

FILED
SUPREME COURT
STATE OF WASHINGTON
10/5/2020 4:33 PM
BY SUSAN L. CARLSON
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NO. 98280-5

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

BONNIE I. MEYERS, as personal representative of the estate of
GABRIEL LEWIS ANDERSON, a deceased minor, age 15, and on behalf
of the beneficiaries of the estate, and BRANDI K. SESTROM and
JOSHUA ANDERSON, individually,

Appellants,

v.

FERNDALE SCHOOL DISTRICT, a public school district of the State of
Washington,

Respondent,

And

WILLIAM KLEIN and JANE DOE KLEIN, and the marital community
composed thereof,

Defendants.

**PETITIONER FERNDALE SCHOOL DISTRICT'S
RESPONSE TO AMICUS BRIEF**

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I. Introduction

In its amicus brief, WSAJF urges the court to adopt the extraordinary position that legal causation analysis should be eliminated in all negligence cases involving a special relationship. In doing so, WSAJF blurs all distinction between three distinct types of special relationships. Its brief moves loosely between the duty in “take-charge” cases (parole officer/ probationer); the duty in custodial/*in loco parentis* cases (schools/ nursing homes), and the duty in “express assurances/special relationship” (9-1-1 operator) cases. It argues that all special relationship cases already include a policy determination that, if a special relationship exists, liability should extend to any harm to the protected party. Thus, it asks this court to rule out legal causation as a defense in all “special relationship” cases.

This court has never held that defendants in a “special relationship” with the plaintiff face automatic liability. Instead, as this Court said in *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 284, 979 P.2d 400, 411 (1999), “establishment of a duty *does not resolve* the proximate cause issue.” This Court should maintain its past practice of carefully looking at the policy reasons for imposing or declining liability in the case of a special relationship. It should not adopt WSAJF’s proposed blanket rule that trial courts no longer are permitted to apply legal causation analysis in situations that involve a special relationship.

II. WSAJF would blur important distinctions

A. WSAJF seeks to radically change long-standing Washington law

In its briefing, amicus WSAJF plays very loose with three important categories of duty: the “take-charge” duty; the “special relationship”-based exception to the public duty doctrine; and the “custodial/*in loco parentis*” duty. It argues that they are all “based on a special relationship that gives the defendant the authority and ability to control another.” (Amicus brief at 9).

Then, because it urges that “all special relationship cases” should be treated similarly, it has cherry-picked the holdings from some “take-charge” cases and some “express assurances/special relationship” cases. In some of those cases, this Court superficially appears to have declined to engage in legal cause analysis. WSAJF seizes on the portions of those cases declining to engage in legal causation analysis. Thus, they contend the Court should similarly disregard Ferndale’s legal causation defenses here, in the custodial/*in loco parentis* context. Ultimately, WSAJF’s position is that, if a “special relationship”-type duty applies, of *any* type, there is no need to analyze “legal causation”—liability should extend simply from proof of the relationship. That would be a radical expansion of “special relationship” law, which this Court has rejected, and should

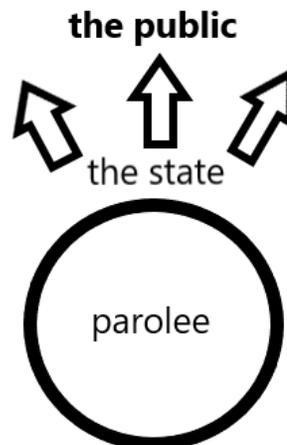
continue to reject. *See Hertog*, 138 Wn.2d at 283.

B. “Take-Charge” and “Express Assurance” cases are not similar to “*in loco parentis*” cases

The policy underpinnings of special relationships that result in “take-charge” duty and “express assurance” duty are quite dissimilar from each other, and from custodial/*in loco parentis* cases.

1. Policies behind a “Take-Charge” duty

A “take-charge” duty exists when an actor has a legislatively imposed duty to regulate the conduct of another person. That duty is most familiar from parole/parolee cases (*i.e.*, *Taggart v. State*, 118 Wn.2d 195, 822 P.2d 243 (1992)). The parole officer has the duty to control the parolee, not for the benefit or protection of the parolee/tortfeasor, but for the protection of innocent third parties who might be harmed by the person under supervision. *See Taggart*, 118 Wn.2d at 219-220. And, the scope of the supervisor’s duty is to prevent those risks that are likely, given the offender’s known history.



The *Taggart* court defined “take charge” duty, first stating that there must be a “definite, established and continuing relationship between the defendant and the third party.” *Id.* at 219 (quoting *Honcoop v. State*, 111 Wn.2d 182, 193, 759 P.2d 1188 (1988)). The court then cited RCW 72.04A.080, which states that “probation and parole officers of the department shall be charged with ... giv[ing] guidance and supervision to such parolees within the conditions of a parolee's release from custody.” *Taggart*, 118 Wn.2d at 219 (quoting RCW 72.04A.080). The court then noted that the State had the authority to (1) regulate the parolees’ movements within the state, (2) require the parolees to report, (3) impose special conditions such as refraining from using alcohol or undergoing drug rehabilitation or psychiatric treatment, and (4) order the parolees not to possess firearms. *Taggart*, 118 Wn.2d at 220. Finally, the *Taggart* court recognized that “parole officers are, or should be, aware of their parolees’ criminal histories, and monitor, or should monitor, their parolees’ progress.” *Id.* The *Taggart* court concluded that “[b]ecause of these factors ... parole officers have ‘taken charge’ of the parolees they supervise for purposes of § 319.” *Id.* Thus, the “take charge” duty became a term of art for having the duty and ability to control another, as described in *Taggart*. Under *Taggart*, once any particular set of facts met these three factors, it fell into the “take charge” type relationship and, the Court ruled, liability

“should extend” that far. *Id.* at 226.

In *Hertog*, then, the Court confirmed that “[w]here a special relation exists based upon taking charge of the third party, the ability and duty to control the thrd party indicate that defendant’s actions in failing to meet that duty are not too remote to impose liability.” *Hertog*, 138 Wn.2d at 284 (emphasis added). Conversely, “where such a [take charge] relationship is *not* found, proximate causation may not be so readily found either.” *Id.* at 283 (emphasis added).

Notably, even where a take-charge relationship exists, the scope of the risks that must be protected against is limited. It includes only those risks that would be reasonably foreseeable to the parole officer given what is known about the offender’s past crimes. *See, e.g., Taggart*, 118 Wn.2d at 225; *Estate of Davis v. State*, 127 Wn. App. 833, 844, 113 P.3d 487, 493 (2005), as amended (June 2, 2005), publication ordered (June 2, 2005) (“Erickson had been convicted of property crimes. He had not been violent toward any person. Nothing in the record indicates Mr. Scott, or by extension the State, had any reason to believe Mr. Erickson would commit murder.”)

As discussed *infra*, a “take-charge” relationship is a fundamentally different relationship from a school/student relationship in outcome-determinative ways.

2. The policies behind a custodial/*in loco parentis* duty

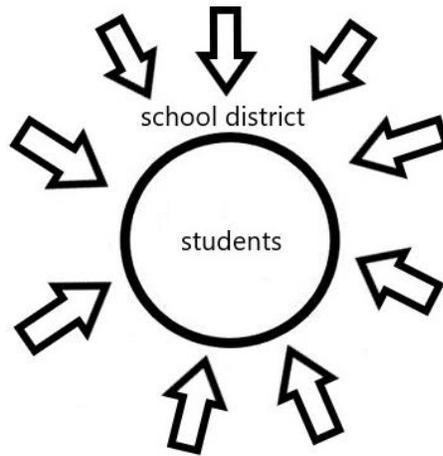
This custodial special relationship between school and student hinges on the fact of mandatory school attendance.

It is not a voluntary relationship. The child is compelled to attend school. He must yield obedience to school rules and discipline formulated and enforced pursuant to statute. * * * The result is that the protective custody of teachers is mandatorily substituted for that of the parent. * * * ‘As a correlative of this right * * *, a duty is imposed by law on the school district to take certain precautions to protect the pupils in its custody from dangers reasonably to be anticipated * * *.’

McLeod v. Grant County Sch. Dist., 42 Wn.2d 316, 319-20, 255 P.2d 360 (1953) (quoting *Briscoe v. Sch. Dist. No. 123, Grays Harbor County*, 32 Wn.2d 353, 362, 201 P.2d 697, 701 (1949)).

Under the “protective custody” type of special relationship, the group of people to whom the school’s duty is owed is finite. It only includes those students in custody or engaged in school-related activity (e.g., *Travis v. Bohannon*, 128 Wn. App. 231, 115 P.3d 342 (2005)).

Conversely, the scope of the dangers that must be protected against is almost infinite—any foreseeable risk. The school must protect students against “all comers,” as long as those risks are within the general field of danger.



This relationship invokes a fundamentally different set of duties and policy considerations than the “take-charge” duty, above. In a take-charge case, the defendant only has to “control” one person, and is privy to knowledge about *that person’s* dangerous propensities and likely ways to re-offend. In a custodial/*in loco parentis* case, the group to whom the duty is owed is smaller, and yet the body of risks against which the school must protect is broader, and often without any semblance of control over the injury-causing instrumentality.

For that reason alone, it is inappropriate to carry over the analysis from “take-charge” cases. Moreover, while a “take-charge” relationship is inherently limited by the State’s *actual knowledge of the risk*, no such limitation exists on schools’ potential liability. Legal causation provides that missing limit: should the duty extend so far *in this case* in light of logic, common sense, justice, policy, and precedent? The distinct natures

of these duties distinguishes their precedents: ignoring crucial legal distinctions is unwise.

3. The policies behind “Express Assurance” duties

Finally, in the express assurances/special relationship cases, the defendant would not have had an enforceable duty as to any particular individual—they had a “public duty” toward all. By engaging in some express assurances, though, the defendant has opted into a duty to protect. “The special relationship exception is a ‘focusing tool’ used to determine whether a local government ‘is under a general duty to a nebulous public or whether that duty has focused on the claimant.’” *Babcock v. Mason Cty. Fire Dist.*, 144 Wn.2d 774, 786, 30 P.3d 1261, 1268 (2001). By making express assurances of protection to a particular individual, they have then undertaken a duty to use ordinary care to carry it out. *See Beal ex rel. Martinez v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998); *Chambers-Castanes v. King County*, 100 Wn.2d 275, 669 P.2d 451 (1983). The basis for imposing this type of liability is not statutory like in “take-charge” cases, nor “substitutionary” like *in loco parentis* cases. It is, instead, “voluntary” because of the affirmative assurances made by a defendant, coupled with reliance. This is a third completely distinguishable policy basis for holding that liability “should extend this far.”

C. Fundamentally different underlying policies require different analysis

Because these three types of “special relationships” are premised on such different policies, they are not interchangeable. The reasons for imposing liability against a take-charge defendant are fundamentally different than the reasons for imposing liability against a custodial/*in loco parentis* defendant. This Court should be careful to maintain long-standing distinctions between these types of duties.

Judges must retain their ages-old discretion to limit liability where, as here, considerations of logic, common sense, justice, policy, and precedent militate against virtually unlimited liability.

