98280-5

NO. 79655-1-I

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.

FERNDALE 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.

PETITION FOR REVIEW (RAP 13.4(b)(1) AND (4)) (CORRECTED)

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I. IDENTITY OF PETITIONER, DECISION & INTRODUCTION

The trial court (Judge R. Montoya-Lewis, presiding) dismissed on summary judgment because no reasonable juror could find Ferndale liable for plaintiff's tragic death as a matter of law. Ferndale's P.E. teacher took high school students out for exercise: with school permission, walking on a school-approved route he had followed 30 times before. Everyone was walking safely on a suburban public sidewalk when a driver suddenly and unexpectedly fell asleep and, within seconds, drove off the road, across an 8-foot shoulder, onto the sidewalk, and into several students – missing the teacher by two feet but killing two students.

Judge Montoya-Lewis ruled this inconceivable tragedy was unforeseeable as a matter of law. But on *de novo* review, the Court of Appeals disagreed. *Meyers v. Ferndale Sch. Dist*., No. 79655-1-I (Feb. 10, 2020). This published analysis contradicts this Court's precedent--notably *Schooley v. Pinch's Deli Market, Inc*., 134 Wn.2d 468, 951 P.2d 749 (1998) and *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974). It also contradicts the Court of Appeals' own significant decision in *Channel v. Mills*, 77 Wn. App. 268, 890 P.2d 525 (1995). The Court of Appeals failed to consider whether logic, common sense, justice, policy and precedent permit liability under these facts–an issue that this Court should decide. This Court should accept review under RAP 13.4(b)(1) and (4).

II. ISSUES PRESENTED FOR REVIEW

The Court of Appeal's analysis on "cause in fact" is in conflict with the Court of Appeal's holding in *Channel v. Mills*, and its analysis on "legal causation" conflicts with *Schooley v. Pinch's Deli Mkt, Inc*., 134 Wn.2d at 478, and *King v. City of Seattle*, 84 Wn.2d at 249–50 (and also arguably with *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013)). The decision is published. If its methodology is followed in other cases, it will result in widespread use of an impermissible "short-cut" on legal causation analysis—in fact, the very shortcut that the concurrence in *Lowman* warned against. This erroneous methodology, and its conflict with *Schooley/King*, justify review under RAP 13.4(b)(1).

Further, because the errant result may impose liability on school districts statewide, for "allowing" students to encounter risks that are otherwise simply an activity of daily living—*i.e*., walking right next to a adult, on a public sidewalk, in broad daylight--it involves an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4).

III. STATEMENT OF FACTS

The material facts of this case are not in dispute. The Ferndale School District formerly operated a "choice" high school, Windward High School, which had an average yearly enrollment of 68-170 students (CP 236-237). The high school was housed in a small former elementary school building, at the intersection of Northwest and Smith Roads, in rural Ferndale. Decedent Gabriel Anderson was a 15-year-old freshman student and nearing the end of his first school year at Windward.

Because Windward's campus was a former elementary school, it had a very rudimentary playground, with a less-than-standard sized, cement track not suitable for engaging high school students in P.E.-type activities. (CP 310). Furthermore, many students at Windward were uninterested in traditional athletics or sports. (CP 310). So, at various times, P.E. teacher Evan Ritchie would take his high school students (ages 15-18) walking for exercise. They would meet, go over expectations, and the strike out along the sidewalk adjacent to Smith Road, on a five-and-a-half foot wide, raised, paved sidewalk with a six-inch curb.

The sidewalk was buffered from the roadway by an eight-foot marked shoulder. (CP 310-311). They would walk along the side border of their campus, into the residential neighborhood and up the road 0.68 miles, then cross the road, turn around and come back. The roadway was straight,

flat, and had excellent visibility. It was not busy during school hours (CP 311).

Ritchie obtained permission from the school administration when he took students on this walk on the sidewalk during P.E. class. The school did not obtain permission slips from parents, because it was not a field trip requiring formal parental approval. (CP 237-38, 312). Every Ferndale witness testified that permission slips were not necessary since the activity was confined within a single class period and furthered the specific educational purpose of the class—"physical education." (CP 237-38). The students were under Ritchie's direction and instruction throughout the activity and were always back in time for their next class. (CP 238). Appellant's brief mischaracterized District testimony to argue that field trip permission slips were required.

On June 10, 2015, Ritchie provided the students with instructions for topics to discuss during the walk, and reviewed safety precautions, then began the walk. (CP 312). The students walked safely on the sidewalk to their turn-around point .68 miles from school. (CP 313-314). They safely crossed W. Smith Road and began returning to school. (CP 313-314). Ritchie was walking in a "sweep" position, near the back.

Ritchie and Gabriel were walking side by side on the sidewalk. (CP 314). They were .2 miles from the school when defendant William

Klein, with his own young child in the back seat, fell asleep at the wheel. (CP 52-61). Klein's vehicle left the roadway, crossed the 8 foot shoulder, hit the curb and went up and over, and onto the sidewalk striking Gabriel and other students. (CP 52-61). Ritchie was still in conversation with, and was *within two feet* of, Gabriel when Gabriel was struck. (CP 314).

Gabriel was killed. The driver—Klein—was acquitted criminally, based on a defense of having fallen asleep. This suit followed, and raised only negligence-based claims against the District.

