a student has three unexcused absences. The school prints out a list of students who have excessive absences. The principal testified that he is alerted when a student accumulates ten absences, excused or unexcused, and a letter is mailed home to the parents. According to one student's testimony, "[e]veryone skips" and the teachers know about it, but they don't really stop it.

Kaitlin's father, John Kazanjian, filed an affidavit indicating that the School Board did not notify him of his child's truancy and that he did not give her permission to leave school with anyone other than family members. Kaitlin's close friend testified that Kaitlin used to make sure she was home when the school called to intercept the school's automated calls and delete them off the caller ID so that her parents would not find out that the school had called about her truancy. Principal Culp testified that Kaitlin did not have an excessive number of unexcused absences. She did not have ten absences, excused or unexcused, so a letter was never sent to her parents. She was never caught skipping school.

John S. Kazanjian, suing as the personal representative of the estate, brought a three-count complaint against Carlos Pozo, Jorge Fernando Pozo, and the School Board of Palm Beach County. On May 12, 2005, the School Board moved for summary judgment, arguing it owed no duty to supervise a truant student and, even if it did, a motor vehicle accident was not a foreseeable proximate cause of any such

breach. It also argued that it was immune from suit for its discretionary policies.

[1] A summary judgment presents a pure question of law, which is subject to *de novo* review. *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003).

[2] Children have been skipping school "[s]ince at least the days of Huck Finn and Tom Sawyer." *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal.3d 508, 150 Cal.Rptr. 1, 585 P.2d 851, 858 (1978). The primary purpose of Florida's truancy laws appears to be the promotion of academic success. *See* § 1003.26, Fla. Stat. (2005). These statutes are distinguishable from the more recently adopted closed campus policies at many schools (apparently including Dwyer), which are intended, at least in part, to promote student safety. *See Hoyem*, 585 P.2d at 854. Although the students involved in this case were absent from their classes and, thus, truant, it is significant that they left campus without authorization.

[3] The plaintiff argues that Kaitlin, Pozo, and Lawrensen were habitually truant and that the School Board failed to follow the habitual truancy statutes to ensure their attendance. By statute, a "habitual truant" is a student who accumulates "15 unexcused absences within 90 calendar days." § 1003.01(8), Fla. Stat (2005). Though the statute does not address what happens when a student misses only part of a day, it is clear that a student cannot accumulate more than one absence per day, no matter how many classes he or she misses that day. The plaintiff's argument that each missed class is a separate absence, so that missing one full day of school would count as several unexcused absences, is an incorrect construction of the statute. Although the Palm Beach County School Board policy is poorly worded in defining an absence as missing

attendance, which is taken multiple times each day, it adopts the same “15 absences in 90 days” standard and is interpreted by school officials in conformity with the statute. At most, counting even one missed class as a full day’s absence, Courtney Lawrensen had only six absences in a ninety-day period; Carlos Pozo had seven absences in ninety days, and Kaitlin Kazanjian had eight absences in ninety days. These students were not habitually truant, as a matter of law. Therefore, the principal had no duty to report them to the School Board or DMV or to file truancy petitions.

[4–6] The plaintiff also argues that the School Board failed in its general duty to supervise these students. “A public school, at least through the high school level, undoubtedly owes a general duty of supervision to the students placed within its care.” *Rupp v. Bryant*, 417 So.2d 658, 666 (Fla.1982). This duty is based on the school’s standing partially in place of the student’s parents. *Id.* “Mandatory schooling has forced parents into relying on teachers to protect children during school activity.” *Id.* While Florida recognizes a general duty of supervision, a school has no duty to supervise “all movements of all pupils all the time.” *Id.* at 668 n. 26.

To the extent that the plaintiff is arguing that the school owed a duty to supervise Kaitlin and/or Charles off school property, such an argument is foreclosed by both statute and case law. *See* § 1003.31(2), Fla. Stat. (2005) (“The duty of supervision shall not extend to anyone other than students attending school and students authorized to participate in school-sponsored activities.”); *Rupp*, 417 So.2d at 668 n. 26 (“The school also has no duty to supervise off-premises activities of students which are not school related.”); *Matallana v. Sch. Bd. of Miami-Dade County*, 838 So.2d 1191, 1192 (Fla. 3d DCA

2003) (holding that the school had no duty to supervise at the time of an incident which occurred off school premises and was unrelated to any school activity); *Gross v. Family Servs. Agency, Inc.*, 716 So.2d 337, 339 (Fla. 4th DCA 1998) (stating that schools generally have not been held to have a duty of supervision when injuries occurred off-campus while students have been involved in non-school related activities); *Paella ex rel. Paella v. Ulmer*, 136 Misc.2d 34, 518 N.Y.S.2d 91, 93 (N.Y.Sup.Ct.1987) (holding that the school board had no duty to supervise once truant student was beyond its lawful control).

[7] The plaintiff also seeks to impose liability upon the School Board for breaching a duty to prevent the students from leaving campus without authorization. A negligence cause of action is comprised of four elements; the first is a “duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003) (quoting W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 164–65 (5th ed.1984)). As we wrote in *Biglen v. Florida Power & Light Co.*, 910 So.2d 405, 408 (Fla. 4th DCA 2005):

The supreme court has made foreseeability the polestar to finding both the existence of a legal duty and its scope; “whenever a human endeavor creates a generalized and foreseeable risk of harming others,” which the court describes as a “foreseeable zone of risk,” the law generally places a duty upon a defendant “ ‘either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.’ ” *McCain v. Fla. Power Corp.*, 593 So.2d 500, 503 (Fla.1992)

(quoting *Kaisner v. Kolb*, 543 So.2d 732, 735 (Fla.1989)). The existence of a legal duty means that a defendant stands in a “‘relation to the plaintiff as to create [a] legally recognized obligation of conduct for the plaintiff’s benefit.’” *Palm Beach–Broward Med. Imaging Ctr., Inc. v. Cont’l Grain Co.*, 715 So.2d 343, 344 (Fla. 4th DCA 1998) (quoting PROSSER AND KEATON § 42, at 274). The absence of a foreseeable zone of risk means that the law imposes no legal duty on a defendant, and therefore defeats a negligence claim.

In determining the existence of a legal duty, which is a question of law, a court allocates risk by “balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.” *Levy v. Fla. Power & Light Co.*, 798 So.2d 778, 780 (Fla. 4th DCA 2001) (quoting *Vaughan v. E. Edison Co.*, 48 Mass.App.Ct. 225, 719 N.E.2d 520, 523 (1999)).

Cases from other jurisdictions hold that violation of a school’s closed campus or truancy policy will not support a negligence action against a school board for personal injuries to third parties occurring off campus.

In *Collette v. Tolleson Unified School District, No. 214*, 203 Ariz. 359, 54 P.3d 828 (Ariz.Ct.App.2002), the school was alleged to have negligently enforced a closed campus policy. The plaintiff was a motorist struck by a student who had left campus without authorization during a lunch break. The Arizona court affirmed summary judgment in favor of the school:

¶ 16 The only conduct of the District at issue here is the alleged negligent enforcement of its modified closed-campus policy. Nothing happened to Thomason while at school that affected his ability to drive a car. Nor was Thomason’s driving part of any school activity. The

car Thomason was driving had not been provided to him by the District and the District had no reason to believe Thomason was an incompetent or dangerous driver. Thomason was driving on a public street with a valid driver’s license for a personal purpose.

¶ 17 Plainly, the District had no power to control Thomason’s actual operation of his vehicle. Appellants are really arguing that the District’s duty to supervise its students gave rise to a duty to appellants to keep Thomason from driving his car at the particular time this accident happened. We do not believe reasonable persons would agree that such a duty exists, and decline to impose such a duty in this case for both practical and policy reasons.

Id. at 832–33 (citation omitted).

Similarly, in *Thompson v. Ange*, 83 A.D.2d 193, 443 N.Y.S.2d 918 (1981), the student struck another motorist while driving off-campus in violation of school rules. The New York court affirmed a summary judgment in favor of the school, stating:

The uncontroverted proof was that Graziano was a licensed driver. The schools’ awareness of reckless driving by some students and their concern for student safety is not sufficient to show that Graziano was anything but the average 17-year old whom the Legislature has determined may be licensed to drive[.]. There is no claim that the schools had notice that Graziano was an incompetent driver. The risk that Graziano would be involved in an automobile accident was no greater than the risk incurred by the operation of an automobile by any average 17-year old driver. Violation of the no-driving rule did not increase the risk of accident in any way; that risk existed regardless of any rule.

...

In short, although plaintiffs have been grievously injured in an automobile accident caused by a student driver violating a school rule and although driving by teenagers may be a matter of concern to schools and to the general public, we are not prepared to hold that these schools had the duty to shield the public from a student operating an automobile off the school grounds in violation of school rules.

Id. at 921.

[8] We agree with *Collette* and *Thompson* that school rules relating to a student's presence on campus do not impose a legal duty of care running from the school board to third parties who are injured as a result of the negligent driving conduct of a student who has violated the school's policies.¹

A related question is whether the high school owed a duty to prevent Kaitlin from leaving school property without authorization to protect *her* from off-campus dangers such as car crashes. The best Florida case for the plaintiff is *Doe v. Escambia County School Board*, 599 So.2d 226 (Fla. 1st DCA 1992). In that case the student was fourteen years old, but was performing mentally at a third or fourth grade level. A male student took her by the arm, walked her out to a car in the school parking lot, drove her off campus, and sexually assaulted her. The first district reversed a summary judgment for the school board, finding that the failure to supervise in both the school building and the school parking lot was actionable. We distinguish *Doe* because the student in that

case was abducted rather than having left voluntarily.

Tollenaar v. Chino Valley School District, 190 Ariz. 179, 945 P.2d 1310 (Ariz.Ct.App.1997), is directly on point. The high school there had a closed campus policy, but its enforcement was lax. Shortly after arriving at school, the plaintiffs' children got into a car with another student and left campus. A collision with a tractor-trailer killed the plaintiffs' children. The Arizona court affirmed a summary judgment for the school, holding that the school exposed the students only to the ordinary risks of vehicular collision that "[m]embers of our mobile society face . . . whenever they are in cars.'" *Id.* at 1311 (quoting *Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 825 P.2d 20, 24 (Ariz.Ct.App.1991)). The *Tollenaar* court went on to hold that the exposure to that foreseeable risk did not amount to exposure to an unreasonable risk, creating no duty of care. *Id.*

New York and California have taken different stances on the precise question of duty presented by these facts. California has held that a duty exists, but emphasizes that the duty is one of "ordinary care, not fortresses; schools must be reasonably supervised, not truant-proof." *Hoyem*, 585 P.2d at 857. New York, on the other hand, appears to recognize no such duty, at all. In *Palella*, a 14-year old skipped school and went joyriding with his friends, which ended in a police chase and a car crash with grievous injuries. The court granted the school's motion for summary judgment, stating:

1. We note that in *Louis v. Skipper*, 851 So.2d 895 (Fla. 4th DCA 2003), this court confronted a claim by a third party injured by an automobile driven by a student on a school sanctioned field trip. The injured party sued the school board, arguing that the student was an agent of the board at the time of the accident. We affirmed a summary judgment

in favor of the school board, "[i]nasmuch as the student [driver] was neither an employee of the school board, nor driving a school board vehicle." *Id.* at 896. *Louis* involves a claim of agency, not a claim that violation of a school board policy amounted to negligence.

