No. 91775-2

No. 45832-2-II

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

N.L.,

Appellant,

vs.

BETHEL SCHOOL DISTRICT,

Respondent.

BETHEL SCHOOL DISTRICT'S RESPONSE BRIEF

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I. INTRODUCTION

This action arises out of an episode of sexual intercourse in April 2007 between Plaintiff N.L., then a 14-year-old student at Bethel Junior High, and Nicholas Clark, then an 18-year-old student at Bethel High School. The intercourse occurred at Clark's home one day after N.L. and Clark first met. On the day of the incident, N.L. skipped her track practice, voluntarily left campus with Clark, and went to his house. According to N.L., however, she unwillingly had sex with Clark.

Five years later, N.L. sued Bethel School District ("the District"), claiming that the harm she suffered was reasonably foreseeable. N.L. alleges that because Clark was a Level I registered sex offender and had a disciplinary history, the District should have anticipated that N.L. would skip track practice and leave school property on her own volition, and then be subjected to unwilling sex at a private residence. This theory did not support a negligence claim in the trial court, and does not support a reversal and remand in the Court of Appeals.

II. COUNTER STATEMENT OF THE ISSUES

1. Should this Court affirm the trial court's summary judgment dismissal of N.L.'s negligence claim against Bethel School District because the duty of care owed by a school district to its students

does not extend to a student-on-student injury that occurs off-campus on private property after the student voluntarily skips her afterschool activity and leaves the campus with the other student?

2. Does the student's decision to skip her afterschool activity and leave campus constitute an independent act that breaks the chain of causation?

III. COUNTER STATEMENT OF THE CASE

In April 2007, Plaintiff N.L. was a 14-year-old student at Bethel Junior High School.[1] (CP 38 at ¶ 12) She was a member of the junior high track team. (CP 38 at ¶ 12) Nicholas Clark was an 18-year-old student enrolled at Bethel High School. (CP 37 at ¶ 11) Clark was a member of the high school track team. (CP 37 at 11) The junior high and high school teams shared the same field for practices, and the teams would hold their own practices at the same time. (CP 38-39 at ¶ 13)

N.L. first met Clark on April 24, 2007. (CP 47 at 48:9-15) A mutual friend introduced them. (CP 47 at 47:17-21, 48:9-10) N.L. testified that she did not know Clark prior to this first meeting. (CP 47 at 48:2-4; CP 52 at 69:21 to CP 53 at 70:2) N.L.'s first meeting with Clark

[1]Although N.L. is now an adult, the District uses her initials to maintain consistency with the caption.

took place somewhere "[o]n the track field" at practice. (CP 47 at 48:22-24; CP 48 at 53:7-14) N.L. testified that the meeting "just took a couple seconds." (CP 52 at 69:9-14) The mutual friend gave Clark's phone number to N.L., and Clark and N.L. subsequently exchanged phone calls and text messages. (CP 48 at 50:15-17; CP 48 at 50:24-51:1, 51:9-16)

In these communications, Clark asked N.L. if she wanted to go to lunch with him. (CP 48 at 51:17-19) The following day, April 25, N.L. skipped track practice. (CP 49 at 56:14-16; CP 54 at 96:5-9) Clark also skipped track practice. (CP 49 at 56:17-19) Around 2:00 P.M., N.L. met Clark in the high school's parking lot. (CP 49 at 56:24-57:2) N.L.'s friend walked with N.L. for part of the way. (CP 49 at 57:6-9) N.L. told her friend that she and Clark were going to get lunch at the nearby Burger King. (CP 49 at 57:15-20) N.L. then got into Clark's car with him. (CP 49 at 57:25 to CP 50 at 58:2) During her deposition, N.L. confirmed that she "voluntarily" got into Clark's car. (CP 49 at 57:25 to CP 50 at 58:2)

