

NO. 48063-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MISTI BELL, individually, and as guardian for her daughter, C.B., a
minor, and SCOTT BELL, individually,

Appellants,

v.

BETHEL SCHOOL DISTRICT, a public corporation, individually

Defendant,

and

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.

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RESPONDENTS' BRIEF

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I. INTRODUCTION

In this negligence case, the trial court correctly ruled that defendant Northwest School of Innovative Learning (NWSOIL)¹ did not have any duty toward C.B., and properly dismissed the case on summary judgment. This Court should affirm that ruling because, in addition to there being no duty, plaintiff did not prevent admissible evidence of causation.

This is a case involving a 15-year-old girl, C.B., who was attending NWSOIL, an alternative school that contracts with various school districts, including Bethel School District, to provide education to some of a school district's students. The school district is responsible for transporting the students to and from NWSOIL. On the afternoon of March 19, 2012, C.B. got on the Bethel School District bus to go home after a day of school at NWSOIL. Following an argument with other students on the bus and the bus driver, C.B. voluntarily left the bus and began walking down Tacoma Avenue South in downtown Tacoma.

Immediately after leaving the school bus, police were called but determined that C.B. was a runaway and closed their investigation. Following her decision to get off the school bus, C.B. went to the public library where she engaged in small talk, but made no effort to contact her

¹ Plaintiffs sued multiple entities associated with the Northwest School of Innovative Learning. For ease of reference, only NWSOIL is used here.

parents, the police or her social services caseworkers. Though she had no money and had never ridden a city bus, she then walked to a city bus stop hoping to get on a city bus. There she met Michael Bond, and voluntarily followed him back to his apartment for bus passes, and ended up staying for a few hours voluntarily drinking and smoking marijuana. Eventually, C.B. alleges that Michael Bond turned abusive and she was able to obtain his cell phone and call her parents.

In this lawsuit, C.B.'s parents and C.B. alleged that NWSOIL was negligent in failing to protect their daughter from this alleged molestation. The trial court correctly rejected plaintiffs' attempts to expand the existence and scope of the duty a school owes to its students to incidents that occur off campus, after school hours, when a student is no longer in the school's custody, and as the result of a series of intentional decisions made by the teenage plaintiff. This is well beyond the boundaries of the duty owed by a school to its student. Additionally, plaintiffs' arguments regarding the foreseeability of the harm and C.B.'s alleged health crisis do not create a duty on the part of NWSOIL.

In addition to there being no duty, the summary judgment is also properly affirmed because there is no causation between any alleged negligent act of NWSOIL and the events with Mr. Bond, and there is no evidence of causation of injury, as the evidence shows that C.B. was an

extremely troubled child with an extensive history of poor behavior which simply continued on the same path after this alleged incident.

II. COUNTERSTATEMENT OF THE CASE

A. C.B. has a long history of behavioral issues that predate the incident at issue in this case.

By the time C.B. was a little over two years old, she was already exhibiting substantial negative behaviors, including temper tantrums, self-harm (including pulling out clumps of hair, scratching and hitting herself), and by age three these tantrums had worsened. CP 36-37. She was suspended twice from daycare for abusing another student in daycare and for locking a teacher in a closet and threatening to hit her with a paper-weight. CP 55. By age five, her parents were “at their wits end” and struggling with their own feelings of anger and “not wanting to be around their daughter.” CP 40-41.

In the fall of 2002, C.B.’s kindergarten teacher reported that C.B.’s behaviors made it “extremely challenging for me [the teacher] to teach and for the other students to learn.” CP 42. She was diagnosed with ADHD, though medications failed to effectively control her behavior. CP 43-44. Given the long -standing psychiatric history in the Bell family – bipolar, depression, schizophrenia, childhood aggression and attention issues – C.B.’s primary care provider, who had diagnosed ADHD, acknowledged that this could be “a much more complicated picture.” CP 47-48.

In her first grade year, the Bell family moved to the South Sound and enrolled C.B. in the Bethel School District, where she was placed in the emotionally behaviorally disturbed (EBD) self-contained program at the start of second grade. CP 100. C.B. had her first inpatient psychiatric admission at the age of seven, with diagnoses of oppositional defiant disorder, anxiety disorder and bipolar disorder (provisional). CP 51-52. Her parents reported “an increase in lying and telling outrageous stories at home and school.” CP 54. In her outpatient follow-up, her care providers noted continued significant behavioral problems at school, CP 78-79, and “considerable talk about body parts, dolls not having underwear, etc.” CP 80-82.

Between second grade and sixth grade, C.B. spent the majority of her time in a mainstream classroom, with support from the EBD program, but health problems followed. In May 2005, she had a pancreatic mass removed. CP 56-57. The tumor recurred in 2008 and C.B. had additional surgeries, chemotherapy and radiation throughout 2008, 2009, 2010 and 2011, causing her to miss a significant amount of school. Her tumors have remained stable and unchanging since February 2011.

In January 2009, C.B.’s behavior and social interactions continued to deteriorate. CP 102. In February 2009, at age 12, C.B. was taken to the Seattle Children’s emergency department for suicidal ideation. Her

mother reported that C.B. “banged on the wall” and “shattered a picture frame.” CP 58. She also stated that in the prior week, C.B. took clothes, tied them together and then tied them around her neck and went on the roof. CP 58. When her mother found her and told her to get off the roof, C.B. stated that “I want to die. I’ll kill myself.” CP 58. C.B. was also physically assaulting her younger sister (age 6) and saying “I want to kill you.” CP 58.

1. C.B.’s behaviors began to escalate as she hit adolescence.

In the fall of 2009, C.B. was a seventh grader at Frontier Junior High in the Bethel School District. In emails to C.B.’s teacher, Tina Jacobs, the Bells stated that they felt they could no longer protect C.B. and that they had “decided to leave the school situation up to the school, as far as behavior” because they had their hands full dealing with the home behaviors. CP 104. The Bells were “burnt out,” “tired,” and acknowledged that they had never really had control since she was little. CP 103. Misti Bell stated that she noticed a significant change in C.B. following the tumor recurrence and that C.B. had “reached her breaking point.” CP 103. C.B. was making irrational decisions, stealing, and using extremely poor judgment. CP 103.

