

Court of Appeals No. 33889-4-III  
Grant County Superior Court No. 14-2-00502-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

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**Michele Anderson, a single person, individually and as the  
administrator of the Estate of Sheila Rosenberg, Petitioner**

v.

**Soap Lake School District, et. al, Respondent**

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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## I. INTRODUCTION

Defendant/Respondent Soap Lake School District (“the District”) files this supplemental brief pursuant to RAP 13.7(d) and the Court’s Order Granting Plaintiff Michelle Anderson’s Petition for Review of the Court of Appeal’s decision in *Anderson v. Soap Lake Sch. Dist.*, No. 33889-4-III. In its unpublished opinion dated November 22, 2016 (hereinafter “*Order*”), the Court of Appeals, Division III affirmed the trial court’s dismissal at summary judgment of Ms. Anderson’s claims against the District alleging breach of duty, breach of contract, and negligent supervision of women’s basketball coach Igor Lukashevich. The District requests that the Court uphold the trial and appellate courts’ dismissal of Ms. Anderson’s claims.

## II. STATEMENT OF ISSUES

In accepting review of the appellate decision, the Commissioner’s Office of this Court has summarized and classified the principal issues in this case. The Commissioner’s issue statement is non-binding<sup>1</sup>, though the District agrees that it is a proper statement of the issues before this Court:

Whether in this wrongful death action alleging that a school basketball coach gave alcohol to a student athlete and her boyfriend

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<sup>1</sup> “When this court accepts review of cases, the Commissioner’s Office attempts to identify, summarize, and classify the principal issue or issues each case presents. . . the Justices have not reviewed or approved the issues or classifications, and there can be no guarantee that the court’s opinions will address these precise questions.” Washington Court, *Supreme Court Issues*, prepared by Narda Pierce, Supreme Court Commissioner ([https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/](https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/), last visited May 31, 2017).

at an off campus party before the students were killed when the boyfriend lost control of their vehicle in a high speed accident, the student's estate provided sufficient evidence to survive summary judgment on claims that the school district violated a heightened standard of care in negligently hiring and supervising the coach and that the district is vicariously liable for the coach's actions.

*Supreme Court Issues Cases Not Yet Set & May Term 2017*, dated May 15, 2017 ([https://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf](https://www.courts.wa.gov/appellate_trial_courts/supreme/issues/casesNotSetAndCurrentTerm.pdf), p. 11, *last visited* May 31, 2017).

Accordingly, the two primary issues addressed below are whether Ms. Anderson submitted sufficient evidence to survive summary judgment regarding the claims that the District was 1) negligent in hiring and supervising Mr. Lukashevich and 2) vicariously liable for his actions.

### **III. COUNTER STATEMENT OF THE CASE**

The District incorporates the Counter Statement of the Case set forth in *Respondent's Response Brief* filed with the Court of Appeals, Division III on June 3, 2016 and in *Respondent's Answer to Appellant's Petition for Review* filed with this Court on February 15, 2017.

### **IV. ARGUMENT**

**A. The Trial and Appellate Courts Properly Held that the District Was Not Vicariously Liable for the Actions of Mr. Lukashevich.**

**i. Mr. Lukashevich Did Not Act Within the Scope of His Employment.**

Respondeat superior, or vicarious liability, imposes liability on an employer for the torts of an employee who is acting on the employer's

behalf within the scope of employment. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420. “Respondeat superior is analytically distinct and separate from a cause of action for negligent hiring, retention, and supervision.” *Id.*

Here, Mr. Lukashevich was not engaged in serving the District at the Friday night party. Ms. Anderson asserts that the party was “coach-sanctioned” merely because the party was at Mr. Lukashevich’s house. The appellate court properly concluded that “There was no evidence produced suggesting that the gathering at Lukashevich’s was a school-sponsored team event or that any other member of the SLSD women’s basketball team was present on the night in question.” *Order*, p. 4. Mr. Lukashevich was not “fulfilling his . . . job functions at the time he . . . engaged in the injurious conduct” because the Friday night party was different from the kind of conduct he was authorized to engage in as a District employee.