In this case, the infant plaintiff intentionally absented himself from the physical custody and control of the School District. Nothing short of a prison-like atmosphere with monitors at every exit could have prevented the infant from leaving the school grounds on the day in question. This court is not prepared to mandate that a school district must employ security measures to insure that its students comply with reasonable attendance policies.

518 N.Y.S.2d at 93; *see also Glaser ex rel. Glaser v. Emporia Unified Sch. Dist. No. 253*, 271 Kan. 178, 21 P.3d 573 (2001) (holding that a middle school owed no duty to a student who ran off campus into traffic).

[9] Whether there is a duty to prevent a student from leaving campus without authorization depends on the age of the student. Such a duty seems clear at the elementary school level, yet is anything but clear at the high school level. *See Rogers*, 825 P.2d at 25 (“Nor do we suggest that a calculus of unreasonable risk will yield equivalent results at every level of the schools. We leave for resolution in other unsupervised egress cases such questions as whether parents’ supervisory expectations may reasonably differ at differing levels of the schools and whether the risks that may be deemed unreasonable may likewise differ with the age of the student involved.”).

[10] Recently, in *Clay Electric*, the Florida Supreme Court quoted the elements of negligence from *Prosser and Keeton on the Law of Torts*, which quotes the duty element as follows:

A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others *against unreasonable risks*.

873 So.2d at 1185 (quoting *Prosser and Keeton on the Law of Torts* 164–65 (W. Page Keeton ed., 5th ed.1984)) (emphasis added). We conclude that, for a high school student, skipping school is simply not so dangerous as to pose an “unreasonable risk” of harm, and thus should create no duty of care.

Teenage drivers are statistically worse drivers than adults, as the insurance actuarial data shows. However, we as a society have determined that they are safe enough to be on the roads; riding with a licensed teenage driver should not be considered an unreasonably risky undertaking. *See Tollenaar*, 945 P.2d at 1311. According to the plaintiff, the legislature’s enactment of a law providing for the suspension of habitually truant students’ driver’s licenses demonstrates that our lawmakers recognize that habitually truant students are a safety risk on the roads.² However, we can find no legislative history or statistics to support plaintiff’s position. It seems far more likely that the legislature simply intended to use a driver’s license as a coercive tool to keep high school students in class. The statute does not signify a legislative determination that truant students are worse drivers than their contemporaries. In any event, as previously pointed out, none of these students were habitually truant.

[11, 12] In *Palm Beach–Broward Medical Imaging Center, Inc. v. Continental Grain Co.*, 715 So.2d 343, 345 (Fla. 4th DCA 1998), we stated:

In applying the “foreseeable zone of risk” test to determine the existence of a legal duty, the supreme court has focused on the likelihood that a defendant’s conduct will result in the type of injury suffered by the plaintiff. This

2. § 1003.27(2)(b), Fla. Stat. (2005).

aspect of foreseeability requires a court to evaluate

whether the type of negligent act involved in a particular case has so frequently previously resulted in the same type of injury or harm that 'in the field of human experience' the same type of result may be expected again.

Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441, 443 (Fla.1961).

(emphasis omitted). Applying this standard, we hold that no duty exists. As the record demonstrates, high school students routinely skip school yet, as the paucity of reported cases shows, horrific car crashes while skipping school are exceedingly rare. *See id.* at 346. Placing liability on the school board for off campus automobile accidents involving high school students would encourage the imposition of hyper-restrictive conditions on high school campuses. The off-campus dangers confronting high school students are risks that should be confronted by students and their parents. We conclude that in the context of a negligence cause of action brought on behalf of a student injured off campus, a school may not be held liable for injuries suffered by a student who has violated the school's campus attendance policies.

[13, 14] In any event, we believe that sovereign immunity bars the plaintiff's suit against the School Board. The School Board is immune from suit for its discretionary planning level policies regarding parking permits, student parking, and penalties for student breaches of school attendance and parking rules. *See Orlando v. Broward County, Florida*, 920 So.2d 54 (Fla. 4th DCA 2005) (holding that school board's decision as to school hours was a planning-level decision for purposes of school board's entitlement to sovereign immunity in action by mother of child who was killed while crossing a street on his

way home from school), *review denied*, 934 So.2d 450 (Fla.2006).

A high school may have sound educational reasons for wanting to treat its students with the dignity which comes with freedom of movement, rather than as young children or prisoners. *See Wilson v. County of San Diego*, 91 Cal.App.4th 974, 111 Cal.Rptr.2d 173, 178 (2001) (discussing decision not to make children's center a lockup facility to avoid treating juveniles as if they had committed a crime). The decision whether to have an open campus, a "fortress," or something in-between, is a policy decision that should be left to school professionals and not second-guessed by civil juries. *Orlando v. Broward County*, 920 So.2d at 57.

As to the plaintiff's other point on appeal concerning the School Board's Renewed Motion for Protective Order, we find no abuse of discretion in the trial court's granting such motion.

Affirmed.

WARNER and GROSS, JJ., concur.



The AVALON CENTER and Unisource Administrators, Appellants,

v.

Jane HARDAWAY, Appellee.

No. 1D06-2698.

District Court of Appeal of Florida,
First District.

Sept. 21, 2007.

Rehearing Denied Oct. 26, 2007.

Background: Employer and its insurer appealed from decision of the Judge of

chapter 180, Florida Statutes, sovereign immunity is waived, and the City does not need a contract to collect the stormwater utility fees authorized pursuant to chapter 403, Florida Statutes. The City's argument is without merit.

[1, 2] Statutes purporting to waive sovereign immunity are strictly construed in favor of the State, and must be clear and unequivocal. See *e.g.*, *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla. 1958); *Div. of Admin. v. Oliff*, 350 So.2d 484 (Fla. 1st DCA 1977); *Seaside Prop., Inc. v. State Road Dep't*, 121 So.2d 204 (Fla. 3d DCA 1960); *Blockbuster Video, Inc. v. Dep't of Transp.*, 714 So.2d 1222 (Fla. 2d DCA 1998). Waiver of sovereign immunity will not be implied. See *Spangler*, 106 So.2d at 424; *Seaside Prop.*, 121 So.2d at 206.

[3] Here, the City refuses to accept that chapter 180 has a very specific listing of the municipal services included within its scope. One municipal service not included in that list is stormwater runoff. The Legislature, for whatever reason, decided not to include stormwater runoff within the scope of chapter 180. We are unable to rewrite the chapter to provide the relief sought by the City. Because chapter 180 does not provide a waiver of sovereign immunity for utilities authorized pursuant to chapter 403, the parties' circumstances have not changed since the first appeal.

Consequently, although the stormwater fee may be a valid utility fee, consistent with our previous opinion, before the City can sue to collect the fee, it must have a written contract. See *City of Gainesville v. Fla. Dep't of Transp.*, 778 So.2d 519, 530 (Fla. 1st DCA 2001). Since the City acknowledges it does not have a written contract, the trial court properly dismissed

the City's complaint with prejudice. The trial court's order is AFFIRMED.

KAHN, C.J., and THOMAS, J., concur.



Huguette ORLANDO, as personal representative of the Estate of Caleb Orlando, deceased, Appellant,

v.

BROWARD COUNTY, FLORIDA, the City of Dania Beach, and School Board of Broward County, Appellees.

No. 4D04-4868.

District Court of Appeal of Florida,
Fourth District.

Dec. 21, 2005.

Rehearing Denied Feb. 22, 2006.

Background: Mother whose child was killed while crossing the street on the way home from school brought negligence action against school board, among others. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Ilona M. Holmes, J., concluded that school board was entitled to sovereign immunity. Mother appealed.

Holdings: The District Court of Appeal, Gross, J., held that:

- (1) school board's decision as to school hours was a planning-level decision, and
- (2) school board did not create a dangerous condition for which there was no proper warning.

Affirmed.

1. Schools ⇨89.8(1)

School board's decision to operate middle school from 9:00 a.m. to 4:00 p.m., thereby exposing students to rush hour traffic on surrounding streets, was a planning-level decision, for purposes of school board's entitlement to sovereign immunity in action by mother of child who was killed while crossing a street on his way home from school; decision involved the governmental objective of educating children, decision required the exercise of judgment and expertise to satisfy educational, health, and other requirements relating to length of the school day, and school board had statutory authority to adopt policies for the opening and closing of schools. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. §§ 768.28, 1001.42(4)(f).

2. States ⇨191.6(2)

Constitutional provision authorizing the legislature to make provision for bringing suits against the state provides absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment. West's F.S.A. Const. Art. 10, § 13.

3. States ⇨112(2)

Statute waiving sovereign immunity in tort cases constitutes a limited waiver of the state's sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

4. States ⇨112.2(1)

Despite limited statutory waiver of sovereign immunity against tort claims, certain discretionary, planning-level governmental functions remain immune from tort liability. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

5. Municipal Corporations ⇨728**States** ⇨112.2(1)

If a challenged governmental act, omission, or decision necessarily involves a

basic governmental policy, program, or objective, is essential to the realization or accomplishment of that policy, program, or objective, and requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved, and the governmental agency possesses the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision, then the challenged act, omission, or decision can be classified as a discretionary, planning-level governmental process, for purposes of entitlement to sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

6. Schools ⇨89.8(1)

School board did not create a dangerous condition for which there was no proper warning by exposing students to rush hour traffic on their way to and from school, and thus exception to doctrine of sovereign immunity when a governmental entity creates a dangerous condition and fails to warn of the danger did not apply to suit against school board by mother whose child was killed while crossing the street on his way home from school; danger posed by traffic was open and obvious, and school board did not create the danger and had no authority to alleviate it. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

7. Municipal Corporations ⇨723

When a governmental entity creates a known dangerous condition, which is not readily apparent to persons who may be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger, and the governmental entity is not entitled to sovereign immunity for a breach of this duty; however, a dangerous condition that is readily apparent to the public does not fit within this exception to

the doctrine of sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

8. Automobiles ⇌279

For purposes of exception to sovereign immunity when a governmental entity creates a hidden danger, the danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

Lawrence B. Friedman of The Friedman Law Firm, P.A., Boca Raton, for appellant.

Dorsey C. Miller, III of Haliczzer, Pettis & Schwamm, P.A., Fort Lauderdale, for appellee School Board of Broward County.

