

67645-8

67645-8

No. 67645-8-I

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

N.K.,

Appellant,

vs.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY SAINTS, a foreign corporation sole
registered to do business in the state of Washington, *et al.*,

Respondents.

BRIEF OF RESPONDENT PACIFIC HARBORS COUNCIL

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I. INTRODUCTION

This case arises from a sexual predator molesting a young boy, N.K., 35 years ago in Shelton, Washington. The perpetrator, Dustin Hall, lived in Shelton for less than a year in 1977 and has never been heard from again. In 2010, Respondent Pacific Harbors Council learned for the first time about the existence and alleged activities of Mr. Hall, when N.K. filed suit against it.

This Court is being asked to consider and apply thirteen years of modern and consistent jurisprudence that began with *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) In *C.J.C.*, the Court addressed the threshold questions of *if*, *when*, and *how* a duty arises to protect victims of abuse. As N.K. argued to the Honorable Brian Gain, “the law is not murky” and “C.J.C. has been the guide in terms of what the law” is in Washington.¹

The trial court granted summary judgment dismissal, pursuant to *C.J.C.*, ruling that N.K. lacked any material evidence to establish that Respondents Pacific Harbors Council and Boy Scouts of America had (1) a “special relationship” with victim N.K. or perpetrator Mr. Hall; (2) prior specific knowledge of Mr. Hall’s proclivities; and (3) a causal connection between the existence of Mr. Hall in Shelton and the resulting harm to

¹ Verbatim Report of Proceedings at 14:22-23.

N.K.² In sum, this Court should affirm the trial court’s dismissal of N.K.’s negligence claim because it is based on contrived facts and specious arguments.

II. COUNTER-STATEMENT OF ISSUES

1. Under *de novo* review, did the trial court properly grant summary judgment to Pacific Harbors Council (“PHC”) because, as a matter of law, no special relationship exists between PHC and either Hall or N.K.?

2. Under *de novo* review, should summary judgment be affirmed because PHC had no knowledge that the alleged perpetrator, Dustin Hall, posed a risk of harm to boys?

3. Under *de novo* review, should summary judgment be affirmed because there is no causal connection between PHC and Hall’s previous existence in Shelton, Washington?

III. RESTATEMENT OF THE CASE

A. **Pacific Harbors Council Is a Distinct and Separate Legal Entity Within the Scouting Movement.**

Pacific Harbors Council (“PHC”) is the chartered local council of Boy Scouts of America, covering the southern region of the Puget Sound, namely parts of King and Pierce County, and all of Mason, Thurston,

² Verbatim Report of Proceedings at 24:23 to 25:1-14.

Grays Harbor, and Lewis counties.³ (CP 1082) PHC is a separate, distinct nonprofit corporation, with its own board of directors and officers. PHC also raises, allocates, and disburses its own funds. (CP 1059; 1082)

PHC's purpose is to help the youth within its communities through promotion of the Scouting program to other organizations. (CP 1059; CP 1082) For example, PHC promotes "scoutcraft, patriotism, courage, self-reliance, and kindred virtues" as expressed in the scouting program. (CP 101)

PHC does not create, administer, sponsor, operate, or organize Scout troops.⁴ (CP 102; CP 1083) Rather, the individual troops are organized, created and run by local independent community organizations, including churches, schools, parent-teacher associations, and civic organizations. (CP 1060; CP 1083)

The local, independent community organizations actually "own" and operate the troops, and supervise and control the scouting activities. (CP 101) Likewise, the local, independent community organizations select their Scout leaders and may also discharge those leaders without any approval by PHC. (CP 1060)

³ In 1993, the Tumwater Council merged with the Mount Rainier Council (which served Tacoma and Pierce County). (CP 1083) The merged entity became Pacific Harbor Council. (CP 1083)

⁴ PHC has three "venturing crews" associated with the three council camping operations, which are not the subject of this lawsuit. (CP 1083)

