

No. 48063-8-II

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

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DIVISION II
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STATE OF WASHINGTON
BY  CLERK
DEFENDANT

C.B., individually; MISTI BELL, individually; and SCOTT BELL,
individually,

Appellants/Plaintiffs,

vs.

BETHEL SCHOOL DISTRICT, a public corporation, individually;
NORTHWEST SCHOOL OF INNOVATIVE LEARNING; BHC
FAIRFAX HOSPITAL, INC.; a Tennessee for profit corporation d/b/a
FAIRFAX HOSPITAL BEHAVIORAL HEALTH SERVICES; and
UNIVERSAL HEALTH SERVICES, INC., a Delaware for profit
corporation,

Respondents/Defendants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

On September 1, 2016, Washington's Supreme Court affirmed the opinion of this Court in *N.L. v. Bethel School District*, 187 Wn.App. 460 (2015). *N.L. v. Bethel School District*, ___ Wn.2d ___, 378 P.3d 162, 333 Ed. Law Rep. 939 (Cause No. 91775-2, September 1, 2016). In *N.L.*, the Supreme Court found that foreseeability is the most important variable in determining the duty of a school district owed to its student. *Id.* at 168.

We hold 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. While the location of the injury is relevant to many elements of the tort, the mere fact the injury occurs off campus is not by itself determinative. As the Idaho Supreme Court noted in a somewhat similar case, "the relevant inquiry is to the location of the negligence rather than the location of the injury." (citation omitted). Whether the district breached its duty to take reasonable care to protect N.L. from [her assailant] is a factual question in this case.

Id.

C.B. respectfully submits that *N.L.* is determinative in this case. As the record shows, C.B.'s actions, including her angry outburst, her oppositional defiance, and ultimately her flight from the bus operated by the Bethel School District ("Bethel"), were entirely foreseeable to NWSOIL. Her actions were foreseeable because C.B.'s behaviors were consistent with her known-mental health history, her I.E.P. and her past conduct at NWSOIL and elsewhere. In fact, NWSOIL, as a secure, lock-down facility with specific knowledge of a C.B.'s special needs, was in the best position

to anticipate C.B. actions and protect her from the dangers those actions presented.

Furthermore, NWSOIL had actual knowledge of the following facts:

1) C.B. was in a crisis situation; 2) the bus had not left NWSOIL's loading area; 3) the Bethel bus driver warned NWSOIL's counselors that a problem was going to occur, and 4) both C.B. and the bus driver tried to gain reentry to NWSOIL in order to prevent further problems, but NWSOIL staff refused to unlock the school's doors telling the bus's dispatch operator that once C.B. was on the bus, she was Bethel's problem.

C.B. submits that issues of material fact exist as to the foreseeability of the harm she suffered after being constructively removed for Bethel's bus and denied entry back into NWSOIL. C.B. respectfully requests this Court reverse the trial court's summary dismissal and remand this case for trial.

II. C.B.'S REPLY ARGUMENT

A. *N.L. v. Bethel School District*

As this Court knows, *N.L. v. Bethel School District*, involved a suit brought by a Bethel School District student who was raped off campus by another Bethel student. *N.L. v. Bethel School District*, 378 P.3d at 164. The Supreme Court's decision affirmed this Court's earlier opinion in *N.L. v. Bethel School Dist.*, 187 Wn.App. 460, 348 P.3d 1237 (2015). In the earlier opinion, this Court appropriately framed the question of the school district's duty in terms of foreseeability:

A school district's duty to exercise reasonable care extends only to foreseeable risks of harm. [citation omitted].

A school district's duty "is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." *McLeod v Grant County Sch. Dist.*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953). The particular sequence of events that led to the plaintiff's injury need not be foreseeable for a defendant school district to owe a duty to its students. *McLeod*, 42 Wn.2d at 322, 255 P.2d 360. Foreseeability is a question for the jury unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod*, 42 Wn.2d at 323, 255 P.2d 360. "If ... there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury." *McLeod*, 42 Wn.2d at 323, 255 P.2d 360 (quoting RESTATEMENT OF TORTS § 453 cmt. a (1934)).

Id. at 469.

In its review, the Supreme Court agreed that Bethel owed a duty to its students to use reasonable care to protect them from foreseeable injuries, including those injuries that happened off campus, and that "whether this injury fell within the scope of that duty is properly a question for the jury." 378 P.3d at 169.

The Supreme Court also rejected Bethel's argument that N.L.'s "decision to leave campus with [her assailant] changes this calculation as a matter of law." Refusing to follow this rationale, the Court stated, "[F]oreseeability is normally an issue for the jury." *Taggart v. State*, 118 Wn.2d 195, 224, 822 P.2d 243 (1992)) (quoting *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989)). We see no reason to depart from that rule here. Students have been skipping class '[s]ince at least the days of Huck Finn and Tom Sawyer.' [citation omitted]. We cannot say as a matter of law

that it is unforeseeable that students will leave campus together.” *N.L. v. Bethel School District*, 378 P.3d at 169.

B. C.B.’s Actions Were Entirely Foreseeable to NWSOIL.

NWSOIL’s arguments, both at the trial court and here upon review, are substantially similar to those rejected in *N.L. Id.* NWSOIL argues that despite its superior knowledge of C.B.’s psychiatric, emotional and behavioral needs, its duty to C.B. ended and instead was passed to Bethel once C.B. boarded the bus. Respondent’s Brief at 23-26. NWSOIL claims that “No Washington case has held that foreseeability, without custody, creates a duty.” Respondent’s Brief at 26. The Supreme Court’s ruling in *N.L.* plainly rejects NWSOIL’s argument. “[A] school district may owe a duty to its students, despite the fact that injury occurred off of school grounds and outside of school hours.” *N.L. v. Bethel School District*, 378 P.3d at 168 (quotation omitted). The key question here, and one that C.B. contends should be answered by the trier of fact, is whether C.B.’s actions [fleeing the school bus] and the dangers that were associated with those actions [sexual assault by a stranger only blocks away from NWSOIL] were the type that NWSOIL should have anticipated and taken precautions in order to protect C.B. from these foreseeable dangers. *N.L. v. Bethel*, 187 Wn.App. at 469.