IV. ARGUMENT

A. The Court of Appeals' "legal cause" decision conflicts with several of this Court's precedents. (RAP 13.4(b)(1)).

In a negligence-based claim, our state's seminal case, *Schooley,* requires three steps: an analysis of duty (which is defined here by foreseeability / "zone of danger" because of the school/in loco parentis context), then analysis of "cause in fact" (*i.e.*, "but for" causation), and finally, analysis of legal cause. *Schooley* expressly holds that "a court should not conclude that the existence of a duty automatically satisfies the requirements of legal causation." *Id.* at 479. The Court of Appeals failed to follow this language, and in fact, did the opposite. Because of this conflict, this Court should accept review under RAP 13.4(b)(1).

The Court of Appeals analysis also ran afoul of *King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228, 235 (1974), holding that the legal cause analysis is "always to be determined on the facts of each case":

> Cause in fact is not, however, the sole determinate of proximate cause, and in a broader sense the question of law as to whether legal liability *should* attach, given cause in fact, is the question still before us in this case.
>
> * * *
>
> Conceding all the other elements of tort liability are present, *they are not sufficient in themselves to make out a prima facie case*.
>
> "The court *must still adduce from the record* whether, as a policy of law, legal liability should attach to the defendant if the other factual elements are proven and no affirmative defense is made out. 'Causation, as such, is a question of fact. Proximate causation is a question of law. The entire doctrine [of proximate cause] assumes that a defendant is not necessarily to be held responsible for all the consequences of his acts. McLaughlin, Proximate Cause, 39 Harv. L. Rev 149, 155 (1925).
>
> * * *
>
> [Legal liability] is always to be *determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent*. . . the best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other." 1 T. Street, Foundations of Legal Liability, 110 (1906).

King, 84 Wn.2d at 250. For conflict with these two instructive cases, alone, this Court should accept review under RAP 13.4(b)(1).[1]

[1] *See also Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1965).

It further appears that the Court of Appeals was unduly influenced by the method of analysis in *Lowman*, but *Lowman* is distinguishable. There, this Court did not have to engage anew in legal cause/policy analysis because of *Keller v. Spokane*, 146 Wn.2d 237, 241, 44 P.3d 845, 847 (2002). In *Keller*, the Court had already determined that the duty to maintain a safe roadway extended even to negligent drivers—and therefore, that an obstruction off of the roadway was *not too remote* to impose liability. Therefore, this Court in *Lowman* did not repeat the "logic, common sense, justice, policy and precedent" analysis. Instead, it noted that *because of Keller*, "If Lowman's injuries were in fact caused by the placement of the utility pole too close to the roadway, then they cannot be deemed too remote for purposes of legal causation." *Lowman*, 178 Wn.2d at 171.

As the Madsen concurrence in *Lowman* clarified, not every case has a *Keller*-like precedent. Therefore, for *every other* fact pattern, the fact-specific, policy-based analysis required by *Schooley* must still be done. ("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.") *Lowman, supra*, at 172 (Madsen, concurring).

The Court of Appeals should have conducted a true "legal cause" analysis on the facts of *this* case. (*Schooley/King*). These conflicts warrant review by this Court under RAP 13.4(b)(1).

i. The Trial Court properly analyzed all three steps of *Schooley*.

The trial court properly undertook the first step—analysis of the applicable duty--under well-established school law. (CP at 569 ("school districts have a duty to anticipate dangers which may reasonably be anticipated and to then take precautions to protect the pupils in its custody from such dangers.")). It also properly observed, as to "cause in fact," that in a strict sense, if FSD had not taken the students to walk on the sidewalk, or if they had been walking on the opposite side of the street, they would not have been in the location where they were struck—which is the type of "cause in fact" analysis urged by plaintiffs, yet rejected in *Channel v. Mills*. However, the trial court noted that, in reality, that type of "cause in fact" was insufficient, especially when students were frequently on that same sidewalk with parental consent, before and after school and during lunch. (CP at 570 ("None of those actions, had they been taken, would

have avoided this accident. Mr. Klein fell asleep.")). Finally, the trial court ultimately held that this accident was "not foreseeable" as a matter of law. That decision was correct.

ii. The Court of Appeals analyzed duty and "cause in fact" but then omitted the mandatory *Schooley*/*King* third step entirely.

a. Duty

On review, the Court of Appeals' analysis on *duty* was to reiterate the applicable "zone of danger" test. Slip Opinion, Appendix at 7-9. It noted that existing case law holds that "vehicles leaving roadways" is within a foreseeable zone of danger when using a sidewalk. Slip Op. at 8-9 ("It is common knowledge, and has been noted in case law for decades, that cars do not always stay in their lanes; accidents happen."). Ferndale does not challenge the Court of Appeal's analysis of the duty owed.

b. Cause in Fact

The Court of Appeals then conducted an analysis of "cause in fact" but did so in a way that conflicts with *Channel v. Mills*. Appellant's allegations of shortcomings by the District, constituting proximate cause, had to do with whether the teacher should have used a permission slip, should have been wearing a reflective safety vest, could have requested additional chaperones, could have made students walk facing traffic both

ways, or could have made them cross at a designated crosswalk at the turn-around point (where there is no marked crosswalk). See Slip Op. at 10-12. But these shortcomings are irrelevant to how this accident happened. This accident was caused by a driver who fell asleep and hit students while they were walking on a sidewalk – not when they were crossing the road, not because they didn't have more chaperones, not because they weren't wearing hi-vis clothing/vests, and not because they had not obtained permission slips first.