A person selected by the local, independent, community organization to serve as a Scout leader must complete a registration application, which the local organization then sends to its local council. (CP 1060) Here, the local community organization is LDS, and the geographic local council is PHC. PHC then forwards the registration information to BSA. (CP 1060) If, for any reason, the applicant's identification is referenced in BSA's "Ineligible Volunteer" files; the applicant does not meet BSA's membership standards; or BSA is concerned that the applicant would jeopardize the health and safety of BSA youth or adult members, then BSA denies registration. (CP 102-03)

PHC maintains the troop rosters for troops within its geographic area, which are updated regularly. (CP 1083; CP 1018; CP 1092) These rosters are created based on the chartering or re-chartering documents submitted by the local independent community organization that sponsors and operates the troops. (CP 1083)

The local independent community organizations may send the re-chartering documents to PHC at the end of the year, in addition to regular updates throughout the year. (CP 1083; CP 1018; CP 1092) The documents list the troop committee members, the troop members, the Scoutmaster and Assistant Scoutmaster (if any) for the following year. (CP 1083)

PHC's registrar makes changes to the troop roster throughout the year, whenever it receives a new registration application.⁵ For example, in 1978 Roy Romans is listed as the Scoutmaster on the troop roster, then mid-way through 1978 Terry Robinson came in as the Scoutmaster. (CP 1018; CP 1092) Accordingly, Mr. Romans' designation as Scoutmaster was crossed out and Mr. Robinson's name added. (CP 1018; CP 1092)

Likewise, PHC's registrar makes changes to the troop roster when it receives the registration of new troop members or registration applications for new Scoutmasters or Assistant Scoutmasters from the local independent community organizations. (CP 1083) For example, in 1977, the PHC registrar added roster troop members in March, April, May, June, September, and October. (CP 860; CP 1088)

B. "Dustin Hall" Is Not Listed on the Troop Roster.

PHC is the custodian of the troop rosters maintained by the Tumwater Council. (CP 1083) The LDS Shelton Ward Troop in Mason County, Troop No. 155, was one of the troops served by the Tumwater Council. (CP 1083) The troop rosters for the LDS Shelton Ward Troop for the years 1976 (CP 1085-86), 1977 (CP 1088-89), and 1978 (CP 1091-92)

⁵ N.K. erroneously asserts that "the rosters and registrations for Troop 155 were only submitted at the end of the year and Hall was gone by September 1977." (App. Br. at 14, incorrectly citing CP 1333) In fact, roster changes were made throughout the year. (CP 860; CP 1088)

do not list, designate, reference, or identify the name “Dustin Hall” in any of these rosters. “Dustin Hall” is not listed as a registered Scoutmaster or Assistant Scoutmaster for Shelton Ward Troop #155.

C. PHC Had No Knowledge of Dustin Hall or of Any Threat that He Posed to Scouts.

- PHC had no knowledge (general or specific) of Hall’s existence, much less his attendance or non-attendance at Troop 155 meetings in Shelton, Washington.
- Hall is not listed as a registered volunteer in any of the LDS Shelton Ward troop rosters for 1976, 1977, or 1978. (CP 1083)
- PHC did not employ Hall.
- There is no evidence that Hall ever submitted a registration application to PHC or that PHC “selected” Hall.
- PHC routinely updated the troop roster whenever LDS forwarded changes (CP 860; CP 1018; CP 1088; CP 1092), but Dustin Hall’s name was never added to the roster.
- As a separate, legal nonprofit corporation, PHC did not and does not create, administer, sponsor, operate, or organize Scout troops. (CP 102; CP 1083)
- PHC does not and did not supervise and control the scouting activities at the LDS Shelton Ward. (CP 101)

N.K.'s contention that "the [church] worked for the local council" is misleading. (Appellant's Brief ("App. Br.") at 23) Although the citation to the Clerk's Papers (CP 1694) is to the deposition testimony of Paul Ernst, the term "worked" is taken out of context from Mr. Ernst's response. The local, independent organizations do not "work" for the local chartering council; the council seeks to help the youth in their communities through promotion of the Scouting program to other organizations within the councils' geographic areas. (CP 1059; CP 1082-83) The local organizations are entirely independent and separate from PHC; organizations such as LDS sponsor, own, and operate the scouting units. (CP 1059-60; CP 1082-83)

D. PHC Did Not Assume Care of N.K.

N.K. was listed on the troop roster that LDS sent to PHC, along with the names of other troop members on the roster. (CP 1085) PHC then forwarded the troop roster to BSA. (CP 1060) However, at no time did PHC ever voluntarily assume the "care" of N.K., nor was N.K. "entrusted" to PHC, nor does NK submit evidence to the contrary.