D. WSAJF is mischaracterizing *why* this Court rejected legal causation arguments

Even if “take-charge” or “express assurances” precedents could safely be applied to *in loco parentis* situations, WSAJF mistakenly asserts that this Court “ruled out” the availability of a legal causation defense because of the finding of a special relationship. But in each of the cases where the Court declined to do legal causation analysis, *there had already been some similar fact-pattern, in a previous case, to which this Court had already applied* the mixed factors of logic, common sense, justice, policy and precedent.

This Court has repeatedly emphasized – for decades, if not for over

a century – that negligence requires proof of *four* elements, and that under the third—causation—there are two parts: cause-in-fact, and legal causation. This Court has never pronounced “legal causation” unavailable to any particular type of relationship or defendant. If it has declined to analyze legal cause in any case, it was because the Court had already engaged with similar-enough facts to have already reached a conclusion on whether liability “should extend that far.”

1. *Joyce declines “legal causation” because of Taggart/Bishop*

Taggart and Bishop v. Miche, 137 Wn.2d 518, 973 P.2d 465

(1999) are the seminal “take-charge” cases. In them, this Court did the hard work of determining whether liability should extend to a parole or probation officer, for crimes committed by the parolee while on supervision. It laid out a multi-factor test, largely focused on the degree of authority, control and information given to the parole officer. It then found that, if those baseline facts exist, liability should, in fact, extend that far.

Taggart, 118 Wn.2d at 226; *Bishop*, 137 Wn.2d at 530-31. In other words, the “legal causation” analysis for “take charge” relationships happened in *Taggart/Bishop*.

But, for the next several years, municipal and state defendants continued to bring *new* “legal causation” challenges--variants on the same

theme. *See, e.g., Hertog*, 138 Wn.2d 265; *Joyce*, 155 Wn.2d 306. They also involved parolees who committed crimes and injured a member of the public, while on supervision. Eventually, this Court began to decline to engage in legal causation analysis—*e.g.*, “the Department argues that there is something so fundamentally different between a community corrections officer and a probation officer that our prior holdings do not apply. We disagree. We have answered all of the questions raised by the State about its duty before.” *Joyce*, 144 Wn.2d at 315-16.

WSAJF, here, seizes on those holdings which decline to analyze legal cause, to argue that this Court was somehow treating the existence of the special relationship as dispositive on “legal causation.” That is incorrect. The reason that *Joyce* contains language “skipping over” the asserted legal causation defense is because the *Joyce* court found, “we have been here before. We surveyed the nature of the State’s duty in supervising offenders in detail in *Bishop* * * * Stewart’s relationship with the Department is essentially the same as the one discussed in *Bishop*.” *Joyce*, 155 Wn.2d at 319. The Court was simply falling back on the legal causation analysis it had already done, on similar facts, in an earlier case.

In other words, like was true with the *Lowman/Keller*¹ pairing in

¹ *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013); *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002).

the public roadway maintenance context, the *Joyce* court did not need to repeat its analysis of legal causation because the court had already applied legal causation to those same basic facts, in *Bishop*, and already held that on such facts, liability should extend that far. *Joyce*, 155 Wn. 2d at 318.

Neither *Joyce* nor the other “take-charge” cases cited by WSAJF stand for the idea that a legal cause defense is not allowed in a “special relationship/take-charge” case. This is seen clearly in *Hertog*:

Keeping in mind that *establishment of a duty does not resolve the proximate cause issue*, there is nevertheless a distinction between circumstances where a special relationship is found and where none is found.

Hertog, 138 Wn.2d at 284. (Emphasis added.) The same *Hertog* court also said, clearly, “[w]hile the same policy considerations may be relevant to both elements, existence of a duty does not automatically satisfy the requirement of legal causation, however.” *Hertog*, 138 Wn.2d at 283, 979 P.2d at 410–11.

Even in the “take-charge” context, this Court’s direction is clear—legal causation, as a prong of proximate causation, does not disappear as a defense merely because there is a special relationship. It would be a mistake to adopt such a rule in a take-charge case, and even more of a mistake to then cross-apply such a rule in a custodial/*in loco parentis* context.

2. *Beal* declines re-evaluation of legal causation because of *Chambers-Castanes*

The same is true in the “express assurance” cases. Amicus WSAJF seizes on *Beal* and argues that it “rejected” a legal cause challenge because of the existence of a special relationship. It did not, in fact, do so. Instead, the *Beal* court declined to *re*-engage in legal causation analysis—not because this Court deemed it inapplicable or unavailable to express assurances/special relationships—but *because it had already done it in Chambers-Castanes*. The *Beal* court said:

[Th]e City contends that any connection between the City's acts and the murder is too remote to impose liability, and thus legal causation is lacking. * * * **In light of Chambers–Castanes this question has already been decided against the City.** That is, the court has already recognized that liability may be premised upon assurances of police protection, and causation found when a municipality breaches its duty to provide that protection and as a result plaintiff is injured by a third party's criminal acts. The City does not ask the court to overrule *Chambers–Castanes* nor does it explain how this case is distinguishable on the legal causation issue.

Beal, 134 Wn.2d at 788. If this Court had intended to say “legal causation is not available once a special relationship comes into existence,” it certainly would have said so. Instead, in *Chambers-Castanes*, it laid out a privity-assurance-reliance test which, once met, resulted in a determination that liability *should* extend that far.² It simply re-applied

² “An actionable duty to provide police services will arise if, (1) there is some form of privity between the police department and the victim that sets the victim apart

that test, in *Beal*.

In summary, in the “take-charge” context and the “express assurances” context, the legal causation prong of proximate causation does not disappear as a defense merely because there is a special relationship. It would be a mistake to adopt such a rule in a take-charge or express assurance case, and even more of a mistake to the cross-apply such a rule to the custodial/*in loco parentis* context.

3. Prior legal cause analysis in the school context

This Court has applied legal cause analysis to school-based *in loco parentis* cases before. In some cases, it has extended liability; in others, it has not. *See, e.g., Claar ex rel. Claar v. Auburn Sch. Dist.*, 126 Wn. App. 897, 903, 110 P.3d 767, 770 (2005). But this Court has never done a legal causation analysis for a similar fact-pattern to the one presented here.³

Should a school face liability for student injuries caused by a negligent third party, simply because of choosing to use a public sidewalk as an extension of its physical education classroom? Like *Hertog* directs, “establishment of a duty does not resolve the proximate cause issue.”

from the general public, and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim.” *Chambers-Castanes*, 100 Wn.2d 275, 286, 669 P.2d 451, 458 (1983).

³ The closest it has come to facts like these was in *Claar*, where the court *declined* to hold that a school bus driver would face liability for dropping a child off near a roadway where the child was then struck. *Claar* 126 Wn. App. At 903 (“Johnson’s duty towards Claar does not extend as far as Claar wants it to under these circumstances.”).

Hertog, 138 Wn.2d at 284. Similarly, finding a “special relationship” does not dispense with the need to analyze legal causation. *Id.* at 283 (“existence of a duty does not automatically satisfy the requirement of legal causation.”). Here, the trial court correctly recognized that it could dismiss, even if the school stood *in loco parentis*, based on the remoteness of the risk and as a matter of logic, common sense, and public policy. That was not error. This Court should affirm.

III. The Role of the Arizona Rule

Finally, WSAJF misconstrues the District’s arguments regarding the “Arizona rule.” It argues that they turn on whether the student is in the school’s custody at the time. It then attacks the strawman of its own creation.

Washington law already answered the “custody” question. *See, e.g., Travis*, 128 Wn. App. at 239; *Carabba v. Anacortes Sch. Dist.*, 72 Wn.2d 939, 956, 435 P.2d 936 (1967). Using Arizona case law for *that* issue is unhelpful and inapplicable. The value of the Arizona cases is in their application of the “policy” part of legal cause analysis.

As was held in *Kazanjian v. Sch. Bd. of Palm Beach County*, 967 So. 2d 259, 267 (Fla.App. 4 Dist. 2007) “we as a society have determined that [teenage drivers] are safe enough to be on the roads; riding with a licensed teenage driver should not be considered an unreasonably risk

undertaking.” In *Wilson v. County of San Diego*, 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173 (Cal.App. 2001), and in *Orlando v. Broward County*, 920 So. 2d 54, 57 (Fla.App. 4 Dist. 2005), the courts recognized that it was a policy decision whether or not to make a children’s center (or school) a locked-down facility, or instead to treat students with dignity that comes with having freedom of movement. In *Rogers ex rel. Standley v. Retrum and Prescott Unified Sch. Dist.*, 170 Ariz. 399, 403, 825 P.2d 20 (Ariz.App. 1991), the court acknowledged that

...policy considerations appropriate to local school boards—local transportation options, interschool transfer arrangements, and extracurricular activity locations, for example—are pertinent to the decision whether restrictions should be placed on high school students coming and going from the campus during ordinary hours.

These courts did what the trial court, here, also did. They grappled with local community standards and with the fact that there might be valid educational and social purposes behind allowing students to be exposed to “traffic.” They grappled with whether such decisions should be made by educators and school boards, or instead, by juries, after the fact. The value of these cases, and the “Arizona rule,” lies in the fact that the Arizona courts engaged with the policy considerations--that certain risks are inherent in engaging with the world at large, and yet, may still be worth encountering for valid educational purposes. Or, said inversely, that a defendant should not face custodial liability for doing what hundreds of

thousands of others do (using sidewalks, roadways, and vehicles), simply because it happened to be the one with custody at the time of the injury.

In fact, this Court has used a variant of the Arizona rule, without saying as much, in *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wn.2d 190, 200, 15 P.3d 1283, 1287 (2001), as amended (Jan. 31, 2001). In that case, the defendant had done nothing more than leave keys in the ignition of a vehicle. In evaluating whether that act should give rise to liability, this Court first said:

This does not mean that any risk of harm gives rise to a duty. Instead, an unusual risk of harm, a “high degree of risk of harm,” is required. *Id.* There is nothing in the facts of this case indicating that a high degree of risk of harm to plaintiff was created by Budget's conduct of leaving the keys in the ignition of an automobile in an area where Budget had never had a prior vehicle theft.

Kim, 143 Wn.2d at 196. It then looked at “ordinary” risks and

“extraordinary” risks, holding;

There is nothing “quite out of the ordinary” about Budget's administrative facility parking lot or the Dodge minivan that was stolen. Plaintiff implies that arguably, Budget knew or should have known its vehicle lots were an especial temptation and, if proved, Budget could have a duty of care to safeguard against theft. Even were this true, it fails to address the question presented in this case, which solely involves Budget's administrative facility parking lot, not a rental vehicle lot or any other Budget vehicle lot. Vehicles were not rented from Budget's administrative facility and, as noted, there is no indication there had ever been a prior theft from this location. In essence, Budget's administrative lot is no different from the parking lots of thousands of other Washington businesses.

Kim, 143 Wn. 2d at 198. The *Kim* court went on to reject proximate cause-in-fact and legal cause, based in part on the “unusual risk of harm” analysis, above.

This entirely proper type of “acceptable level of risk” analysis occurred here, in this trial court. It was then rejected by the Court of Appeals, under the mistaken belief that, if duty exists, legal causation is no defense. That was error.

IV. Conclusion

It was error for the Court of Appeals to read *Lowman* as an instruction to skip directly from the existence of a duty, to a determination of liability. WSAJF would have this court make the same error, or even worse, to issue a bright-line rule that a special relationship equates to automatic liability. WSAJF’s proposed new rule should be rejected. The trial court’s grant of summary judgment should be reinstated.

DATED THIS 5th DAY OF October, 2020.


