RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE
Mar 02, 2017, 4:57 pm
RECEIVED ELECTRONICALLY

No. 939772

SUPREME COURT
OF THE STATE OF WASHINGTON

Michele Anderson, a single person, individually and as the administrator of the Estate of Sheila Rosenburg,
Petitioner

v.

Soap Lake School District, et al,
Respondents.

Appeal from the Court of Appeals Division III

REPLY ON PETITION FOR REVIEW

Attorneys for Petitioner Michele Anderson:
Douglas D. Phelps, WSBA #22620
Katharine Allison, WSBA #41648
Amber Henry, WSBA # 49146
Phelps & Associates
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467

TABLE OF CONTENTS

	Page No.
Table of Authorities	2
I. Argument	3
A. **The Washington State Supreme Court should accept review in this case because the Petitioner has met the criteria set forth in RAP 13.4.**	3
1. **This matter involves issues of substantial public interest; therefore review by this Court would be appropriate.**	3
2. **The Court of Appeals decision conflicts with decisions of this court and Courts of Appeals; therefore review by this Court would be appropriate.**	3
B. **Petitioner's claims were improperly dismissed by the trial court and the Court of Appeals decision upholding that ruling was in error.**	4
1. **Soap Lake School District owed a duty to Sheila Rosenberg.**	4
a. **The death of Sheila Rosenberg was not so distant in time and place from her presence on school grounds as to absolve the district of liability.**	5
b. **The activities code further reinforces the existence of a duty on the part of the district.**	6
c. **Moreover, the existence of a duty in this case is a question for the jury.**	7
2. **Evidence or alleged lack thereof regarding the breach of a duty is a question for the jury.**	7
II. Conclusion	8

TABLE OF AUTHORITIES

Washington Cases	Page Nos.
Hartley v. State, 103 Wn.2d 768, 778, 698 P.2d 77 (1985)	8
King v. City of Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974)	8
Kok v. Tacoma School District No. 10, 179 Wn. App. 10, 17, 317 P. 3d 481 (2013)	5
McLeod v. Grant County School District, 42 Wn.3d 319, 319 (Wash. 1953)	4, 6
N.L. v. Bethel School District, 378 P.3d 162 (2016)	4, 6, 7, 8
Rhea v. Grandview School Dist. No. JT 116-200, 694 P.2d 666, 39, Wn. App. 557 (Wash. App. Div. 3 1985)	4
Scott v. Blanchet High School, 50 Wn.App. 37, 747 P.2d 1124 (1987).	5, 6
Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992)	4

Other Authorities	Page Nos.
RAP 13.4	1, 3

I. ARGUMENT

A. The Washington State Supreme Court should accept review in this case because the Petitioner has met the criteria set forth in RAP 13.4.

The Supreme Court accepts petitions for review in the following circumstances: 1) where the Court of Appeals decision is in conflict with a decision of the Supreme Court, 2) where the Court of Appeals decision is in conflict with a published decision of the Court of Appeals, 3) where a significant question of Constitutional law is involved, or 4) where the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Here, Plaintiff argues that the Court of Appeals decision conflicts with Washington case law, and that the issues involved are ones of substantial public interest that warrant review.

1. The case at hand involves issues of substantial public interest that make review by this Court appropriate.

This case involves a primary issue that is of great interest to the public: ensuring safety of children at school and while they are supervised by their teachers and coaches. The Court of Appeals decision prevents the school district which hired the coach in question from being held accountable for its failure to properly oversee the athletics program and relationships between coaches and students.

2. The decision of the Court of Appeals conflicts with decisions of this Court.

The Court of Appeals decision conflicts with multiple decisions of this Court. In particular, it conflicts with the decisions of this Court in *N.L. v. Bethel School District*, 378 P.3d 162 (2016); *Kok v. Tacoma School District No. 10*, 179 Wn.App. 10, 317 P.3d 481 (2013); *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953); and *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992). These conflicts have been addressed in Petitioner's opening brief and will be discussed further below.

Furthermore, the Court of Appeals decision does also conflict with *Rhea v. Grandview School Dist. No. JT*, 29 Wn.App. 557, 694 P.2d 666 (1985). In Rhea, a faculty member knew that students were seeking alcohol for an evening after a "Senior Day" and reported the incident. *Id.* at 559. Ultimately the Court found the district not to be liable. *Id.* at 561. However, that is a significantly different situation from the one at hand. Here, not only was faculty aware that Mr. Turchik and Ms. Rosenberg were drinking, faculty actually provided the alcohol to them.

To allow the Court of Appeals decision to stand without additional consideration would create significant confusion for the lower courts regarding when exactly a matter should properly go before a jury to consider. The conflicting rulings merit review.

B. The Court of Appeals decision was in error.

1. Soap Lake School District did owe a duty to Sheila Rosenberg.

a. Sheila Rosenberg's death was not sufficiently distant in time and place from her presence and participation in basketball-related activities on and off school grounds to absolve the district of liability.