E. PHC Incorporates By Reference Subsections of BSA's Statement of Facts.

To avoid redundancy, PHC adopts and incorporates as if fully set forth herein BSA's Statement of the Case, contained in section III,

subsections A-J.

IV. ARGUMENT

A. The Standard of Review Is *De Novo*.

The appellate court reviews summary judgment decisions *de novo*, engaging in the same inquiry as the trial court, to determine if the moving party (here, Respondent PHC) is entitled to summary judgment as a matter of law, and if there is any genuine issue of material fact requiring a trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003); *Green v. A.P.C.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). Unsupported conclusional statements alone are insufficient to prove the existence or nonexistence of issues of fact. *Hash v. Children's Orthopedic Hosp. & Medical Ctr.*, 49 Wn. App. 130, 741 P.2d 584 (1987), *aff'd*, 110 Wn.2d 912, 757 P.2d 507 (1988).

Likewise, a nonmoving party (N.K.) attempting to resist a summary judgment “may not rely on speculation, argumentative assertions that unresolved factual matters remain,” rather “the nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Halvorsen v. Ferguson*, 46 Wn. App. 708, 721, 735 P.2d 675 (1986).

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding v. Virginia Mason Med. Ctr.*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

B. The Court Should Affirm the Trial Court's Dismissal of Claims Against PHC Because N.K. Appears to Have Abandoned Its Claims Against PHC.

Tellingly, N.K.—in 50 pages of briefing—only mentions Pacific Harbors Council or PHC *thrice*: in his introduction, conclusion, and incorrect cite to the Clerk's Papers. (App. Br. at 1, 49, and 13, respectively) Accordingly, it appears that N.K. has abandoned on appeal its claims against PHC. PHC is a separate legal entity, and was named as a separate party to this lawsuit.⁶ (CP 2) However, the Court should dismiss N.K.'s appeal as against PHC or summarily affirm the trial court's dismissal because N.K. fails to establish through facts on the record, that:

PHC—as a separate corporate entity—was an agent of LDS or BSA;

PHC—as a separate corporate entity—knew Hall posed a risk to N.K.;

PHC—as a separate corporate entity—had a “special relationship” with N.K. and Hall; and

⁶ In his complaint, N.K. asserted a claim for attorney fees under SECA (RCW 9.68A.130) (CP 8), but apparently abandoned it upon appeal since he failed to address it in his opening brief as required under RAP 18.1(a)-(b).

PHC—as a separate corporate entity—had a duty to prevent Hall from abusing N.K.

Given the dearth of evidence with respect to N.K.’s negligence claim against PHC on appeal, this Court should summarily dismiss or affirm the trial court’s dismissal of N.K.’s claim against PHC.

Further, N.K. erroneously refers to PHC and BSA “collectively as Defendants.” (App. Br. at 2) Collapsing two separate parties into one is a fatal error in N.K.’s appeal since PHC and BSA are separate legal entities with different executive directors; functional duties; board of directors and officers; offices and headquarters; responsibilities and obligations. (CP 1059; CP 1082) The Court should affirm the trial court’s dismissal of all claims against PHC and BSA because N.K. has failed to segregate the alleged duties and breaches of each separate entity in his Statement of Facts and Legal Arguments.

C. There Is No Admissible Evidence that Hall Was an “Agent” Acting Under the Control or Authority of PHC.

Restatement (Second) of Torts § 315 unequivocally affirms that there is *no duty to control the acts of a third party*, except under two circumstances:

There is *no duty* so to control the conduct of a third person as to prevent him from causing physical harm to another

unless

- (a) 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, or
- (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965) (emphasis added).