Further, because the conduct was “far beyond the authorized time or space limits” of his employment and because the party did not serve the purpose of the employer, the District cannot be vicariously liable. *See Coates v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 392, 399, 347 P.2d 1093 (1960)(“[W]here the event causing the injuries is so distant in time and place from any normal school activity that it would be assumed that the protective custody was in the parents,” a claim is invalid.). Conduct not

performed in furtherance of the employer's business is outside the scope of employment. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993). "This includes conduct involving the employee's 'wholly personal motive' and 'solely personal objectives or desires.'" *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 37, 380 P.3d 553 (2016), *review denied*, 186 Wn.2d 1028, 385 P.3d 124 (2016) citing *Thompson*, 71 Wn. App. at 553. Any effort to correlate the District permitting Mr. Lukashevich to organize a pizza party for the basketball team with inviting Ms. Rosenberg over to his house for alcohol misstates reality and the undisputed record. There is no evidence as to what Mr. Lukashevich's motivations were other than that Ms. Rosenberg was permitted to illegally consume alcohol at his house and leave in a vehicle driven by Pavel Turchik who was also intoxicated.

**ii. Ms. Anderson Grossly Mischaracterizes the Record and Offers No Factual Support for Her Assertions.**

Ms. Anderson's *Reply on Petition for Review* doubles-down on her previous assertions made at the appellate level which are replete with unfounded argument and misrepresentation of the record. "A fact is an event, an occurrence, or something that exists in reality. It is what took place, an act, an incident, a reality as distinguished from supposition or opinion. The 'facts' required by CR 56(e) to defeat a summary judgment

motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–60, 753 P.2d 517 (1988)(internal citations omitted). “Likewise, conclusory statements of fact will not suffice.” *Id.* In an effort to establish that Mr. Lukashevich was acting within the scope of his employment, Ms. Anderson takes great liberties with the record and the testimony of Mr. Kemp, the District’s AD. Without any citation, Ms. Anderson states

... Lukashevich was given free rein to socialize with his players and reward them as he saw fit for their performance as part of the team. The Athletics Director knew that he did social nights and such as these rewards. On the night in question, Coach Lukashevich had conducted an evening basketball practice at the gym, then invited players to his home for ice cream, including Ms. Rosenburg. At his home, he served alcohol to the players, and the death of Ms. Rosenburg occurred shortly thereafter. It was foreseeable that Coach Lukashevich, being close in age to his players, with no training as an educator, and with this authorization from the Athletics Director to reward his players as he saw fit, would take the socialization to an improper level.

*Reply on Petition for Review*, p. 6. None of these assertions are borne out by, or cited anywhere within, the record. Mr. Lukashevich was permitted to organize a team event at a pizza parlor in Ephrata, Washington. CP 405. Permitting a coach to organize the legal activity of a team meal and inviting the entire team cannot reasonably be inferred to mean that the District condoned (or should have foreseen) Mr. Lukashevich inviting an individual player to his home around midnight on a Friday to engage in illegal activity.

Further, there are no facts that Ms. Rosenberg's presence at Mr. Lukashevich's house was a "reward" for basketball-related activities. There are no facts that any other players from the women's basketball team were present or were served alcohol. In fact, the unauthenticated record suggests that the gathering at Mr. Lukashevich's house was a continuation of a party at another student's house where Ms. Rosenberg first started drinking. CP 140-41. Ms. Rosenberg engaged in underage drinking with Mr. Turchik that evening well before visiting Mr. Lukashevich. *Id.*

**B. The Court of Appeal's Opinion that the District Did Not Owe Ms. Rosenberg a Duty of Care Is Supported by this Court's Holding in *N.L. v. Bethel School Dist.***

**i. The Court of Appeal's Order Is Consistent with *N.L. v. Bethel Sch. Dist.***

Although the Court of Appeals did not cite to or address this Court's holding in *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 438, 378 P.3d 162 (2016), the appellate court's holding that the District did not owe Ms. Rosenberg a duty of care is fully supported by *N.L.* and the applicable Washington case law. In *Peck v. Siau*, the Court of Appeals described the scope of a school district's duty as follows:

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. [I]t also requires that the district exercise reasonable care to protect students from the harmful actions of fellow students, a teacher, or other third persons. However, the district is not liable merely because such activities occur. Rather,

*the district will be liable only if the wrongful activities are foreseeable, and the activities will be foreseeable only if the district knew or in the exercise of reasonable care should have known of the risk that resulted in their occurrence.*

65 Wn. App. 285, 293, 827 P.2d 1108 (1992)(emphasis added; citations omitted). “A district’s duty to exercise reasonable care may end when the student leaves the district’s custody, but a district’s liability for a breach of duty while a student was in its custody is not cut off just because a harm did not occur until later.” *Bell v. Nw. Sch. of Innovative Learning*, 198 Wn. App. 117, 123, 391 P.3d 600 (2017) citing *N.L.*, 186 Wn.2d at 432. “Thus, where a duty arises and a breach of that duty occurs while a student is in a district’s custody, then whether the scope of that duty extends to incidents off campus will depend on whether such incidents were foreseeable to the district.” *Id.* citing *N.L.*, 186 Wn.2d at 435. In order to establish foreseeability, “the harm sustained must be reasonably perceived as being within the general field of danger covered by the specific duty owed by the defendant.” *Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975).