The record is replete with CB's escalating poor behaviors. In November 2009, she was admitted to Seattle Children's with areas of concern including "physically fighting with peers at school, skipping class, refusing to go to school, cruelty toward household pets, stealing money to buy marijuana, stealing her father's knife and trying to kill herself." CP 59-60, 105-106. In 2010, she began schooling at home with a tutor furnished by Bethel School District. The tutor reported significant frustrations with lack of parental support and reinforcement, as well as an inability to engage C.B. in her school work. CP 109-11.

In the first-half of 2011, C.B. had numerous issues, including C.B.'s report that she engaged in vaginal and oral sex with an older man (age 20), following exchanges of sexually explicit text messages. C.B.'s parents attempted to file a protective order; however, when police contacted the alleged perpetrator, he stated that he believed that C.B. was 18, that she was a nice girl, and that he was sorry for the misunderstanding. C.B. admitted that the sex was consensual, and no sexual assault charges were filed. CP 120-21, 141-45. In March and April 2011, she had three suicide attempts in trying to overdose on medication. CP 115-19, 122-28. The Bells stated they were "at a breaking point," that they did not want to take C.B. home due to safety concerns for their family, and that her "risky behaviors have increased dramatically since

February 2011.” C.B. threatened to kill family while they slept. C.B.’s younger sister slept in her parents’ room and the family locked themselves in the bedroom while they slept. CP 129-32. In April, C.B. was admitted to NW Behavioral Healthcare for three months to address psychiatric issues and substance abuse. She admitted to using marijuana (since age 13), drinking alcohol (since age 12), smoking cigarettes (beginning at 11-12), an opiate addiction, and snorting a line of cocaine. She also admitted to trading sexual favors with older men for drugs. CP 178-83. Throughout her stay she was noncompliant with staff requests and used profane and verbally aggressive language. CP 168-71.

C.B. continued to have multiple issues in the second-half of 2011. In September, she assaulted her mother while being driven to a counseling appointment. C.B. began punching her mother in the arm with a closed fist and grabbed her mother’s arm in an attempt to have her crash the car. Ms. Bell pulled into a police station and C.B. ran away from the vehicle. C.B. was arrested and charged with reckless endangerment and Assault 4 DV. CP 149-56. In October she was kicked out of Challenger High School because of lack of cooperation and failure to do her school work. An in-home urine toxicology test given to C.B. by her parents was positive for methamphetamine. C.B. admitted to drug dealing and continued use of marijuana and Ecstasy. CP 86-89. In October/November, C.B. verbally

threatened a Bethel School District worker and used profane language, CP 95-96, assaulted a Bethel School District bus driver by slapping the bus driver on the arm, CP 157-61, and was arrested for harassment and threats to do harm to a School District employee. CP 94, 162-66.

2. In early 2012, C.B. continued to exhibit the same behaviors as previous years.

In early 2012, C.B.'s behaviors demonstrated the same consistent, steady pattern of escalation that had been observed over the prior years. At that time, C.B.'s family was receiving almost around the clock support in the family home through CCS (Catholic Community Services), again due to concerns about their ability to control C.B.'s behaviors and keep her safe. *See generally*, CP 249-60. On January 26, 2012, just prior to starting at NWSOIL, C.B. had her fifth inpatient psychiatric admission. She was admitted to Children's Hospital from January 26, 2012 to February 1, 2012 for suicidal ideation and plan. CP 66-70. On February 3, 2012, C.B. disclosed that she was sexually abused, but refused to talk about it. CP 251-56.² In late February, she attempted to sneak out of the house at 1:00 a.m. to meet up with an older man (30+), but was

² In April 2013, she disclosed that she was raped by her uncle, who was a registered sex offender, when she was three years old. Her parents disputed the allegation, stating that C.B. was famous for making up lies and this allegation did not surprise her mother. CP 201-02.

intercepted by her father. CP 259. In March, she made a noose out of electrical cords and hung it in her closet. CP 258.

In summary, prior to the incident on March 19, 2012, which serves as the basis for this lawsuit, C.B. was an out of control teenager with significant behavioral issues. She had: (1) been admitted five times for inpatient psychiatric care; (2) made countless suicide attempts; (3) displayed inappropriate sexual behaviors; (4) significant drug use; (5) several arrests for assaultive behaviors and was on probation; and (6) significant interventions by numerous providers, but no one was able to keep C.B. from making poor choices.

B. C.B.'s placement at NWSOIL and relationship to Bethel School District.

C.B.'s first day at NWSOIL was February 6, 2012. From the outset, C.B. continued her past patterns of behavioral problems at NWSOIL. CP 299-303. C.B. had attended NWSOIL for only a total of 25 days prior to the events on March 19, 2012.

Washington public schools are required to provide a free, appropriate public education to eligible special education students between the ages of 3 and 21. CP 328-29. There are times when a student's special education needs cannot be met by their home district. In those cases, the school districts may contract with an OSPI approved Nonpublic

Agency (NPA). NWSOIL is one such approved NPA. CP 328-29. When a student is placed at NWSOIL by their home school district, NWSOIL provides the student's special education and related services, as outlined by the student's Individualized Education Program (IEP) prepared by the home school district. This means that Bethel School District contracted with NWSOIL to have NWSOIL implement the Bethel School District IEP for C.B. CP 328-29. As part of this contract, it is the home district's responsibility to provide transportation to NWSOIL students to and from school. That means that the students need to arrive at the school by 9:00 a.m. when school begins and buses need to be prepared to transport the students home at 2:30 p.m. when the school day ends (12:30 p.m. on Wednesdays, which is an early dismissal day).

Per the Director of Transportation for the Bethel School District, Karen Campbell, Bethel School District's responsibility for its students at NWSOIL begins when the student steps on the bus, because that student is now in their custody.