According to N.L., Clark told her that he had "forgotten something at his house and that [they] were just going to go grab it real quick." (CP 50 at 58:3-7) After arriving at Clark's house, they went inside Clark's bedroom where he "put [N.L.] on his bed and [] started to take [N.L.'s] clothes off." (CP 50 at 58:13-18) N.L. testified that she resisted Clark's

efforts to take her clothes off and told him "no." (CP 50 at 58:22-24; CP 50 at 59:13-15) Clark then kissed N.L. and they had sexual intercourse. (CP 50 at 61:24 to CP 51 at 62:4, 63:7-9)

N.L. testified at her deposition that she had sex with Clark, but "[n]ot willingly." (CP 51 at 63:5-6) N.L. also denied ever telling anyone that she willingly had sex with Clark. (CP 51 at 63:15-18) At her deposition, however, N.L. was shown a transcript of her November 2, 2007 interview with an investigator hired by Clark's criminal defense attorney, and the investigator asked, "Was this consensual?" and N.L. replied, "Yeah basically, yeah." (CP 58 at 21:3-4) At her deposition, N.L. responded that, despite this statement to the investigator, "she never felt that it was consensual."[2] (CP 52 at 67:16-20)

After having sex, Clark drove N.L. back to school property and N.L. took the bus home. (CP 54 at 96:10-16) The following day, N.L. told one of her friends about sex with Clark. (CP 45 at 34:24 to 35:3) N.L. and Clark did not have any further sexual contact. (CP 54 at 97:1-4)

N.L.'s friend told her mother about N.L. having sex with Clark; the

[2] The District recognizes that this Court will likely assume the sex was unwilling because, on de novo review of a summary judgment motion, this Court must view all facts in a light most favorable to the nonmoving party. *Travis v. Bohannon*, 128 Wn. App. 231, 237, 115 P.3d 342 (2005). The District highlights N.L.'s November 2007 interview only to show that the unwilling nature of the sex is far from undisputed.

friend's mother then called both Bethel Junior High and N.L.'s mother. (CP 45 at 37:15 to CP 46 at 38:9) The Pierce County Sherriff's Department investigated the allegation. (CP 39 at ¶ 14) Clark was initially charged with Third Degree Rape of a Child, but pled guilty to the lesser charge of Second Degree Assault. (CP 60)

Clark was also charged with and pled guilty to the crime of Failure to Register as a Sex Offender. (CP 60) In November 2004, approximately two-and-a-half years earlier, Clark pled guilty to Attempted Indecent Liberties for an incident involving Clark and a female student that occurred in June 2004 at Bethel Junior High when Clark was 15 years old. (CP 64-69; CP 73) As a result of his guilty plea, Clark registered as a Level I sex offender and, in December 2004, the Pierce County Sherriff's Office sent a sex offender notification to Bethel High School's then-principal, Wanda Riley.[3] (CP 75-76; CP 79 at 115:1-12)

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[3] His file contains discipline notices for sexual harassment, touching, and, as N.L.'s counsel characterized them, other "inappropriate behaviors." (CP 82 at 59:12-15; CP 82 at 63:4-16; CP 83 at 64:3-8; CP 86 at 76:10 to CP 87 at 80:4) His file also includes the discipline notice for the incident that resulted in the Attempted Indecent Liberties conviction. (CP84 at 69:5 to CP 85 at 70:19) Apart from the April 2007 incident that gave rise to this lawsuit, Clark's file did not contain any discipline notices for sexually inappropriate behaviors during his last two years at Bethel High School (11th and 12th grades). (CP 87 at 80:23 to 92 at 99:22) As one former assistant principal testified, Clark's "frequency of [disciplinable] behaviors decreased" over time and "once th[e] sexual offender offense came into his play [*i.e.*, the Attempted Indecent Liberties conviction], [Clark's] behavior changed." (CP 92 at 99:11-15)

N.L.'s representation that Ms. Riley "did not inform Clark's teachers of his sex offender status" mischaracterizes her testimony. (Appellant's Opening Br. at 9) In fact, she testified that "I told teachers that we have sex offenders in our building, but I am not at liberty to tell you their names." (Appellant's Opening Br. at 9 n.25, 22) Likewise, N.L.'s expert, Judith Billings, explained that Ms. Riley "testified that she notified counselors, some teachers of a sex offender, the director of transportation, the school athletic director, of a student's status" though not every single person. (CP 301)