With respect to the doctrine of agency, N.K. presents a tortured and illogical supposition: “[A]ll of N.K.’s abuse is attributable to the Scout-Scoutmaster relationship created when Defendants’ agents allowed Hall to assume leadership of Troop 155.” (App. Br. 15; no cite to the record)

Under N.K.’s misguided logic, Hall was the “Scouting Defendants” agent (apparently, though incorrectly, as a collective and single entity), and that the “Scouting Defendants” controlled LDS, who was supposedly tasked with supervising Hall.

N.K.’s argument is unavailing. First, he provides no legal support for his specious agency argument. Second, PHC and BSA are separate, distinct, legal corporate entities—not a solitary unit. N.K. sued each entity. His ongoing reference to the individual entities as a “set” is disingenuous and unsupported by the clear and unambiguous evidence.

PHC never had *any* relationship with Hall—never even knew he existed until 2010.

- Hall is not listed as a registered volunteer in any of the LDS Shelton Ward troop rosters for 1976, 1977, or 1978. (CP 1083)
- There is no evidence that Hall ever submitted a registration application to PHC or that PHC “selected” Hall.
- PHC routinely updated the troop roster whenever LDS forwarded changes (CP 860; CP 1018; CP 1088; CP 1092), but Dustin Hall’s name was never added to the roster.
- As a separate, legal nonprofit corporation, PHC did not and does not create, administer, sponsor, operate, or organize Scout troops. (CP 102; CP 1083)
- PHC does not and did not supervise and control the scouting activities at the LDS Shelton Ward. (CP 101)

N.K. has failed to present any material evidence that Hall was an agent of PHC. Conversely, PHC has demonstrated that it is impossible for Hall to be an agent of PHC when PHC never knew he existed; had no supervisory control over LDS Shelton Ward; and did not operate, administer, or sponsor its programs. This Court should affirm summary judgment dismissal of N.K.’s negligence claim.

D. There Is No Causal Connection Between PHC and Hall's Harm of N.K.

C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wn.2d 699, 724, 985 P.2d 262 (1999) sets forth four factors that together establish the existence of a duty. The Supreme Court held “we find the conjunction of four factors present in the case before us decisive to finding the existence of a duty is not foreclosed as a matter of law:”

(1) the special relationship between the Church and deacon Wilson;

(2) the special relationship between the Church and the plaintiffs;

(3) the alleged knowledge of the risk of harm possessed by the Church; and;

(4) the alleged causal connection between Wilson's position in the Church and the resulting harm.

Id. at 724. One factor focuses “on whether the Church or its individual officials negligently caused the harm *by placing its agent into association with the plaintiffs* when the risk was, or should have been, known.” *Id.* (emphasis added)

N.K. opines that “all of N.K.'s abuse is attributable to the Scout-Scoutmaster relationship created when Defendants' agents allowed Hall to assume leadership of Troop 155.” (App. Br. 15; no cite to the record) N.K. also contends that “Hall used his assumed role to gain access to N.K.”

(App. Br. at 13; no cite to the record) This is false and belied by N.K.'s mother's own testimony.

N.K.'s mother testified in her deposition on September 15, 2010, *she did not know whether Hall had a position with the troop.* (CP 1922 at 35:13-16) She also testified that Hall would sometimes come alone to their family's home because "him and Richie [her husband and N.K.'s stepfather] were friends." (CP 1923 at 37:6-9)

When N.K.'s mother was asked why she allowed N.K. to interact with Hall, she states as follows:

Q: (By Mr. Pfau) Is one of the reasons you let Dusty -- or you let Kevin stay at Dusty Hall's apartment is because he was affiliated or he was connected with the Boy Scouts?

MR. ROSENBERGER: Object to the form.

MS. KASTAMA: Same.

Q: (By Mr. Pfau) You may answer.

A: *Because he was becoming a friend with all of us.*

(CP 854)

When N.K.'s mother was given the opportunity to state affirmatively that it was Hall's alleged position with the Scouts that led her to allow her son to interact with Hall, she states that it is because they were becoming friends. (CP 854) She did not mention Hall's alleged position

with the Scouts or a purported position with PHC.