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APPENDIX

Kazanjian v. Sch. Bd. of Palm Beach County, 967 So. 2d 259, 265, 268 (Fla.App. 4 Dist. 2007)

Orlando v. Broward County, 920 So. 2d 54 (Fla.App. 4 Dist. 2005)

Rogers ex rel. Standley v. Retrum and Prescott Unified Sch. Dist., 170 Ariz. 399, 403-404, 825 P.2d 20 (Ariz.App. 1991)

Wilson v. County of San Diego, 91 Cal. App. 4th 974, 111 Cal. Rptr. 2d 173 (Cal.App. 2001)

Grover M. Moscovitz, for appellant.

A. Margaret Hesford, Margate, for appellee.

Before GERSTEN, C.J., and SHEPHERD and ROTHENBERG, JJ.

PER CURIAM.

Affirmed. *See Gaylis v. Caminis*, 445 So.2d 1063, 1065 (Fla. 3d DCA 1984).



1

Kai Uwe THIER, Appellant,

v.

The STATE of Florida, Appellee.

No. 3D06-2643.

District Court of Appeal of Florida,
Third District.

Sept. 19, 2007.

Rehearing Denied Nov. 9, 2007.

An Appeal from the Circuit Court for Miami-Dade County, Mark King Leban, Judge.

Kai Uwe Thier, in proper person.

Bill McCollum, Attorney General, and Michael C. Greenberg, Assistant Attorney General, for appellee.

Before GREEN and SUAREZ, JJ., and SCHWARTZ, Senior Judge.

PER CURIAM.

Because the Miami-Dade Circuit Court properly held that, although the petitioner was imprisoned in the county, it had no jurisdiction by habeas corpus to consider the validity of a Broward County conviction,

see *Johnson v. State*, 947 So.2d 1192 (Fla. 3d DCA 2007); *Broom v. State*, 907 So.2d 1261 (Fla. 3d DCA 2005), the order of denial below is affirmed.

Affirmed.



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John S. KAZANJIAN, as Personal Representative of the Estate of Kaitlin Ashley Kazanjian, deceased, Appellant,

v.

SCHOOL BOARD OF PALM BEACH COUNTY, Carlos Pozo and Jorge Fernando Pozo, Appellees.

No. 4D05-4371.

District Court of Appeal of Florida,
Fourth District.

Sept. 19, 2007.

Rehearing Denied Nov. 2, 2007.

Background: Estate of minor passenger, who was killed when driver crashed his car into trees after both passenger and driver had left school's campus without authorization, brought negligence action against school board, alleging that passenger and driver were habitually truant and that the school board failed to follow habitual truancy policies which might have prevented the accident. The Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Timothy P. McCarthy, J., entered summary judgment for school board, and estate appealed.

Holdings: The District Court of Appeal, Taylor, J., held that:

- (1) driver and passenger who had 7 to 8 absences in a ninety-day period were not habitually truant; and
- (2) school board owed no duty to lessen the risk of injuries by preventing high school students from leaving campus without authorization.

Affirmed.

1. Appeal and Error ◊893(1)

A summary judgment presents a pure question of law, which is subject to de novo review.

2. Schools ◊72, 161

Primary purpose of Florida's truancy laws is the promotion of academic success, and these statutes are distinguishable from the more recently adopted closed campus policies, which are intended, at least in part, to promote student safety. West's F.S.A. §§ 1003.01(8), 1003.26.

3. Schools ◊161

By statute, a "habitual truant" was a student who accumulated 15 unexcused absences within 90 calendar days, and thus, students who had 6, 7, or 8 absences, respectively, in a ninety-day period were not habitually truant, as a matter of law, and therefore, the principal had no duty to report them to the school board or Department of Highway Safety and Motor Vehicles (DMV) or to file truancy petitions. West's F.S.A. §§ 1003.01(8), 1003.27(2).

4. Schools ◊89.8(1)

In the context of a negligence action seeking damages for injuries sustained by high school student in a car crash that occurred after student had left school's campus without authorization, the school board owed no duty to lessen the risk of such injuries by preventing high school students from leaving campus without authorization.

5. Schools ◊89.2

A public school, at least through the high school level, owes a general duty of supervision to the students placed within its care, and this duty is based on the school's standing partially in place of the student's parents.

6. Schools ◊89.2

While Florida recognizes a general duty of supervision, a school has no duty to supervise all movements of all pupils all the time.

7. Negligence ◊215, 1692

In determining the existence of a legal duty, which is a question of law, a court allocates risk by balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.

8. Schools ◊89.8(1)

School rules relating to a student's presence on campus do not impose a legal duty of care running from the school board to third parties who are injured as a result of the negligent driving conduct of a student who has violated the school's policies.

9. Schools ◊89.2

Whether there is a duty to prevent a student from leaving campus without authorization depends on the age of the student; such a duty seems clear at the elementary school level, yet is anything but clear at the high school level.

10. Schools ◊89.2

For a high school student, skipping school is simply not so dangerous as to pose an "unreasonable risk" of harm, and thus should create no duty of care.

11. Schools ◊89.2

Off-campus dangers confronting high school students are risks that should be confronted by students and their parents.

12. Schools ⇔89.2

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.

13. Schools ⇔89

School board is immune from suit for its discretionary planning level policies regarding parking permits, student parking, and penalties for student breaches of school attendance and parking rules.

14. Schools ⇔89.8(1)

Sovereign immunity barred negligence suit brought against school board by estate of high school student, who was killed when car in which she was riding crashed into trees after both student and car's driver had left school's campus without authorization; school board was immune from suit for its discretionary planning level policies regarding penalties for student breaches of school attendance and parking rules, and the decision whether to have an open campus, a "fortress," or something in-between, was a policy decision that should be left to school professionals and not be second-guessed by civil juries.

Judy F. Hyman of Robert M. Montgomery, Jr. & Associates, P.L., West Palm Beach, for appellant.

Mark Hendricks and Elizabeth L. Pedersen of Panza, Maurer & Maynard, P.A., Fort Lauderdale, for appellee School Board of Palm Beach County.

TAYLOR, J.

John S. Kazanjian, as personal representative of the estate of Kaitlin Ashley Ka-

zanjian, appeals an adverse summary judgment on his negligence claims against the School Board of Palm Beach County. This case involves the tragic death of a Dwyer High School student in a car crash that occurred after she left campus without authorization. Kazanjian claims that his daughter and the driver in the fatal crash were habitually truant and that the School Board failed to follow habitual truancy policies, which might have prevented the accident. He also argues that the School Board owed a duty to prevent high school students from leaving campus without authorization.

We affirm the summary judgment, holding (1) the students were not habitually truant, as a matter of law; (2) in the context of a negligence action seeking damages for injuries sustained in a car crash away from school grounds, the School Board owed no duty to lessen the risk of such injuries by preventing high school students from leaving campus without authorization; and (3) in any event, the decision as to the appropriate campus security measures was a policy decision as to which the School Board enjoys sovereign immunity.

In November 2003, after their first-period class, eleventh-graders Courtney Lawrensen, Kaitlin Kazanjian, Carlos Pozo, Danny Shaw, and Chris Roon decided to skip school and go get breakfast. The students had no passes. They simply walked to their cars and left school grounds without being stopped. Kaitlin and Lawrensen left in Lawrensen's car. They all met up at a Mobil station and Kaitlin got into Pozo's car. They were planning to stop at Pozo's house to get money and then drive on to the restaurant.

On the way to his house, Pozo was driving between 72 and 74 m.p.h. on wet roads in a residential area with a speed limit of 35 m.p.h. While fiddling with the radio,

Pozo failed to navigate a curve in the road. He crashed his car into two trees, killing Kaitlin. The traffic homicide investigator, Officer Jeffery Main, described the accident as "horrific," indicating that it had a larger debris field than any accident he had investigated in eighteen years.

Dwyer High School has 1,900 students in eight buildings on a 60-acre campus. The school has two police officers and one police aide. There is a fence around the campus with many entrances and exits. There are parking gate restrictions as to when students can come and go. A police aide monitors the parking area and staff members monitor the front gate of the campus. During the day, the gates leading to the athletic fields are open because ingress and egress is necessary to the fields.

The school is not a fortress; gates are open and it is possible to get out. Students are permitted to leave campus during the school day with prior permission of a parent. If a parent sends a note that the student has permission to leave during the day, the school issues an off-campus pass to leave. Also, some students do not have classes every school period; they are allowed to leave during school hours. Students exiting the school parking lot during the day are sometimes stopped by the police aide on the way to their cars for passes or schedules showing they are not supposed to be in class. One student testified that it is easy to forge a pass. If students are stopped trying to leave when they should be in class, they are taken to the campus police or an administrator. The campus police call the student's parents. The students are not physically restrained; if a student wants to go, he or she can go. But, if administrators are aware of a student leaving without authorization, they will call his or her parents.

The Palm Beach County School Board has a written truancy policy, Policy 6Gx50-5.187. It defines an "absence" as not being present when attendance is checked, unless the student arrives in time to be counted "tardy." "Habitual truancy" is defined as a child having fifteen unexcused absences within ninety calendar days. According to Dwyer High School Assistant Principal William Basil, this policy refers to fifteen full days of absence without excuse before the habitual truancy procedures are invoked. Under the policy, principals have the duty to report habitually truant students to the School Board and to the Department of Highway Safety and Motor Vehicles, as required by section 1003.27(2), Florida Statutes (2005). The DMV notification is automatic when a student accumulates fifteen unexcused absences in a ninety-day period. The policy also requires the filing of a truancy petition under section 984.151 or a child-in-need-of-services petition under section 1003.27(3) in all cases of habitual truancy.

Attendance is taken in every class. If a student does not attend a class, he or she is marked absent on a computerized form, and at the end of the day, a phone dialer places a call reporting the absence to the student's home. The calls are placed even if a student misses only a single class. The calls are generally received at about 6:00 p.m. The message indicates that the student has been absent from one or more classes. Parents must write a note to get an absence excused. Notes from parents are periodically followed-up by phone calls to parents to verify their authenticity, but not every note is checked in this way. If the absence is unexcused, some teachers will allow the work to be made up, but others will not. Attendance is also indicated on the student's grade card, which is sent home to parents.

When students are caught skipping school, the punishment can range from a call to the parents to suspension. The punishment is typically detention or in-school suspension. Parents are notified any time a student is disciplined in any manner. Teachers are asked to contact the assistant principal if a student has three unexcused absences. The school prints out a list of students who have excessive absences. The principal testified that he is alerted when a student accumulates ten absences, excused or unexcused, and a letter is mailed home to the parents. According to one student's testimony, "[e]veryone skips" and the teachers know about it, but they don't really stop it.

Kaitlin's father, John Kazanjian, filed an affidavit indicating that the School Board did not notify him of his child's truancy and that he did not give her permission to leave school with anyone other than family members. Kaitlin's close friend testified that Kaitlin used to make sure she was home when the school called to intercept the school's automated calls and delete them off the caller ID so that her parents would not find out that the school had called about her truancy. Principal Culp testified that Kaitlin did not have an excessive number of unexcused absences. She did not have ten absences, excused or unexcused, so a letter was never sent to her parents. She was never caught skipping school.