GROSS, J.

In this case we hold that sovereign immunity bars a mother's claim against a school board for the death of her son. The school board's decision on when to begin and end the school day was a discretionary, planning-level decision. The facts of the case do *not* give rise to a situation where the school board had an operational level duty to warn of a dangerous condition that it created, which was not readily apparent, so that it constituted a trap for the unwary.

Huguette Orlando, as the mother and guardian of her minor son, Caleb Orlando, filed a negligence complaint against the School Board of Broward County and other defendants, pursuant to the Wrongful Death Act, section 768.16, *et seq.*, Florida Statutes (1999). The case arose out of a 1999 accident where an automobile struck and killed Caleb while he was crossing the street west of the intersection at Southeast

5th Avenue and Sheridan Street in Dania Beach.

Caleb was a 13-year-old eighth grader at Olsen Middle School. The school's hours of operation were from 9:00 a.m. until 4:00 p.m. The School Board provided bus transportation for Olsen Middle students who lived beyond a two-mile radius of the school. At the beginning of the 1997 school year, Caleb lived outside of the two-mile radius and was eligible for bus transportation. In October 1997, Caleb's family moved to a residence within the two-mile radius. Despite living within the radius, Caleb was permitted to ride the school bus until December 1998.

When the mother learned that her son was no longer permitted to ride the school bus, she protested at the school's office. Concerned for her son's safety, she asked the person in charge of bus transportation if there were any exceptions to the two-mile radius rule or if anything could be done to restore her son's bus transportation privileges. The person advised her that Caleb was ineligible for bus transportation and there were no exceptions to the policy.

On May 26, 1999, Caleb was dismissed from school at 4:00 p.m. At 4:15 p.m., Caleb was at Sheridan Street, about 30 feet west of the intersection with Southeast 5th Avenue. This intersection is within a two-mile radius of the school and does not have a crossing guard. There was no school zone at the intersection. Attempting to cross the street, Caleb stepped into the westbound lane of Sheridan Street, against traffic and not at a crosswalk. He passed in front of a transit bus. As Caleb moved past the bus, he was struck and killed by a passing motorist.

Olsen Middle is surrounded by busy streets, where peak traffic occurred between the hours of 7:30 a.m. to 9:00 a.m.

and 4:30 p.m. to 6:00 p.m. At the location on Sheridan Street, where the accident occurred, the speed limit was 45 miles-per-hour. The School Board was aware that hazardous walking routes existed within a two-mile radius of Olsen Middle; Caleb was the fourth child in a seven-year period to die in transit to or from the school, all within the two-mile radius.

[1] The mother first argues that the School Board negligently decided to operate Olsen Middle School from 9:00 a.m. to 4:00 p.m., thereby exposing the students to rush hour traffic on the surrounding streets, and creating a foreseeable zone of risk, which imposed a duty on the School Board to take precautions to protect the children.

[2, 3] Article X, section 13 of the Florida Constitution provides “absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment.” *Cir. Ct. of the Twelfth Jud. Cir. v. Dep’t of Natural Resources*, 339 So.2d 1113, 1114 (Fla.1976). Section 768.28, Florida Statutes (1999), “constitutes a limited waiver of the states sovereign immunity.” *Id.* at 1116. Section 768.28(5) provides that the “state and its agencies and subdivisions [are] liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.”

[4] Even though the statute creates a limited waiver of sovereign immunity, certain discretionary, planning-level governmental functions remain immune from tort liability. *See, e.g., Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla.1979) (holding that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain “discretionary” governmental functions remain immune from tort liability.). Setting the time when a given school opens or

closes is a discretionary, planning-level function of the School Board, not subject to the waiver of sovereign immunity.

[5] In *Commercial Carrier Corp.*, the supreme court set forth a preliminary test to determine whether a governmental function is a discretionary one:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 1019 (quoting *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440, 445 (1965)). If these questions can be “clearly and unequivocally answered in the affirmative,” then the challenged act, omission, or decision can be classified as a discretionary, planning-level governmental process. *Id.*

In this case, the four questions can clearly and unequivocally be answered in the affirmative. The decision when to open and close a school involves a governmental policy, program, or objective. Setting a beginning and ending of a school day is essential to the School Board’s objective of educating children. Determining school hours involves the exercise of judgment and expertise. The length of the school day must meet educational, health, and other requirements, obligating the School Board to coordinate the release of hundreds of schools at locations all over

Broward County. Finally, pursuant to section 230.23(4)(f), Florida Statutes (1999) (now renumbered § 1001.42(4)(f)), the School Board has the power to “adopt policies for the opening and closing of schools.” Under the *Commercial Carrier* preliminary test, the decision when to open and close a school is a planning-level decision entitled to sovereign immunity. See *Harrison v. Escambia County Sch. Bd.*, 419 So.2d 640 (Fla. 1st DCA 1982), *approved*, 434 So.2d 316 (Fla.1983) (holding that designation of the location of a school bus stop is a planning-level decision of a School Board).

[6, 7] The mother seeks to avoid the operation of sovereign immunity by arguing that the School Board’s decision created “a hidden trap or dangerous condition for which there was no proper warning.” *Dept of Transp. v. Neilson*, 419 So.2d 1071 (Fla.1982). “[W]hen a governmental entity creates a known dangerous condition, which is not readily apparent to persons who may be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.” *Payne v. Broward County*, 461 So.2d 63, 65 (Fla.1984) (citing *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla.1982)).

[8] However, a dangerous condition that is readily apparent to the public does not fit within this exception to the doctrine of sovereign immunity. The danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard. See *Masters v. Wright*, 508 So.2d 1299, 1300 (Fla. 4th DCA 1987). As the supreme court has written, “[a] governmental entity has no duty to warn pedestrians of the routine danger of crossing the street in midblock.” *Payne*, 461 So.2d at 66.

Payne is instructive on this issue. In *Payne*, a high school student walking

home from school was fatally injured as she tried to cross Rock Island Road. *Id.* at 64. Coral Springs High School was located at the northeast intersection of Rock Island Road and Sample Road. *Id.* The student followed the pedestrian sidewalk that ran 125 feet north of Sample Road until it ended at Rock Island. *Id.* At this point she attempted to cross Rock Island Road, where she was struck and killed by a motorist. *Id.*

The student’s parents sued Broward County, the School Board, the City of Coral Springs, and others who were dismissed at trial. The trial court entered a directed verdict in favor of the School Board. *Id.* The jury attributed 40% of the liability to the County. *Id.* The County appealed to this court, which reversed the final judgment, holding the county was immune from tort liability. *Id.* at 64–65. This court also certified questions to the supreme court, including the following:

Was this [the opening of the Rock Island Road intersection] the creation of a known danger which requires a warning or an aversion of danger?

Id. at 65.

The supreme court in *Payne* recognized that the County both created and knew of the conditions at the intersection where the student was killed. However, the court concluded that the intersection was “not a trap” and that “whatever danger there was in crossing the street midblock was open and obvious.” *Id.* at 66.

In this case, the School Board is less culpable than the County in *Payne*. The School Board had knowledge of the traffic conditions on Sheridan Street, but it did not create the dangerous condition. As in *Payne*, the dangerous condition here was open and obvious, no “greater than that existing anywhere it is possible to cross a road midblock.” *Id.* This was not a situation presenting an “operational level duty

to warn of a known dangerous condition created by the public entity not readily apparent, constituting a trap for the unwary.” *Duval County Sch. Bd. v. Dutko*, 483 So.2d 492, 495 (Fla. 1st DCA 1986).

The mother relies heavily on *Dutko*, but it is distinguishable. *Dutko* held that the School Board had created a “trap for the unwary” by its continued maintenance of a bus stop where waiting children were exposed to dangers that were not readily apparent; the hidden danger was the often-occurring, erratic actions of drivers who “left the roadway and drove upon the grassy shoulder, requiring waiting children to scurry out of the way of wayward vehicles.” *Id.* at 495. In this case, there was no hidden danger. The School Board did not create or overlook the dangerous condition, the traffic on Sheridan Street, which was readily apparent. The School Board did not have the authority to take precautionary measures to alleviate the traffic or slow it down. *See Padgett v. Sch. Bd. of Escambia County*, 395 So.2d 584 (Fla. 1st DCA 1981) (stating local government and the Department of Transportation have a statutory duty of installing and maintaining school traffic control devices); *see also Garcia v. Metro. Dade County*, 561 So.2d 1194 (Fla. 3d DCA 1990).

We have considered the mother’s remaining point on appeal, concerning the School Board’s Empty Seat Policy, and find it to be without merit. Under section 234.01, Florida Statutes (1999), the School Board did not have a statutory duty to provide bus transportation to students who lived less than two miles from school.

Affirmed.

STONE and HAZOURI, JJ., concur.



1

Fred D. LARABEE, Petitioner,

v.

STATE of Florida, Respondent.

No. 5D05–3227.

District Court of Appeal of Florida,
Fifth District.

Dec. 23, 2005.

Rehearing Denied Feb. 9, 2006.

Petition for Writ of Prohibition, Julie H. O’Kane, Respondent Judge.

Warren W. Lindsey and William R. Ponnall, of Kirkconnell, Lindsey, Snure & Yates, P.A., Winter Park, for Petitioner.

No Appearance for Respondent.

PER CURIAM.

We deny the petition without prejudice to petitioner to file a notice of expiration of speedy trial, thereby triggering the recapture provisions of Florida Rule of Criminal Procedure 3.191(p). *See State v. B.S.S.*, 890 So.2d 487 (Fla. 5th DCA 2004).

WRIT DENIED.

GRIFFIN, THOMPSON and TORPY,
JJ., concur.



2

Ray OWENS, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 4D05–1917.

District Court of Appeal of Florida,
Fourth District.

Dec. 28, 2005.

Background: Defendant was convicted of sale and possession of cocaine. Defendant

170 Ariz. 399

Kevin C. ROGERS, a minor By and Through his next best friend and natural mother, Sheila E. STANDLEY, Plaintiffs-Appellants,

v.

Randolph RETRUM and Jane Doe Retrum, husband and wife; Prescott Unified School District, Defendants-Appellees.

No. 1 CA-CV 89-356.

Court of Appeals of Arizona,
Division 1, Department E.

July 18, 1991.

As corrected Aug. 13, 1991.

Review Denied March 3, 1992.

High school student brought action against school district and teacher to recover damages for injuries sustained in accident while he was riding in friend's automobile after student became angry with his teacher and left school building. The Superior Court, Yavapai County, Cause No. CV-49796, James Hancock, J., entered judgment for school district and teacher. Student appealed. The Court of Appeals, Fidel, P.J., held that although it was foreseeable that mobile high school students, permitted to leave campus during classroom hours, would be exposed to risk of roadway accidents, neither high school nor teacher subjected high school student to unreasonable risk of vehicular injury by permitting unsupervised egress from class on campus during school day and could not be held liable in negligence.