Her testimony starkly contrasted with her declaration, dated July 28, 2011, submitted with N.K.'s response to the motions for summary judgment. She states that "[t]he *only* reason we allowed our son to participate in activities with him [Hall]...is because he was active in the church and a leader of Troop 155." (CP 1365 at ¶ 6)

Under the *Marshall* rule, a party who provides clear answers to unambiguous deposition questions that negates the existence of any genuine issue of material fact, cannot thereafter create an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony. *Marshall v. AC&S, Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989); *see also Overton v. Consolidated Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002); *Van T. Junkins & Assocs., Inc. v. U.S. Indus. Inc.*, 736 F.2d 656, 657 (11th Cir. 1984).

N.K.'s mother provided no explanation in her declaration as to why she suddenly took this contradictory position. Secondly, this is not a case of lack of recollection of events by the witness, N.K.'s mother was able to answer the deposition questions clearly and indicates that she allowed Hall to interact with her son because they were becoming friends. *See Marshall*, 56 Wn. App. at 184 (holding that lack of recall is not

sufficient to controvert clear opposing evidence on a summary judgment motion).

Accordingly the trial court's order granting summary judgment dismissal should be affirmed because there is no genuine issue of material fact on the casual connection element. Further, there are absolutely no facts supporting N.K.'s contention that PHC or BSA placed Hall in association with N.K.

The facts here are similar to the facts in *Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 445, 167 P.3d 1193 (2007) . "Taylor (abuser), although a high priest, was not placed by the LDS Church in the plaintiff's home." *Id.* at 444-445. Taylor was in the home because he married the plaintiff's mother, and the church "had nothing to do with that." *Id.* at 445.

Likewise, Hall was allowed to interact with N.K. based on a friendly relationship with his parents, not because Hall was "placed" in association with N.K. by PHC or BSA. No admissible facts exist to indicate that Hall's alleged role with the Scouts led N.K.'s parents to allow their child in his presence or even facts indicating that PHC or BSA placed Hall in association with N.K. on their own volition. Summary judgment dismissal should be affirmed.

E. The Court Should Decline to Consider N.K.'s Assignment of Error No. 2 Because It Is Unsupported by Arguments or Citations.

1. N.K.'s Assignment of Error No. 2

N.K.'s Assignment of Error No. 2 states that “ [t]he trial court erred in concluding the Scout Defendants had no duty to protect N.K. from Hall because it [sic] ignored the special relationship between them and N.K., and it [sic] failed to recognize the special relationship between the Scout Defendants and Hall. These special relationships existed because they invited to [sic] N.K. to participate in Scouting, they controlled the actions of troop leaders, they had complete control of adult participation in Scouting, and they gave LDS authority to use unregistered adults, like Hall, as Scout volunteers.” (App. Br. at 4)

N.K.'s Issue Pertaining to Assignment of Error No. 2 states that “BSA invited boys to participate in Scout activities away from their parents under the sole supervision of the adults selected or allowed by BSA, and BSA fully and ultimately controlled the participation of adults in Scouting, including unregistered adult volunteers. Under these circumstances, did BSA develop a special relationship with N.K. and Hall such that there is a duty to warn of, or remedy, known or reasonably anticipated dangers of the risk of molestation by volunteers?” (App. Br. at 6)

What is starkly missing in N.K.'s opening brief, however, are both facts *and* law that support Assignment of Error No. 2. Accordingly, PHC submits that this Court should decline to consider N.K.'s Assignment of Error No. 2.

2. RAP 10.3(a)(5)-(6) Requires Citation to the Record for Each Factual Statement, as Well as Citations to Legal Authority.

RAP 10.3(a)(5) states that “[r]eference to the record *must* be included for each factual statement.” RAP 10.3(a)(5) Likewise, RAP 10.3(a)(6) requires citations to legal authority and references to the relevant parts of the record. RAP 10.3(a)(6) state that the content of a brief should contain the “argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record.”

3. Examples of *No Cites* to the Record in N.K.'s “Statement of Facts”

N.K.'s “laissez-faire” legal briefing is replete with references to the Clerk's Papers which are either nonexistent; difficult if not impossible to find; citations that are irrelevant to the factual statements for which the references were made; and references to 150-page documents rather than to specific pages of the record relating to the particular factual statements made. (App. Br. at 18) For example:

App. Br. at 1-6, N.K. fails to cite to the record *at all*. No cites.