Q. Do you see on what's marked page 2 of 2, what's been previously marked as Exhibit 1, it says "When a teacher, coach, or other certified staff member is assigned to accompany students on a bus, such person shall be primarily responsible for behavior of the students in his/her charge. *The bus driver shall have final authority and responsibility regarding the safe transport of students.*" Did I read that correctly?

A. You.

MS. BLAKNEY: You said "certified" rather than "certificated."

MR. COCHRAN: You're correct.

Q. But otherwise, that's an accurate statement of what the policy was for drivers with Bethel School District back in March 2012?

A. Yes.

Q. Does that responsibility -- does that begin when the student actually steps onto the bus?

A. For a driver to be responsible? Is that what you're asking?

Q. Correct. "The bus driver shall have final authority and responsibility regarding the safe transport of student." When does that actually begin, according to Policy 6630?

A. *Well, I believe when they get on the bus. That's when they have the student in their presence.*

CP 28-29 (emphasis added).

Q. Do you agree with Shelby [NWSOIL employee] that once [C.B.] on that particular day, March 19th of 2012 -- and you've seen the video -- that once [C.B.] got on that bus, she was the Bethel School District's problem?

A. And when she enters our bus, as you asked me earlier, when do we take responsibility, and when they step on the bus.

CP 30.

Once a student is on the school district's bus, that student is in the custody of the district, and NWSOIL can only reassume a duty in the case

of a positive handoff, as described by Joel Stutheit, Assistant Director of Transportation. Mr. Stutheit testified that there have been times when a school bus driver had difficulties with a NWSOIL student on the bus, and has "circled around" the block to drop the students back off at NWSOIL for alternate transportation arrangements. Dropping the students back off at NWSOIL requires a "positive handoff."

Q.[D]o you know of other students that have done that at Northwest SOIL as well, that have stayed after because they need to get picked up by their parents for some reason?

A. We've circled around before and have done the same thing with other students.

Q. You've used that term "circled around." I don't know what that means.

A. Well, because of how Tacoma lays, we pick them up and we start driving, we have problems, we take a right and then circle the block and come back around.

Q. And then drop them off to be picked up by their parents?

A. We have -- yes. We -- *well, we don't drop them off. We make sure somebody is able to come and get them or we walk --*

Q. Positive handoff?

A. Yes, positive handoff.

CP 32-33 (emphasis added).

Q. And there will be someone from Northwest SOIL out there to receive this student. Once you get positive handoff, the bus can leave?

A. Yes.

Q. And that's because you believe the student is in safe hands because they are left with someone at the school?

A. Correct.

CP 34.

C. On March 19, 2012, C.B. voluntarily left the school bus without permission following a verbal altercation with the school bus driver and other students.

On March 19, 2012, C.B. arrived to school in a difficult mood and she had five different behavioral episodes throughout the course of the school day. CP 300-03. After school was out for the day, C.B. stepped on the Bethel School District bus at around 2:45 p.m.³ Almost immediately, she began a verbal altercation with some of the younger students on the bus. The bus driver alerted some of the NWSOIL Behavioral Intervention Specialists (BIS) who were on the sidewalk that C.B. was "not in a good mood." CP 7. The lead BIS, James Tate, stepped onto the school bus to de-escalate the situation. C.B. agreed that she could ride home on the bus and when Mr. Tate stepped off the bus, it was calm and quiet. Mr. Tate and the other NWSOIL staff returned to the building. CP 7.

³ The following summary of the bus incident – from the time C.B. steps onto the bus to the time she left the bus – is based on the school bus videotape, CP 7.

After Mr. Tate left the school bus, C.B. began to escalate and started a verbal altercation with the bus driver. At around 2:54 p.m., C.B. asked if she could go back to the school, and the bus driver got off the bus and followed her back to the school. C.B. was unable to gain entry into the school and did not have any further contact with NWSOIL employees. C.B. and the bus driver returned to the bus where their argument recommenced. At 2:57 p.m., C.B. voluntarily exited the bus and began walking down Tacoma Avenue. Per Bethel School District protocol, the bus driver notified dispatch and immediately called 911. The driver was on the phone with 911 within a minute after C.B. left the bus. CP 7.

Police were immediately dispatched to the scene and were en route by 3:02 p.m. CP 343. Officers searched a nearby McDonald's and the public library but could not locate C.B. CP 343. Law enforcement had the parents' contact information by 3:42 p.m. CP343-44. At 3:43 p.m., C.B.'s status was identified as "runaway," a report was made, and the investigation closed at 3:55 p.m. CP at 343-44.

Per C.B.'s own testimony, when she left the bus on March 19, 2012, she first went to the Tacoma Public Library. CP 11. C.B. struck up a conversation with some of the people in the library and walked around for several minutes. CP 11. Despite striking up a conversation with several people, she never asked any of the library patrons or librarian to

borrow a telephone to call her parents, the police, or a CCS worker. CP at 12-13. After leaving the library, C.B. began asking people on the street about bus tickets and bus routes. CP 14-15. While she was talking to another person, Michael Bond approached and told C.B. that he knew which bus she needed to take and that he had bus tickets in his apartment. CP 15. C.B. willingly accompanied Michael Bond back to this apartment. CP 15.

After about five to ten minutes of hanging out in his apartment, Mr. Bond offered C.B. marijuana and alcohol, which she accepted. CP 16-17. Approximately a half an hour after C.B. arrived to the apartment, Mr. Bond then had three friends come over, and they all hung out, drank and smoked. CP 18. Up until this point, C.B. had not asked to leave the apartment:

Q. Okay. At this point with all of you in the apartment and all of you drinking and smoking marijuana, had you ever said at this point, any point up to then, I'd like to leave?

A. With like -- well, at that moment like nothing like bad had happened yet *and I was kind of having a good time for a little bit.* Like I was -- I mean, I was -- you know, I wasn't -- *I didn't feel like I had wanted to leave at that moment.*

CP 18-19 (emphasis added). As the evening progressed, Mr. Bond and his friends began making sexual innuendos towards C.B., and although they made her feel uncomfortable, she made no attempts to leave at that point.