This Court is well aware of the facts of *N.L.* which are distinguishable from this action. The victim, N.L., met Nicholas Clark at school track practice. *N.L.*, 186 Wn.2d at 426. Mr. Clark was a registered sex offender who had previously assaulted a young girl. *Id.* at 427. The school’s principal knew of Mr. Clark’s status as a sex offender, but took no

responsive action. *Id.* Mr. Clark persuaded N.L. to leave the school's campus and raped her. *Id.*

This Court stated that the issue was “whether [the] District’s *duty to N.L. ended* when she left campus.” *N.L.*, 186 Wn.2d at 426 (emphasis added). The Court held that a “district’s *duty to exercise reasonable care might end when the student leaves its custody,*” but a *district’s liability* for a breach of duty “*while the student was in its custody* would [not] be cut off merely because the harm did not occur until later.” *Id.* at 432 (first emphasis in original; emphasis added). In a recent decision, the Court of Appeals, Division II summarized this Court’s holding in *N.L.*:

The mere fact that an *injury* occurs off campus is not determinative of whether a duty exists; rather, the relevant inquiry is to the location of the negligence rather than the location of the injury. *N.L.*, 186 Wn.2d at 435, 378 P.3d 162. Contrary to CB's contentions, *N.L.* does not establish that a school district's duty to its students arises from foreseeability alone regardless of whether the student is in the district's custody. Rather, *N.L.* established that where a duty arises and a breach of that duty occurs while a student *is in a school district's custody*, then whether the *scope of that duty extends* to incidents off campus will depend on whether such incidents were foreseeable to the school district. *N.L.*, 186 Wn.2d at 435, 378 P.3d 162

*Bell*, 198 Wn. App. at 124. In *N.L.*, the RCW and school district’s policy required that the principal “must inform any teacher of the student and any other personnel who should be aware of the information of a student’s sex offender status.” 186 Wn.2d at 428. It was undisputed that the principal was

aware of the student's status as a sex offender. It was further undisputed that the coaches of the track team were not notified.

In this case, there are no facts that the District had any knowledge or could foresee that Mr. Lukashevich would permit Ms. Rosenberg to drink alcohol at his home or allow her to leave with a drunk driver. Undoubtedly, a school district's duty can continue when a student steps off of campus. However, the alleged breach of the duty did not occur when Ms. Rosenberg was on campus. Ms. Anderson has offered no facts either that a) the District was aware or in exercising reasonable care should have been aware of Mr. Lukashevich's improper conduct or b) that Mr. Lukashevich was acting within the scope of his employment as the women's basketball coach around midnight on Friday. Unlike *N.L.*, where the breach occurred on campus while N.L. was in the school's custody, Ms. Anderson points to no breach of duty by the District while Ms. Rosenberg was within its custodial care and has not shown that Mr. Lukashevich was acting within his scope of employment. Ms. Anderson has not introduced any facts that the District failed to adequately protect Ms. Rosenberg from a known or foreseeable risk.

When comparing the appellate court's analysis in *N.L.*, the distinction between the facts of *N.L.* giving rise to liability and this action is even more compelling:

Unlike the defendant school districts in *Coates*, *Scott* and *Kok*, who did not have any knowledge to reasonably foresee the plaintiff student's harm, BSD had a lengthy discipline record of Clark's sexual behavior. BSD received notice of Clark's sex offender status more than two years before he assaulted NL. Yet BSD took no action to monitor Clark or prevent further sexual assaults by Clark after receiving that notice with knowledge of Clark's other instances of sexual conduct.

*N.L. v. Bethel Sch. Dist.*, 187 Wn. App. 460, 472, 348 P.3d 1237 (2015) *aff'd*, 186 Wn.2d 422, 378 P.3d 162 (2016). There are no facts that the District was on notice of Mr. Lukashevich's behavior or unfitness prior to the accident in this case. The Court of Appeals reached the proper conclusion in dismissing Ms. Anderson's claims which was consistent with *N.L.*, "SLSD had no way to anticipate the danger or exercise its supervision over Sheila Rosenberg at midnight on a Friday. . .The gathering at Lukashevich's home was so distant in time and place from any normal school activity that it was outside the district's authority, precluding its liability for any harm" *Opinion*, at 4. The courts' orders should be affirmed.