John S. Kazanjian, suing as the personal representative of the estate, brought a three-count complaint against Carlos Pozo, Jorge Fernando Pozo, and the School Board of Palm Beach County. On May 12, 2005, the School Board moved for summary judgment, arguing it owed no duty to supervise a truant student and, even if it did, a motor vehicle accident was not a foreseeable proximate cause of any such

breach. It also argued that it was immune from suit for its discretionary policies.

[1] A summary judgment presents a pure question of law, which is subject to *de novo* review. *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003).

[2] Children have been skipping school "[s]ince at least the days of Huck Finn and Tom Sawyer." *Hoyem v. Manhattan Beach City Sch. Dist.*, 22 Cal.3d 508, 150 Cal.Rptr. 1, 585 P.2d 851, 858 (1978). The primary purpose of Florida's truancy laws appears to be the promotion of academic success. *See* § 1003.26, Fla. Stat. (2005). These statutes are distinguishable from the more recently adopted closed campus policies at many schools (apparently including Dwyer), which are intended, at least in part, to promote student safety. *See Hoyem*, 585 P.2d at 854. Although the students involved in this case were absent from their classes and, thus, truant, it is significant that they left campus without authorization.

[3] The plaintiff argues that Kaitlin, Pozo, and Lawrensen were habitually truant and that the School Board failed to follow the habitual truancy statutes to ensure their attendance. By statute, a "habitual truant" is a student who accumulates "15 unexcused absences within 90 calendar days." § 1003.01(8), Fla. Stat (2005). Though the statute does not address what happens when a student misses only part of a day, it is clear that a student cannot accumulate more than one absence per day, no matter how many classes he or she misses that day. The plaintiff's argument that each missed class is a separate absence, so that missing one full day of school would count as several unexcused absences, is an incorrect construction of the statute. Although the Palm Beach County School Board policy is poorly worded in defining an absence as missing

attendance, which is taken multiple times each day, it adopts the same “15 absences in 90 days” standard and is interpreted by school officials in conformity with the statute. At most, counting even one missed class as a full day’s absence, Courtney Lawrensen had only six absences in a ninety-day period; Carlos Pozo had seven absences in ninety days, and Kaitlin Kazanjian had eight absences in ninety days. These students were not habitually truant, as a matter of law. Therefore, the principal had no duty to report them to the School Board or DMV or to file truancy petitions.

[4–6] The plaintiff also argues that the School Board failed in its general duty to supervise these students. “A public school, at least through the high school level, undoubtedly owes a general duty of supervision to the students placed within its care.” *Rupp v. Bryant*, 417 So.2d 658, 666 (Fla.1982). This duty is based on the school’s standing partially in place of the student’s parents. *Id.* “Mandatory schooling has forced parents into relying on teachers to protect children during school activity.” *Id.* While Florida recognizes a general duty of supervision, a school has no duty to supervise “all movements of all pupils all the time.” *Id.* at 668 n. 26.

To the extent that the plaintiff is arguing that the school owed a duty to supervise Kaitlin and/or Charles off school property, such an argument is foreclosed by both statute and case law. *See* § 1003.31(2), Fla. Stat. (2005) (“The duty of supervision shall not extend to anyone other than students attending school and students authorized to participate in school-sponsored activities.”); *Rupp*, 417 So.2d at 668 n. 26 (“The school also has no duty to supervise off-premises activities of students which are not school related.”); *Matallana v. Sch. Bd. of Miami-Dade County*, 838 So.2d 1191, 1192 (Fla. 3d DCA

2003) (holding that the school had no duty to supervise at the time of an incident which occurred off school premises and was unrelated to any school activity); *Gross v. Family Servs. Agency, Inc.*, 716 So.2d 337, 339 (Fla. 4th DCA 1998) (stating that schools generally have not been held to have a duty of supervision when injuries occurred off-campus while students have been involved in non-school related activities); *Paella ex rel. Paella v. Ulmer*, 136 Misc.2d 34, 518 N.Y.S.2d 91, 93 (N.Y.Sup.Ct.1987) (holding that the school board had no duty to supervise once truant student was beyond its lawful control).

[7] The plaintiff also seeks to impose liability upon the School Board for breaching a duty to prevent the students from leaving campus without authorization. A negligence cause of action is comprised of four elements; the first is a “duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others against unreasonable risks.” *Clay Elec. Coop., Inc. v. Johnson*, 873 So.2d 1182, 1185 (Fla.2003) (quoting W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 164–65 (5th ed.1984)). As we wrote in *Biglen v. Florida Power & Light Co.*, 910 So.2d 405, 408 (Fla. 4th DCA 2005):

The supreme court has made foreseeability the polestar to finding both the existence of a legal duty and its scope; “whenever a human endeavor creates a generalized and foreseeable risk of harming others,” which the court describes as a “foreseeable zone of risk,” the law generally places a duty upon a defendant “either to lessen the risk or see that sufficient precautions are taken to protect others from the harm that the risk poses.” *McCain v. Fla. Power Corp.*, 593 So.2d 500, 503 (Fla.1992)

(quoting *Kaisner v. Kolb*, 543 So.2d 732, 735 (Fla.1989)). The existence of a legal duty means that a defendant stands in a “‘relation to the plaintiff as to create [a] legally recognized obligation of conduct for the plaintiff’s benefit.’” *Palm Beach–Broward Med. Imaging Ctr., Inc. v. Cont’l Grain Co.*, 715 So.2d 343, 344 (Fla. 4th DCA 1998) (quoting PROSSER AND KEATON § 42, at 274). The absence of a foreseeable zone of risk means that the law imposes no legal duty on a defendant, and therefore defeats a negligence claim.

In determining the existence of a legal duty, which is a question of law, a court allocates risk by “balancing the foreseeability of harm, in light of all the circumstances, against the burden to be imposed.” *Levy v. Fla. Power & Light Co.*, 798 So.2d 778, 780 (Fla. 4th DCA 2001) (quoting *Vaughan v. E. Edison Co.*, 48 Mass.App.Ct. 225, 719 N.E.2d 520, 523 (1999)).

Cases from other jurisdictions hold that violation of a school’s closed campus or truancy policy will not support a negligence action against a school board for personal injuries to third parties occurring off campus.

In *Collette v. Tolleson Unified School District, No. 214*, 203 Ariz. 359, 54 P.3d 828 (Ariz.Ct.App.2002), the school was alleged to have negligently enforced a closed campus policy. The plaintiff was a motorist struck by a student who had left campus without authorization during a lunch break. The Arizona court affirmed summary judgment in favor of the school:

¶ 16 The only conduct of the District at issue here is the alleged negligent enforcement of its modified closed-campus policy. Nothing happened to Thomason while at school that affected his ability to drive a car. Nor was Thomason’s driving part of any school activity. The

car Thomason was driving had not been provided to him by the District and the District had no reason to believe Thomason was an incompetent or dangerous driver. Thomason was driving on a public street with a valid driver’s license for a personal purpose.

¶ 17 Plainly, the District had no power to control Thomason’s actual operation of his vehicle. Appellants are really arguing that the District’s duty to supervise its students gave rise to a duty to appellants to keep Thomason from driving his car at the particular time this accident happened. We do not believe reasonable persons would agree that such a duty exists, and decline to impose such a duty in this case for both practical and policy reasons.

Id. at 832–33 (citation omitted).

Similarly, in *Thompson v. Ange*, 83 A.D.2d 193, 443 N.Y.S.2d 918 (1981), the student struck another motorist while driving off-campus in violation of school rules. The New York court affirmed a summary judgment in favor of the school, stating:

The uncontroverted proof was that Graziano was a licensed driver. The schools’ awareness of reckless driving by some students and their concern for student safety is not sufficient to show that Graziano was anything but the average 17-year old whom the Legislature has determined may be licensed to drive[.]. There is no claim that the schools had notice that Graziano was an incompetent driver. The risk that Graziano would be involved in an automobile accident was no greater than the risk incurred by the operation of an automobile by any average 17-year old driver. Violation of the no-driving rule did not increase the risk of accident in any way; that risk existed regardless of any rule.

...

In short, although plaintiffs have been grievously injured in an automobile accident caused by a student driver violating a school rule and although driving by teenagers may be a matter of concern to schools and to the general public, we are not prepared to hold that these schools had the duty to shield the public from a student operating an automobile off the school grounds in violation of school rules.

Id. at 921.

[8] We agree with *Collette* and *Thompson* that school rules relating to a student's presence on campus do not impose a legal duty of care running from the school board to third parties who are injured as a result of the negligent driving conduct of a student who has violated the school's policies.¹

A related question is whether the high school owed a duty to prevent Kaitlin from leaving school property without authorization to protect *her* from off-campus dangers such as car crashes. The best Florida case for the plaintiff is *Doe v. Escambia County School Board*, 599 So.2d 226 (Fla. 1st DCA 1992). In that case the student was fourteen years old, but was performing mentally at a third or fourth grade level. A male student took her by the arm, walked her out to a car in the school parking lot, drove her off campus, and sexually assaulted her. The first district reversed a summary judgment for the school board, finding that the failure to supervise in both the school building and the school parking lot was actionable. We distinguish *Doe* because the student in that

case was abducted rather than having left voluntarily.

Tollenaar v. Chino Valley School District, 190 Ariz. 179, 945 P.2d 1310 (Ariz.Ct.App.1997), is directly on point. The high school there had a closed campus policy, but its enforcement was lax. Shortly after arriving at school, the plaintiffs' children got into a car with another student and left campus. A collision with a tractor-trailer killed the plaintiffs' children. The Arizona court affirmed a summary judgment for the school, holding that the school exposed the students only to the ordinary risks of vehicular collision that "[m]embers of our mobile society face . . . whenever they are in cars.'" *Id.* at 1311 (quoting *Rogers ex rel. Standley v. Retrum*, 170 Ariz. 399, 825 P.2d 20, 24 (Ariz.Ct.App.1991)). The *Tollenaar* court went on to hold that the exposure to that foreseeable risk did not amount to exposure to an unreasonable risk, creating no duty of care. *Id.*

New York and California have taken different stances on the precise question of duty presented by these facts. California has held that a duty exists, but emphasizes that the duty is one of "ordinary care, not fortresses; schools must be reasonably supervised, not truant-proof." *Hoyem*, 585 P.2d at 857. New York, on the other hand, appears to recognize no such duty, at all. In *Palella*, a 14-year old skipped school and went joyriding with his friends, which ended in a police chase and a car crash with grievous injuries. The court granted the school's motion for summary judgment, stating:

1. We note that in *Louis v. Skipper*, 851 So.2d 895 (Fla. 4th DCA 2003), this court confronted a claim by a third party injured by an automobile driven by a student on a school sanctioned field trip. The injured party sued the school board, arguing that the student was an agent of the board at the time of the accident. We affirmed a summary judgment

in favor of the school board, "[i]nasmuch as the student [driver] was neither an employee of the school board, nor driving a school board vehicle." *Id.* at 896. *Louis* involves a claim of agency, not a claim that violation of a school board policy amounted to negligence.

In this case, the infant plaintiff intentionally absented himself from the physical custody and control of the School District. Nothing short of a prison-like atmosphere with monitors at every exit could have prevented the infant from leaving the school grounds on the day in question. This court is not prepared to mandate that a school district must employ security measures to insure that its students comply with reasonable attendance policies.

518 N.Y.S.2d at 93; *see also Glaser ex rel. Glaser v. Emporia Unified Sch. Dist. No. 253*, 271 Kan. 178, 21 P.3d 573 (2001) (holding that a middle school owed no duty to a student who ran off campus into traffic).