On August 30, 2012, more than five years after she had sex with Clark, N.L. filed suit against the District. (CP 34-42) Her complaint alleged that the District owed N.L. a duty of care, and that the District breached this duty by failing to adequately supervise Clark. (CP 40 at ¶ 19) This breach led to the "reasonably foreseeable consequence[]" of "a sexual assault against N.L." (CP 41 at ¶ 22) N.L.'s complaint claims that the off-campus sex was "reasonably foreseeable" because Clark was a registered sex offender and had a "lengthy [disciplinary] history of offending against students, and sexually offending against female students."[4] (CP 40 at ¶ 18)

[4] N.L. claims that the District "purposefully destroyed" Clark's file. (Appellant's Opening

During discovery, N.L.'s expert, Judith Billings, submitted a preliminary report criticizing the District's failure to adhere to the "Washington model policy and procedure regarding the release of information concerning offenders[.]" (CP 302) Ms. Billings' report states that the model policy was available in December 2006 (CP 302). The relevant incident that is the subject of this appeal occurred in April 2007—giving the District only a four-month window to adopt those policies. (VP 13:20-24)

On December 12, 2013, the District moved for summary judgment

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Br. at 3 n.5) This allegation is both irrelevant to this appeal and inaccurate. The destruction of Clark's file was never raised before the trial court. It was not an issue in the District's summary judgment motion, and N.L. did not request a spoliation inference before her claim was dismissed. This Court should therefore disregard N.L.'s accusation as an attempt to unfairly prejudice the District on appeal.

Moreover, Plaintiff's allegation is misleading. Because the destruction of Clark's file was not before the trial court—and has been improperly raised by N.L. in her opening brief—the Clerk's Papers do not include documents related to the District's handling of Clark's file. Nonetheless, the District represents the following to this Court: N.L.'s attorneys filed a pre-suit Public Records Act ("PRA'") request with the District in July 2011 for Clark's file. The District obtained Clark's file from Bethel High School, digitally scanned the entire file, and then returned it to the high school. However, because N.L.'s attorneys did not have Clark's authorization, the District did not disclose Clark's file. But the District anticipated that Clark's authorization would eventually be acquired, which is why the District digitally-scanned Clark's file upon receiving the PRA request. At some point around September 2011 after Clark's file had been returned to the high school, Clark's file was shredded by an employee at the high school. There was no bad faith because the employee had not been instructed to preserve the file, and Clark's last year with the District was 2006-07 (the State and District retention schedules applicable at that time only required student files to be preserved for two years). N.L. received the digitally-scanned version of Clark's entire file from the District on April 2, 2012, in response to a second Public Records Act request that contained Clark's authorization (which N.L.'s attorneys somehow obtained). Clark's file contained several documents that were unreadable both in their original and digitally-scanned versions. The District employee who scanned Clark's file has signed a declaration stating that the subject documents were not readable in either version.

dismissal. (CP 17-92) At oral argument on January 10, 2014, the Honorable Susan K. Serko admitted that "this is a disturbing case." (VP 11:16) However, she ruled that the duty of care does not extend to noncustodial settings, and "the fact that this occurred off site that is the pivotal factor in the case." (VP16:12-19; VP 17:25 to 18:2) In dismissing the case, Judge Serko stated that she did "not believe that the schools are guarantors of safety; and certainly a teacher, an administrator, a coach is not in the role of a CCO, a community corrections officer." (VP 18:2-4) Accordingly, "the issue is not so much the duty as the causation element, and on that basis I'm going to dismiss the case and grant summary judgment for the defense." (VP 18:5-7; CP 500-01) N.L. filed her Notice of Appeal. (CP 502-05)

IV. ARGUMENT

A. Summary of Argument

This Court should affirm summary judgment dismissal of N.L.'s action with prejudice for two independent reasons. First, N.L. has failed to show the existence of an actionable duty. The injury in this case occurred off-campus on private property after N.L. voluntarily skipped track practice and left campus with Clark. As such, N.L. was not in the District's custody and no special relationship applied. As a matter of law,

the injury suffered was not within the general field of danger that the District could have anticipated. Ruling otherwise would essentially impose strict liability on school districts for off-campus injuries suffered by students who skip out on afterschool activities and leave school property on their own volition. This open-ended burden would be untenable and massive.