In reality, the Court of Appeals' "cause in fact" analysis boils down to the idea that, if the District had not taken the students off campus, they would not have been present at the location where driver Klein left the roadway. *See, e.g.*, CP at 393 (report of plaintiff's expert); Slip Op. at 1 ("Ferndale's actions, Meyers asserted, exposed Anderson to the negligent driving of Klein.") As discussed in more detail below, that type of "cause in fact" analysis runs afoul of *Channel v. Mills* and is insufficient to constitute "cause in fact."

c. Legal Cause Analysis

As to the legal cause analysis that *Schooley* and *King* require, the Court of Appeals skipped this step entirely. In its Opinion, pages 12-15, the Court of Appeals *purported to* address "legal cause." But, instead,

what it did was cite to *Lowman*, for the idea that, "any consideration of the legal cause question should…*begin with* a review of the duty question." (Opinion at 14, emphasis added). Then, after noting that legal cause analysis *begins with* a review of duty, the Court of Appeals *went no further* than reiterating the duty. Its analysis ended. Its opinion turned to the lack of prior cases decided in favor of school districts, on the issue of legal cause. This error is obvious at Slip Opinion page 14, where the Court jumped directly from stating that duty should be the "starting point," to distinguishing *N.L v. Bethel Sch. Dist*., 186 Wn.2d 422, 430, 378 P.3d 162, 166 (2016), and *McLeod v. Grant County Sch. Dist*., 42 Wn.2d 316, 255 P.2d 360 (1953). But prior *case law* is not where *Schooley* or *King* direct the Court of Appeals to turn. In fact, doing so was directly contrary to *Schooley* and *King*: "The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.' *King*, 84 Wn.2d at 250.

Under *Schooley*, "legal causation should not be assumed to exist every time a duty of care has been established." *Schooley*, 134 Wn.2d at 480. Instead, the Court of Appeals was required, by *Schooley* and *King*, to turn its analysis to actually doing the messy, complicated, policy-driven, societal-standards-based work of analyzing *whether liability should extend*

to *these* facts.[2] It needed to examine the competing values of protecting students in school custody, with a school's right and ability to leave campus for recreational, enrichment or other educational purposes.

Under a legal cause analysis, the court "still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident." *Keller v. City of Spokane*; *see also McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998) ("[T]he court often exercises its gatekeeper function by dismissing an action * * * for lack of legal cause if the defendant's actions are too remote a cause of plaintiff's injuries.").

Here, as stated by accident reconstruction expert, David Wells, "the roadway where this accident occurred was about as safe as you can make any road." (CP 157). The traffic lanes are each twelve feet wide. There is an eight foot wide shoulder between the fog line and the curb. (CP 157). It is wider than a typical road. There is a six-inch raised curb, protecting the five-and-a-half foot wide sidewalk. The roadway and sidewalk were in excellent condition. (CP 157). The road is mostly flat

[2] In other words, the Court of Appeals fell into the very shortcut that Justice Madsen warned against in the concurring opinion in *Lowman*. But no shortcut was available here. There is no "*Keller"* for these facts—*i.e.*, no established precedent holding that students/teachers should not be present on public sidewalks, nor that school districts have some duty to "make safe" a public sidewalk even as against negligent users, like the government was held to have in *Keller*.

and straight, with no visibility issues. There are pedestrians routinely using the roadway and sidewalks, including students walking to and from school, and at lunch. It is uncontroverted that Gabriel himself was permitted by his guardians to, and routinely did, *cross* this same roadway at lunchtime to buy his lunch at a nearby market. (CP 157, 543-544). There has only been one other pedestrian-related accident in the entire area, in the last ten years – and that occurred in the crosswalk of the intersection to the east of the school. It happened during the summer when a young male ran between cars stopped at the intersection, and jumped into the path of a slow moving vehicle. (CP 158). In other words, there have been no similar accidents.

The specific area where the students were located when they were struck had also been previously studied and approved as a Safe Walk Route by the District, pursuant to the procedures set forth in WAC 391-141-340. (CP 269, 306). The roadway had bus stops on it and is routinely used by students to walk to and from school. Further, Ritchie had taken PE students walking along this sidewalk around 30 times without any issues. (CP 310). It is uncontroverted that Klein had been driving at around 32-34 mph when he fell asleep, and that *one second elapsed,* from when his vehicle left the roadway until he impacted Gabriel Anderson. (CP 186-87).

These are the facts to which the Court of Appeals was required to apply logic, common sense, justice, policy and precedent, and to determine whether liability should extend to Ferndale, for allowing P.E. teacher Ritchey to take students for a walk on the sidewalk.

B. The Court of Appeals' decision conflicts with its own decision in *Channel v. Mills*. (RAP 13.4(b)(2)).

The Court of Appeals' decision at pages 10-12 purported to find an issue of "cause in fact" about whether "Ferndale's field trip and excursion policy covered Ritchie's class outing and whether compliance with that policy would have prevented Anderson's death." But the effect of a parental permission slip—signed or unsigned—would simply have been to allow, or prevent, Anderson from being present with the class on the public sidewalk—a location where Anderson and any other pedestrian had every lawful right to be. Simply causing Anderson to be on a public sidewalk is insufficient "cause-in-fact" under *Channel v. Mills*.