[9] Whether there is a duty to prevent a student from leaving campus without authorization depends on the age of the student. Such a duty seems clear at the elementary school level, yet is anything but clear at the high school level. *See Rogers*, 825 P.2d at 25 (“Nor do we suggest that a calculus of unreasonable risk will yield equivalent results at every level of the schools. We leave for resolution in other unsupervised egress cases such questions as whether parents’ supervisory expectations may reasonably differ at differing levels of the schools and whether the risks that may be deemed unreasonable may likewise differ with the age of the student involved.”).

[10] Recently, in *Clay Electric*, the Florida Supreme Court quoted the elements of negligence from *Prosser and Keeton on the Law of Torts*, which quotes the duty element as follows:

A duty, or obligation, recognized by the law, requiring the [defendant] to conform to a certain standard of conduct, for the protection of others *against unreasonable risks*.

873 So.2d at 1185 (quoting *Prosser and Keeton on the Law of Torts* 164–65 (W. Page Keeton ed., 5th ed.1984)) (emphasis added). We conclude that, for a high school student, skipping school is simply not so dangerous as to pose an “unreasonable risk” of harm, and thus should create no duty of care.

Teenage drivers are statistically worse drivers than adults, as the insurance actuarial data shows. However, we as a society have determined that they are safe enough to be on the roads; riding with a licensed teenage driver should not be considered an unreasonably risky undertaking. *See Tollenaar*, 945 P.2d at 1311. According to the plaintiff, the legislature’s enactment of a law providing for the suspension of habitually truant students’ driver’s licenses demonstrates that our lawmakers recognize that habitually truant students are a safety risk on the roads.² However, we can find no legislative history or statistics to support plaintiff’s position. It seems far more likely that the legislature simply intended to use a driver’s license as a coercive tool to keep high school students in class. The statute does not signify a legislative determination that truant students are worse drivers than their contemporaries. In any event, as previously pointed out, none of these students were habitually truant.

[11, 12] In *Palm Beach–Broward Medical Imaging Center, Inc. v. Continental Grain Co.*, 715 So.2d 343, 345 (Fla. 4th DCA 1998), we stated:

In applying the “foreseeable zone of risk” test to determine the existence of a legal duty, the supreme court has focused on the likelihood that a defendant’s conduct will result in the type of injury suffered by the plaintiff. This

2. § 1003.27(2)(b), Fla. Stat. (2005).

aspect of foreseeability requires a court to evaluate

whether the type of negligent act involved in a particular case has so frequently previously resulted in the same type of injury or harm that 'in the field of human experience' the same type of result may be expected again.

Pinkerton-Hays Lumber Co. v. Pope, 127 So.2d 441, 443 (Fla.1961).

(emphasis omitted). Applying this standard, we hold that no duty exists. As the record demonstrates, high school students routinely skip school yet, as the paucity of reported cases shows, horrific car crashes while skipping school are exceedingly rare. *See id.* at 346. Placing liability on the school board for off campus automobile accidents involving high school students would encourage the imposition of hyper-restrictive conditions on high school campuses. The off-campus dangers confronting high school students are risks that should be confronted by students and their parents. 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.

[13, 14] In any event, we believe that sovereign immunity bars the plaintiff's suit against the School Board. The School Board is immune from suit for its discretionary planning level policies regarding parking permits, student parking, and penalties for student breaches of school attendance and parking rules. *See Orlando v. Broward County, Florida*, 920 So.2d 54 (Fla. 4th DCA 2005) (holding that school board's decision as to school hours was a planning-level decision for purposes of school board's entitlement to sovereign immunity in action by mother of child who was killed while crossing a street on his

way home from school), *review denied*, 934 So.2d 450 (Fla.2006).

A high school may have sound educational reasons for wanting to treat its students with the dignity which comes with freedom of movement, rather than as young children or prisoners. *See Wilson v. County of San Diego*, 91 Cal.App.4th 974, 111 Cal.Rptr.2d 173, 178 (2001) (discussing decision not to make children's center a lockup facility to avoid treating juveniles as if they had committed a crime). The decision whether to have an open campus, a "fortress," or something in-between, is a policy decision that should be left to school professionals and not second-guessed by civil juries. *Orlando v. Broward County*, 920 So.2d at 57.

As to the plaintiff's other point on appeal concerning the School Board's Renewed Motion for Protective Order, we find no abuse of discretion in the trial court's granting such motion.

Affirmed.

WARNER and GROSS, JJ., concur.



The AVALON CENTER and Unisource Administrators, Appellants,

v.

Jane HARDAWAY, Appellee.

No. 1D06-2698.

District Court of Appeal of Florida,
First District.

Sept. 21, 2007.

Rehearing Denied Oct. 26, 2007.

Background: Employer and its insurer appealed from decision of the Judge of

chapter 180, Florida Statutes, sovereign immunity is waived, and the City does not need a contract to collect the stormwater utility fees authorized pursuant to chapter 403, Florida Statutes. The City's argument is without merit.

[1, 2] Statutes purporting to waive sovereign immunity are strictly construed in favor of the State, and must be clear and unequivocal. See *e.g.*, *Spangler v. Fla. State Tpk. Auth.*, 106 So.2d 421, 424 (Fla. 1958); *Div. of Admin. v. Oliff*, 350 So.2d 484 (Fla. 1st DCA 1977); *Seaside Prop., Inc. v. State Road Dep't*, 121 So.2d 204 (Fla. 3d DCA 1960); *Blockbuster Video, Inc. v. Dep't of Transp.*, 714 So.2d 1222 (Fla. 2d DCA 1998). Waiver of sovereign immunity will not be implied. See *Spangler*, 106 So.2d at 424; *Seaside Prop.*, 121 So.2d at 206.

[3] Here, the City refuses to accept that chapter 180 has a very specific listing of the municipal services included within its scope. One municipal service not included in that list is stormwater runoff. The Legislature, for whatever reason, decided not to include stormwater runoff within the scope of chapter 180. We are unable to rewrite the chapter to provide the relief sought by the City. Because chapter 180 does not provide a waiver of sovereign immunity for utilities authorized pursuant to chapter 403, the parties' circumstances have not changed since the first appeal.

Consequently, although the stormwater fee may be a valid utility fee, consistent with our previous opinion, before the City can sue to collect the fee, it must have a written contract. See *City of Gainesville v. Fla. Dep't of Transp.*, 778 So.2d 519, 530 (Fla. 1st DCA 2001). Since the City acknowledges it does not have a written contract, the trial court properly dismissed

the City's complaint with prejudice. The trial court's order is AFFIRMED.

KAHN, C.J., and THOMAS, J., concur.



Huguette ORLANDO, as personal representative of the Estate of Caleb Orlando, deceased, Appellant,

v.

BROWARD COUNTY, FLORIDA, the City of Dania Beach, and School Board of Broward County, Appellees.

No. 4D04-4868.

District Court of Appeal of Florida,
Fourth District.

Dec. 21, 2005.

Rehearing Denied Feb. 22, 2006.

Background: Mother whose child was killed while crossing the street on the way home from school brought negligence action against school board, among others. The Circuit Court, Seventeenth Judicial Circuit, Broward County, Ilona M. Holmes, J., concluded that school board was entitled to sovereign immunity. Mother appealed.

Holdings: The District Court of Appeal, Gross, J., held that:

- (1) school board's decision as to school hours was a planning-level decision, and
- (2) school board did not create a dangerous condition for which there was no proper warning.

Affirmed.

1. Schools ⇨89.8(1)

School board's decision to operate middle school from 9:00 a.m. to 4:00 p.m., thereby exposing students to rush hour traffic on surrounding streets, was a planning-level decision, for purposes of school board's entitlement to sovereign immunity in action by mother of child who was killed while crossing a street on his way home from school; decision involved the governmental objective of educating children, decision required the exercise of judgment and expertise to satisfy educational, health, and other requirements relating to length of the school day, and school board had statutory authority to adopt policies for the opening and closing of schools. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. §§ 768.28, 1001.42(4)(f).

2. States ⇨191.6(2)

Constitutional provision authorizing the legislature to make provision for bringing suits against the state provides absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment. West's F.S.A. Const. Art. 10, § 13.

3. States ⇨112(2)

Statute waiving sovereign immunity in tort cases constitutes a limited waiver of the state's sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

4. States ⇨112.2(1)

Despite limited statutory waiver of sovereign immunity against tort claims, certain discretionary, planning-level governmental functions remain immune from tort liability. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

5. Municipal Corporations ⇨728

States ⇨112.2(1)

If a challenged governmental act, omission, or decision necessarily involves a

basic governmental policy, program, or objective, is essential to the realization or accomplishment of that policy, program, or objective, and requires the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved, and the governmental agency possesses the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision, then the challenged act, omission, or decision can be classified as a discretionary, planning-level governmental process, for purposes of entitlement to sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

6. Schools ⇨89.8(1)

School board did not create a dangerous condition for which there was no proper warning by exposing students to rush hour traffic on their way to and from school, and thus exception to doctrine of sovereign immunity when a governmental entity creates a dangerous condition and fails to warn of the danger did not apply to suit against school board by mother whose child was killed while crossing the street on his way home from school; danger posed by traffic was open and obvious, and school board did not create the danger and had no authority to alleviate it. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

7. Municipal Corporations ⇨723

When a governmental entity creates a known dangerous condition, which is not readily apparent to persons who may be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger, and the governmental entity is not entitled to sovereign immunity for a breach of this duty; however, a dangerous condition that is readily apparent to the public does not fit within this exception to

the doctrine of sovereign immunity. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

8. Automobiles ⇌279

For purposes of exception to sovereign immunity when a governmental entity creates a hidden danger, the danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard. West's F.S.A. Const. Art. 10, § 13; West's F.S.A. § 768.28.

Lawrence B. Friedman of The Friedman Law Firm, P.A., Boca Raton, for appellant.

Dorsey C. Miller, III of Haliczzer, Pettis & Schwamm, P.A., Fort Lauderdale, for appellee School Board of Broward County.

GROSS, J.

In this case we hold that sovereign immunity bars a mother's claim against a school board for the death of her son. The school board's decision on when to begin and end the school day was a discretionary, planning-level decision. The facts of the case do *not* give rise to a situation where the school board had an operational level duty to warn of a dangerous condition that it created, which was not readily apparent, so that it constituted a trap for the unwary.

Huguette Orlando, as the mother and guardian of her minor son, Caleb Orlando, filed a negligence complaint against the School Board of Broward County and other defendants, pursuant to the Wrongful Death Act, section 768.16, *et seq.*, Florida Statutes (1999). The case arose out of a 1999 accident where an automobile struck and killed Caleb while he was crossing the street west of the intersection at Southeast

5th Avenue and Sheridan Street in Dania Beach.

Caleb was a 13-year-old eighth grader at Olsen Middle School. The school's hours of operation were from 9:00 a.m. until 4:00 p.m. The School Board provided bus transportation for Olsen Middle students who lived beyond a two-mile radius of the school. At the beginning of the 1997 school year, Caleb lived outside of the two-mile radius and was eligible for bus transportation. In October 1997, Caleb's family moved to a residence within the two-mile radius. Despite living within the radius, Caleb was permitted to ride the school bus until December 1998.