CP 20-21. Then Mr. Bond's friends began to leave until it was just C.B. and Mr. Bond alone in the apartment. CP 22-23. Per C.B.'s report, Mr. Bond then forced her to perform oral sex on him and he digitally penetrated C.B. CP 23 . At a little before 8:00 p.m., C.B. gained access to Mr. Bond's cell phone and used it to call her mother. CP 24-25. She then left the apartment and waited out front until police arrived. CP 25-26. Mr. Bond was taken into custody shortly after 8:00 p.m. and C.B. was transported to Mary Bridge Children's Hospital for a forensic examination. CP at 345-348. C.B. agreed to a partial examination, but refused a pelvic exam. CP 347.

Mr. Bond was initially charged with child molestation in the third degree, unlawful imprisonment, and resisting arrest. CP 305-06. However, the Prosecutor substantially reduced the charges and offered a plea deal to communication with a minor for immoral purposes and unlawful imprisonment, which Mr. Bond accepted. CP 308-26 As part of the plea deal, Mr. Bond denied that he committed the offenses, but stated that after reviewing the discovery he believed that there was a substantial likelihood that a jury would convict him at trial. CP 311, 325. The Prosecutor's statement regarding the plea deal noted that "considering the circumstances of this case, and the unique medical and behavioral concerns regarding the minor victim, the State believes that this is an

appropriate resolution, as it eliminates the stress and uncertainties of trial.”

CP 307.

D. Following the March 2012 incident, C.B.’s behaviors continued along the same pre-incident trajectory.

Following this incident, C.B. continued on the same trajectory of defiant and unsafe behaviors that she exhibited prior to the March 2012 incident. For example, C.B. had psychiatric admissions in March 2012, CP 71, April 2012, CP 279-81 (where she assaulted a nurse, see videotape at CP 9, 4:35-4:42), and May 2012, CP 283-294. She had additional suicide attempts in March 2012, CP 71, two in April 2012, CP 133-39, 207-16, 262-77, and August 2013, CP 218.

In addition to the psychiatric admissions, C.B.’s sexual activities continued. On April 20, 2012, she reported to have connected with an older man on the “Night Exchange,” a chat line for people looking for sexual partners, and snuck out to have sex. CP 134-39, 207-16, 264-69. On April 21, 2012, she bragged about a sexual addiction and her obsession with having sex with older men. CP 279-81. On April 3, 2013, C.B. stated that when she ran away from home she engaged in prostitution, and she solicited adult men online for sex. CP 239-42. On April 26, 2013, C.B. alleged that she was raped by four males over the course of several hours while she was hitchhiking to Bellingham. She later recanted this

story and said she had made it up to avoid getting into trouble for running away. On May 1, 2013, Misti Bell advised law enforcement that C.B. was a "chronic liar," an assessment that C.B. herself agreed with during her police interview, stating that "she is a pathological liar and she knows it." CP 219-26.

C.B.'s drug use likewise continued after March 2012. In October 2013, she was admitted to the hospital for an infection to her right buttock due to self-admitted heroin use. CP 72-74. She also admitted to using crack cocaine. CP at 188-92. In November 2013, medical providers at Remann Hall noted numerous track marks from IV drug use. CP 185-87.

C.B. also continued to threaten her family and others. On April 17, 2012, she threatened to kill her mother. CP 133. On April 20, 2012, C.B. assaulted a CCS worker by punching her in the face. CP 134-39, 207-16, 264-69. On March 17, 2013, C.B. attacked her father with a pizza cutter. CP 196-97.

Finally, C.B.'s poor life choices continued after March 2012. In April 2013, she was placed in DSHS custody and admitted to extensive drug use and prostitution. CP 203-06; 331. In 2013, she ran away from various housing facilities and foster homes. CP 217, 237-38, 243-47, 249-50, 296-97, 339-41.

III. COUNTERSTATEMENT OF THE ISSUES

Did the trial court correctly dismiss this case on summary judgment when:

- 1) NWSOIL owed no duty to C.B. because she was not in NWSOIL's custody;
- 2) There is no evidence that any alleged negligence by NWSOIL caused the event at issue; and
- 3) There is no evidence that any alleged negligence by NWSOIL caused harm to C.B.?

IV. ARGUMENT

A. Standard of review.

The standard of review in reviewing a summary judgment order is de novo. *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 212, 254 P.3d 778 (2011). The threshold determination of whether a defendant owes a duty to a plaintiff is a question of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991); *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984).

B. The trial court correctly held that NWSOIL owed no duty to C.B.

A cause of action for negligence requires the plaintiff to show: (1) that the defendant owed a duty to the plaintiff; (2) breach of that duty; (3) an injury; and (4) a proximate cause between the breach and the injury.

Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875

P.2d 621 (1994). In this case, the trial court correctly held that no duty exists.

1. A school only has a duty toward students in its custody.

Washington law provides that, generally, a private person does not have a duty to protect others from the criminal acts of third parties. *See e.g., Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 223,802 P.2d 1360, 1364 (1991); Restatement (Second) of Torts § 315 (adopted in *Petersen v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983)). The courts have recognized limited exceptions to this general premise, such as when there is a special relationship between the defendant, the third party, or the third party's victim.⁴ *Hutchins*, 116 Wn.2d at 227-28. One such special relationship is the relationship between a school and its student, when the student is in the school's custody, as recognized in *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953).⁵

In *McLeod*, the students were at recess in the school gym. A teacher designated to supervise the gym left the students alone for a period of time, and then several school boys (age 12-16) carried a 12-year-old

⁴ Here it is beyond dispute that NWSOIL had no relationship with the alleged perpetrator, Michael Bond.

⁵ Contrary to plaintiffs' desire to twist the "special relationship" cases into an additional (and heightened) standard applicable to NWSOIL, the special relationship doctrine is simply the vehicle that creates a duty between school and student in the first place. The duty, if it exists, is still the duty to use reasonable care *McLeod*, 42 Wn.2d at 320.

girl into a darkened room under the grandstand in the gym and forcibly raped her. *McLeod*, 42 Wn.2d at 318.