**ii. The Court of Appeal's Decision Does Not Conflict with Any Other Decisions of this Court.**

In her *Reply on Petition for Review*, Ms. Anderson contends (without analysis) that the appellate court's decision sustaining the trial court's dismissal of her claims conflicts with a litany of decisions of this Court and other appellate courts. On the contrary, a plain and fair reading of the cases cited by Ms. Anderson sustains the dismissal of her claims.

- *McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953)

In *McLeod*, the general field of danger flowed from the existence of an accessible darkened room at the school coupled with a lack of supervision. 42 Wn.2d at 322. Even in the absence of any evidence of the “vicious propensities” of the assailants, those specific facts put the school on notice of a *risk* of indecent acts; the particular harm (rape) fell within that risk. *Id.* at 321. In this action, there are no facts that the District was put on notice of a risk or unfitness that Mr. Lukashevich posed. There is no evidence that Mr. Lukashevich had any proclivities to socialize with students outside of the team setting or to serve minors with alcohol.

- *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994)

In *J.N.*, the plaintiff submitted overwhelming evidence of notice to the school district of the assailant’s prior actions demonstrating a propensity to assault other students. *Id.*, 74 Wn. App at 60. Thus, even assuming that the harm was outside of the “general field of danger” that the school district should have anticipated, summary judgment was still inappropriate because there was sufficient evidence that the school district had notice of the possibility of the specific harm inflicted. *Id.* at 60. “Clearly, where the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the

protection of other children from the potential for harm caused by such behavior.” *Id.* Here, the District could not have reasonably anticipated that Mr. Lukashevich was inviting students over to his home and permitting them to consume alcohol. Unlike *J.N.*, where the school was aware of the assailant’s propensity to harm other students, Ms. Anderson has no facts that the District had any notice that Mr. Lukashevich engaged in improper conduct. *J.N.* supports the dismissal of Ms. Anderson’s claims.

- *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 317 P.3d 481 (2013)

In *Kok*, the appellate court held that the school district's duty to exercise reasonable care did not extend to a student who was fatally shot at school by another student because the school district could not have reasonably anticipated the harm that occurred. 179 Wn. App. at 13–14. At the time of the shooting in that case, none of the offending student’s teachers or other professionals who had evaluated or treated the offending student had notified the school district that he was at risk of assaulting or killing another student at school. *Id.* at 20. Neither the offending student’s behavior at school nor his medical records indicated “any assaultive behavior or tendencies.” *Id.* This action is no different. The District did not know and could not have foreseen Mr. Lukashevich’s conduct well outside the scope of his employment as women’s basketball coach.

- *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992)

*Taggart* is not compelling authority under the current state of record in this action. *Taggart* concerns the special relationship that exists when a parole officer assumes the duty to take reasonable precautions to protect anyone foreseeably endangered by a parolee's dangerous propensities. 118 Wn.2d at 224. This Court found that the two parolees who harmed the two plaintiffs both had alcoholic and violent histories. *Id.* The injuries could have been foreseeable because both parole officers knew of the parolees' violent histories and were aware that, if not supervised, the parolees could harm others. *Id.* at 224-25. In the current action, Ms. Anderson has not produced any evidence that Mr. Lukashevich's conduct on February 19, 2011 was foreseeable. There are no facts that he had the propensity to engage in illegal activities with students off-campus and after hours.

- *Rhea v. Grandview Sch. Dist. No. JT 116-200*, 39 Wn. App. 557, 694 P.2d 666 (1985)

*Rhea* has been addressed extensively by the parties and the District reaffirms and incorporates its prior analysis. *Respondent's Response Brief*, pp. 17-24; *Answer to Petition for Review*, pp. 9-10. In *Rhea*, where a faculty advisor was aware that students would be seeking alcohol and drinking off campus, the court held that "Even when viewed in the light most favorable to the nonmoving party, it cannot be said that mere knowledge by the faculty

adviser and principal brought the senior party within the scope of the District's authority." 39 Wn. App. at 561. In this action, because Mr. Lukashevich was acting outside the scope of his employment and the illegal conduct occurred at his home after school hours, Ms. Anderson is still required to demonstrate that the District knew or should have foreseen Mr. Lukashevich's conduct. Mr. Lukashevich's personal knowledge of his own actions does not automatically impute to the District where he was not acting within the scope of his employment. The *Rhea* opinion supports dismissal of Ms. Anderson's claims where she introduces no evidence.