When the mother learned that her son was no longer permitted to ride the school bus, she protested at the school's office. Concerned for her son's safety, she asked the person in charge of bus transportation if there were any exceptions to the two-mile radius rule or if anything could be done to restore her son's bus transportation privileges. The person advised her that Caleb was ineligible for bus transportation and there were no exceptions to the policy.

On May 26, 1999, Caleb was dismissed from school at 4:00 p.m. At 4:15 p.m., Caleb was at Sheridan Street, about 30 feet west of the intersection with Southeast 5th Avenue. This intersection is within a two-mile radius of the school and does not have a crossing guard. There was no school zone at the intersection. Attempting to cross the street, Caleb stepped into the westbound lane of Sheridan Street, against traffic and not at a crosswalk. He passed in front of a transit bus. As Caleb moved past the bus, he was struck and killed by a passing motorist.

Olsen Middle is surrounded by busy streets, where peak traffic occurred between the hours of 7:30 a.m. to 9:00 a.m.

and 4:30 p.m. to 6:00 p.m. At the location on Sheridan Street, where the accident occurred, the speed limit was 45 miles-per-hour. The School Board was aware that hazardous walking routes existed within a two-mile radius of Olsen Middle; Caleb was the fourth child in a seven-year period to die in transit to or from the school, all within the two-mile radius.

[1] The mother first argues that the School Board negligently decided to operate Olsen Middle School from 9:00 a.m. to 4:00 p.m., thereby exposing the students to rush hour traffic on the surrounding streets, and creating a foreseeable zone of risk, which imposed a duty on the School Board to take precautions to protect the children.

[2, 3] Article X, section 13 of the Florida Constitution provides “absolute sovereign immunity for the state and its agencies absent waiver by legislative enactment or constitutional amendment.” *Cir. Ct. of the Twelfth Jud. Cir. v. Dep’t of Natural Resources*, 339 So.2d 1113, 1114 (Fla.1976). Section 768.28, Florida Statutes (1999), “constitutes a limited waiver of the states sovereign immunity.” *Id.* at 1116. Section 768.28(5) provides that the “state and its agencies and subdivisions [are] liable for tort claims in the same manner and to the same extent as a private individual under like circumstances.”

[4] Even though the statute creates a limited waiver of sovereign immunity, certain discretionary, planning-level governmental functions remain immune from tort liability. *See, e.g., Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010, 1022 (Fla.1979) (holding that although section 768.28 evinces the intent of our legislature to waive sovereign immunity on a broad basis, nevertheless, certain “discretionary” governmental functions remain immune from tort liability.). Setting the time when a given school opens or

closes is a discretionary, planning-level function of the School Board, not subject to the waiver of sovereign immunity.

[5] In *Commercial Carrier Corp.*, the supreme court set forth a preliminary test to determine whether a governmental function is a discretionary one:

- (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective?
- (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective?
- (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
- (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Id. at 1019 (quoting *Evangelical United Brethren Church v. State*, 67 Wash.2d 246, 407 P.2d 440, 445 (1965)). If these questions can be “clearly and unequivocally answered in the affirmative,” then the challenged act, omission, or decision can be classified as a discretionary, planning-level governmental process. *Id.*

In this case, the four questions can clearly and unequivocally be answered in the affirmative. The decision when to open and close a school involves a governmental policy, program, or objective. Setting a beginning and ending of a school day is essential to the School Board’s objective of educating children. Determining school hours involves the exercise of judgment and expertise. The length of the school day must meet educational, health, and other requirements, obligating the School Board to coordinate the release of hundreds of schools at locations all over

Broward County. Finally, pursuant to section 230.23(4)(f), Florida Statutes (1999) (now renumbered § 1001.42(4)(f)), the School Board has the power to “adopt policies for the opening and closing of schools.” Under the *Commercial Carrier* preliminary test, the decision when to open and close a school is a planning-level decision entitled to sovereign immunity. See *Harrison v. Escambia County Sch. Bd.*, 419 So.2d 640 (Fla. 1st DCA 1982), *approved*, 434 So.2d 316 (Fla.1983) (holding that designation of the location of a school bus stop is a planning-level decision of a School Board).

[6, 7] The mother seeks to avoid the operation of sovereign immunity by arguing that the School Board’s decision created “a hidden trap or dangerous condition for which there was no proper warning.” *Dept of Transp. v. Neilson*, 419 So.2d 1071 (Fla.1982). “[W]hen a governmental entity creates a known dangerous condition, which is not readily apparent to persons who may be injured by the condition, a duty at the operational-level arises to warn the public of, or protect the public from, the known danger.” *Payne v. Broward County*, 461 So.2d 63, 65 (Fla.1984) (citing *City of St. Petersburg v. Collom*, 419 So.2d 1082 (Fla.1982)).

[8] However, a dangerous condition that is readily apparent to the public does not fit within this exception to the doctrine of sovereign immunity. The danger of jaywalking on a busy street during rush hour is readily apparent to pedestrians, so that a governmental entity has no duty to warn of such an open and obvious hazard. See *Masters v. Wright*, 508 So.2d 1299, 1300 (Fla. 4th DCA 1987). As the supreme court has written, “[a] governmental entity has no duty to warn pedestrians of the routine danger of crossing the street in midblock.” *Payne*, 461 So.2d at 66.

Payne is instructive on this issue. In *Payne*, a high school student walking

home from school was fatally injured as she tried to cross Rock Island Road. *Id.* at 64. Coral Springs High School was located at the northeast intersection of Rock Island Road and Sample Road. *Id.* The student followed the pedestrian sidewalk that ran 125 feet north of Sample Road until it ended at Rock Island. *Id.* At this point she attempted to cross Rock Island Road, where she was struck and killed by a motorist. *Id.*

The student’s parents sued Broward County, the School Board, the City of Coral Springs, and others who were dismissed at trial. The trial court entered a directed verdict in favor of the School Board. *Id.* The jury attributed 40% of the liability to the County. *Id.* The County appealed to this court, which reversed the final judgment, holding the county was immune from tort liability. *Id.* at 64–65. This court also certified questions to the supreme court, including the following:

Was this [the opening of the Rock Island Road intersection] the creation of a known danger which requires a warning or an aversion of danger?

Id. at 65.

The supreme court in *Payne* recognized that the County both created and knew of the conditions at the intersection where the student was killed. However, the court concluded that the intersection was “not a trap” and that “whatever danger there was in crossing the street midblock was open and obvious.” *Id.* at 66.

In this case, the School Board is less culpable than the County in *Payne*. The School Board had knowledge of the traffic conditions on Sheridan Street, but it did not create the dangerous condition. As in *Payne*, the dangerous condition here was open and obvious, no “greater than that existing anywhere it is possible to cross a road midblock.” *Id.* This was not a situation presenting an “operational level duty

to warn of a known dangerous condition created by the public entity not readily apparent, constituting a trap for the unwary.” *Duval County Sch. Bd. v. Dutko*, 483 So.2d 492, 495 (Fla. 1st DCA 1986).

The mother relies heavily on *Dutko*, but it is distinguishable. *Dutko* held that the School Board had created a “trap for the unwary” by its continued maintenance of a bus stop where waiting children were exposed to dangers that were not readily apparent; the hidden danger was the often-occurring, erratic actions of drivers who “left the roadway and drove upon the grassy shoulder, requiring waiting children to scurry out of the way of wayward vehicles.” *Id.* at 495. In this case, there was no hidden danger. The School Board did not create or overlook the dangerous condition, the traffic on Sheridan Street, which was readily apparent. The School Board did not have the authority to take precautionary measures to alleviate the traffic or slow it down. *See Padgett v. Sch. Bd. of Escambia County*, 395 So.2d 584 (Fla. 1st DCA 1981) (stating local government and the Department of Transportation have a statutory duty of installing and maintaining school traffic control devices); *see also Garcia v. Metro. Dade County*, 561 So.2d 1194 (Fla. 3d DCA 1990).

We have considered the mother’s remaining point on appeal, concerning the School Board’s Empty Seat Policy, and find it to be without merit. Under section 234.01, Florida Statutes (1999), the School Board did not have a statutory duty to provide bus transportation to students who lived less than two miles from school.

Affirmed.

STONE and HAZOURI, JJ., concur.



1

Fred D. LARABEE, Petitioner,

v.

STATE of Florida, Respondent.

No. 5D05–3227.

District Court of Appeal of Florida,
Fifth District.

Dec. 23, 2005.

Rehearing Denied Feb. 9, 2006.

Petition for Writ of Prohibition, Julie H. O’Kane, Respondent Judge.

Warren W. Lindsey and William R. Ponnall, of Kirkconnell, Lindsey, Snure & Yates, P.A., Winter Park, for Petitioner.

No Appearance for Respondent.

PER CURIAM.

We deny the petition without prejudice to petitioner to file a notice of expiration of speedy trial, thereby triggering the recapture provisions of Florida Rule of Criminal Procedure 3.191(p). *See State v. B.S.S.*, 890 So.2d 487 (Fla. 5th DCA 2004).

WRIT DENIED.

GRIFFIN, THOMPSON and TORPY,
JJ., concur.



2

Ray OWENS, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 4D05–1917.

District Court of Appeal of Florida,
Fourth District.

Dec. 28, 2005.

Background: Defendant was convicted of sale and possession of cocaine. Defendant

170 Ariz. 399

Kevin C. ROGERS, a minor By and Through his next best friend and natural mother, Sheila E. STANDLEY, Plaintiffs-Appellants,

v.

Randolph RETRUM and Jane Doe Retrum, husband and wife; Prescott Unified School District, Defendants-Appellees.

No. 1 CA-CV 89-356.

Court of Appeals of Arizona,
Division 1, Department E.

July 18, 1991.

As corrected Aug. 13, 1991.

Review Denied March 3, 1992.

High school student brought action against school district and teacher to recover damages for injuries sustained in accident while he was riding in friend's automobile after student became angry with his teacher and left school building. The Superior Court, Yavapai County, Cause No. CV-49796, James Hancock, J., entered judgment for school district and teacher. Student appealed. The Court of Appeals, Fidel, P.J., held that although it was foreseeable that mobile high school students, permitted to leave campus during classroom hours, would be exposed to risk of roadway accidents, neither high school nor teacher subjected high school student to unreasonable risk of vehicular injury by permitting unsupervised egress from class on campus during school day and could not be held liable in negligence.

Affirmed.

1. Schools ⇐63(3), 147

School teachers and administrators are under obligation for benefit of students within their charge and that obligation includes duty not to subject those students, through acts, omissions, or school policy, to foreseeable and unreasonable risk of harm.

2. Schools ⇐89.8, 147

Although it was foreseeable that mobile high school students, permitted to leave campus during classroom hours, would be exposed to risk of roadway accidents, neither high school nor teacher subjected student to unreasonable risk of vehicular injury by permitting unsupervised egress from class on campus during school day and could not be held liable for injuries sustained by student in accident which occurred while he was riding in friend's automobile after student became angry with teacher and left school building.

3. Negligence ⇐4

Reckless or criminal nature of intervenor's conduct does not place it beyond scope of duty of reasonable care if that duty entails foresight and prevention of precisely such a risk.

4. Negligence ⇐4

Not every foreseeable risk is an unreasonable risk; it does not suffice to establish liability to prove that defendant owed plaintiff a duty of reasonable care, that act or omission of defendant was contributing cause of injury to plaintiff, and that risk of injury should have been foreseeable to defendant.