In determining that the school district had a duty toward the child, the court noted that the relationship between the school district and the child is not a voluntary one. *Id.* at 319. While at school, the child “must yield obedience to school rules and discipline formulated and enforced pursuant to statute.” *Id.* As such, the school district has a duty “to take certain precautions to protect its pupils *in its custody* from dangers reasonably to be anticipated.” *Id.* at 320, quoting *Briscoe v. School Dist. No. 123*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949) (emphasis added); *see also, J.N. v Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 56-57, 871 P.2d 1106 (1994); *Peck v. Siau*, 65 Wn. App. 285, 292, 827 P.2d 1108 (1992). However, the school is not an insurer of the safety of its pupils. *Peck*, 65 Wn. App. at 293.

The cases in Washington where the courts have held that a school owed a duty to the student involved harms on school property, during the school day, or at a school sponsored event where the school provides some level of oversight. *See, e.g., McLeod*, 42 Wn.2d 316; *J.N. v Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994) (student A.B. was sexually assaulted by another student in an arguably under-supervised bathroom during recess); *Briscoe*, 32 Wn.2d 353 (students injured during

football game at recess); *Sherwood v. Moxee Sch. Dist. No. 90*, 58 Wn.2d 351, 363 P.2d 138 (1961) (summary judgment reversed where student's parents filed wrongful death action after their son died during an initiation ceremony of a high school letterman's society when school district agents were present).

At the other end of the spectrum are cases involving instances of student misconduct, off campus, well after school hours, and outside the presence of a school employee/advisor or other school supervision. In *Coates v. Tacoma Sch. Dist.*, 55 Wn.2d 392, 347 P.2d 1093 (1960), a student was killed following an off-campus initiation ceremony into a club that was organized with the consent and sponsorship of the school district. *Id.* at 393. The student was a passenger in a car driven by another student, who was operating the car at a high rate of speed, and under the influence of alcohol. The car left the roadway and struck a telephone pole at around 2:00 a.m. *Id.* While the club had an advisor, it was alleged that the students' activities were largely unsupervised. *Id.* Under these facts – an organization/club having no relationship to the curriculum or generally recognized extracurricular activities, who met on a non-school day, at a point far removed from the school – the court held no duty was owed by the school. *Id.* at 397.

While not as egregious as the facts in *Coates*, this present case falls more closely in line with the *Coates* case, than it does with *McLeod*. The key requirement, then, for the triggering of a duty is custody. This is based on the school's right to control the student. As stated in *Peck*, "[t]he basic idea [behind the duty] is that a school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power goes the responsibility of reasonable supervision." *Peck*, 65 Wn. App.at 292. Under facts such as these, there is certainly no Washington authority supporting such a significant enlargement of the scope of the school's duty to its students who are off school property after school-hours.

2. A review of the videotape shows that NWSOIL did not have custody of C.B. when she voluntarily left the bus.

The trial court correctly ruled that C.B. was not in NWSOIL's custody when she voluntarily left the bus. Bethel School District and NWSOIL agree that transporting C.B. to and from school was Bethel's responsibility. CP 28-30. Bethel agreed that when a student stepped onto the bus, that student was its responsibility. *Id.*

A detailed review of the videotape of this incident shows that C.B. was on the bus and was in Bethel's custody the entire time. The atmosphere on the bus was calm, and even light, when C.B. first got onto

the bus. CP 7 at time of 0:00 to 2:30. Shortly after getting on the bus, she instigated verbal altercations with other students with multiple derisive statements replete with profanities. *Id.*, beginning at 2:35.

NWSOIL employee James Tate did come out to the bus and talked to C.B. *Id.*, beginning at 6:08. Approximately two minutes later, the scene on the bus was calmer and Mr. Tate walked away. *Id.* at approx. 8:00. The bus driver, Norma Henderson, a Bethel employee, called her Bethel dispatcher, and told her that she was ready to “head out” and that if she had any more problems she would call 911. *Id.* at 8:13-8:17.

C.B. then asked to go back to school. *Id.* at 8:52. C.B. and the bus driver then exited the bus. However, they returned a few minutes later, with the bus driver later indicating that “there’s no one in the school.”⁶ *Id.* at 13:00.

At this point, C.B. asked the bus driver to call her dad to come pick her up. *Id.* at 11:23. The bus driver declined, saying that she would call 911 but would not her dad, stating that it was her protocol. *Id.* at 11:26-11:40. When C.B. reiterated her demand, the bus driver again declined, stating that she would only call 911, calling it “my choice.” *Id.* at 11:53-

⁶ The Bells argue that NWSOIL “refused” to open the doors. *Appellants’ Brief (App. Br.) at 2*. There is no evidence that anyone at NWSOIL refused to open the doors. The only evidence is that there was no one present at the doors when C.B. and Ms. Henderson went back to the school.

11:57. C.B. did not like that option and stated that “they will take me to jail.” 11:57-12:06.

After further arguing between C.B. and Ms. Henderson, Ms. Henderson stated again the two choices – “sit down and buckle up and we’ll go home, or I’ll call 911.” *Id.* at 12:30-12:35. She stated that these were the two choices that Joel Stutheit, Assistant Director of Transportation for Bethel School District, told Ms. Henderson to give to C.B. *Id.* at 12:22-12:28.

C.B. then demanded the driver call her CCS worker, stating that “I need it [for you to call my CCS worker] now or I’m walking.” *Id.* at 12:41-12:51.⁷ Ms. Henderson again stated that she would only call 911. *Id.* at 12:51-12:55. C.B. then stated that she was leaving, says “fuck you” to Ms. Henderson, and looked into the camera as she exited the bus. *Id.* at 12:55-13:12.

This video demonstrates that: 1) C.B. was in the custody of Bethel from the moment she walked onto the bus until she ultimately left of her own volition; and 2) NWSOIL had no control over the protocol of Bethel or the choices offered by Bethel.

⁷ Though C.B. demanded that Ms. Henderson call her CCS worker “or I’m walking.” C.B. stated that the reason she did not call her CCS worker when she went to the library was that she did not know the phone number. CP 13.