Affirmed.

1. Schools ⇐63(3), 147

School teachers and administrators are under obligation for benefit of students within their charge and that obligation includes duty not to subject those students, through acts, omissions, or school policy, to foreseeable and unreasonable risk of harm.

2. Schools ⇐89.8, 147

Although it was foreseeable that mobile high school students, permitted to leave campus during classroom hours, would be exposed to risk of roadway accidents, neither high school nor teacher subjected student to unreasonable risk of vehicular injury by permitting unsupervised egress from class on campus during school day and could not be held liable for injuries sustained by student in accident which occurred while he was riding in friend's automobile after student became angry with teacher and left school building.

3. Negligence ⇐4

Reckless or criminal nature of intervenor's conduct does not place it beyond scope of duty of reasonable care if that duty entails foresight and prevention of precisely such a risk.

4. Negligence ⇐4

Not every foreseeable risk is an unreasonable risk; it does not suffice to establish liability to prove that defendant owed plaintiff a duty of reasonable care, that act or omission of defendant was contributing cause of injury to plaintiff, and that risk of injury should have been foreseeable to defendant.

5. Negligence ⇐4, 136(14)

To decide whether risk was unreasonable requires evaluative judgment ordinarily left to jury in negligence action; however, in approaching question of negligence or unreasonable risk, court sets outer limits, and jury will not be permitted to require party to take precaution that is clearly unreasonable.

Musgrove & Drutz, P.C. by Mark W. Drutz, Christopher Ware, Prescott, for plaintiffs-appellants.

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears by Steven D. Smith, Tony J. Rudman, Timothy F. Bolden, Phoenix, for defendants-appellees.

OPINION

FIDEL, Presiding Judge.

Plaintiff Kevin C. Rogers appeals from summary judgment entered for defendants Randolph Retrum and Prescott Unified School District on plaintiff's negligence claim. We affirm summary judgment because plaintiff's injury did not result from an unreasonable risk that may be charged to the conduct of these defendants.

FACTUAL AND PROCEDURAL HISTORY

We state the facts, as always, in the light most favorable to the party appealing from summary judgment.

On the morning of February 5, 1989, Kevin C. Rogers, a sixteen-year-old junior at Prescott High School, completed an advanced electronics test. Although Rogers anticipated a good grade, the teacher, Randolph Retrum, publicly gave him a failing grade. When Rogers asked why, Retrum threw the test in his direction and answered, "Because I don't like you."

Although class was not over, Retrum permitted students to leave class as they pleased, and Prescott High School permitted students to enter and leave the campus freely.¹

Humiliated and upset, Rogers left class with a friend named Natalo Russo, punching a wall and kicking some trash cans on his way to Russo's car. As Russo tried to calm him, the friends left campus in Russo's car by a meandering route that eventually led them eastward on Iron Springs Road. There Russo, the driver, accelerated and lost control, passing in a curve at a speed exceeding 90 miles per hour. When the car struck an embankment, landed on its nose, and slid several hundred feet, Rogers was ejected and sustained the injuries for which he sues.

After the accident, Retrum admitted that Rogers had actually passed the test. Retrum had falsely given Rogers a failing grade because Rogers had always done

well in the class and Retrum "wanted [Rogers] to know what it felt like to fail."

Rogers settled negligence claims against Natalo Russo and his parents, and the trial court granted summary judgment rejecting Rogers's negligence claims against Retrum and the district. From this judgment, Rogers appeals.

PLAINTIFF'S CLAIM OF NEGLIGENCE

We first point out that Retrum's alleged conduct, however egregious, is not the causal focus of plaintiff's claim. If, in the flush of first reaction, plaintiff had blindly run into harm's way, we would examine the range of foreseeable, unreasonable risks that might be attributed to a teacher's false and deliberate humiliation of an impressionable teenager entrusted to his class.

Plaintiff, however, stepped into his friend Natalo Russo's car. And plaintiff's counsel has conceded at oral argument that there is no evidence that Retrum's words to Rogers affected Russo's operation of his car.

Counsel instead targets Retrum's "open class" and the district's "open campus" policies as the causal negligence in this case. By these policies, according to counsel, defendants breached their supervisory duty to plaintiff and exposed him to the risk of highway injury when he should have been in class. We confine our analysis to this claim.

DUTY

The first question in a negligence case is whether the defendants owed a duty to the plaintiff. We find that defendants had a relationship with plaintiff that entailed a duty of reasonable care.

Our supreme court has distilled, as the essence of duty, the obligation to act reasonably in the light of foreseeable and unreasonable risks. See *Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984) (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton*

1. The defendants dispute these allegations, but also acknowledge that we must accept them as

truthful for the purpose of reviewing summary judgment.

on the *Law of Torts* § 53, at 356 (5th ed. 1984) [hereinafter Prosser and Keeton] (“[D]uty’ is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty [if it exists] is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.”).

[1] Clearly, school teachers and administrators are “under [an] obligation for the benefit of” the students within their charge. See *id.* This obligation includes the duty not to subject those students, through acts, omissions, or school policy, to a foreseeable and unreasonable risk of harm. See *Jesik v. Maricopa County Community College Dist.*, 125 Ariz. 543, 546, 611 P.2d 547, 550 (1980) (“A public school district in Arizona is liable for negligence when it fails to exercise ordinary care under the circumstances.”); see also *Chavez v. Tolleson Elementary School Dist.*, 122 Ariz. 472, 476, 595 P.2d 1017, 1021 (App.1979) (“[T]he duty of the school personnel . . . as to the supervision of students in their charge [is] one of ordinary care.”).

LEGAL CAUSE

[2] We next take up defendants’ argument that summary judgment may be affirmed on the ground that Russo’s driving was an intervening, superseding cause. We do so before reaching the dispositive question of breach of duty because questions of breach and cause are too often confused and this case may serve to delineate them. We are guided by the comment of Professors Prosser and Keeton that

[i]n [certain] cases the standard of reasonable conduct does not require the defendant to recognize the risk, or to take precautions against it. . . . In these cases the defendant is simply not negligent. When the courts say that his conduct is not “the proximate cause” of the harm, they not only obscure the real issue, but suggest artificial distinctions of causation which have no sound basis, and can only arise to plague them in the future.

Prosser and Keeton, *supra* § 42, at 275; see also *Tucker v. Collar*, 79 Ariz. 141, 145, 285 P.2d 178, 181 (1955) (“Much confusion has resulted from many courts disposing of cases upon the ground defendant’s act was not the proximate cause of an injury when the proper basis was that there was no negligence.”).

One element of legal cause is “but-for causation” or causation-in-fact. See *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983) (“[A]s far as causation-in-fact is concerned, the general rule is that a defendant may be held liable if his conduct contributed to the result and if that result would not have occurred ‘but for’ defendant’s conduct.”). This element is adequately established; a jury might reasonably find that, but for the open campus and classroom policies plaintiff complains of, Rogers and Russo would have been at school at 9:10 a.m. on February 5, 1989, and not in a car on Iron Springs Road.

The more elusive element of legal cause is foreseeability, and this, according to defendants, is lacking in this case. They argue:

[N]o reasonable person could or should have realized Russo would drive in a criminally reckless manner at 100 miles an hour so as to cause an accident. Thus it is the intervening superseding act of fellow student Russo, not the act of Return or Prescott Schools[,] which was the proximate cause of plaintiff’s injury.

We decline to affirm the trial court’s judgment on this ground.

First, “we must take a broad view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable.” *Schnyder v. Empire Metals, Inc.*, 136 Ariz. 428, 431, 666 P.2d 528, 531 (App.1983) (citing *McFarlin v. Hall*, 127 Ariz. 220, 222, 619 P.2d 729, 731 (1980)). It is not unforeseeable that mobile high school students, permitted to leave campus during classroom hours, will be exposed to the risk of roadway accidents.

[3] Second, the reckless or criminal nature of an intervenor’s conduct does not

place it beyond the scope of a duty of reasonable care if that duty entails foresight and prevention of precisely such a risk. See *Rossell v. Volkswagen of America*, 147 Ariz. 160, 169, 709 P.2d 517, 526 (1985), cert. denied, 476 U.S. 1108, 106 S.Ct. 1957, 90 L.Ed.2d 365 (1986) (“[T]he scope of the risk created by the negligence of the original actor may include the foreseeable negligent or criminal conduct of others.”); see also Restatement (Second) of Torts § 281 comment h (“If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause.”).

This case illustrates the point of comment h. The condition created by defendants’ negligent conduct, according to plaintiff, was exposure to a preventable risk of vehicular injury off school grounds. Inherent in the risk of vehicular injury is the prospect of an intervenor’s negligent or reckless driving of a car; to foresee the injurious end is to foresee that a careless intervenor, one way or another, may be the means. For this reason, it does not advance analysis in this case to focus on the details of the intervenor’s conduct. The essential question is not whether the district might have foreseen the risk of vehicular injury but whether the district, given its supervisory responsibilities, was obliged to take precautionary measures. This

2. A useful contrast is provided by *Williams by Williams v. Stewart*, 145 Ariz. 602, 703 P.2d 546 (App.1985). When a maintenance worker entered a swimming pool to unclog the drain, the dirty water allegedly caused his preexisting sinus infection to spread to his brain. Division Two of this court affirmed summary judgment, stating:

Even assuming that [a persistent failure to clean the pool] created an unreasonable risk of some kinds of harm, Williams’ injury was well outside the scope of foreseeable risk, was unrelated to what made the conduct negligent, and no liability resulted. This is not a case “where the duty breached was one imposed to prevent the type of harm which plaintiff ultimately sustained.”

question, we conclude, is neither one of duty nor causation; it is one of breach.²

UNREASONABLE RISK

[4] Not every foreseeable risk is an unreasonable risk. It does not suffice to establish liability to prove (a) that defendant owed plaintiff a duty of reasonable care; (b) that an act or omission of defendant was a contributing cause of injury to plaintiff; and (c) that the risk of injury should have been foreseeable to defendant. The question whether the risk was unreasonable remains. This last question merges with foreseeability to set the scope of the duty of reasonable care.³ Cf. 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 18.2, at 656–57 (2d ed. 1986) (“[T]he inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e., negligent).”).

[5] To decide whether a risk was unreasonable requires an evaluative judgment ordinarily left to the jury. “Summary judgment is generally not appropriate in negligence actions.” *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 518, 652 P.2d 1040, 1041 (1982). However, in approaching the question of negligence or unreasonable risk,

the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable. . . . Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country.

Id. at 603, 703 P.2d at 547 (citations omitted). The same cannot be said in this case. Here, to paraphrase *Williams*, assuming that the school’s failure to restrict egress from campus created an unreasonable risk of vehicular injury off campus, plaintiff’s injury was within the scope of foreseeable risk. Analysis thus shifts from the causal question whether the risk was foreseeable to the negligence question whether the risk was unreasonable.