**C. Ms. Anderson's Claims of Negligent Hiring, Retention, Training, and Supervision Were Properly Dismissed by the Trial Court and Affirmed by the Court of Appeals.**

**i. The Record Is Devoid of Any Evidence that the District Negligently Hired or Retained Mr. Lukashevich.**

To prove a claim of negligent hiring, Ms. Anderson must show that (1) the district knew or, in the exercise of ordinary care, should have known of the Mr. Lukashevich's unfitness at the time of hiring; and (2) the Mr. Lukashevich proximately caused Ms. Rosenberg's injury. *Rucshner v. ADT, Sec. Sys., Inc.*, 149 Wn. App. 665, 680, 204 P.3d 271 (2009). "The difference between negligent hiring and negligent retention is the time at which the employer's negligence occurs." *Peck v. Siau*, 65 Wn. App. at 288.

“With negligent hiring, it occurs at the time of hiring; with negligent retention, it occurs in the course of employment.”

The record is void of any facts that Mr. Lukashevich was unfit to perform his responsibilities as women’s basketball coach at the time he was hired by the District. Ms. Anderson was required to present admissible evidence that Mr. Lukashevich was unfit when he was hired or that with ordinary care the District could have determined that he was unfit. Ms. Anderson makes no attempt to allege any such facts. Thus, there is no reasonable inference that the District failed to exercise reasonable care at the time of hiring.

Ms. Anderson identifies no events or instances that occurred after Mr. Lukashevich was hired or prior to February 19, 2011 that the District should have been aware of to support her negligent retention claim. Ms. Anderson submitted no evidence to show that Mr. Lukashevich was a risk to any students, that he had previously provided any of his players with alcohol, or had performed his job in any manner that would permit the District to suspect he was unfit. Simply put, no district employee or administrator acquired any information that Mr. Lukashevich was unfit for his position, nor are any such facts alleged.

**ii. The Record Is Devoid of Any Evidence that the District Negligently Trained or Supervised Mr. Lukashevich.**

The trial court and Court of Appeals properly found that Ms. Anderson failed to establish any facts that the District had negligently trained or supervised Mr. Lukashevich. “Distinct from [negligent hiring and retention] are negligent supervision and training, for which an employer can be liable for failing to exercise ordinary care in supervising an employee.” *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. at 47 (internal citation omitted). An employer is not liable for negligently supervising an employee whose conduct was outside the scope of the employment unless the employer knew, or in the exercise of reasonable care should have known, the employee presented a risk of danger to others. *Thompson v. Everett Clinic*, 71 Wn. App. at 555 (citing *Peck v. Siau*, 65 Wn. App. at 294).

As noted above, Ms. Anderson evidences no facts that Mr. Lukashevich presented a risk of danger to others or was unfit to act as girls basketball coach. As to negligent training, Ms. Anderson does not articulate or identify what aspect of the training of Mr. Lukashevich was improper or what training Mr. Lukashevich was required to receive. Ms. Anderson merely offers cursory statements that Mr. Lukashevich was not properly trained or supervised, but does not identify the subject-matter or the purported deficiencies.

Ms. Anderson's reliance on unsupported assertions and her own factual inaccuracies regarding the testimony of athletic director and principal Kevin Kemp cannot raise an issue of material fact. *See Respondent's Response Brief*, pp. 29-33. Ms. Anderson provides no explanation how Mr. Kemp's memory or the things he did do constitute negligent hiring, supervision, or training. Therefore, the trial court properly granted the District's motion for summary judgment on these issues.

**D. The Breach of Contract Claim Was Properly Dismissed.**

The lower court's properly rejected Ms. Anderson's claim for breach of contract. The District reincorporates its argument raised in *Respondent's Response Brief* (pp. 24-25) and *Respondent's Answer to Appellant's Petition for Review* (pp. 16-17) and requests that this Court affirm Court of Appeal's holding. Ms. Anderson is asking this Court to impose a duty on school districts to supervise students at all times, regardless of the lack of connection to the school district, and based solely upon an activities code signed by a student, pursuant to which the student agrees not to participate in certain conduct. It is not a contract and it does not create a contractual or common law duty of care.