Because C.B. was not in NWSOIL's custody, NWSOIL did not owe a duty to C.B. This is the end of the analysis because, without a duty, NWSOIL cannot be liable. *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 890, 73 P.3d 1019, 1024 (2003) (holding that "we must first decide whether the defendants owed Minahan any duty. If the defendants did not owe the duties that Minahan suggests, then further analysis is unnecessary.")

3. Plaintiffs' attempts to create a duty fail.

In an effort to avoid the lack of duty, the Bells make several factually and legally incorrect arguments, some without any factual or legal citations. First, plaintiffs largely ignore the custody issue,⁸ instead focusing their argument on foreseeability. *App. Br. at 4, 20-23*. They argue, without citation, that "the better approach [to determining whether there is a duty] is that consistent with Washington precedent linking duty with the foreseeability of the harm." *App. Br. at 23*. This is incorrect. No Washington case has held that foreseeability, without custody, creates a duty. The issue of foreseeability is only relevant if there is custody. If so, then foreseeability puts an outer limit on the extent of the duty. Without custody, the issue of foreseeability is moot.

⁸ Plaintiffs make a passing reference to "dual custody" in the introduction of their brief. *App. Br. at 3*. But this argument is not developed in the brief. This court need not consider undeveloped arguments. RAP 10.3(a)(6); *State v. Demison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990)

The Bells also reference C.B.'s "full blown mental health crisis." *App. Br. at 1, 2, 23, 28*. First, there is no evidence of "mental health crisis"⁹ during the incident at issue and if there was, any such diagnosis would have to come from a mental health professional. Plaintiffs presented no such expert testimony.¹⁰ Second, it is unclear what point plaintiffs are making regarding this alleged crisis. Even assuming such a "crisis," that fact would not create a duty on the part of NWSOIL.

In response to the lack of custody, the Bells argue that NWSOIL "presented no evidence indicating as a matter of law that a reasonable alternative school in the same or similar circumstances would not have recognized that its duty to protect C.B. was much more than just loading her onto the bus in this situation." *App. Br. at 29*. This *non sequitur* is indeed hard to follow. In using the "reasonableness" language, the Bells conflate the existence of a duty with the satisfaction of that duty. Whether or not NWSOIL acted reasonably is not relevant unless there was a duty in the first place.

Plaintiffs reference an argument (that they do not develop) that whether there was a duty is a factual issue. *App. Br. at 4*. As set forth

⁹ Indeed, C.B. is making volitional choices based on her belief that if 911 is called, she will go to jail.

¹⁰ As will be discussed below, the only expert testimony offered by plaintiffs was that of Edward Dragan who has a PhD in Education. He is not qualified to render mental health opinions.

above, the issue of whether there is a duty is a legal issue for the court. Moreover, there is no evidence supporting any factual dispute regarding custody. The video clearly shows that Bethel had custody of C.B. Similarly, any argument that NWSOIL “reassumed” custody when C.B. attempted to go back to the school fails. First, as admitted by Joel Stutheit, there is no transfer of custody without a “positive handoff,” which did not occur. CP 32-34. Second, after returning from attempting to get in the school, C.B. was safely on the bus. CP 7, beginning at 11:23. It was *after* returning to the bus when the altercation between C.B. and Ms. Henderson led to C.B. voluntarily leaving the bus.

Additionally, plaintiffs argue, without citation, that this duty is non-delegable. *App. Br. at 2, 4*. Again, this argument is undeveloped. But even assuming that a duty is non-delegable, it does not answer the questions of whether the duty exists, and when it ends. Non-delegable does not mean the duty exists in perpetuity. Even if the duty is non-delegable, it ceases when custody ceases. Additionally, if such a duty was non-delegable, it would be Bethel’s duty, as it has the duty to educate the child. CP 328-29.

Finally, plaintiffs argue that somehow a duty existed because the bus was in the loading zone, *App. Br. at 9, 27*, and because the bus driver warned that “a problem was going to occur.” *App. Br. at 2, 4*. Regarding

the loading zone, this is another *non sequitur*. First, there is no “loading zone” as this school is on Tacoma Avenue. The alleged “loading zone” is a curb on the side of the street. More importantly, Bethel admitted that it has custody of the student when the student steps on the bus. CP 28-29. Regarding the bus driver warning of a problem, the warning was in relation to a conflict between C.B. and another student, CP 7 at 4:58, not that C.B. was going to leave the bus.

4. Plaintiffs’ expert Dragan cannot create a duty and his testimony is not admissible.

Plaintiffs presented the testimony of their education expert, Edward Dragan, PhD, who has a doctorate in Education Administration and Supervision. CP 836-42. While large parts of his declaration are directed at Bethel, or at the defendants as a group, Dr. Dragan did attempt to testify that NWSOIL had a duty to supervise C.B., CP 837-38, and that NWSOIL had a duty to transition the students onto buses, CP 840-41. Because duty is a legal issue, Dr. Dragan cannot create a duty by his testimony. As such, NWSOIL moved to strike his testimony. CP 874. Moreover, Dragan attempted to argue that C.B.’s leaving the bus was not voluntary. CP 839. To the extent any expert can testify about this issue, it would not be Dragan, but rather an expert in mental health issues, such as a psychologist or psychiatrist. His testimony is inadmissible on that issue.