3. *Williams v. Stewart* is a case where foreseeability analysis, not unreasonable risk analysis, placed the injury outside the scope of duty of reasonable care.

3 F. Harper, F. James & O. Gray, *supra* § 15.3, at 355-57.⁴

Coburn v. City of Tucson is a recent example of the court's preemption of the question of unreasonable risk. There, a child eastbound on a bicycle was struck and killed by a southbound driver in an intersection collision. 143 Ariz. at 51, 691 P.2d at 1079. The child had ignored a stop sign and entered the intersection in the lane of westbound (oncoming) traffic. The child could not see the driver approaching because a bush at the northwest corner obscured his view. The child's parents sued the city for failure to remove the bush; the city both controlled the street and owned the lot where the bush grew. *Id.* The evidence established, however, that the bush would not have obstructed the view of south- or northbound traffic for any eastbound cyclist or driver who had stayed in the eastbound lane and stopped at the stop sign. *Id.* at 54, 691 P.2d at 1082. The supreme court affirmed summary judgment for the city, finding that the city had not breached its duty to provide intersections that are reasonably safe.

The lack of liability may be framed in terms of duty, but we prefer that duty be recognized as a distinct element involving the obligation of the actor to protect the other from harm. Here, there was a duty, but no negligence; therefore, there is no liability.

Id. (citations omitted).

We make the same determination in this case. Members of our mobile society face the risk of collision whenever they are in cars. This risk is arguably higher for teenage passengers of teenage drivers. The school in this case, however, did nothing to

increase this general risk. It did not, for example, leave students inadequately supervised or instructed in a driver's education class. It did not tolerate drinking at a school affair. It simply chose not to restrict students to campus during the school day and thereby shield them from the ordinary risk of vehicular harm that they would face when out of school. We conclude that "the standard of reasonable conduct [did] not require the defendant[s] to . . . take precautions against" that risk. Prosser and Keeton, *supra* § 42, at 275. More simply stated, the defendants' omission did not create an unreasonable risk of harm.

Although, in taking this issue from the jury, we find that reasonable persons could not differ, we do not mask the element of policy in our choice. See 3 F. Harper, F. James & O. Gray, *supra* § 15.3, at 357-58. First, the question of the legal consequence of an open campus high school policy is not a random judgment best left to case-by-case assessment, but a question likely to recur and one on which school boards need some guidance. See Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal.L.Rev. 1867, 1926-27 (1966). Second, policy considerations appropriate to local school boards—local transportation options, inter-school transfer arrangements, and extracurricular activity locations, for example—are pertinent to the decision whether restrictions should be placed on high school students coming and going from the campus during ordinary hours. Finally, and most significantly, we decline to make high school districts that adopt an open campus policy insurers against the ordinary risks of vehicular inju-

4. In describing the question whether a risk was unreasonable as requiring evaluative judgment, we acknowledge that the question does not fall neatly into the category of question of fact or the category of question of law. These categories serve less as guides to analysis than as labels that attach after the court has decided whether to leave evaluation to the jury or preempt it for the court. See James, *Functions of Judge and Jury in Negligence Cases*, 58 Yale L.J. 667, 667-68 (1949) (The common generality that questions of law are for the court and questions of fact for the jury "has never been fully true in either of its branches and tells us

little or nothing that is helpful."); see also *Farrell v. Waterbury Horse R.R.*, 60 Conn. 239, 247, 21 A. 675, 676 (1891) ("[T]he result of comparing the conduct with the standard is generally spoken of as 'negligence' or the 'finding of negligence.' Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word."); Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal.L.Rev. 1867, 1881 (1966) ("[C]onsideration of the jury's role in negligence cases should proceed unadorned, and unobscured, by the law-fact terminology.").

ry that students face in driving off school grounds.

This is not to suggest that a school's supervisory omissions can never give rise to liability for an accident off campus. We do not pretend that the range of foreseeable and unreasonable risks from supervisory omissions is automatically circumscribed by the school fence. See *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal.3d 508, 515-16, 150 Cal.Rptr. 1, 5, 585 P.2d 851, 855 (1978) (rejecting argument that off-campus consequences of on-campus supervisory lapses are beyond the range of duty).

Nor do we suggest that a calculus of unreasonable risk will yield equivalent results at every level of the schools. We leave for resolution in other unsupervised egress cases such questions as whether parents' supervisory expectations may reasonably differ at differing levels of the schools and whether the risks that may be deemed unreasonable may likewise differ with the age of the student involved.⁵ Our limited holding in this case is that the defendant high school and its teacher did not subject the plaintiff high school student to an unreasonable risk of vehicular injury by permitting unsupervised egress from class and campus during the school day.

CONCLUSION

Because plaintiff's injury was not a result within an unreasonable risk created by defendants, we hold that defendants were not negligent. The trial court's summary judgment in favor of defendants is affirmed.

LANKFORD and MCGREGOR, JJ.,
concur.



5. In a prior elementary school case, our court held that the abduction and slaying of a ten-year-old child who left campus without permission were unforeseeable consequences of the school's alleged supervisory lapse. *Chavez v. Tolleson Elementary School District*, 122 Ariz. 472, 478, 595 P.2d 1017, 1023 (App.1979). How-

170 Ariz. 404

Gregory Allen STANHOPE, ADOC
46210, Plaintiff/Appellant,

v.

The STATE of Arizona; Arizona Department of Corrections, and its officers, agents and employees, to-wit: Samuel Lewis, Director; J.C. Kenney, Assistant Director; Robert Goldsmith, Warden; Acting Warden Thomas; CPS Molnar; CPO Valdez; Sergeant Webber; CPO Fulton; Deputy Warden John Aveneti; Deputy Warden Sam Sublett, Defendants/Appellees.

No. 2 CA-CV 90-0263.

Court of Appeals of Arizona,
Division 2, Department B.

Aug. 22, 1991.

Reconsideration Denied Nov. 7, 1991.

Prisoner sought review of his placement in protective segregation unit. Motion to dismiss was granted by the Superior Court, Pinal County, Cause No. CIV-38763, Franklin D. Coxon, J., and prisoner appealed. The Court of Appeals, Fernandez, J., held that prisoner classification decision is not subject to judicial review under the Administrative Review Act.

Affirmed.

1. Appeal and Error ¶863

In reviewing grant of motion to dismiss for failure to state claim on which relief can be granted, Court of Appeals will uphold the lower court if it appears certain that plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claims stated.

ever, because cases after *Chavez* have stressed that "we must take a broad view of the class of risks and victims that are foreseeable," we have recognized the question of unreasonable risk—the question of foreseeable risk—as dispositive in this case.

83 A.D.2d 193
Supreme Court, Appellate Division,
Fourth Department, New York.

Howard T. THOMPSON and
Ruth Thompson, Appellants,

v.

Nicholas ANGE, et al., Defendants,
Gary A. Graziano, an infant, by the person
having lawful custody, Albert Spinelli, Jose
E. Rivera, Ronald L. Johns, Appellants,
Board of Education of East Irondequoit
Central School District, Dr. E. Royal
Hanna, Maryann P. Haas, Richard J.
Barone, Dr. Frank J. Carberry, Jr., Foster
DiFiore, Jr., Carol Ann Alice, Paul M.
Grant, Fay S. Powell, Steven Schafheimer,
Superintendent of East Irondequoit Central
School District, Dr. Rodney D. Spring,
Principal of [Eastridge High School](#), Dr.
Dale Berne, Respondents. Appeal No. 1.
Jean OPACZEWSKI, Rita Opaczewski
and Richard Opaczewski, Appellants,

v.

Nicholas ANGE, et al., Defendants,
Gary A. Graziano, an infant, by the person
having lawful custody, Albert Spinelli, Jose
E. Rivera, Ronald L. Johns, Appellants,
East Irondequoit Central School
District, Board of Education of East
Irondequoit Central School District,
Dr. E. Royal Hanna, President of the
Board of Education of East Irondequoit
Central School District, Dr. Rodney
D. Spring, Superintendent of the East
Irondequoit Central School District,
Dr. Dale Berne, Principal of [Eastridge
High School](#), Respondents. Appeal No. 2.

Howard T. THOMPSON and
Ruth Thompson, Appellants,

v.

Nicholas ANGE, et al., Defendants,
and

Board of Cooperative Educational
Services, No. 1, Respondent,
Gary A. Graziano, an infant by the
person having lawful custody, Albert
Spinelli, Jose E. Rivera, Ronald L.
Johns, Appellants. Appeal No. 1.

Jean OPACZEWSKI, Rita Opaczewski
and Richard Opaczewski, Appellants,

v.

Nicholas ANGE, et al., Defendants,
and

Board of Cooperative Educational
Services, No. 1 and Kenneth F. Harris,
Superintendent of the Board of Cooperative
Educational Services, No. 1 Respondents,
Gary A. Graziano, an infant by the person
having lawful custody, Albert Spinelli and
Ronald Johns, Appellants. Appeal No. 2.

Nov. 13, 1981.

Synopsis

Motorists injured in a multiple car accident caused by a student's operation of his car on a public highway in violation of school rules brought negligence action against school authorities and the student, as well as others, to recover for serious personal injuries. The Monroe Supreme Court, Special Term, Boehm, J., entered summary judgment for school authorities, and motorists appealed. The Supreme Court, Appellate Division, Schnepf, J., held that school authorities were under no duty to shield the general public from student operating his automobile off the school grounds in violation of school rules.

Affirmed.

Attorneys and Law Firms

****919 *194** Culley, Marks, Corbett, Tanenbaum, Reifsteck & Potter, Rochester, for appellants Thompson in Appeal 1; Merle Troeger, Rochester, of counsel.

Middleton, Wilson, Boylan & Gianniny, Rochester, for appellants Opaczewski in Appeal 2; John Wilson, Rochester, of counsel.

Foster & Foster, Rochester, for appellant Johns in Appeals 1 and 2; Edwin Foster, Rochester, of counsel.

Hickey, McHugh & Garlick, Rochester, for appellants Graziano & Spinelli in Appeals 1 and 2; Thomas McHugh, Rochester, of counsel.

Mercer & Burke, Rochester, for appellant Rivera in Appeals 1 and 2; John Burke, Rochester, of counsel.

Sullivan, Gough, Skipworth, Summers & Smith, Rochester, for respondents in Appeals 1 and 2; William Gough, Rochester, of counsel.

Winchell, Connors & Corcoran, Rochester, for respondents Bd. of Cooperative Educational Services and Harris in Appeals 1 and 2; Joseph Fritsch, Jr., Rochester, of counsel.

Before SIMONS, J. P., and CALLAHAN, DENMAN, MOULE and SCHNEPP, JJ.

Opinion

SCHNEPP, Justice.