B. The Standard of Review for Summary Judgment Is De Novo

"The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). The elements of negligence include the existence of a duty to the plaintiff, breach of that duty, and injury to the plaintiff proximately caused by the breach. *Degel v. Majestic Mobile Manor, Inc.*, 129 Wn.2d 43, 48, 914 P.2d 728 (1996).

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). This Court views the facts and all reasonable inferences to be drawn from them in favor of the nonmoving party. *Travis v. Bohannon*,

128 Wn. App. 231, 237, 115 P.3d 342 (2005). 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).

C. A Legal Duty Is Reviewed as an Issue of Law; Proximate Cause Is Reviewed as an Issue of Law if all Inferences from the Evidence Are Incapable of Reasonable Doubt.

Whether or not the duty element exists in the negligence context is a question of law that is reviewed de novo. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999) *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). The issue of proximate cause is reviewable on appeal as a question of law if all inferences from the evidence are incapable of reasonable doubt. *City of Seattle v. Blume*, 134 Wn.2d 243, 252, 947 P.2d 223 (1997).

D. N.L. Failed to Demonstrate the Existence of an *Actionable* Duty

An appellate court may affirm a trial court's disposition of a summary judgment motion on any basis supported by the record. *Redding*, 75 Wn. App. at 426. Accordingly, this Court should affirm the trial court's dismissal of N.L.'s negligence claim due to the absence of duty, breach, or causation because: (1) the harm occurred off-campus on private property and not during a school-sponsored off-campus extracurricular

activity, which eliminates the "essential rationale" for a "special relationship" between the District and N.L.; and (2) the harm caused by N.L.'s sexual intercourse with Clark was not within a "general field of danger" that the District should have anticipated. Because these two elements are absent from this case, N.L. cannot demonstrate an actionable duty. *N.K. v. Corp. of the Presiding Bishop of the Church of Latter-Day Saints*, 175 Wn. App. 517, 532, 307 P.3d 730, *review denied*, 179 Wn.2d 1005 (2013) (discussing the "special relationship"); *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 321, 255 P.2d 360 (1953) (discussing the general field of danger).

N.L. argues that the trial court granted summary judgment "solely on the basis of causation." (Appellant's Opening Br. at 19) This is an unreasonably narrow interpretation. In fact, the trial court acknowledged that the duty of care did not extend to "noncustodial settings" and "*the fact that this occurred off site is the pivotal factor in the case.*" (VP 16:1-19; VP 17:25 to 18:2) (emphasis added). Similarly, N.L. conflates the trial court's ruling. The trial court never concluded that "schools are not responsible for the safety of its students." (Appellant's Opening Br. at 19) Instead, the trial court commented that it did not "believe that the schools are guarantors of safety[.]" (VP 18:2) Schools cannot *guarantee* a

student's safety when she skips an afterschool activity, voluntarily leaves the school grounds, and an injury occurs in a private residence.

1. The Threshold Question Is What Duty a Defendant Owes the Plaintiff

A cause of action for negligence requires N.L. 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. *Travis*, 128 Wn. App. at 237. The threshold determination of whether a defendant owes a duty to a plaintiff is a question of law. *Id.* at 237-38. The existence of a legal duty is a question of law that depends on "mixed considerations of 'logic, common sense, justice, policy, and precedent.'" *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001) (quoting *Lords v. N. Auto Corp.*, 75 Wn. App. 589, 596, 881 P.2d 256 (1994)).