There is no authority that by having students sign such an agreement, it somehow *expands* the public duty obligations and guarantees that the school district will act to prevent a student from engaging in the

conduct the student agrees to avoid. Not only has no Washington court ever recognized such a duty, but the imposition of such a duty would create endless and unlimited liability for school districts to supervise students literally around the clock. That is not the law and that cannot be the law.

**E. Evidence Relied Upon by Ms. Anderson in Opposing Summary Judgment Is Inadmissible.**

The District reincorporates its argument raised in *Respondent's Response Brief*, Sec. IV, Part E, concerning Ms. Anderson's evidence introduced at the trial court and additional evidence cited in the *Brief of Appellant*. Summary judgment was granted on the basis that the District did not owe a duty to Ms. Rosenberg because the late-night and off-campus party was not sponsored, sanctioned or supervised by the District and because Ms. Rosenberg was not in the care, custody or control of the District. The Declaration of Michelle Anderson (CP 59-78), Declaration of Douglas Phelps (CP 79-156) and the Supplemental Declaration of Douglas Phelps (CP 360-478) did not provide any facts to the contrary.

Mr. Phelps' declaration (CP 79-156) included a litany of unauthenticated irrelevant documents. *Respondent's Response Brief*, pp. 34-37. The police report regarding the accident could not be properly authenticated by Mr. Phelps. *See Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 367, 966 P.2d 921 (1998). Further, the declaration is replete with

testimony about what the various exhibits state and constitutes hearsay. ER 801-802. The supplemental declaration of Mr. Phelps (CP 360-478) consisting of Mr. Phelps' commentary and summation of the testimony of Mr. Kemp's deposition constitutes hearsay. ER 801-802. The deposition speaks for itself; Mr. Phelps' extrapolations, paraphrasing, and personal opinions about what Mr. Kemp said should not be considered.

More problematic is the *Declaration of Michele Anderson in Support of Plaintiff's Response in Opposition to Defendant Soap Lake School District's Motion to Dismiss* (CP 59-78) which Ms. Anderson submitted in opposition to the District's Motion to Dismiss. CP 36-37. As set forth in *Respondent's Response Brief*, the District's motion to dismiss was a wholly separate and distinct proceeding from the Motion for Summary Judgment. CP 166-167. The declaration was neither re-submitted by Ms. Anderson to oppose summary judgment nor relied upon in her Response to the District's Summary Judgment Motion (CP 179-186). "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Ms. Anderson's declaration was not put before the trial court on summary judgment, nor was it considered. CP 498.

Ms. Anderson's Brief of Appellant references utilizing an iPhone to establish a timeline and various Facebook and iPhone text messages. *Id.*, p.

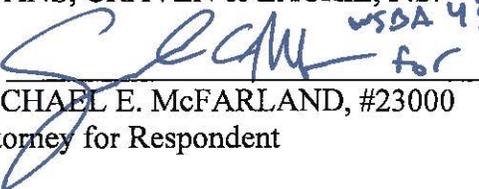
4. The text messages attached to Ms. Anderson's Declaration are unauthenticated and hearsay and there is no admissible evidence regarding any information the Facebook posts may have contained. Even if this Court considers the text messages, they do not create a genuine dispute of fact about whether the District owed a duty to Ms. Rosenberg on the night in question. The text messages do not suggest the party was a basketball party to reward Ms. Rosenberg for her basketball accomplishments. Rather, they demonstrate the purpose of going to Mr. Lukashovich's house was simply, as Mr. Turchik purportedly texted Ms. Rosenberg, "to get wasted." CP 70.

#### V. CONCLUSION

The trial court properly granted the District's motion for summary judgment. Ms. Anderson failed to present evidence that, even when viewed in the light most favorable to her, raised a genuine issue of material fact to defeat summary judgment. Based upon the record of evidence, the appellate pleadings, and the arguments and authority cited herein, the District respectfully asks that this Court affirm the Court of Appeals' and trial courts' decision dismissing Ms. Anderson's claims.

DATED this 2 day of June, 2017.

EVANS, CRAVEN & LACKIE, P.S.

By  for

MICHAEL E. McFARLAND, #23000

Attorney for Respondent

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 2nd day of June, 2017, the foregoing was delivered to the following persons in manner indicated:

***Counsel for Plaintiff***

Doug Phelps  
Phelps and Associates  
2903 N. Stout Road  
Spokane, WA 99206

Via Regular Mail	<input type="checkbox"/>
Via Certified Mail	<input type="checkbox"/>
Via Facsimile	<input type="checkbox"/>
Hand Delivered	<input checked="" type="checkbox"/>



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Kimberley L. Mauss