App. Br. at 10, N.K. states “Yet that did not stop him from allowing Hall to assume leadership of the ward’s Boy Scout troop, Troop 155.” No cite to the record.

App. Br. at 10, N.K. contends that “Despite Hall’s ‘personable’ nature, Danford viewed Hall as a ‘flim-flam man.’” No cite to the record.

App. Br. at 11, N.K. states: “As detailed below, those same boys are part of nearly a dozen witnesses who testified that the creepy drifter/flim-flam man was openly allowed to lead the ward’s Boy Scout troop, and the ward’s leadership knew as much because they appointed him to that position.” No cite to the record.

App. Br. at 11, N.K. surmises that “Scouting was (and remains) an integral part of LDS life.” No cite to the record.

App. Br. at 12, N.K. concludes that “It was this position that Hall would assume.” No cite to the record.

App. Br. at 12, N.K. opines that “During the few months Hall was in Shelton, he was Troop 155’s de facto leader.” No cite to the record.

App. Br. at 17, N.K. concludes that “By 1976, BSA knew that its system was inadequate to properly exclude abusers.” No cite to the record.

App. Br. at 20, N.K. again egregiously concludes, “Despite knowing of the patterns of danger and means by which that danger could be avoided, the Scout Defendants chose to do nothing, and allow the rape and molestation of young boys to continue.” No cite to the record.

4. Examples of a Plethora of *Incorrect Cites* in N.K.’s “Statement of Facts”

When N.K. actually follows the rules by citing to the record, the citations are usually incorrect. For example:

App. Br. at 8, N.K. states “This case was dismissed on summary judgment motions filed by BSA and LDS,” citing CP 1035-55. This citation is incorrect;

App. Br. at 11, N.K. states: “It was the youth program for all LDS boys *when they reached age 11*,” citing CP 1248 and CP 1275. However, neither cite supports the predicate “when they reached age 11.”

App. Br. at 12, N.K. opines that “Everyone knew who the Scoutmaster was—it was a *position of prominence and carried inherent credibility*,” citing CP 1249; CP 1263; CP 1270-71; CP 1276; and CP 1282. However these cites do not contain the words or phrases (or similarities to) “position of prominence” or “carried inherent credibility.”

App. Br. at 13, N.K. states that “Yet by all accounts, Hall was quite new to the community *when allowed to assume control over N.K.’s*

Boy Scout troop,” citing to CP 1174; CP 1181; and CP 1211. However, none of these citations use either the phrase “assume control” or “over N.K.’s Boy Scout troop.”

App. Br. at 13, N.K. states that “Hall wore a Boy Scout uniform with patches that reflected his affiliation with Troop 155 *and PHC,*” citing CP 1180; CP 1192; CP 1198; CP 1235. However, none of the citations reference “PHC.”

App. Br. at 14, N.K. states that “*Defendants suggest Hall was not a leader of Troop 155 merely because his name was not printed on the Troop’s annual roster, and because Hall had not yet registered with BSA before he fled town,*” citing CP 1206. This cite is incorrect.

App. Br. at 14, N.K. states that “Defendants’ own witnesses contradict this position by admitting the rosters and registrations for Troop 155 were only submitted at the end of the year and Hall was gone by September 1977,” citing CP 1333. Again, this is an incorrect cite, and fails to support this alleged “fact.”

App. Br. at 14, N.K. asserts that “The ward leadership, as well as former Scoutmaster Ben Danford, saw Hall participating in Scout meetings and *the Bishopric voted to make him a Scout volunteer,*” citing CP 1198; CP 1282; CP 1313-14. CP 1313-14 references Hall’s

volunteerism, but none of the cites state that the “Bishopric voted to make him a Scout volunteer.”

App. Br. at 15-16, N.K. contends that “The abuse of Scouts was not limited to N.K., *and sometimes occurred when more than one boy was with Hall*, on Scout campouts and other overnight Scout activities,” citing CP 1180-81; CP 1187-88; CP 1193; CP 1220; CP 1236; CP 1257; CP 1259; and CP 1291-92. None of these cites support N.K.’s statement of “fact” that the abuse “*sometimes occurred when more than one boy was with Hall*.” For example, CP 1188 at 38:7-9 expressly states the opposite. “Q: Who were the other boys—were there any boys in the room with you when this [abuse] happened? A: Not at that time.”