As the record shows, NWSOIL had an extensive and well-documented knowledge of C.B.’s behaviors and susceptibilities. CP at 679, 694. In fact, C.B. and her parents were directed to NWSOIL because it was a secure, locked facility run by Fairfax Hospital. CP689-90, 692. NWSOIL

knew C.B. was prone to fight or flight reactions, confrontations, and it she needed supervision in order to avoid danger. And on the day of her assault, NWSOIL also knew that C.B. was in a behavioral crisis, her anger was escalating, and that she and her bus driver were trying to get into the school to avert a disaster. Equally important, NWSOIL knew C.B. and her bus were still in the loading area outside the building. Despite this knowledge, NWSOIL did nothing.

In addition, the opinion in *N.L.* also dismisses NWSOIL's contention that custody and therefore duty ended when "she voluntarily left the bus." Respondent's Brief at 23. First, C.B. rejects NWSOIL's characterization that C.B. voluntarily left the bus. *Id.* The notion that a student in a lockdown facility could "voluntarily" leave the bus defies explanation, especially considering C.B.'s long mental health history. Second, and contrary to NWSOIL's assertion otherwise, the analysis as to the foreseeability and therefore the duty owed by NWSOIL does not end because C.B. fled the bus. This apparent intervening act argument was also addressed in *N.L.* "The fact that the danger stems from such an intervening act ... does not itself exonerate a defendant from negligence. If, under the assumed facts, such intervening force is reasonably foreseeable, a finding of negligence may be predicated thereon." *McLeod*, 42 Wn.2d at 320, 255 P.2d 360 (citing *Berghund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940)).

Finally, the Supreme Court's *N.L.* opinion also distinguished *Coates v. Tacoma School District No. 10*, 55 Wn.2d 392, 396, 347 P.2d 1093

(1960), a case cited by NWSOIL in support of its argument that a school's duty of reasonable care to prevent injuries is limited to injuries that happen in the custodial context. *N.L. v. Bethel School District*, 378 P.3d at 167. The *N.L.* Court that *Coates* was not analogous because it involved events and injuries (a Tacoma student involved in a drinking and driving accident in Mason County) so distant in time and place from normal school activity that the school was relieved of liability. *Id.* Here, like in *N.L.*, C.B.'s injuries occurred in part because NWSOIL failed to take adequate precautions to protect her while she was in the school bus loading area and trying to re-enter the school.

C. Medical Testimony Was Not Required at Summary Judgment to Establish Cause in Fact

Cause in fact is generally a question of fact for the jury to decide after weighing the evidence. *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). In its brief, NWSOIL cites cases primarily dealing with medical malpractice and motor vehicle collision injuries for the alleged proposition that C.B.'s injuries from sexual assault must be established by expert medical testimony in order to prove causation. Respondents Brief at 37-38. However, NWSOIL's assertion is an incorrect statement of Washington law. It is not always necessary to prove every element of causation by medical testimony. If, from the facts and circumstances, a reasonable person can infer that the causal connection exists, the evidence is sufficient. *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981). This legal proposition is built in to ER 701, which

provides that a lay opinion is admissible as long as it is rationally based on the perception of the witness, helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of rule 702. ER 701. Here, C.B. presented evidence that after the sexual assault, she attempted suicide multiple times, including the night of the assault. CP at 75. She also presented evidence that after the assault, she ran away from home more often, left home for longer durations, she used drugs more often and even turned to prostitution. CP at 820-830. C.B.'s father, Scott Bell, testified that the severity of C.B.'s actions increased and became "more life threatening." CP at 816. Bell also testified that he watched his daughter's life spiral downward, with distrust and anger after she was sexually assaulted. CP at 818. This evidence, of the personal devastation suffered by C.B. and the strain that it put on her relationship with her parents, is permissible under ER 701 as a lay, first-person account of how sexual assault damaged this high school student. ER 701. Summary judgment on cause in fact is not appropriate in this case.

III. CONCLUSION

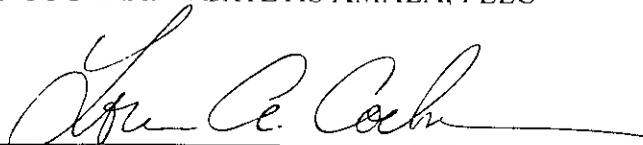
For the foregoing reasons, Appellants, C.B., Misti Bell and Scott Bell respectfully ask this court to reverse summary dismissal and remand the case for trial.

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RESPECTFULLY SUBMITTED this 3rd day of October, 2016.

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CERTIFICATE OF SERVICE

Kim Snyder, being first duly sworn upon oath, deposes and says:

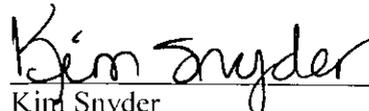
I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on October 3, 2016, I personally delivered, a true and correct copy of the above document, directed to the attorney for Respondent NWSOIL:

Timothy Ashcraft
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VIA EMAIL AND ABC LEGAL MESSENGER

DATED this 3rd day of October, 2016.



Kim Snyder
Legal Assistant

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