In *Channel*, the issue was an intersection vehicle collision. One party sought to establish, through expert testimony, that if Mills' speed had been different, upon his approach, "the vehicles would have cleared" each other. Therefore, they argued, his negligence (speeding) caused the accident because it brought him to the location where he could collide

with the other car. The Court of Appeals engaged in an exhaustive survey of in-state and out-of-state caselaw, then drew two corollary principals:

- "speed in excess of that permitted by statute or ordinance is not a proximate cause of a collision if the favored driver's automobile is where it is entitled to be, and the favored driver would have been unable to avoid the collision even if driving at a lawful speed."
- "A necessary corollary is that speed is not a proximate cause if it does no more than bring the favored and disfavored drivers to the same location at the same time, and the favored driver has the right to be at that location (i.e., the favored driver has the right of way)."

Channel, 77 Wn. App. at 276-77.[3]

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[3] While all of the Washington cases discussed in *Channel* are "vehicle speed" cases, out-of-state cases discussed in *Channel* are from other contexts, such as a driver who happened to be driving underneath the location where a negligently-maintained tree fell when the wind blew. But for the driver's speed, the defending municipality argued, he would not have arrived at that location at the precise time the tree fell. That argument was roundly rejected as "cause in fact." *Berry v. Sugar Notch Borough*, 191 Pa. 345 (1889).

Also instructive is the discussion, in *Channel*, of *Doss v. Town of Big Stone Gap*, 145 Va. 520, 134 S.E. 563 (1926). The defendant town maintained an aviation park, open to both airplanes and cars. The town allowed the street leading to the park to deteriorate, allegedly as a result of the Town's negligence. The Town provided a detour, and the plaintiff was using that detour when his car was rear-ended by an airplane trying to land at the park. The plaintiff's estate sued the Town on the theory that but for the Town's negligence in maintaining the street, he would not have been using the detour, and but for using the detour, he and the airplane would not have been at the point of impact at the same time. The court held that the Town's negligence in maintaining the street—while it may have brought them into the same vicinity at the same time--was not a proximate cause of the accident.

The Court of Appeals also listed several other short-comings that plaintiff alleged—things like only having one adult present, allowing the students to "spread out," and walking with their backs to traffic. It used these as evidence to support "cause in fact" being a jury question. (Slip Op at 11-12). But all of these alleged short-comings—even if they did exist—still lead only to the fact of some of the students happening to be present on the sidewalk at the precise location where Klein suddenly drove off the road. Using "being in the wrong place at the wrong time" as evidence of "cause in fact" is directly contrary to *Channel*.

Even assuming, arguendo, Ferndale's negligence in failing to obtain a permission slip, or issue a hi-vis vest to Ritchey, or to add another chaperone, simply taking Anderson to the location on the sidewalk where Klein would eventually strike Anderson is not cause-in-fact. All Ferndale did was "bring the favored and disfavored driver [here, a pedestrian], to the same location at the same time." *Channel, supra*, at 277. While the Court of Appeals deemed that sufficient to equate to "cause in fact," *Channel* would say otherwise.

For this conflict, too, the Court of Appeals' decision should be reviewed. RAP 13.4(b)(1).

C. Whether a school district should be liable for taking its P.E. students for a walk on a suburban sidewalk, when they were injured by a sleeping driver, is an issue of substantial public interest that this Court should decide. (RAP 13.4(b)(4)).

The Court of Appeals abrogated its analysis of "logic, common sense, justice, and policy" and instead simply looked to the duty described in earlier school law cases (*N.L. v. Bethel Sch. Dist.;* and *McLeod v. Grant Cty. Sch. Dist.*). That was error. Neither *N.L*, nor *McLeod*, involved similar facts to this case. The instruction from *Schooley* and *King* is that the Court must engage each case on its own facts, and make a policy determination "as to how far the consequences of a defendant's acts should extend." In doing so, "[t]he standards * * * are not susceptible of a conclusive and fixed set of rules, readily formulated. '(Legal liability) is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy, and precedent. *King*, 84 Wn.2d at 250. And, because the Court of Appeals did not do so, this Court should accept review to do so.

This Court has already recently grappled with just how far to extend liability against schools. *See Hendrickson v. Moses Lake Sch. Dist*., 192 Wn.2d 269, 428 P.3d 1197 (2018); and *Anderson v. Soap Lake Sch. Dist*., 191 Wn.2d 343, 354, 423 P.3d 197, 205 (2018). It has never gone so far as to hold that a school should be subject to liability, simply for taking

students out in public, or off campus to a location where otherwise-ordinary risks could, but rarely do, happen. This is not a case where the injury arose from "allowing" students to improperly use an unmarked crosswalk (despite plaintiff's argument to the contrary). Ferndale was not thrusting its students into a busy metropolitan intersection without an adult present. The injury arose while a high-school-aged student was walking two-by-two, with his teacher, *on a wide, flat, public sidewalk that served as a primary "walk to school" route for students*. It occurred because driver Klein fell asleep in broad daylight, at the wheel, and happened to veer their way.

As the District argued below, unless this Court is prepared to hold a parent liable for a death resulting from the same choice (walking next to their child along a public sidewalk in the early afternoon), how can it hold a school—acting *in loco parentis*—liable for an accident like this?