C. **Case law in other jurisdictions support that no duty is triggered because C.B. was not in the custody of NWSOIL.**

In the New York case of *Harker v. Rochester City Sch. Dist.*, 241 A.D.2d 937, 661 N.Y.S.2d 332 (1997), a seventh grade student was cut on the cheek by an eighth grade student after they both got off the bus after school. *Id.* at 937. As is the case here, transportation was provided by one entity (National School Bus) and education was provided by another entity (Rochester City School District). *Id.* Based on a forged note from the perpetrator's mother giving her permission to get off on a different stop, the bus driver let the perpetrator off at the same bus stop as the victim. *Id.* Apparently, there had been a history of verbal altercations and one prior assault on the school bus prior to this day. *Id.* Once the bus had rounded the corner and was out of sight, the two students got into a fight and the perpetrator cut the victim's cheek with a razor blade, requiring 30 stitches. *Id.*

The trial court denied the school district's and bus company's motions for summary judgment. The appellate court reversed. The court echoed the comments made in Washington that a school district "is not the insurer of the safety of its students." *Id.* at 938. Finding that the students were no longer in either the school district's or bus company's custody, the court found that neither owed a duty to the students. *Id.*

In attempting to distinguish this case, plaintiffs argue that here the school, NWSOIL, is a privately run specialized school and the issue occurred at a loading zone, instead of a bus stop. *App. Br. at 22*. These alleged distinctions are irrelevant. The issue of public versus private has no impact on the custody question. And, as discussed above, the loading zone issue is a red-herring as plaintiffs grasp at any distinction to avoid the obvious – there was no custody by NWSOIL.

In another New York case, *Chainani by Chainani v. Board of Educ.*, 87 N.Y.2d 370, 663 N.E.2d 283 (1995), a combined appeal presented the question of “whether public schools that have contracted for transportation served with independent bus companies should be liable for injuries to students which occur between the child’s home and the bus stop.” *Id.* at 377. While the New York court conceded that a school has a duty of care while children are in its physical custody or orbit of authority, it ultimately held that “whatever the precise boundaries for the duty...here the schools had contracted-out responsibility for transportation, and therefore cannot be held liable on a theory that the children were in their physical custody at the time of injury.” *Id.* The same can be said for C.B. under the circumstances of this case. NWSOIL has a contract with Bethel School District that Bethel will provide transportation to and from the school. At the time C.B. left the bus, C.B. was not in the physical custody

of NWSOIL. Therefore, there can be no duty that attaches to NWSOIL at that point in time. In the absence of a duty, plaintiffs' claim must fail as a matter of law.

Again, plaintiffs try to distinguish this case by arguing that, here, C.B. was in the middle of a "known mental health crisis" in the loading area. *App. Br. at 23*. This attempt likewise fails.

C.B. ceased to be in the custody of NWSOIL when the school day ended and she stepped onto her school bus for transportation home. The situation here is no different than if C.B.'s parents or guardian/approved caregiver arrived to school at the end of the day to pick up C.B. If the foundation for the school's duty to its students is *in loco parentis*, then certainly when a parent picks their child up from school, custody of that child is reassumed by the parent because the school no longer stands in the place of the parent. The same is true when C.B. stepped on the school bus following the conclusion of the school day. The responsibility for transport fell to Bethel School District – over which NWSOIL had no control – and there were no representatives of NWSOIL who accompanied C.B. on the bus. NWSOIL cannot be said to stand in the place of C.B.'s parents when she gets on the bus, because NWSOIL has no control over the transport of students by Bethel School District.

D. Plaintiffs' claims also fail because there is no proximate cause.

Though it appears that the trial court based its decision on lack of duty, NWSOIL also moved for summary judgment based on lack of proximate cause. CP 590-91. "An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record." *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283, 287 (2008).

Plaintiffs have the burden of proving both that any alleged negligence on the part of NWSOIL was a proximate cause of the events leading up to the alleged assault by Michael Bond, and also that any alleged negligence by NWSOIL was a proximate cause of C.B.'s injuries.

1. Plaintiffs cannot show that any alleged negligence by NWSOIL was a proximate cause of the chain of events leading up to the alleged assault due to C.B.'s own intervening conduct and attenuated circumstances.

Proximate cause consists of two elements: cause-in-fact and legal causation. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). Cause-in-fact is "a cause which in a direct sequence [unbroken by any new independent cause.] produces the [injury] complained of and without which such [injury] would not have happened." 6 Washington Practice: Washington Pattern Jury Instructions: Civil 15.01, at 181 (2005). An independent cause may break the causal chain if it is a superseding cause.

As the court in *Cramer v. Dep't of Highways*, 73 Wn. App. 516 (1994)

stated:

Whether an act may be considered a superseding cause sufficient to relieve a defendant of liability depends on whether the intervening act can reasonably be foreseen by the defendant; only intervening acts which are not reasonably foreseeable are deemed superseding causes. A *superseding cause* exists if the acts of the plaintiff or a third party are *so highly extraordinary or unexpected that [they] can be said to fall without the realm of reasonable foreseeability as a matter of law.*

Id. at 520 (internal citations omitted, emphasis added).

Here, C.B.'s behavior after she left the bus was so highly extraordinary and unexpected that it cannot be described as reasonably foreseeable. There were a multitude of events that occurred between C.B.'s last contact with NWSOIL and her alleged assault: She returned to the bus, where she re-escalated and re-engaged with the bus driver and other students; C.B. then chose to exit the bus rather than sit down, buckle up, and head home; she chose to walk down Tacoma Avenue to the public library where she hung out with friends; and decided not to call her parents, the police or a CCS worker despite the opportunity to do so. C.B. then walked to a city bus stop, engaged in conversation with Mr. Bond, voluntarily agreed to follow him back to his house, hung out with him, voluntarily consumed drugs and alcohol, and admitted to not leaving

because she was having a “good time.” all before being allegedly assaulted by Mr. Bond.

This is not a case of child luring, as plaintiffs argue, where a young child was snatched from the curb while waiting for her bus. Nor is this even a case where C.B. took off on foot and was immediately abducted and assaulted. Instead, this is a case of a teenage girl of high intelligence making several choices over a significant period of time, choosing not to call her parents and instead willingly following a stranger to his apartment, willingly remaining there for some time, and participating in illegal activity prior to being assaulted. Here, C.B.’s own actions were so highly extraordinary and unexpected that her actions amounted to a superseding cause sufficient to break the causal chain.

Legal causation is a question of law. *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). In analyzing legal causation, the court must decide “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.” *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311-12 (2006).