App. Br. at 16, N.K. opines, “*Indeed, the Scout Defendants admitted that they had to implement practices ‘to protect youth in Scouting programs from the risk of sexual abuse,’*” citing CP 1371; CP 1378. Neither cite supports this statement.

App. Br. at 17, N.K. concludes “*...in other words, BSA concealed the danger of molestation to protect its reputation,*” citing CP 1415. However, CP 1415 does not support this statement of “fact.”

App. Br. at 18, N.K. cites to 11 examples in the United States, but fails to provide actual page cites to the Clerk's Papers—instead directing this Court and the parties to a collective 149 pages at CP 1432-1581.

App. Br. at 23, N.K. states that “*In the end, BSA consented to the Church's conduct, as shown by its collecting fees from N.K., the Church, and the rest of Troop 155 as a way to pay for its operating expenses,*” citing CP 1199; CP 1324-25; CP 1678. These cites do not support N.K.'s purported statement of “fact” that BSA consented to the Church's conduct.

5. Examples of Misleading and Tacked on Phrases in N.K. “Statement of Facts”

To establish BSA's purported “knowledge” of Hall's activities, N.K. misleadingly tacks on phrases to his quotes under the guise of citing to the record. For example:

App. Br. at 12-13, N.K. states that “*BSA knew of all this because the 'LDS's bishopric supervised the ward's troop Scoutmaster, and was responsible for the troop itself,*” citing CP 1039. The italicized portion of this sentence is not in CP 1039, and is a classic example of N.K.'s lack of candor with respect to the record.

App. Br. at 19, N.K. opines that “For example, they knew the majority of Scouts were sexually abused in ‘one on one’ situations, *but they did nothing to stop it,*” citing CP 1587-89; CP 1699; CP 1712-13; CP

1716. The italicized portion is blatantly false. In fact, BSA “did training for leaders, all leaders to be aware of situations when—of how they should act and how youth should be protected, we constantly did that.” CP 1713 at 69:9-11.

6. N.K.’s Legal Argument in Support of Assignment of Error No. 2 Lacks References to the Relevant Parts of the Record.

RAP 10.3(a)(5) states that “[r]eference to the record *must* be included for each factual statement.” RAP 10.3(a)(5) Likewise, RAP 10.3(a)(6) requires citations to legal authority and references to the relevant parts of the record. RAP 10.3(a)(6) state that the content of a brief should contain the “argument in support of the issues presented for review, together with citations to legal authority and references to the relevant parts of the record.”

N.K.’s three-paragraph argument in support of his second assignment of error (App. Br. at 40-41) wholly fails to reference the relevant parts of the record upon which he relies. Rather, N.K.’s “argument” is a factually unsupported conclusion.

In paragraph two N.K. asserts, sentence by sentence, as follows:

- The trial court erred in concluding the Scout Defendants had no duty to protect N.K. because it ignored the special relationship that existed between

them and N.K. [*no cite to record or Verbatim Report of Proceedings*]

- During and after Scout meetings alone with Hall, on Scout trips, and on trips with others that were arranged because of Scouting, N.K. was in the custody and control of Scout Defendants and their agents. [*no cite*]
- N.K. relied on those agents to safeguard him during Scout activities. [*no cite*]
- This relationship, alone, created a duty to protect N.K. from reasonably anticipated third-party criminal conduct. [*cite to C.J.C. case*]

In paragraph three, N.K. asserts, sentence by sentence as follows:

- Moreover, although the trial court found a special relationship existed between Hall and LDS, it refused to find a special relationship between Hall and the Scout Defendants because it concluded they lacked awareness that he was participating in Scouting. [*no cite to the Verbatim Report of Proceedings*]
- This is demonstrably false because the Scout Defendants authorized their Scoutmaster and LDS agents to choose and supervise Scout volunteers, including unregistered volunteers, and there is substantial evidence that the Scoutmaster and Bishopric knew Hall was volunteering with the Troop; [*no cite*]
- in fact, one of the Bishopric members admitted the ward's leaders voted to allow Hall to volunteer with the Troop. [*no cite*]
- The trial court erred in finding the Scout Defendants had no duty to protect N.K. from Hall where there is ample evidence that they had a special relationship with Hall. [*no cite*]

(App. Br. at 40-41) That is the totality of his argument in support of Assignment of Error No. 2.