The real-world effect of a ruling like the Court of Appeals' decision is to hobble the public schools of this state from engaging in any enrichment activities that might "expose" students to potential, but extremely rare, risks. The educational impact has the potential to be staggering. This case deserved a fair look using "logic, common sense, justice, policy and precedent." Therefore, Ferndale asks this Court to

decide this issue of substantial public interest under RAP 13.4(b)(4), for the sake of Washington's public school districts, state-wide.

V. CONCLUSION

The Court of Appeals' decision of "legal cause" is in conflict with *Schooley* and *King*. RAP 13.4(b)(1). The Court of Appeals analysis of "cause in fact" conflicts with its own decision in *Channel v. Mills*. RAP 13.4(b)(1). Further, the case raises an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). This Petition should be granted.

DATED THIS 11th DAY OF March, 2020.

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APPENDIX

Meyers v. Ferndale Sch. Dist., No. 79655-1-I (Feb. 10, 2020)

FILED
2/10/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS 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.

FERNDALE SCHOOL DISTRICT, a political subdivision of the State of Washington,

Respondent,

and

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

Defendants.

DIVISION ONE

No. 79655-1-I

PUBLISHED OPINION

FILED: February 10, 2020

DWYER, J. — Following the death of high school student Gabriel Anderson, Bonnie Meyers, as personal representative of Anderson's estate, filed suit against the Ferndale School District (Ferndale) and William Klein. Meyers asserted that Anderson's death was the result of Ferndale negligently removing Anderson from the safety of his high school campus. Ferndale's actions, Meyers asserted, exposed Anderson to the negligent driving of Klein, who fell asleep

behind the wheel and drove his motor vehicle up onto a sidewalk, killing Anderson.

The trial court granted Ferndale's subsequent motion for summary judgment and dismissed Meyers' claims against Ferndale, concluding—as a matter of law—that the collision was not reasonably foreseeable and that Ferndale therefore had no duty to take steps to prevent its occurrence. In its order, the trial court improperly based its determination of foreseeability on the specific harm that occurred, rather than on the general field of danger created when Ferndale staff took Anderson off campus for a walk along a public roadway. Because evidence in the record establishes a genuine issue of material fact regarding whether it was foreseeable that Anderson could be struck by a motor vehicle while walking along a public roadway, we reverse.

I

Gabriel Anderson was a student at the Ferndale School District's Windward High School during the 2014-2015 school year. At Windward High School, he was in teacher Evan Ritchie's physical education class. On June 10, 2015, Ritchie decided to take Anderson's class for a walk off the school's campus grounds.

Windward High School was ostensibly a modified closed campus school and Ferndale had specific policies in place during the 2014-2015 school year regarding taking students off campus on field trips or excursions. Ferndale required teachers to obtain the permission of a student's parent or guardian before taking them off campus for a field trip or excursion. All parties agree that

Ritchie did not follow these policies prior to taking Anderson's class off campus.[1] Instead, Ritchie asserted that only minutes prior to the outing he sought and obtained the approval of Windward High School's then principal, Tim Kiegley, to take his class for a walk off campus.[2]

Without securing any additional adult supervision, Ritchie then proceeded to take his students off campus, walking west on the sidewalk along the north side of West Smith Road past the school safety zone to a section of the road where motor vehicles were permitted to travel at speeds of up to 40 miles per hour. At times during the walk, some students were up to 200 meters away from Ritchie. To return to the school, the students were explicitly granted permission to cross West Smith Road to reach the south side of the road at locations other than at designated crosswalks, and they did so.

To return to the school, the students crossed the street and walked along the sidewalk on the south side of West Smith Road, with their backs to oncoming traffic. At a point outside of the school safety speed zone, just before the intersection of Graveline Road and West Smith Road, Anderson and several other students were struck by William Klein's sport utility vehicle. Klein had fallen asleep at the wheel and driven off the road and onto the sidewalk. Anderson and

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[1] However, the parties dispute whether the policy was applicable to Ritchie's decision to take his class out for a walk near the school. Ferndale and Ferndale's witnesses assert that the policy did not apply to the outing Ritchie took his class on because it was not a field trip or an excursion.

[2] The record contains inconsistent statements from Kiegley regarding how much information Ritchie provided to him concerning where, exactly, Ritchie planned to take his class. Even in the portions of the record wherein Kiegley asserted that he knew about Ritchie's planned walking path prior to the class's departure, Kiegley did not properly identify the location of crosswalks along West Smith Road, asserting that there is a crosswalk on West Smith Road at the west end of the students' walking path when there is none.

one other student were killed. Two other students were grievously injured.

Meyers subsequently sued both Klein and Ferndale, alleging that they had acted negligently and that their negligence had resulted in Anderson's untimely death. Ferndale then moved for summary judgment dismissal of Meyers' claims against it on the grounds that (1) the collision that killed Anderson was not foreseeable—thus Ferndale had no duty to take steps to prevent it—and (2) even if Ferndale breached a duty, such breach was not the proximate cause of Anderson's death. The trial court agreed with Ferndale that the collision was not foreseeable and issued an order granting summary judgment and dismissing Meyers' claims against Ferndale on that basis.

Meyers appeals.