The issue for resolution is whether school authorities are liable in negligence to members of the driving public for injuries caused by a student's operation of his car on a public highway in violation of school rules. Plaintiffs sue the Board of Cooperative Educational Services No. 1 (BOCES), the East Irondequoit School District, et al. (East Irondequoit), and the student Gary Graziano, as well as others, for serious personal injuries suffered by them in a multiple car accident which occurred on Interstate Route 490 East near Rochester in the midmorning of March 23, 1977. Plaintiffs claim that BOCES and East Irondequoit are liable for their damages because these defendants, through negligent supervision and failure to enforce their own rules, permitted Graziano, then a student at the Foreman Center operated by BOCES, and at Eastridge High School operated by East Irondequoit, to drive his own automobile from Eastridge to the Foreman Center; the accident occurred enroute. Plaintiffs and certain codefendants

appeal from Special Term's orders granting BOCES' ***195** and East Irondequoit's motions for summary judgment which were made on the ground that there is no triable issue of fact or justiciable controversy between plaintiffs and the moving defendants. Special Term held that as a matter of law these defendants owed no duty of care to plaintiffs in the manner in which they supervised and enforced their rules governing driving by students to the Foreman Center. We agree.

We have previously affirmed the denial of summary judgment to several of the other codefendants (****920** *Thompson v. Johns*, and decisions reported at 77 A.D.2d 805–806, 430 N.Y.S.2d 754).¹ Defendants BOCES and East Irondequoit, however, stand on a different footing.

The record establishes that Graziano, a student in the tenth grade at Eastridge, was enrolled in a vocational training program at the Foreman Center. Prior to the accident Graziano's vehicle had been parked at Eastridge pursuant to an East Irondequoit parking permit. At the time of the accident he was driving his car from Eastridge to the Foreman Center for the purpose of attending vocational classes that were offered to Eastridge students and others. There is no question that Graziano, by driving his own car on a public highway to the Foreman Center, violated various rules of BOCES and East Irondequoit, including those requiring that all Eastridge students attending BOCES classes ride on a regularly scheduled bus to the Foreman Center unless they have written parental permission to drive their own car and possess a Foreman Center parking permit. Plaintiffs assert that BOCES and East Irondequoit, by the adoption of these rules, perceived a risk to the public in student driving and, accordingly, had a duty to supervise their students and to enforce the rules to prevent student driving on public highways, during school hours. This duty was violated, according to plaintiffs, by not taking attendance on the BOCES buses and by only spot-checking compliance with the no-driving rule, despite notice to both BOCES and East Irondequoit that the rule was being violated. A reasonable trier of fact could find, on the record in this case, that Graziano would not ***196** have been on the highway on March 23, 1977 had the schools taken appropriate steps to supervise students to prevent unauthorized school-hour driving or to enforce school rules against such driving.

However, a finding that the schools were negligent in enforcing their rules would not establish legal liability on the part of these defendants. “[B]efore a defendant may be held liable for negligence it must be shown that the defendant owes

a duty to the plaintiff” (*Pulka v. Edelman*, 40 N.Y.2d 781, 782, 390 N.Y.S.2d 393, 358 N.E.2d 1019). “Without duty, there can be no breach of duty, and without breach of duty there can be no liability” (*Williams v. State of New York*, 308 N.Y. 548, 557, 127 N.E.2d 545). Absent this showing, even though defendants may be negligent, it is, at best “negligence in the air” for which they cannot be held accountable (*Martin v. Herzog*, 228 N.Y. 164, 170, 126 N.E. 814).

We have been unable to find any reported case in New York which defines the responsibility of a school for injuries caused by its students to non-students off school grounds (see generally, *Ann. 38 A.L.R.3d 830*). All the cases cited by plaintiffs involve injuries to students who were within the physical custody of the school at the time of injury. Indeed, schools have only been held to have a duty to supervise their students and protect them from risks of harm from each other (see, e. g., *Ohman v. Board of Educ. of City of N.Y.*, 300 N.Y. 306, 90 N.E.2d 474; *Hoose v. Drumm*, 281 N.Y. 54, 22 N.E.2d 233; *Lauricella v. Board of Educ. of City of Buffalo*, 52 A.D.2d 710, 381 N.Y.S.2d 566), and from others, if the school has physical custody of and control over them (*Pratt v. Robinson*, 39 N.Y.2d 554, 560, 384 N.Y.S.2d 749, 349 N.E.2d 849).

The standard of care applicable to a school's supervision of its students is the same standard of care generally applicable to the State when it has custody of a mental defective (*Excelsior Ins. Co. of N.Y. v. State of New York*, 296 N.Y. 40, 69 N.E.2d 553) or a parolee (*Wasserstein v. State of New York*, 32 A.D.2d 119, 300 N.Y.S.2d 263, *affd.*, 27 N.Y.2d 627, 313 N.Y.S.2d 759, 261 N.E.2d 665), or to a county when it has charge of a delinquent child (*Staruck v. County of Otsego*, 285 App.Div. 476, 138 N.Y.S.2d 385)—that is, the degree of supervision which a parent of ordinary prudence would undertake in comparable circumstances (*Lawes v. Board of Educ. of City of N. Y.*, 16 N.Y.2d 302, 305, 266 N.Y.S.2d 364, 213 N.E.2d 667; **921 *Hoose v. Drumm*, 281 N.Y. 54, 57–58, 22 N.E.2d 233, *supra*; *Swiatkowski v. Board of Educ. of City of Buffalo*, 36 A.D.2d 685, 319 N.Y.S.2d 783). Yet even a parent who negligently supervises his child is not liable for *197 the child's tortious conduct unless, for example, he entrusts a dangerous instrument to his child (see *Holodook v. Spencer*, 36 N.Y.2d 35, 45, 364 N.Y.S.2d 859, 324 N.E.2d 338; e. g., *Nolechek v. Gesuale*, 46 N.Y.2d 332, 413 N.Y.S.2d 340, 385 N.E.2d 1268 [motorcycle operated by partially blind 16-year old]; *Bucholtz v. Grimmer*, 50 A.D.2d 1062, 376 N.Y.S.2d 277 [chain saw in hands of a 17-year old]), or fails to restrain his child's conduct when he knows of the child's dangerous propensities (see *Steinberg v. Cauchois*,

249 App.Div. 518, 293 N.Y.S. 147). The State is not liable for the acts of an escaped mental patient unless it knows that the patient requires confinement and might do harm if allowed to escape (*Excelsior Ins. Co. of N.Y. v. State of New York*, 296 N.Y. 40, 69 N.E.2d 553, *supra*; *Higgins v. State of New York*, 24 A.D.2d 147, 265 N.Y.S.2d 254). A parole officer is not responsible for the violent conduct of a parole violator unless the parolee's past history and record shows previous acts of physical violence or proclivity toward such conduct (*Wasserstein v. State of New York*, 32 A.D.2d 119, 300 N.Y.S.2d 263, *supra*).

We hold that a similar rule applies to schools in the circumstances of this case. The uncontroverted proof was that Graziano was a licensed driver. The schools' awareness of reckless driving by some students and their concern for student safety is not sufficient to show that Graziano was anything but the average 17-year old whom the Legislature has determined may be licensed to driver. There is no claim that the schools had notice that Graziano was an incompetent driver. The risk that Graziano would be involved in an automobile accident was no greater than the risk incurred by the operation of an automobile by any average 17-year old driver. Violation of the no-driving rule did not increase the risk of accident in any way; that risk existed regardless of any rule.

Finally, plaintiffs' argument that BOCES and East Irondequoit assumed a legal duty to plaintiffs by making rules prohibiting student driving between Eastridge and the Foreman Center has no merit. Beneficial conduct creates legal responsibility only where corresponding inaction on the part of others results (see *Florence v. Goldberg*, 44 N.Y.2d 189, 197, 404 N.Y.S.2d 583, 375 N.E.2d 763; *Moch Co., Inc. v. Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896; *Zibbon v. Town of Cheektowaga*, 51 A.D.2d 448, 453, 382 N.Y.S.2d 152). There is no evidence in this record that plaintiffs or anyone else, relied on either the no-driving rule or the *198 failure of the schools to supervise and enforce compliance with the rule.

In short, although plaintiffs have been grievously injured in an automobile accident caused by a student driver violating a school rule and although driving by teenagers may be a matter of concern to schools and to the general public, we are not prepared to hold that these schools had the duty to shield the public from a student operating an automobile off the school grounds in violation of school rules. With or without rules, neither BOCES nor East Irondequoit has any duty to members

of the driving public to keep their student Graziano off the public highways with his automobile during school hours. It would be extending the legal consequences of wrongs beyond a controllable degree to hold that the use of an automobile by a licensed operator under these circumstances constitutes an unreasonable risk to others for which these schools may be liable.

Accordingly, the orders at Special Term should be affirmed and the complaints of plaintiffs against these defendants dismissed.

Appeals No. 1.—Order and Judgment unanimously affirmed without costs.

Appeals No. 2.—Order and Judgment unanimously affirmed without costs.

SIMONS, J.P. and CALLAHAN, DENMAN and MOULE, JJ., concur.

All Citations

83 A.D.2d 193, 443 N.Y.S.2d 918, 1 Ed. Law Rep. 398

Footnotes

- 1 The facts of the underlying accident are set out in the dissenting memorandum of Hancock, J. in [Thompson v. Johns](#), 77 A.D.2d 805–806, 430 N.Y.S.2d 754.

190 Ariz. 179
Court of Appeals of Arizona,
Division 1, Department A.

Tony TOLLENAAR, Dean Scheppel,
Grace Scheppel, Debra Powell, and James
Larry Powell, Jr., Plaintiffs–Appellants,

v.

CHINO VALLEY SCHOOL DISTRICT,
a political subdivision of the State
of Arizona, Defendant–Appellee.

No. 1 CA–CV 96–0167.

|
May 29, 1997.

|
Reconsideration Denied June 20, 1997.

|
Review Denied Nov. 12, 1997.

Synopsis

Parents of students killed in off-campus vehicular accident sued school district, alleging negligent supervision. The Superior Court of Yavapai County, Cause No. CV 93-0478, [Raymond W. Weaver, Jr., J.](#), granted district's motion for summary judgment, and parents appealed. The Court of Appeals, [Fidel, J.](#), held that: (1) district's failure to enforce closed campus policy did not result in breach of its general duty to avoid exposing others to foreseeable, unreasonable risk of harm, and (2) district was not liable on theory of negligent performance of voluntary protective undertaking.

Affirmed.

Attorneys and Law Firms

****1310 *179** Beal, Schmidt & Dyer, P.C. by [Ted A. Schmidt](#) and [Gary J.D. Dean](#), Tucson, for Plaintiffs–Appellants.

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OPINION

[FIDEL](#), Judge.