7. The Court Should Not Consider N.K.'s Assignment of Error No. 2.

According to RAP 10.3(a)(5), citations to legal authority and references to the relevant portions of the record *must* be included in support of issues raised on appeal. The Supreme Court, interpreting RAP 10.3(a)(5), states that “[w]ithout adequate, cogent argument and briefing, this court should not consider an issue on appeal.” *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990).

In *Schmidt*, the Court refused to determine whether RCW 4.22.060 is unconstitutional because plaintiff failed to cite legal authority or brief the precise constitutional issue being raised. Here, the Court should refuse to determine the issue in Assignment of Error No. 2 (namely whether a “special relationship” existed with N.K. and Hall that triggered a duty to “warn of, or remedy, known or reasonably anticipate dangers such as the risk of molestation by volunteers?” (App. Br. at 6) N.K. fails to present “adequate, cogent argument and briefing” legally or factually on this issue.

In *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989), the Supreme Court considered the argument and authority that Appellant Saunders presented to the Court of Appeals, and found that

Saunders “presented insufficient argument, evidence, and authority for establishing a per se unfair act” under the Consumer Protect Act. *Id.* at 345.

The *Saunders* Court held that “[a]bsent adequate, cogent argument and briefing, we decline to wander through the complexities of the Consumer Protection Act.” *Id.* Likewise, this Court should decline to wander through the complexities of the creation of special relationships, knowledge, and duties associated with N.K.’s Assignment of Error No. 2 because he fails to provide adequate, cogent argument and briefing.

Moreover, N.K.’s three-paragraph legal argument regarding Assignment of Error No. 2 is based entirely on conclusory and purported “factual” statements, without any citation to the relevant part of the record. In *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 820, 828 P.2d 549 (1992) the Court held that “[g]iven the meager, conclusory testimony, utterly lacking in identification of time or place, the trial court was justified in finding that plaintiffs failed to prove there was any normal public access at all to the canyon or the shorelines.” *Id.* (noting that a party on appeal must specifically identify the location in the record of *where evidence relevant to the party’s argument may be found*; it is not the duty of the reviewing court to search the record to discover that evidence).

Here, all of the factual statements made in N.K.'s argument section of the brief regarding Assignment of Error No. 2 (App. Br. at 40-41) were made without reference to the record, in direct violation of RAP 10.3(a)(5).

Moreover, N.K.'s "Statement of Facts" (App. Br. at 1-27) either completely lack a citation to the record; contain numerous references to Clerk's Papers which are either nonexistent, or difficult if not impossible to find; cite pages irrelevant to the factual statements for which the references were made; or make references to 150-page documents rather than to specific pages of the record relating to the particular factual statements made. (App. Br. at 18) The Court should decline to consider N.K.'s Assignment of Error No. 2.

F. PHC Incorporates by Reference Subsections of BSA's Argument.

To avoid redundancy, PHC adopts and incorporates as if fully set forth herein BSA's Argument, contained in section IV, subsections A-E.

V. CONCLUSION

For all of the foregoing reasons, Respondent Pacific Harbors Council respectfully requests that the Court affirm Honorable Brian Gain's order granting summary judgment dismissal of N.K.'s claim.

Dated this 21st day of May, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 21st day of May, 2012, I caused to be served a true and correct copy of the foregoing via messenger / U.S. mail, postage prepaid and addressed to the following:

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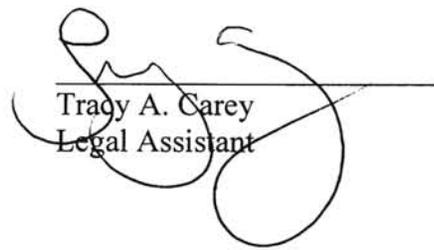
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