II

Meyers contends that the trial court erred by concluding that the collision resulting in Anderson's death was not foreseeable. This is so, Meyers asserts, because the trial court improperly based its determination of foreseeability on the specific harm that occurred, rather than on the general field of danger created when Ritchie took Anderson off campus for a walk along a public roadway. In response, Ferndale asserts that the trial court's ruling did not actually dismiss Meyers' claims against it on the ground that injury to Anderson was unforeseeable but, rather, because Ferndale's actions were neither the cause in fact nor the legal cause of Anderson's death. Meyers has the better argument.

A

We review de novo a trial court's order granting summary judgment. Greensun Grp., LLC v. City of Bellevue, 7 Wn. App. 2d 754, 767, 436 P.3d 397, review denied, 193 Wn.2d 1023 (2019). We will affirm such an order only "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Woods View II, LLC v. Kitsap County, 188 Wn. App. 1, 18, 352 P.3d 807 (2015). On review, we must "conduct the same inquiry as the trial court and view all facts and their reasonable inferences in the light most favorable to the nonmoving party." Greensun Grp., LLC, 7 Wn. App. 2d at 767 (citing Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn.2d 342, 350, 144 P.3d 276 (2006)).

To prevail in this negligence suit, Meyers must show "'(1) the existence of a duty to [Anderson], (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury.'" N.L. v. Bethel Sch. Dist., 186 Wn.2d 422, 429, 378 P.3d 162 (2016) (quoting Crowe v. Gaston, 134 Wn.2d 509, 514, 951 P.2d 1118 (1998)). In this appeal, the parties contest only the issues of duty and proximate cause.

B

Meyers primarily contends that the trial court erred by concluding that Ferndale had no duty to protect Anderson against the collision that resulted in his death. This is so, Meyers asserts, because the court applied the wrong legal standard of foreseeability by requiring the specific collision to be foreseeable in order for Ferndale to have a duty to protect Anderson. According to Meyers,

Ferndale had a duty so long as the specific injury-causing event was within the general field of danger created when Ritchie took Anderson off campus to walk along a sidewalk next to a public roadway.[3] We agree.

"Whether a duty exists is a question of law for the court." N.L, 186 Wn.2d at 429 (citing Aba Sheikh v. Choe, 156 Wn.2d 441, 448, 128 P.3d 574 (2006)). "School districts have the duty 'to exercise such care as an ordinarily responsible and prudent person would exercise under the same or similar circumstances.'" N.L., 186 Wn.2d at 430 (quoting Briscoe v. Sch. Dist. No. 123, 32 Wn.2d 353, 362, 201 P.2d 697 (1949)). While common law generally imposes no duty to prevent a third person from causing physical injury to another, such a duty arises when "'a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct.'" Niece v. Elmview Grp. Home, 131 Wn.2d 39, 43, 929 P.2d 420 (1997) (internal quotation marks omitted) (quoting Hutchins v. 1001 Fourth Ave. Assocs., 116 Wn.2d 217, 227, 802 P.2d 1360 (1991)). Pertinently, "[s]chool districts have a custodial relationship with their students—'[i]t is not a voluntary relationship.' As a result, the school district must 'take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated.'" Hendrickson v. Moses

[3] In response, Ferndale asserts that the trial court did not actually base its ruling on foreseeability in the context of duty but, rather, on legal causation. Ferndale is wrong. The trial court was very clear in its memorandum decision: "The Defendant school district here argues that the accident was not foreseeable, and further argues that the Plaintiffs cannot establish legal cause or proximate cause. The Defendants[ ] prevail on the argument of foreseeability." That the trial court did not base its ruling on causation is made even clearer by the fact that it declined to sign an order proposed by Ferndale that explicitly stated that its actions were not the legal cause of the harm to Anderson. Instead, the order signed by the trial court is silent as to legal causation, referring only to its memorandum letter decision discussing foreseeability in the context of Ferndale's duty.

Lake Sch. Dist., 192 Wn.2d 269, 276, 428 P.3d 1197 (2018) (second alteration in original) (citation omitted) (quoting McLeod v. Grant County Sch. Dist. No. 128, 42 Wn.2d 316, 319-20, 255 P.2d 360 (1953)). "As long as the harm is 'reasonably foreseeable,' a school district may be liable if it failed to take reasonable steps to prevent that harm." Hendrickson, 192 Wn.2d at 276 (citing McLeod, 42 Wn.2d at 320).

When foreseeability is a question of whether a duty exists, it is a question of law, but when foreseeability is a question of whether the harm is within the scope of the duty owed, it is a question of fact for the jury. McKown v. Simon Prop. Grp., Inc., 182 Wn.2d 752, 764, 344 P.3d 661 (2015). Foreseeability is not measured against the specific sequence of events leading to harm or against the exact harm suffered. "'[T]he question is whether the actual harm fell within a general field of danger which should have been anticipated.'" Hendrickson, 192 Wn.2d at 276 (alteration in original) (quoting McLeod, 42 Wn.2d at 321).

For example, in McLeod, our Supreme Court reversed the dismissal of negligence claims against a school district in a case in which a 12-year-old student was forcibly raped by fellow students during recess. 42 Wn.2d at 317. The court refused to base its determination of foreseeability on whether it was foreseeable that students would forcibly rape another student if left unsupervised near an unoccupied dark room. McLeod, 42 Wn.2d at 321. Instead, the court considered whether the harm was in the general field of danger, which it considered to be "that the darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between school boys

and girls." McLeod, 42 Wn.2d at 322.