2. A School District's Duty Is to Protect Students from Harms Caused by Wrongful Acts of Third Parties

The general rule is that school districts have a duty to protect students in their custody only from reasonably foreseeable harm. *McLeod*, 42 Wn.2d at 320 (1953). Accordingly, "[t]he concept of foreseeability limits the scope of the duty owed." *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). Harm is foreseeable if the risk from which it

results was known or in the exercise of reasonable care should have been known. *Peck v. Siau*, 65 Wn. App. 285, 293, 827 P.2d 1108, *review denied*, 120 Wn.2d 1005 (1992).

School districts have a duty to protect students from the harms caused by the wrongful acts of third parties, provided that the harm falls within a "general field of danger" that the school district should have anticipated. *McLeod*, 42 Wn.2d at 321; *see also Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975) ("[T]he harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.") Although the "general field of danger" that should have been anticipated by the defendant is normally an issue for the jury, it can be decided as a matter of law where reasonable minds cannot differ. *Christen*, 113 Wn.2d at 492.

N.L.'s suggestion that the District allegedly breached a duty to monitor or supervise Clark is belied by his extensive disciplinary file. (*See* Appellant's Opening Br. at 21, 22) When Clark was *within the school's custody*, the District constantly monitored and supervised him as evidenced by his detention and suspension record. *However, when he left the school grounds and went home, he was no longer in the school's custody or control*. Indeed, cases involving school districts are explicit:

"A school district's duty requires that it exercise reasonable care to protect students from physical hazards in the *school building or on school grounds*." *Peck*, 65 Wn. App. at 293 (emphasis added). "*For school pupils, in particular*, the essential rational for imposing a duty is that the victim is placed under the control and protection of the other party, the school, with resulting loss of control to protect himself or herself." *N.K.*, 175 Wn. App. at 532 (emphasis added) (internal quotation omitted): "The circumstances under which the custody of another is taken and maintained may be such as to deprive him of his normal ability to defend himself . . . . [A] child *while in school* is deprived of the protection of his parents or guardian.") RESTATEMENT (SECOND) OF TORTS § 320 cmt. b (1965) (emphasis added).

Accordingly, this Court should rule, as a matter of law, that N.L. has failed to establish the existence of any special relationship that would give rise to an actionable duty for the injury that occurred off school property after she and another student voluntarily skipped track practice.

3. *McLeod v. Grant County School District* Provides the Framework for the District's Duty

In the Supreme Court's seminal *McLeod v. Grant County School*

District opinion,[5] the Court clarified the circumstances under which a school district owes a duty to protect against harms caused by the wrongful acts of third parties: "The two factors to be considered in making that determination are, first, the relationship between the parties, and second, the general nature of the risk." *McLeod*, 42 Wn.2d at 319; *see also Travis*, 128 Wn. App. at 238 ("Two factors determine the scope of a school's legal duty: the student-school relationship and the general nature of the risk."). Because the student in *McLeod* was injured while on school property, the special relationship between the student and the school district was clear: "The child is compelled to attend school. . . . The result is that the protective custody of teachers is mandatorily substituted for that of the parent." *McLeod*, 42 Wn.2d at 319.

Next, the Supreme Court turned to the concept of foreseeability. The *McLeod* Court distinguished between (1) "the specific type of incident" that caused the harm (the forcible rape by students in an unlocked and darkened room underneath the bleachers); and (2) and the "general field of danger which should have been anticipated" (the risk that

[5] In *McLeod*, a 12-year-old female student was forcibly raped by several male students, ranging in age from 12- to 16-years old. *McLeod*, 42 Wn.2d at 317-18. The incident took place during recess in an unlocked and darkened room underneath the bleachers in a gym. *Id.* at 317. The students were permitted to play in the gym during recess, but the teacher who was appointed to supervise the students in the gym was not present and did not see or hear the incident. *Id.* at 317-18.

the students would commit some "act of indecency" in the room, such as forcible rape, "molestation, indecent exposure, [or] seduction"). *Id.* at 321-22. The Supreme Court concluded that there was "room for a reasonable difference of opinion as to whether the school district should reasonably have anticipated that the darkened room might be used for acts of indecency." *Id.* at 324. Because of this, and because the special relationship between the student and the school district was not disputed, the question of foreseeability was left "for the jury to decide." *Id.*