5. Negligence ⇐4, 136(14)

To decide whether risk was unreasonable requires evaluative judgment ordinarily left to jury in negligence action; however, in approaching question of negligence or unreasonable risk, court sets outer limits, and jury will not be permitted to require party to take precaution that is clearly unreasonable.

Musgrove & Drutz, P.C. by Mark W. Drutz, Christopher Ware, Prescott, for plaintiffs-appellants.

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears by Steven D. Smith, Tony J. Rudman, Timothy F. Bolden, Phoenix, for defendants-appellees.

OPINION

FIDEL, Presiding Judge.

Plaintiff Kevin C. Rogers appeals from summary judgment entered for defendants Randolph Retrum and Prescott Unified School District on plaintiff's negligence claim. We affirm summary judgment because plaintiff's injury did not result from an unreasonable risk that may be charged to the conduct of these defendants.

FACTUAL AND PROCEDURAL HISTORY

We state the facts, as always, in the light most favorable to the party appealing from summary judgment.

On the morning of February 5, 1989, Kevin C. Rogers, a sixteen-year-old junior at Prescott High School, completed an advanced electronics test. Although Rogers anticipated a good grade, the teacher, Randolph Retrum, publicly gave him a failing grade. When Rogers asked why, Retrum threw the test in his direction and answered, "Because I don't like you."

Although class was not over, Retrum permitted students to leave class as they pleased, and Prescott High School permitted students to enter and leave the campus freely.¹

Humiliated and upset, Rogers left class with a friend named Natalo Russo, punching a wall and kicking some trash cans on his way to Russo's car. As Russo tried to calm him, the friends left campus in Russo's car by a meandering route that eventually led them eastward on Iron Springs Road. There Russo, the driver, accelerated and lost control, passing in a curve at a speed exceeding 90 miles per hour. When the car struck an embankment, landed on its nose, and slid several hundred feet, Rogers was ejected and sustained the injuries for which he sues.

After the accident, Retrum admitted that Rogers had actually passed the test. Retrum had falsely given Rogers a failing grade because Rogers had always done

well in the class and Retrum "wanted [Rogers] to know what it felt like to fail."

Rogers settled negligence claims against Natalo Russo and his parents, and the trial court granted summary judgment rejecting Rogers's negligence claims against Retrum and the district. From this judgment, Rogers appeals.

PLAINTIFF'S CLAIM OF NEGLIGENCE

We first point out that Retrum's alleged conduct, however egregious, is not the causal focus of plaintiff's claim. If, in the flush of first reaction, plaintiff had blindly run into harm's way, we would examine the range of foreseeable, unreasonable risks that might be attributed to a teacher's false and deliberate humiliation of an impressionable teenager entrusted to his class.

Plaintiff, however, stepped into his friend Natalo Russo's car. And plaintiff's counsel has conceded at oral argument that there is no evidence that Retrum's words to Rogers affected Russo's operation of his car.

Counsel instead targets Retrum's "open class" and the district's "open campus" policies as the causal negligence in this case. By these policies, according to counsel, defendants breached their supervisory duty to plaintiff and exposed him to the risk of highway injury when he should have been in class. We confine our analysis to this claim.

DUTY

The first question in a negligence case is whether the defendants owed a duty to the plaintiff. We find that defendants had a relationship with plaintiff that entailed a duty of reasonable care.

Our supreme court has distilled, as the essence of duty, the obligation to act reasonably in the light of foreseeable and unreasonable risks. See *Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984) (quoting W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton*

1. The defendants dispute these allegations, but also acknowledge that we must accept them as

truthful for the purpose of reviewing summary judgment.

on the Law of Torts § 53, at 356 (5th ed. 1984) [hereinafter Prosser and Keeton] (“[D]uty’ is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty [if it exists] is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.”).

[1] Clearly, school teachers and administrators are “under [an] obligation for the benefit of” the students within their charge. See *id.* This obligation includes the duty not to subject those students, through acts, omissions, or school policy, to a foreseeable and unreasonable risk of harm. See *Jesik v. Maricopa County Community College Dist.*, 125 Ariz. 543, 546, 611 P.2d 547, 550 (1980) (“A public school district in Arizona is liable for negligence when it fails to exercise ordinary care under the circumstances.”); see also *Chavez v. Tolleson Elementary School Dist.*, 122 Ariz. 472, 476, 595 P.2d 1017, 1021 (App.1979) (“[T]he duty of the school personnel . . . as to the supervision of students in their charge [is] one of ordinary care.”).

LEGAL CAUSE

[2] We next take up defendants’ argument that summary judgment may be affirmed on the ground that Russo’s driving was an intervening, superseding cause. We do so before reaching the dispositive question of breach of duty because questions of breach and cause are too often confused and this case may serve to delineate them. We are guided by the comment of Professors Prosser and Keeton that

[i]n [certain] cases the standard of reasonable conduct does not require the defendant to recognize the risk, or to take precautions against it. . . . In these cases the defendant is simply not negligent. When the courts say that his conduct is not “the proximate cause” of the harm, they not only obscure the real issue, but suggest artificial distinctions of causation which have no sound basis, and can only arise to plague them in the future.

Prosser and Keeton, *supra* § 42, at 275; see also *Tucker v. Collar*, 79 Ariz. 141, 145, 285 P.2d 178, 181 (1955) (“Much confusion has resulted from many courts disposing of cases upon the ground defendant’s act was not the proximate cause of an injury when the proper basis was that there was no negligence.”).

One element of legal cause is “but-for causation” or causation-in-fact. See *Ontiveros v. Borak*, 136 Ariz. 500, 505, 667 P.2d 200, 205 (1983) (“[A]s far as causation-in-fact is concerned, the general rule is that a defendant may be held liable if his conduct contributed to the result and if that result would not have occurred ‘but for’ defendant’s conduct.”). This element is adequately established; a jury might reasonably find that, but for the open campus and classroom policies plaintiff complains of, Rogers and Russo would have been at school at 9:10 a.m. on February 5, 1989, and not in a car on Iron Springs Road.

The more elusive element of legal cause is foreseeability, and this, according to defendants, is lacking in this case. They argue:

[N]o reasonable person could or should have realized Russo would drive in a criminally reckless manner at 100 miles an hour so as to cause an accident. Thus it is the intervening superseding act of fellow student Russo, not the act of Return or Prescott Schools[,] which was the proximate cause of plaintiff’s injury.

We decline to affirm the trial court’s judgment on this ground.

First, “we must take a broad view of the class of risks and victims that are foreseeable, and the particular manner in which the injury is brought about need not be foreseeable.” *Schnyder v. Empire Metals, Inc.*, 136 Ariz. 428, 431, 666 P.2d 528, 531 (App.1983) (citing *McFarlin v. Hall*, 127 Ariz. 220, 222, 619 P.2d 729, 731 (1980)). It is not unforeseeable that mobile high school students, permitted to leave campus during classroom hours, will be exposed to the risk of roadway accidents.

[3] Second, the reckless or criminal nature of an intervenor’s conduct does not

place it beyond the scope of a duty of reasonable care if that duty entails foresight and prevention of precisely such a risk. See *Rossell v. Volkswagen of America*, 147 Ariz. 160, 169, 709 P.2d 517, 526 (1985), cert. denied, 476 U.S. 1108, 106 S.Ct. 1957, 90 L.Ed.2d 365 (1986) (“[T]he scope of the risk created by the negligence of the original actor may include the foreseeable negligent or criminal conduct of others.”); see also Restatement (Second) of Torts § 281 comment h (“If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause.”).

This case illustrates the point of comment h. The condition created by defendants’ negligent conduct, according to plaintiff, was exposure to a preventable risk of vehicular injury off school grounds. Inherent in the risk of vehicular injury is the prospect of an intervenor’s negligent or reckless driving of a car; to foresee the injurious end is to foresee that a careless intervenor, one way or another, may be the means. For this reason, it does not advance analysis in this case to focus on the details of the intervenor’s conduct. The essential question is not whether the district might have foreseen the risk of vehicular injury but whether the district, given its supervisory responsibilities, was obliged to take precautionary measures. This

2. A useful contrast is provided by *Williams by Williams v. Stewart*, 145 Ariz. 602, 703 P.2d 546 (App.1985). When a maintenance worker entered a swimming pool to unclog the drain, the dirty water allegedly caused his preexisting sinus infection to spread to his brain. Division Two of this court affirmed summary judgment, stating:

Even assuming that [a persistent failure to clean the pool] created an unreasonable risk of some kinds of harm, Williams’ injury was well outside the scope of foreseeable risk, was unrelated to what made the conduct negligent, and no liability resulted. This is not a case “where the duty breached was one imposed to prevent the type of harm which plaintiff ultimately sustained.”

question, we conclude, is neither one of duty nor causation; it is one of breach.²

UNREASONABLE RISK

[4] Not every foreseeable risk is an unreasonable risk. It does not suffice to establish liability to prove (a) that defendant owed plaintiff a duty of reasonable care; (b) that an act or omission of defendant was a contributing cause of injury to plaintiff; and (c) that the risk of injury should have been foreseeable to defendant. The question whether the risk was unreasonable remains. This last question merges with foreseeability to set the scope of the duty of reasonable care.³ Cf. 3 F. Harper, F. James & O. Gray, *The Law of Torts* § 18.2, at 656–57 (2d ed. 1986) (“[T]he inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e., negligent).”).

[5] To decide whether a risk was unreasonable requires an evaluative judgment ordinarily left to the jury. “Summary judgment is generally not appropriate in negligence actions.” *Tribe v. Shell Oil Co., Inc.*, 133 Ariz. 517, 518, 652 P.2d 1040, 1041 (1982). However, in approaching the question of negligence or unreasonable risk,

the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable. . . . Thus, for example, the jury may not require a train to stop before passing over each grade crossing in the country.

Id. at 603, 703 P.2d at 547 (citations omitted). The same cannot be said in this case. Here, to paraphrase *Williams*, assuming that the school’s failure to restrict egress from campus created an unreasonable risk of vehicular injury off campus, plaintiff’s injury was within the scope of foreseeable risk. Analysis thus shifts from the causal question whether the risk was foreseeable to the negligence question whether the risk was unreasonable.

3. *Williams v. Stewart* is a case where foreseeability analysis, not unreasonable risk analysis, placed the injury outside the scope of duty of reasonable care.

3 F. Harper, F. James & O. Gray, *supra* § 15.3, at 355-57.⁴

Coburn v. City of Tucson is a recent example of the court's preemption of the question of unreasonable risk. There, a child eastbound on a bicycle was struck and killed by a southbound driver in an intersection collision. 143 Ariz. at 51, 691 P.2d at 1079. The child had ignored a stop sign and entered the intersection in the lane of westbound (oncoming) traffic. The child could not see the driver approaching because a bush at the northwest corner obscured his view. The child's parents sued the city for failure to remove the bush; the city both controlled the street and owned the lot where the bush grew. *Id.* The evidence established, however, that the bush would not have obstructed the view of south- or northbound traffic for any eastbound cyclist or driver who had stayed in the eastbound lane and stopped at the stop sign. *Id.* at 54, 691 P.2d at 1082. The supreme court affirmed summary judgment for the city, finding that the city had not breached its duty to provide intersections that are reasonably safe.

The lack of liability may be framed in terms of duty, but we prefer that duty be recognized as a distinct element involving the obligation of the actor to protect the other from harm. Here, there was a duty, but no negligence; therefore, there is no liability.