Respondents cite to *McLeod v. Grant County School District No. 128* and *Scott v. Blanchet High School* to support the proposition that because the drinking event in this case occurred outside of school hours and off campus, that Ms. Rosenberg was not under the care, custody or control of Soap Lake School District at the time. *McLeod*, 42 Wn.2d 316, 255 P.2d 360 (1953); *Scott*, 50 Wn.App. 37, 747 P.2d 1124 (Div. I, 1987).

McLeod provides that school districts have a duty to protect students in their custody from foreseeable dangers. 42 Wn.2d at 320, 322. In McLeod, the court held that the school district was liable where during recess several students raped another student on campus. Id. at 318. The liability of a school district once students are off campus was not before the court to consider.

In *Scott*, the Court of Appeals found that the district was not liable for a student's sexual relationship with a teacher where there had been counseling sessions between the two of which the rest of the faculty was not aware. 50 Wn.App. 37, 38, 44-45, 747 P.2d 1124 (1987). It held that "at some point...the event is so distant in time and place that the responsibility for adequate supervision is with the parents rather than the school." Id. at 44-45.

However, this Court noted in a recent decision that "nothing in *McLeod* suggests that the district's liability for a breach of duty while the student was in its custody would be cut off merely because the harm did not occur until later." *N.L. v. Bethel School District*, 378 P.3d 162, 167 (2016). It further noted that Scott did not create "a per se rule requiring custody during the injury for a duty to attach." *Id.* at 168. Finally, this Court held that "districts have a duty of reasonable care toward the students in their care to protect them from foreseeable dangers that could result from a breach of the district's duty," and that the injury occurring off campus is not determinative. *Id.*

Here, Coach Lukashevich was given free rein to socialize with his players and reward them as he saw fit for their performance as part of the team. The Athletics Director knew that he did social nights and such as these rewards. On the night in question, Coach Lukashevich had conducted an evening basketball practice at the gym, then invited players to his home for ice cream, including Ms. Rosenberg. At his home, he served alcohol to the players, and the death of Ms. Rosenberg occurred shortly thereafter. It was foreseeable that Coach Lukashevich, being close in age to his players, with no training as an educator, and with this authorization from the Athletics Director to reward his players as he saw fit, would take the socialization to an improper level.

b. The activities code further evidences a duty on the district's part to prevent alcohol use by its students.

The Respondents fail to demonstrate that the Activities Code is not a contract. In order to participate in athletics, students are required to sign the code. Among other things, the code requires them to abstain from alcohol. It requires this abstinence not only during school events, but also outside of school, prohibiting student athletes from even attending any event where alcohol was present. This heightened responsibility on the part of student athletes must be accompanied by an equally heightened duty on the part of the school district to ensure that students and faculty all adhered to this contract to prevent student athlete alcohol use. The district evidently failed to ensure that Coach Lukashevich was fully aware of the requirements of the Activities Code and that he was prepared to monitor student compliance and discipline students as necessary.

c. Moreover, the existence of a duty in this matter is a question for the jury.

In *N.L. v. Bethel School District*, this Court held that whether the injury there fell within the scope of the school district's duty was a matter for the jury. *Id.* at 169. Here too, there are sufficient factual questions to pose to a jury to determine whether the harm here was foreseeable and therefore whether there was a duty at all when a student is injured following a basketball event hosted by her coach.

2. Evidence or alleged lack thereof regarding a breach of a duty is a question for the jury.

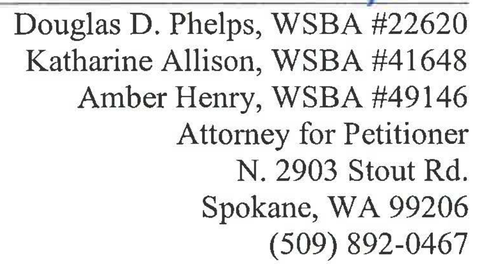
Cause in fact is normally a question for the jury. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Legal causation, on the other hand, can be decided by the court as a matter of law where there are no facts in dispute. *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974). As noted above, the excessive socialization of Coach Lukashevich with his players, leading to providing them with alcohol, was foreseeable given the lack of supervision by the Athletics Director and the freedom to schedule practices and social events at all hours. Moreover, the inaction on the part of the district is disputed. Where facts are in dispute, breach and causation are matters for the jury.

As in *N.L. v. Bethel School District*, whether the district failed to meet its duty, and the causation of injuries from such failure in this matter should properly be a matter for the jury to determine. *N.L.*, 378 P.3d at 170.

II. CONCLUSION

The case law provides for a duty of care to Sheila, Pavel and their parents, a contract of adhesion entered into between the parties further expanded that duty, and the defendants were negligent when they breached their duties to Sheila and her mother, Mrs. Anderson. The Estate of Sheila Rosenberg respectfully requests this Court reverse the decision of the trial court and remand this case for trial.

Respectfully submitted this 2nd day of March, 2017.



Douglas D. Phelps, WSBA #22620
Katharine Allison, WSBA #41648
Amber Henry, WSBA #49146
Attorney for Petitioner
N. 2903 Stout Rd.
Spokane, WA 99206
(509) 892-0467