4. The *McLeod* Factors Are Not Present Here, thus the Trial Court's Dismissal Should Be Affirmed.

The facts of this case stand in stark contrast to *McLeod*. First, the special relationship between the student and the school district is absent because the harm in this case did *not* occur on school property. Nor did the harm occur during "off-campus extra-curricular activities under the supervision of district employees," to which a school district's duty to a student may also extend. *Travis*, 128 Wn. App. at 239. Instead, it is undisputed that the incident between N.L. and Clark occurred off-campus at Clark's house. (CP 50 at 58:14-18; CP 51 at 63:7-9)

The foundation of the special relationship between the school district and the student is the school district's control over either the school property or the off-campus activities supervised by district

employees. "[W]here a special relationship has been recognized, the party that has been found to have a legal duty was in a position to provide protection from foreseeable criminal acts of third parties because he or she had *control over access to the premises* that he or she was obligated to protect." *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 440-41, 874 P.2d 861, *review denied*, 125 Wn.2d 1006 (1994) (emphasis added).[6] "For school pupils, in particular, the essential rationale for imposing a duty 'is that the victim is placed under the control and protection of the other party, the school, with resulting loss of control to protect himself or herself.'" *N.K*, 175 Wn. App. at 532 (quoting *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991)); *see also Peck*, 65 Wn. App. at 293 ("A school district's duty requires that it exercise reasonable care to protect students from physical hazards in the *school building or on school grounds*.") (emphasis added).

Here, the harm occurred off-campus on private property and not during an extra-curricular activity. Accordingly the "essential rationale" for imposing a duty on the District is absent from this case. *N.K.*, 175 Wn.

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[6] N.L. argued in the trial court that *C.J.C. v. Corp. of the Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) applied. (CP 105-06) However, she abandoned this argument on appeal in her opening brief and it is accordingly waived. *In re Kennedy*, 80 Wn.2d 222, 236, 492 P.2d 1364 (1972) ("Points not argued and discussed in the opening brief are deemed abandoned and are not open to consideration on their merits."); *Dickson v. United States Fid. & Guar. Co.*, 77 Wn.2d 785, 787-88, 466 P.2d 515 (1970) ("Contentions may not be presented for the first time in the reply brief.").

App. at 532. This Court should follow the Supreme Court's opinion in *Coates v. Tacoma School District*, which refused to impose a *McLeod*-type duty on a school district for an injury that occurred off-campus and not during any school-sponsored off-campus activity:

> But transcending these differences [between *Coates* and *McLeod*] is the insistence in the *McLeod* case that the injured child was compelled to attend school and that she was in the *protective custody* of the school district *while on the school premises* for that purpose; whereas, here, the time and place of the plaintiff's injury would normally suggest that the responsibility for adequate supervision of what he and his associates did . . . was with the parents and the institution known as the home.

Coates, 55 Wn.2d 392, 398-99, 347 P.2d 1093 (1960) (emphasis added).[7]

In addition to the absence of any special relationship in this case,

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[7] *See also Kazanjian v. Sch. Bd. of Palm Beach Cnty.*, 967 So. 2d 259, 268 (Fla. Dist. Ct. App. 2007) ("We conclude that in the context of a negligence cause of action brought on behalf of a student injured off campus, a school may not be held liable for injuries suffered by a student who has violated the school's campus attendance policies."); *Hansen v. Westhampton Beach Union Free Sch. Dist.*, 900 N.Y.S. 2d 365 (N.Y. App. Div. 2010) ("Schools have a duty to adequately supervise students in their charge and will be held liable for foreseeable injuries proximately related to the absence of adequate supervision. This duty stems from the school's physical custody over students and is based on the rationale that, by exercising such custody, the school has deprived the students of the protection of their parents or guardians. It follows, then, that the school's duty to protect its students from negligence is coextensive with and concomitant to its physical custody and control over its students and that, therefore, once students leave their school's orbit of authority, parents are free to resume custodial control and the school's custodial duty ceases.") (internal citations and quotation marks omitted); *see also Stoddart v. Pocatello Sch. Dist.*, 239 P.3d 784, 792 (Idaho 2010) ("[W]hatever duty the School District owed to its students in 2004 did not include the duty of indefinitely monitoring Draper, which is effectively what the Plaintiffs are now arguing. . . . [W]e simply cannot impose such an enormous burden on school districts.")