This case, like [Rogers v. Retrum](#), 170 Ariz. 399, 825 P.2d 20 (App.1991), arises from a vehicular accident involving high school students driving off campus during the school day. In *Rogers*, we affirmed summary judgment for the school district, holding that it did not subject students to an unreasonable risk of vehicular injury by maintaining an open campus policy. *Id.* at 404, 825 P.2d at 25. In this case, also on appeal from summary judgment, we consider whether a school district subjected students to an unreasonable risk of vehicular injury by failing to enforce a closed campus policy.

HISTORY

In October 1992, Appellants' minor children were students at Chino Valley High School. A closed campus policy required them to remain on campus from arrival till dismissal, but enforcement of the policy was lax. Shortly after arriving at the high school on the morning of October 23, 1992, Appellants' children left campus in another student's car. As they returned to the school, their car collided with a tractor-trailer. Appellants' children were killed, and another passenger was seriously injured.

Appellants sued the Chino Valley High School District and others not relevant to this appeal, alleging that the school negligently supervised the students. The district moved for summary judgment pursuant to *Rogers*, and the trial court granted its motion, giving rise to this appeal.

UNREASONABLE RISK

On appeal from summary judgment, we view the evidence and inferences in the light most favorable to the opposing party. *Id.* at 400, 825 P.2d at 21. The district sought summary judgment on the single ground that the school did not breach a duty to its students because its conduct did not subject them to an unreasonable risk of harm. This argument tracked *Rogers*, where we stated:

Members of our mobile society face the risk of collision whenever they are in cars. This risk is arguably higher for teenage passengers of teenage drivers. The school in this

case, however, did nothing to increase this general risk.... It simply chose not to restrict students to campus during the school day and thereby shield them from the ordinary risk of vehicular harm that they would face when out of school. We conclude that ... the defendants' omission did not create an unreasonable risk of harm.

Id. at 403, 825 P.2d at 24.

The trial court agreed that this case is governed by *Rogers*. So do we, in part. Appellants argue that this school's failure to enforce a closed campus policy is distinguishable from failure to adopt a closed campus policy in *Rogers*. We acknowledge this distinction, but do not find it helpful to Appellants on the question of unreasonable risk. Here, as in *Rogers*, the school exposed the students only to the ordinary risks of vehicular collision that “[m]embers of our mobile society face ... whenever they are in cars.” *Id.* Here, as there, exposure to a foreseeable risk did not amount to exposure to an unreasonable risk. See *id.* at 402, 825 P.2d at 23. Insofar as Appellants attempt to hold the district liable for a breach of the general duty to avoid exposing others to a foreseeable, unreasonable risk of harm, the trial court correctly granted summary judgment.

VOLUNTARY UNDERTAKING AND RELIANCE

Appellants also attempt to bypass *Rogers* by arguing, pursuant to sections 323 and 324A of the Restatement (Second) of Torts (1965), that the school negligently performed a voluntary protective undertaking.

Section 323 provides:

****1312 *181** One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to *liability to the other* for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

(Emphasis added.)

Section 324A extends identical liability to third persons:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to *liability to the third person* for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

....

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

(Emphasis added.)

Arizona has adopted sections 323 and 324A. See *Thompson v. Sun City Community Hosp., Inc.*, 141 Ariz. 597, 608, 688 P.2d 605, 616 (1984); *Papastathis v. Beall*, 150 Ariz. 279, 282, 723 P.2d 97, 100 (App.1986). One who undertakes a service that falls within these sections must perform it with reasonable care. See *Jefferson County Sch. Dist. R-1 v. Justus*, 725 P.2d 767, 772-73 n. 5 (Colo.1986).

Appellants raised their Restatement theory in the trial court, but failed to support it in their presentation of the evidence. On the element of undertaking, Appellants acknowledged, “There are any number [of] reasons why a school might choose a closed campus policy.” Yet, Appellants submitted no evidence that this school, in doing so, undertook to provide a service that it recognized, or should have recognized, as necessary for the students' protection. See RESTATEMENT §§ 323(b), 324A(c).

Appellants likewise submitted no evidence on the subject of reliance. Appellants alleged in their complaint that they “each reasonably expected their child to be supervised and on school premises at the time of this accident.” They also pointed out in argument that two of the students were only fourteen years old, and they invoked our *Rogers* caveat that “parents' supervisory expectations may reasonably differ at differing levels of the schools.” 170 Ariz. at 404, 825 P.2d at 25. Yet, Appellants never supported their allegation of reliance with affidavits, deposition testimony, or any other form of evidence. Nor did Appellants present evidence that their alleged reliance on school enforcement bore some causal relationship to this accident.

The Restatement demonstrates how reliance might play a causal role under [sections 323](#) or 324A:

Where the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk.

Restatement § 324A cmt. e. Appellants, however, presented no evidence that they forewent other precautions in reliance upon school enforcement. Nor did they outline any other manner by which the school, in inducing their reliance, caused their harm.

The district was not obliged in moving for summary judgment to “affirmatively establish the negative” on these issues. See *Orme Sch. v. Reeves*, 166 Ariz. 301, 310, 802 P.2d 1000, 1009 (1990). Rather, Appellants had the burden of supporting their Restatement theory of recovery by “showing that there is evidence creating a genuine issue of ****1313**

***182** fact” concerning the elements of that theory. *Id.* Appellants failed to meet that burden.

CONCLUSION

Because Appellants neither established that the district subjected their children to an unreasonable risk of harm, nor submitted evidence to support their alternative Restatement theory of recovery, summary judgment for the district is affirmed.

[NOYES](#), P.J., and [RYAN](#), J., concur.

All Citations

190 Ariz. 179, 945 P.2d 1310, 121 Ed. Law Rep. 1154, 244 Ariz. Adv. Rep. 23

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91 Cal.App.4th 974
Court of Appeal, Fourth District, Division 1,
California.

Michael William WILSON, a Minor, etc.,
Plaintiff and Appellant,

v.

COUNTY OF SAN DIEGO et al.,
Defendants and Respondents.

No. Do34614.

July 24, 2001.

Synopsis

Adolescent, through his father as guardian ad litem, sued the county, its program administrator for county's children's center, and two care workers provided by an employment agency, for negligence and negligent infliction of emotional distress after child was struck by car and seriously injured while running away from the center, where he was placed after being taken into protective custody. The Superior Court, San Diego County, No. 724450, [Judith McConnell](#), J., entered summary judgment for defendants. Adolescent appealed. The Court of Appeal, [Nares](#), J., held that defendants had no mandatory duty to prevent the adolescent from running away from the center, and injuring himself.

Affirmed.

Attorneys and Law Firms

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[Callahan, McCune & Willis](#) and [Norma S. Marshall](#), for Defendants and Respondents [Michael Polite](#), [Chris Johnson](#) and [Professional Resource Enterprises, Inc.](#)

Opinion

[NARES](#), J.

In this personal injury case, we hold that defendant County of San Diego (County) and its employees did not have a mandatory duty to ***978** prevent an adolescent from running away from Polinsky Children's Center (Polinsky), where he was placed after being taken into protective custody. Because there was no statutory basis to impose negligence liability on the defendants, we affirm summary judgments in their favor.

FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 1998, police officers took 13-year-old Michael William Wilson (Michael) to Polinsky¹ after he telephoned 911 and reported that his grandfather, with whom he was living, was drunk and had struck him on the head with the telephone ****176** when he was trying to talk to his mother, who was incarcerated.

The following afternoon, Michael telephoned his father in Northern California and asked to be picked up from Polinsky. His father said, "I can't come and get you right now." According to the father, he was "in a relationship with a pretty special woman," was "being pulled ... between him and her," and "couldn't have Michael all the time." Michael "got mad and said he was going to take off or that he was going to kill himself, and hung up the phone on [his father]." The father did not notify Polinsky staff about Michael's threat. That evening Michael ran away from Polinsky, unbeknownst to its staff. He was struck by a car and seriously injured when he darted onto Clairemont Mesa Boulevard.

Michael, through his father as guardian ad litem, sued County for negligence and negligent infliction of emotional distress.² Michael alleged that children taken into protective custody are "in extreme emotional states, frightened, paranoid, insecure, and subject to running away," and thus it was foreseeable he was at such risk and County had a duty to prevent him from running away from Polinsky. County moved for summary judgment, arguing there is no statutory basis for its liability. The court granted the motion, finding that County sustained its burden of showing that Michael "cannot establish the essential element that [it] breached a mandatory duty owed to [him]."

Michael amended his complaint to substitute parties in place of Doe defendants: [Geraldine Flaven](#), a program

administrator at Polinsky and a County employee; Professional Resource Enterprises, Inc., doing business as STAT Nurses Registry (STAT), an employment agency that provided residential care workers to Polinsky; and, Michael Polite and Christine Johnson, *979 STAT employees who were on duty at Polinsky the evening Michael ran away.

Flaven moved for summary judgment on the grounds that her duty, as a public employee, was commensurate with County's and, in any event, she was not on duty when Michael was at Polinsky. The court granted the motion on the same ground that it granted County's motion.

STAT, Polite and Johnson subsequently obtained summary judgment on the grounds that Polite and Johnson were "special employees of ... County by virtue of the degree of control exerted over the performance of [their] duties while employed at Polinsky." As employees of County, Polite and Johnson had no duty to prevent Michael from running away from Polinsky, and STAT could have no vicarious liability for their conduct. Judgments were entered for all defendants.

DISCUSSION

I

Standard of Review

"To prevail on [an] action [for] negligence, plaintiff must show that [the] defendants owed [him or] her a legal duty, that they breached the duty, and that the breach was a proximate or legal cause of [his or] her injuries. [Citation.]" (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, 91 Cal.Rptr.2d 35, 989 P.2d 121.) Because "duty is an issue of law to be decided by the court, the applicability of that defense [lack of duty] is amenable to resolution by summary judgment ." (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395, 36 Cal.Rptr.2d 418.) A de novo standard **177 of review applies, and we must "strictly construe the moving party's papers and liberally construe those of the opposing party to determine if they raise a triable issue of material fact." (*Stimson v. Carlson* (1992) 11 Cal.App.4th 1201, 1205, 14 Cal.Rptr.2d 670.)

II

Liability of Public Agencies and Their Employees

A

The California Tort Claims Act ([Gov.Code, § 810 et seq.](#)) bars liability against public agencies and their employees except as specifically provided *980 by statute. ([Gov.Code, § 815.](#)) [Government Code section 815.6](#) provides: "Where a public entity is under a *mandatory duty imposed by an enactment* that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." ([Gov.Code, § 815.6](#)) (Italics added.) "Before the [public agency] will be required to confront a rebuttable presumption of negligence [citation], plaintiff must demonstrate that: (1) the statute which was violated imposes a mandatory duty, (2) the statute was intended to protect against the type of harm suffered, and (3) breach of the statute's mandatory duty was a proximate cause of the injury suffered. [Citations.]" (*Braman v. State of California* (1994) 28 Cal.App.4th 344, 349, 33 Cal.Rptr.2d 608.)