The trial court herein misapplied this foreseeability standard by focusing on the specifics of the collision in this case, rather than on the general field of danger attendant to removing students from campus to walk along a sidewalk adjoining a public roadway. In its memorandum decision, the trial court concluded that Meyers had failed "to establish that this tragic accident was foreseeable on the part of the Defendant school district." The trial court stated "[t]hat a driver would fall asleep in the middle of the day on a bright, sunny afternoon, leave the roadway, and hit the students is not foreseeable for the school district." It further emphasized that Klein "did not see the students before he hit them, as all parties agree that he had no recollection of the accident and the accident itself resulted from him falling asleep at the wheel. There was simply no time for teacher Ritchie to react, nor any time for the students to either. Such an accident is not foreseeable." Plainly, the trial court incorrectly focused its foreseeability analysis on the specific injury-causing event herein.

Focusing on the more general field of danger, the record is replete with evidence indicating that, at the very least, there is a question of fact for the jury regarding whether the harm to Anderson was foreseeable. First, even before considering the record, it is common knowledge, and has been noted in case law for decades, that cars do not always stay in their lanes; accidents happen. See, e.g., Berglund v. Spokane County, 4 Wn.2d 309, 320, 103 P.2d 355 (1940) ("[I]t is a well known fact that automobiles do, at times, for one reason or another, forsake their lane of travel . . . . The records of every court abound with such

instances. It cannot be held, as a matter of law, that such occurrences are so highly extraordinary or improbable as to be wholly beyond the range of expectability."). Second, Meyers presented expert opinion evidence and statistics from the National Highway Traffic Safety Administration confirming that car accidents involving pedestrians are a common occurrence in the United States. Third, deposition testimony from Ferndale officials acknowledged that it was foreseeable that removing students from the school campus could result in harm to the students. Thus, the trial court erred by granting summary judgment on the ground that the harm to Anderson was not foreseeable as a matter of law; there was, at the very least, a question of fact about whether it was reasonably foreseeable that having Anderson walk along a public roadway off the school campus could result in him being injured in a collision involving a motor vehicle.

III

Ferndale contends, in the alternative, that we should affirm the summary judgment order on the ground that, even if Ferndale had a duty to Anderson and breached that duty, there is no genuine issue of material fact regarding whether Ferndale's breach of its duty was the proximate cause of the harm to Anderson.

Appellate courts "may affirm the trial court on 'any theory established in the pleadings and supported by proof,' even where the trial court did not rely on the theory." Potter v. Wash. State Patrol, 165 Wn.2d 67, 78, 196 P.3d 691 (2008) (quoting Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 698, 952 P.2d 590 (1998)). Herein, the parties briefed and argued the issue of proximate cause before the trial court and have briefed the issue of proximate

cause on appeal. The trial court acknowledged that Ferndale presented argument regarding the issue of proximate cause in its order, even though it declined to rule in Ferndale's favor on that issue. We exercise our discretion to consider Ferndale's contention that we should affirm on the alternative ground that, as a matter of law, Ferndale's breach was not the proximate cause of Anderson's death.

Proximate cause consists of two parts—cause in fact and legal cause. Hartley v. State, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 610, 257 P.3d 532 (2011) (quoting Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 478, 951 P.2d 749 (1998)). "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." Schooley, 134 Wn.2d at 478-49.

A

Ferndale asserts that there is no genuine dispute of material fact regarding whether it was a cause in fact of Anderson's death. We disagree.

"Cause in fact refers to the 'but for' consequences of an act—the physical connection between an act and an injury." Hartley, 103 Wn.2d at 778 (citing King v. City of Seattle, 84 Wn.2d 239, 249, 525 P.2d 228 (1974), rejected on other grounds by, City of Seattle v. Blume, 134 Wn.2d 243, 947 P.2d 223 (1997)). It is possible for there to be more than one "but for" cause of a harm, and so causation is frequently considered as a chain of events without which a harm

would not have occurred. See, e.g., Dep't of Labor & Indus. v. Shirley, 171 Wn. App. 870, 884, 288 P.3d 390 (2012). Independent actors may also breach separate duties which in concurrence produce an injury. Stephens v. Omni Ins. Co., 138 Wn. App. 151, 182-83, 159 P.3d 10 (2007), aff'd, 166 Wn.2d 27, 204 P.3d 885 (2009).

The record herein contains sufficient evidence to establish a genuine dispute of material fact regarding whether Ferndale's breach was a "but for" cause of Anderson's death. Meyers' and Ferndale's expert witnesses disagreed about whether Ferndale's field trip and excursion policy covered Ritchie's class outing, and whether compliance with that policy would have prevented Anderson's death. That dispute alone would be sufficient to overcome summary judgment. See C.L. v. Dep't of Soc. & Health Servs., 200 Wn. App. 189, 200, 402 P.3d 346 (2017) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate."), review denied, 192 Wn.2d 1023 (2019).

But there is more. The record also reveals disputes regarding the safety of the walking path Ritchie selected—a path that took students outside of the school safety speed zone to walk alongside a high speed roadway and required crossing the road in an area devoid of designated crosswalks—and the alleged failure to provide sufficient safeguards and to follow pedestrian safety rules during the walk—such as by having only one adult present to supervise the class, allowing students to walk at distances up to 200 meters from Ritchie, and having students walk along sidewalks with their backs to oncoming traffic.