the harm caused by N.L.'s sexual intercourse with Clark was not within a "general field of danger" that the District should have anticipated. *McLeod*, 42 Wn.2d at 321. After being introduced to Clark, N.L. skipped her track practice and "voluntarily" left school property in Clark's vehicle and went to his house, where she unwillingly had sex with Clark. (CP 49 at 56:14-16; CP 49 at 57:25 to CP 50 at 58:2; CP 51 at 63:5-8; CP 54 at 96:5-9) Consistent with the reasoning of *McLeod*, the existence of a duty in this case depends on whether the District could have anticipated that N.L. would intentionally miss an extracurricular activity, willingly get into Clark's vehicle and leave campus with him, and then be subject to some "act of indecency" at Clark's house. *McLeod*, 42 Wn.2d at 321-22.

Reasonable minds cannot differ: the District could not have reasonably foreseen such a sequence of events. Had the incident occurred on-campus—or if the incident occurred off-campus but Clark forcibly removed N.L. from school property—this case would raise other considerations. But neither circumstance is present here: Instead, a minor student, on her own volition, skipped her afterschool sport practice and left campus with another student. The subsequent wrongful act that harmed N.L. occurred on private property where N.L. was not in the District's custody, and where no special relationship applied.

In this way, the instant action is distinguishable from *J.N. v. Bellingham School District*, 74 Wn. App. 49, 871 P.2d 1106 (1994), where a nine-year-old student repeatedly sexually assaulted a seven-year-old student in the boys' restroom during recess periods. *Id.* at 51. The Court noted that there was "arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised rest rooms." *Id.* at 59. Citing *McLeod* and relying on evidence that the school district had notice of the perpetrator's "assaultive propensity," the Court concluded that "harm to a pupil caused by another pupil" was "within the general ambit of hazards which should have been anticipated by the District." *Id.* at 59-60.

Like *McLeod*, however, *J.N.* involved incidents that occurred on campus. The general field of danger in those cases contained the risk of harms occurring when the plaintiff was in the "protective custody of the school district while on the school premises." *Coates*, 55 Wn.2d at 397. Thus, Clark's status as a Level I sex offender and his discipline history is insufficient to analogize this case to *McLeod* and *J.N.* Instead, this Court should follow *Coates* and the foreign cases cited in the previous footnote by concluding that, as a matter of law, the harm in this case was not foreseeable and that N.L.'s claim fails for lack of duty. *Coates*, 55 Wn.2d

at 398-99.

E. The Court Should Affirm the Trial Court's Dismissal Due to the Absence of Proximate Cause.

"Analyses of duty and proximate cause often overlap and are always subject to policy considerations. *Travis*, 128 Wn. App. at 242. "The threshold determination of whether a particular defendant owes any duty of care to the plaintiff is determined by the court as a question of law." *Id.* A school district may be liable only for injuries of which its breach of duty is a proximate cause. *Id.* at 240. If a new, independent act breaks the chain of causation, the original negligence is no longer a proximate cause of the injury and the defendant is not liable for the injury. *Riojas v. Grant Cnty Pub. Util. Dist.*, 117 Wn. App. 694, 697, 72 P.3d 1093 (2003), *review denied*, 151 Wn.2d 1006 (2004). "Unforeseeable intervening acts break the chain of causation between 'the defendant's negligence and the plaintiff's injury.'" *Washburn v. City of Federal Way*, 178 Wn.2d 732, 761, 310 P.3d 1275 (2013) (quoting *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 482, 951 P.2d 749 (1998)).