First, NWSOIL was not privy to any of the happenings on the bus following the BIS’s last contact with C.B. Second, even if NWSOIL had known about C.B.’s interaction with the Bethel School District bus driver

immediately prior to her leaving the bus, her behavior after fleeing the bus cannot be said to be reasonably foreseeable. By C.B.'s own statement on the videotape, she was upset that the bus driver would not call her parents or her CCS worker to come pick her up. It would not be reasonable then to assume that C.B. would immediately walk to a nearby public place, the Tacoma Public Library, where she had an opportunity to call her parents or a CCS worker, and failed to do so.

C.B. was an out of control youth, with long-standing mental health issues since early childhood, whose own parents admit they could not control. At the time of this incident, C.B. had only been a student at NWSOIL for one month. As a matter of public policy, if C.B.'s parents could not control C.B.'s behaviors, how was NWSOIL expected to control and anticipate C.B.'s behaviors, particularly after the school day had ended, when C.B. was on her school bus, and when NWSOIL was unaware of any problems after the NWSOIL BIS worker obtained affirmative agreement from C.B. that she would ride the bus home.

2. Plaintiffs did not meet their burden of proving that the alleged injuries were proximately caused by any negligence by NWSOIL, and not the result of her long-standing psychiatric disorders.

Like any negligence case, the plaintiffs bear the burden of proof connecting the alleged negligent acts to any alleged injuries. Here, this

means that plaintiffs must demonstrate what specific injuries C.B. suffered as a result of this alleged negligence. While plaintiffs allege that C.B. suffered a “precipitous decline” as a result of this injury, they failed to present any expert testimony to support such a claim.

In general, expert testimony is required when an essential element in the case is best established by an opinion which is beyond the expertise of a layperson. 5A K. Tegland, Wash. Prac., Evidence § 300 (1982); *Harris v. Robert C. Groth, M.D., P.S.*, 99 Wn.2d 438, 663 P.2d 113 (1983); *McClure v. Dep’t of Labor & Indus.*, 61 Wn. App. 185, 810 P.2d 25 (1991). To establish causation between a defendant’s wrongful acts and a plaintiff’s injuries, the plaintiff must submit medical testimony convincing enough to remove the issue from the realm of speculation and conjecture. *O’Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968). The testimony must be sufficient to establish that the injury-producing situation “probably” or “more likely than not” caused the subsequent condition, rather than that the accident or injury “might have,” “could have,” or “possibly did” cause the subsequent condition.

Merriman v. Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973) (citing *Ugolini v. States Marine Lines*, 71 Wn.2d 404, 407, 429 P.2d 213 (1967)).

The case of *Carlos v. Cain*, 4 Wn. App. 475, 481 P.2d 945 (1971), is instructive. In an auto accident case, the plaintiff alleged that she began

grinding her teeth as a result of the accident. *Id.* at 476-77. The court of appeals upheld the trial court's exclusion of both the plaintiff's own testimony and her expert witness's testimony that the accident caused the teeth grinding. Citing to the long line of medical negligence cases requiring non-speculative expert testimony, the court stated "[t]he proffered evidence was not legally sufficient to establish the causal relationship between the accident and the condition complained of' because the plaintiff's expert could not say more likely than not that the recent teeth grinding was related to the accident on a more likely than not basis. *Id.* at 477. The court also excluded the plaintiffs' own testimony on damages, stating that "[h]er testimony, if believed, would establish the condition, but it could not establish the necessary causal relationship in terms of reasonable medical probability." *Id.*

The only expert testimony on causation that plaintiffs included was the declaration of Edward Dragan, Ed.D., a former school superintendent. There is no evidence that Dr. Dragan has any medical training. Dr. Dragan simply concluded that the defendants' "collective failure to properly care for C.B. was a proximate cause of her harm." CP 841. This opinion is completely speculative and conclusory, and lacking the requisite qualifications. NWSOIL moved the trial court to strike these opinions. CP 874.

Ultimately, then, plaintiffs did not present a sufficient basis for defeating summary judgment on the issue of proving a causal link between their injuries and the alleged negligence. C.B.'s alleged injuries are far beyond teeth grinding following an accident and indeed well beyond garden variety emotional distress claims. C.B. has numerous and significant psychiatric diagnoses. In fact, plaintiffs go to great lengths to characterize C.B. as "special needs" in acknowledgment of her complex medical and psychiatric history. Sorting out whether or not this event was a proximate cause of any damage to C.B., in light of the above history, is certainly beyond the reach of a lay jury and must be supported by expert witness testimony, which plaintiffs did not produce. As such, their claim fails for lack of evidence of proximate cause of injury.

V. CONCLUSION

The trial court correctly dismissed this case. The Washington courts have seen fit to narrowly tailor the duty owed by a school to its students. This is because the creation of liability, where it otherwise would not exist, must be limited to its logical conclusion. A school simply cannot be responsible for the actions taken by all of its students after school hours, off school property, at a private residence, while the student was not involved in any school sanctioned extracurricular program and while it had no knowledge of such a situation. To do so would amount to

creating a strict liability standard in which a school could never shed its status as *in locum parentis*. Such a standard has never been considered nor advocated by the courts before and would be a gross enlargement of the current legal standard.

In this case, there is no duty, as C.B. was not in the custody of NWSOIL at the time she chose to leave the bus. Second, the claim fails for want of proximate causation between NWSOIL's alleged negligence and the series of events leading up to the alleged assault. C.B., an out of control teenager, who nobody – including her parents – could prevent from doing what she wanted to do, made a series of conscious choices that were so unreasonable that they amount to a superseding cause. Also, a series of choices, made after school hours, off school property, following an affirmative handoff to another entity is simply too remote to justify imposing liability as a matter of public policy. Finally, plaintiffs' claim fails for lack of support that NWSOIL's alleged negligence was a proximate cause of injury because plaintiffs cannot show that C.B.'s behaviors following this incident were different than her behaviors prior the incident.

Liability has its boundaries, and in this case plaintiffs attempted to push the boundaries beyond logic and reason. The trial court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 17th day of August, 2016.

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DATED this 17th day of August, 2016.

Deidre M Turnbull

Deidre M. Turnbull
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