Michael asserts that [Welfare and Institutions Code³ section 300.2](#) imposed a mandatory duty on County and its employees to "stop [him] as he was running away," and to "keep him safe and protected by not giving him any chance to attempt to run away." [Section 300.2](#) states the purpose of juvenile dependency law (§ 300 et seq.) "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and to prevent reabuse of children. The focus shall be on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the

child....” (§ 300.2.)

As our Supreme Court has explained, “application of [Government Code] section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, *that a particular action be taken or not taken*. [Citation.]” (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498, 93 Cal.Rptr.2d 327, 993 P.2d 983, last italics added.) Section 300.2 does not require a public agency to take any *particular action*. Rather, it recites legislative goals and policies that must be implemented through a public agency’s exercise of judgment. (See *Ibarra v. California Coastal Com.* (1986) 182 Cal.App.3d 687, 694, 227 Cal.Rptr. 371 .) Section 300.2 cannot reasonably be interpreted to impose a mandatory duty on public agencies to guarantee the ****178** safety of dependent children in all circumstances.

***981** Moreover, Michael’s duty argument is belied by the statutory requirement that public agencies place dependent minors alleged or adjudged to come within section 300 in “nonsecure” facilities, and to segregate them from minors who are detained for delinquency. (§ 206.) “The term ‘nonsecure facility’ means a facility that is not characterized by the use of physically restricting construction, hardware, and procedures and which provides its residents access to the surrounding community with minimal supervision.” (*Ibid.*)

To comply with section 206, Polinsky adopted a written AWOL (absent without leave) policy that prohibits the physical restraint of a child over 12 years of age who is not developmentally delayed.⁴ In a 1998 “Security Inspection Report,” County’s Juvenile Justice Commission wrote: “It is the intent that [Polinsky] *not* be a secure lock-up facility, and it is not considered one. It is the type of setting where children must feel safe but not incarcerated as if they committed a crime. This philosophy presents issues that inhibit normal techniques of securing facilities that would resist intrusion or AWOL activity.” (Original underscoring.)

Under section 206, the public agency’s control over the “ingress and egress” of juvenile dependents in a nonsecure facility is characterized as being “no greater than that exercised by a prudent parent.” (§ 206.) Caretakers of dependent children are said to act in loco parentis. (*In re Nicole B.* (1979) 93 Cal.App.3d 874, 880, 155 Cal.Rptr. 916.) In *Gibson v. Gibson* (1971) 3 Cal.3d 914, 922, 92 Cal.Rptr. 288, 479 P.2d 648, the court abolished parental tort immunity. However, a parent’s negligence liability is typically based on a direct nexus

between his or her affirmative conduct, such as the operation of a car, and the child’s injury. (See *id.* at p. 921, 92 Cal.Rptr. 288, 479 P.2d 648.) The *Gibson* court explained that although a parent does not have “carte blanche to act negligently toward his [or her] child,” “the parent-child relationship is unique in some aspects, and ... traditional concepts of negligence cannot ***982** be blindly applied to it.” (*Ibid.*) Michael cites no authority to support a contention that a parent owes a duty to an adolescent to prevent him or her from running away from home.

Michael also relies on Polinsky’s “Child Care Worker Manual,” which provided that “[s]taff must be alert, knowing where each child is at all times; staff is expected to supervise and maintain appropriate play activities. Children are to be within view at all times.” The manual also stated that “[c]hildren must always be supervised by an authorized adult while at [Polinsky]. Under no circumstances is a child to be out of the sight of ... staff or another ****179** designated adult unless the child is sleeping.” Further, it was Polinsky’s policy to assign a worker to an individual child in a variety of circumstances, including “[c]hronic AWOL behaviors.”⁵

The term “enactment” as used in [Government Code section 815.6](#) means “a constitutional provision, statute, charter provision, ordinance or regulation.” ([Gov.Code, § 810.6](#).) “This definition is intended to refer to all measures of a formal legislative or quasi-legislative nature.” (Cal. Law Revision Com. com., 32 [West’s Ann. Gov.Code](#) (1995 ed.) foll. § 810.6, p. 155.) The term “regulation,” as used in [Government Code section 810.6](#) means “a rule, regulation, order or standard, having the force of law, adopted ... as a regulation by an agency of the state pursuant to the Administrative Procedure Act [Act].” ([Gov.Code, § 811.6](#).)

“The ... Act rulemaking provisions apply to *most state agencies* and their regulations. [Citations.] There are significant exceptions, however, both as to the agencies and types of regulations covered. [Citation.]” (9 Witkin, *Cal. Procedure* (4th ed. 1997) *Administrative Proceedings*, § 32, p. 1085, original italics; [Gov.Code, § 11340 et seq.](#)) For instance, the Act does not apply to “[a] regulation that relates only to the internal management of the state agency” or “[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.” ([Gov.Code, § 11340.9](#), subs.(d) & (i).) Michael does not contend, and has not demonstrated, that Polinsky’s employee manual constitutes an administrative regulation within the meaning of the Act. Accordingly, the manual imposed no mandatory duties on County or its employees. (See *Hucko v. City of San Diego* (1986) 179 Cal.App.3d

520, 522, fn. 1, 224 Cal.Rptr. 552.)

Michael's reliance on *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 150 Cal.Rptr. 1, 585 P.2d 851 is misplaced. In *Hoyem*, a *983 10-year-old boy was injured after leaving the school campus without permission. The court held the school district was not exonerated from liability as a matter of law for claims that it negligently supervised the child on school grounds. The court relied on former title 5 of the California Administrative Code, section 303, which provided: " 'A pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school.' " (*Hoyem, supra*, at p. 514, 150 Cal.Rptr. 1, 585 P.2d 851; Cal.Code Regs., tit. 5, § 303.) The court explained it "ha[d] no doubt that this rule is at least in part for the pupils' protection, and that the school authorities therefore bore the duty to exercise ordinary care to enforce the rule." (*Hoyem, supra*, at p. 514, 150 Cal.Rptr. 1, 585 P.2d 851.) Here, County and its employees had no statutory duty to ensure that Michael not leave Polinsky. *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 110 P.2d 1044 and *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 87 Cal.Rptr. 376, 470 P.2d 360 are similarly unhelpful.

We are sympathetic to Michael's plight. We are, however, constrained to hold that County and Flaven were entitled to summary judgment on the grounds they had no mandatory duty to prevent him from running away from Polinsky. While perhaps one-on-one care should have been provided Michael, the decision was discretionary, not mandatory.

B

Michael contends he raised triable issues regarding whether Polite and Johnson **180 were independent contractors as opposed to "special employees" of County, and thus the summary judgment for them and STAT was improper. "Whether a person is an employee or an independent contractor is ordinarily a question of fact but if from all the facts only one inference may be drawn it is a question of law." (*Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081, 228 Cal.Rptr. 620.)

" 'An "independent contractor" is generally defined as a person who is employed by another to perform work; who

pursues an "independent employment or occupation" in performing it; and who follows the employer's "desires only as to the results of the work, and not as to the means whereby it is to be accomplished." [Citations.] The most significant factor in determining the existence of an employer-independent contractor relationship is the right to control the manner and means by which the work is to be performed. [Citations.] "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent *984 contractor relationship is established." [Citations.]' [Citation.]" (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 431, 277 Cal.Rptr. 807.)

"A 'special employment' relationship arises when an employer lends an employee to another employer and relinquishes to the borrowing employer all right of control over the employee's activities. [Citation.] The borrowed employee is 'held to have two employers—his original or 'general' employer and a second, the 'special' employer." ' [Citation.]" (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1247–1248, 250 Cal.Rptr. 718.) During periods of "transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492, 162 Cal.Rptr. 320, 606 P.2d 355.) "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work." (*Ibid.*)

The trial court determined that "defendants have established, and plaintiff has failed to controvert, that Polinsky controlled and directed the essential duties of defendant's work..." (Original capitalization omitted.) We agree with this assessment. In declarations, Polite and Johnson stated they (1) received their work schedules and daily work assignments from Polinsky, (2) "received training in the performance of [their] duties as ... residential care worker[s] from County employees,"⁶ (3) were "expected to follow and implement ... County ... policies and procedures for Polinsky," (4) were "under the supervision and received direction in performance of [their] duties from a Residential Care Supervisor and other County employees in supervisory positions," and (5) were not supervised by STAT in the performance of their work at Polinsky. An employee supervisor at Polinsky testified in deposition that workers provided by STAT "were supervised in the same manner as any County employee."

Michael offered no evidence suggesting County did not control the manner and means by which Polite and

Johnson performed ****181** their work. Evidence that STAT contracted to provide County a “certain number of man hours of work per year” and assigned Polite and Johnson to Polinsky does not create a triable issue of material fact.

The court correctly determined that Polite and Johnson were “special employees” of County. Accordingly, as with the County and Flaven, no duty ***985** to prevent Michael from running away from Polinsky can be attributed to Polite, Johnson or STAT.

DISPOSITION

The judgments are affirmed.

BENKE, Acting P.J., and **HUFFMAN**, J., concur.

All Citations

91 Cal.App.4th 974, 111 Cal.Rptr.2d 173, 01 Cal. Daily Op. Serv. 7371, 2001 Daily Journal D.A.R. 9055

Footnotes

- 1 Polinsky is a facility operated by County.
- 2 Michael also named the driver of the car that struck him, his grandfather and other defendants, but they are not involved in this appeal.
- 3 All further statutory references are to the Welfare and Institutions Code except where otherwise specified.
- 4 Polinsky’s AWOL policy states: “[Polinsky] does not condone runaway behavior and reasonable precautions should be taken to discourage this unacceptable method of leaving the facility. While it is recognized that for some older children running away has become an adaptive response to situational pressure, such behavior is considered high risk. For this reason it is difficult to prevent a child from running away from an unlocked facility like [Polinsky]. [¶] Staff can help minimize runaway behavior.... Diligent supervision, active programming, and concerned sensitive staff can and do make a difference with the majority of children....”
The policy advocated AWOL prevention by having staff do such things as “build rapport with each new child who enters [Polinsky],” “be available when a child wants to talk,” “be alert to AWOL plans and use active supervision techniques,” “be aware of the location and change of location of each child at all times,” “[o]pposing the minor by ... creat[ing] a barrier to the child’s movement,” and “[f]ollowing the minor.”
- 5 Michael had apparently run away from Polinsky on a previous occasion.
- 6 Michael asserts that “[t]here was no job training at [Polinsky], only staff and resident interaction.” However, in his responsive separate statement, Michael conceded it was undisputed that “Johnson and Polite received training to perform their job duties from ... County.”

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on the date stated below, I caused to be delivered a true and correct copy of the following document(s), to the following:

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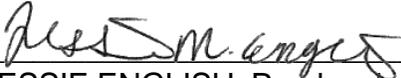
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