Meyers provided expert witness testimony opining that without the improper walking path and the failure to follow proper pedestrian safety procedures, Anderson would not have been struck by Klein's vehicle. It is properly for a jury to decide whether Ferndale's breach of its duty of care was a cause in fact of Anderson's injuries and subsequent death.

B

Ferndale next asserts that we should affirm on the ground that its breach of duty cannot be considered the legal cause of Anderson's death. This is so, Ferndale asserts, because (1) the issue of legal causation is analyzed independently of the field of danger analysis utilized to determine whether a school district has a duty of care and (2) mixed considerations of logic and policy support limiting Ferndale's liability in this case because the connection between the ultimate injury and Ferndale's acts is too remote to impose liability. Ferndale is wrong.

"Unlike factual causation, which is based on a physical connection between an act and an injury, legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend." Schooley, 134 Wn.2d at 478. "In deciding whether a defendant's breach of duty is too remote or insubstantial to trigger liability as a matter of legal cause, we evaluate 'mixed considerations of logic, common sense, justice, policy, and precedent.'" Lowman v. Wilbur, 178 Wn.2d 165, 169, 309 P.3d 387 (2013) (internal quotation marks omitted) (quoting Hartley, 103 Wn.2d at 779). While duty and legal cause are not identical issues, Washington courts "have long recognized the

interrelationship between questions of duty and legal cause." Lowman, 178 Wn.2d at 169 (citing Hartley, 103 Wn.2d at 779-81).

For example, in Lowman, our Supreme Court noted that duty and legal cause both "concern the policy issue of how far the legal consequences of the defendant's negligence should extend." 178 Wn.2d at 169 (citing Hartley, 103 Wn.2d at 779-80). The court concluded that "[i]n the context of liability for negligent roadway design or maintenance, any consideration of the legal cause question should therefore begin with a review of the duty question" in that context. Lowman, 178 Wn.2d at 169.

The Lowman court then proceeded to discuss the duty question by relying on its seminal case concerning duty in the context of a municipality's responsibility to protect the users of public roads, Keller v. City of Spokane. 146 Wn.2d 237, 44 P.3d 845 (2002). It noted that "Keller took a broader view of a municipality's or utility's responsibility to protect the users of public roads. Analyzing the question of duty, the court unequivocally rejected limitations on liability for roadway design or maintenance premised on the negligence or recklessness of a driver." Lowman, 178 Wn.2d at 170-71 (citing Keller, 146 Wn.2d at 249).

After setting forth this analysis, our Supreme Court rejected the argument raised by the defendant utilities in Lowman that it applied solely to the question of duty, and not to the question of legal cause. 178 Wn.2d at 171. The court concluded that "[m]any of the same concerns that guided the duty analysis in Keller must guide the analysis of legal causation in this case." Lowman, 178

Wn.2d at 171. The court further noted that "policy considerations that support imposition of a duty will often compel the recognition of legal causation, so long as cause in fact is established under the relevant facts. Such is the case here." Lowman, 178 Wn.2d at 171 (citation omitted) (citing Harbeson v. Parke-Davis, Inc., 98 Wn.2d 460, 476, 656 P.2d 483 (1983)). It reasoned that "there is no rationale to negate the sound policy preference expressed in Keller for holding municipalities and companies charged with maintaining utilities accountable for doing so in a reasonable fashion, particularly with regard to safe travel on public roads." Lowman, 178 Wn.2d at 172.

Ferndale asserts that we must determine whether its actions are too remote from Anderson's death to impose liability without utilizing the general field of danger foreseeability standard applicable in the context of Ferndale's duty. Transferred to the context of a school district's liability, this is exactly the argument rejected by our Supreme Court in Lowman. Here, as in Lowman, "any consideration of the legal cause question should . . . begin with a review of the duty question." 178 Wn.2d at 169.

Furthermore, Ferndale does not cite to a single case in the school district liability context in which a court ruled that principles of legal causation barred liability.[4] Indeed, prior cases discussing legal causation in the school district context have reached the opposite conclusion. See, e.g., N.L., 186 Wn.2d at 438

[4] Instead, Ferndale cites to cases in other contexts that concluded that principles of legal causation barred liability, including Cunningham v. State, 61 Wn. App. 562, 811 P.2d 225 (1991), and Medrano v. Schwendeman, 66 Wn. App. 607, 836 P.2d 833 (1992). However, these specific cases, and their reasoning regarding the application of legal cause principles, were explicitly rejected in Lowman, 178 Wn.2d at 170-71.

("[W]e cannot say as a matter of law that a district's failure to take any action in response to being notified that Clark was a registered sex offender was not a legal cause of N.L.'s injury. Sexual assault by a registered sex offender is foreseeable, as is the fact that a much younger student can be convinced to leave campus by an older one."); McLeod, 42 Wn.2d at 324 ("We have held that it is for the jury to decide whether the general field of danger should have been anticipated by the school district. If the jury finds respondent negligent in not having anticipated and guarded against this danger, then it is not for the court to say that such negligence could not be a proximate cause of a harm falling within that very field of danger.").

Ferndale's urging that we uncouple legal causation analysis from duty analysis runs counter to the Supreme Court's teachings in Lowman. Based on established law, Ferndale fails to establish that its defalcations were not the legal cause of Anderson's injuries and subsequent death.

Reversed.

WE CONCUR:

SIMMONS SWEENEY SMITH

March 11, 2020 - 4:17 PM

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