Furthermore, proximate cause is composed of both "cause in fact" (*i.e.*, "'but for' causation") and "legal cause." *Kim v. Budget Rent A Car Sys.*, 143 Wn.2d 190, 203, 15 P.3d 1283 (2001) (quoting *Hertog*, 138 Wn.2d at 282-83). As explained above, N.L.'s decision to skip her track

practice and voluntarily leave campus with Clark and her subsequent experience of unwilling sex with Clark at his house was not within the general field of danger that the District could or should have reasonably anticipated. These events constituted "independent act[s]" that interrupted the chain of causation. *Riojas*, 117 Wn. App. at 697. Accordingly, there is no "'direct unbroken sequence'" between the District's alleged breach of a purported duty and N.L.'s injury. *Kim*, 143 Wn.2d at 203 (quoting *Hertog*, 138 Wn.2d at 282).

This Court must also consider "legal causation," which is a "much more fluid concept" than cause in fact." *Tyner v. Dep't of Soc. and Health Servs.*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). "The focus in the legal causation analysis is on '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.'" *Tyner*, 141 Wn.2d at 82 (quoting *Schooley*, 134 Wn.2d at 478-49).

The policy considerations highlighted above should inform this Court's analysis: By allowing causation to run from school district's supposed on-campus breach of duty to an injury that occurred off-campus at a private residence after both students involved voluntarily skipped their afterschool activities, this Court would be "impos[ing]" an "enormous

burden on school districts." *Stoddart*, 239 P.3d at 792. Not only is there a lack of a "direct unbroken sequence" of events in this case, *Kim*, 143 Wn.2d at 203, but there are sound policy justifications to support a ruling by this Court that, at a matter of law, N.L. has failed to establish proximate cause.

The Supreme Court has similarly recognized that a school district's orbit of authority must have limitations: "[I]n the *McLeod* case[,] the injured child was compelled to attend school and . . . was in the protective custody of the school district while on the school premises for that purposes; whereas, here, the time and place of the plaintiff's injury would normally suggest that the responsibility for adequate supervision . . . was with the parents and the institution known as the home." *Coates v. Tacoma School District*, 55 Wn.2d 392, 398-99, 347 P.2d 1093 (1960).

Following *Coates*, Division Two rejected the imposition of an open-ended burden on school districts for injuries that occur off-campus and not during school-sponsored activities: In *Scott v. Blanchet High School*, the plaintiffs argued that the school negligently failed to prevent a sexual and romantic relationship between their daughter and a teacher because the school did not "take adequate precautions at school," such as "further monitoring of teachers, education of students, an express written

prohibition, etc." *Scott*, 50 Wn. App. 37, 45, 747 P.2d 1124 (1987), *review denied*, 110 Wn.2d 1016 (1998). None of the sexual or romantic incidents took place on school property or during activities that were "under the supervision or control of the school." *Id.* at 42.

Division Two explained that "the [plaintiffs] attempt to sidestep the broader implication of the scope of authority question; whether the responsibility for supervision at the time of the alleged activities had *shifted away from the school*." *Id.* at 45 (emphasis added). Division Two determined that the "responsibility for supervision" had indeed "shifted away" from the school and affirmed the dismissal of the plaintiffs' clam. *Id.* This Court should reach the same conclusion here.

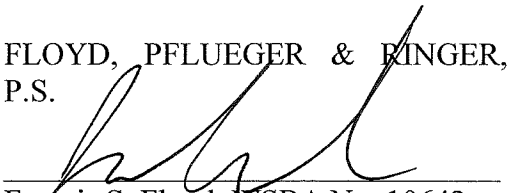
V. CONCLUSION

The District respectfully requests that the Court affirm the trial court's dismissal of N.L.'s negligence claim on any basis supported by the record.

Dated this 27 day of May, 2014.

Respectfully submitted,

FLOYD, PFLUEGER & RINGER, P.S.



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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 27th day of May, 2014, I caused to be served a true and correct copy of the foregoing via U.S. mail, postage prepaid and addressed to the following:

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May 27, 2014 - 4:25 PM

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