Id. (citations omitted).

We make the same determination in this case. Members of our mobile society face the risk of collision whenever they are in cars. This risk is arguably higher for teenage passengers of teenage drivers. The school in this case, however, did nothing to

increase this general risk. It did not, for example, leave students inadequately supervised or instructed in a driver's education class. It did not tolerate drinking at a school affair. It simply chose not to restrict students to campus during the school day and thereby shield them from the ordinary risk of vehicular harm that they would face when out of school. We conclude that "the standard of reasonable conduct [did] not require the defendant[s] to . . . take precautions against" that risk. Prosser and Keeton, *supra* § 42, at 275. More simply stated, the defendants' omission did not create an unreasonable risk of harm.

Although, in taking this issue from the jury, we find that reasonable persons could not differ, we do not mask the element of policy in our choice. See 3 F. Harper, F. James & O. Gray, *supra* § 15.3, at 357-58. First, the question of the legal consequence of an open campus high school policy is not a random judgment best left to case-by-case assessment, but a question likely to recur and one on which school boards need some guidance. See Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal.L.Rev. 1867, 1926-27 (1966). Second, policy considerations appropriate to local school boards—local transportation options, inter-school transfer arrangements, and extracurricular activity locations, for example—are pertinent to the decision whether restrictions should be placed on high school students coming and going from the campus during ordinary hours. Finally, and most significantly, we decline to make high school districts that adopt an open campus policy insurers against the ordinary risks of vehicular inju-

4. In describing the question whether a risk was unreasonable as requiring evaluative judgment, we acknowledge that the question does not fall neatly into the category of question of fact or the category of question of law. These categories serve less as guides to analysis than as labels that attach after the court has decided whether to leave evaluation to the jury or preempt it for the court. See James, *Functions of Judge and Jury in Negligence Cases*, 58 Yale L.J. 667, 667-68 (1949) (The common generality that questions of law are for the court and questions of fact for the jury "has never been fully true in either of its branches and tells us

little or nothing that is helpful."); see also *Farrell v. Waterbury Horse R.R.*, 60 Conn. 239, 247, 21 A. 675, 676 (1891) ("[T]he result of comparing the conduct with the standard is generally spoken of as 'negligence' or the 'finding of negligence.' Negligence, in this last sense, is always a conclusion or inference, and never a fact in the ordinary sense of that word."); Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 Cal.L.Rev. 1867, 1881 (1966) ("[C]onsideration of the jury's role in negligence cases should proceed unadorned, and unobscured, by the law-fact terminology.").

ry that students face in driving off school grounds.

This is not to suggest that a school's supervisory omissions can never give rise to liability for an accident off campus. We do not pretend that the range of foreseeable and unreasonable risks from supervisory omissions is automatically circumscribed by the school fence. See *Hoyem v. Manhattan Beach City School Dist.*, 22 Cal.3d 508, 515-16, 150 Cal.Rptr. 1, 5, 585 P.2d 851, 855 (1978) (rejecting argument that off-campus consequences of on-campus supervisory lapses are beyond the range of duty).

Nor do we suggest that a calculus of unreasonable risk will yield equivalent results at every level of the schools. We leave for resolution in other unsupervised egress cases such questions as whether parents' supervisory expectations may reasonably differ at differing levels of the schools and whether the risks that may be deemed unreasonable may likewise differ with the age of the student involved.⁵ Our limited holding in this case is that the defendant high school and its teacher did not subject the plaintiff high school student to an unreasonable risk of vehicular injury by permitting unsupervised egress from class and campus during the school day.

CONCLUSION

Because plaintiff's injury was not a result within an unreasonable risk created by defendants, we hold that defendants were not negligent. The trial court's summary judgment in favor of defendants is affirmed.

LANKFORD and MCGREGOR, JJ.,
concur.



5. In a prior elementary school case, our court held that the abduction and slaying of a ten-year-old child who left campus without permission were unforeseeable consequences of the school's alleged supervisory lapse. *Chavez v. Tolleson Elementary School District*, 122 Ariz. 472, 478, 595 P.2d 1017, 1023 (App.1979). How-

170 Ariz. 404

Gregory Allen STANHOPE, ADOC
46210, Plaintiff/Appellant,

v.

The STATE of Arizona; Arizona Department of Corrections, and its officers, agents and employees, to-wit: Samuel Lewis, Director; J.C. Kenney, Assistant Director; Robert Goldsmith, Warden; Acting Warden Thomas; CPS Molnar; CPO Valdez; Sergeant Webber; CPO Fulton; Deputy Warden John Aveneti; Deputy Warden Sam Sublett, Defendants/Appellees.

No. 2 CA-CV 90-0263.

Court of Appeals of Arizona,
Division 2, Department B.

Aug. 22, 1991.

Reconsideration Denied Nov. 7, 1991.

Prisoner sought review of his placement in protective segregation unit. Motion to dismiss was granted by the Superior Court, Pinal County, Cause No. CIV-38763, Franklin D. Coxon, J., and prisoner appealed. The Court of Appeals, Fernandez, J., held that prisoner classification decision is not subject to judicial review under the Administrative Review Act.

Affirmed.

1. Appeal and Error ¶863

In reviewing grant of motion to dismiss for failure to state claim on which relief can be granted, Court of Appeals will uphold the lower court if it appears certain that plaintiff would not be entitled to relief under any state of facts susceptible of proof under the claims stated.

ever, because cases after *Chavez* have stressed that "we must take a broad view of the class of risks and victims that are foreseeable," we have recognized the question of unreasonable risk—the question of foreseeable risk—as dispositive in this case.

91 Cal.App.4th 974
Court of Appeal, Fourth District, Division 1,
California.

Michael William WILSON, a Minor, etc.,
Plaintiff and Appellant,

v.

COUNTY OF SAN DIEGO et al.,
Defendants and Respondents.

No. Do34614.

July 24, 2001.

Synopsis

Adolescent, through his father as guardian ad litem, sued the county, its program administrator for county's children's center, and two care workers provided by an employment agency, for negligence and negligent infliction of emotional distress after child was struck by car and seriously injured while running away from the center, where he was placed after being taken into protective custody. The Superior Court, San Diego County, No. 724450, [Judith McConnell](#), J., entered summary judgment for defendants. Adolescent appealed. The Court of Appeal, [Nares](#), J., held that defendants had no mandatory duty to prevent the adolescent from running away from the center, and injuring himself.

Affirmed.

Attorneys and Law Firms

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[Callahan, McCune & Willis](#) and [Norma S. Marshall](#), for Defendants and Respondents [Michael Polite](#), [Chris Johnson](#) and [Professional Resource Enterprises, Inc.](#)

Opinion

[NARES](#), J.

In this personal injury case, we hold that defendant County of San Diego (County) and its employees did not have a mandatory duty to ***978** prevent an adolescent from running away from Polinsky Children's Center (Polinsky), where he was placed after being taken into protective custody. Because there was no statutory basis to impose negligence liability on the defendants, we affirm summary judgments in their favor.

FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 1998, police officers took 13-year-old Michael William Wilson (Michael) to Polinsky¹ after he telephoned 911 and reported that his grandfather, with whom he was living, was drunk and had struck him on the head with the telephone ****176** when he was trying to talk to his mother, who was incarcerated.

The following afternoon, Michael telephoned his father in Northern California and asked to be picked up from Polinsky. His father said, "I can't come and get you right now." According to the father, he was "in a relationship with a pretty special woman," was "being pulled ... between him and her," and "couldn't have Michael all the time." Michael "got mad and said he was going to take off or that he was going to kill himself, and hung up the phone on [his father]." The father did not notify Polinsky staff about Michael's threat. That evening Michael ran away from Polinsky, unbeknownst to its staff. He was struck by a car and seriously injured when he darted onto Clairemont Mesa Boulevard.

Michael, through his father as guardian ad litem, sued County for negligence and negligent infliction of emotional distress.² Michael alleged that children taken into protective custody are "in extreme emotional states, frightened, paranoid, insecure, and subject to running away," and thus it was foreseeable he was at such risk and County had a duty to prevent him from running away from Polinsky. County moved for summary judgment, arguing there is no statutory basis for its liability. The court granted the motion, finding that County sustained its burden of showing that Michael "cannot establish the essential element that [it] breached a mandatory duty owed to [him]."

Michael amended his complaint to substitute parties in place of Doe defendants: [Geraldine Flaven](#), a program

administrator at Polinsky and a County employee; Professional Resource Enterprises, Inc., doing business as STAT Nurses Registry (STAT), an employment agency that provided residential care workers to Polinsky; and, Michael Polite and Christine Johnson, *979 STAT employees who were on duty at Polinsky the evening Michael ran away.

Flaven moved for summary judgment on the grounds that her duty, as a public employee, was commensurate with County's and, in any event, she was not on duty when Michael was at Polinsky. The court granted the motion on the same ground that it granted County's motion.

STAT, Polite and Johnson subsequently obtained summary judgment on the grounds that Polite and Johnson were "special employees of ... County by virtue of the degree of control exerted over the performance of [their] duties while employed at Polinsky." As employees of County, Polite and Johnson had no duty to prevent Michael from running away from Polinsky, and STAT could have no vicarious liability for their conduct. Judgments were entered for all defendants.

DISCUSSION

I

Standard of Review

"To prevail on [an] action [for] negligence, plaintiff must show that [the] defendants owed [him or] her a legal duty, that they breached the duty, and that the breach was a proximate or legal cause of [his or] her injuries. [Citation.]" (*Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1188, 91 Cal.Rptr.2d 35, 989 P.2d 121.) Because "duty is an issue of law to be decided by the court, the applicability of that defense [lack of duty] is amenable to resolution by summary judgment ." (*Freeman v. Hale* (1994) 30 Cal.App.4th 1388, 1395, 36 Cal.Rptr.2d 418.) A de novo standard **177 of review applies, and we must "strictly construe the moving party's papers and liberally construe those of the opposing party to determine if they raise a triable issue of material fact." (*Stimson v. Carlson* (1992) 11 Cal.App.4th 1201, 1205, 14 Cal.Rptr.2d 670.)

II

Liability of Public Agencies and Their Employees

A

The California Tort Claims Act ([Gov.Code, § 810 et seq.](#)) bars liability against public agencies and their employees except as specifically provided *980 by statute. ([Gov.Code, § 815.](#)) [Government Code section 815.6](#) provides: "Where a public entity is under a *mandatory duty imposed by an enactment* that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." ([Gov.Code, § 815.6](#)) (Italics added.) "Before the [public agency] will be required to confront a rebuttable presumption of negligence [citation], plaintiff must demonstrate that: (1) the statute which was violated imposes a mandatory duty, (2) the statute was intended to protect against the type of harm suffered, and (3) breach of the statute's mandatory duty was a proximate cause of the injury suffered. [Citations.]" (*Braman v. State of California* (1994) 28 Cal.App.4th 344, 349, 33 Cal.Rptr.2d 608.)

Michael asserts that [Welfare and Institutions Code³ section 300.2](#) imposed a mandatory duty on County and its employees to "stop [him] as he was running away," and to "keep him safe and protected by not giving him any chance to attempt to run away." [Section 300.2](#) states the purpose of juvenile dependency law (§ 300 et seq.) "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being may include provision of a full array of social and health services to help the child and family and to prevent reabuse of children. The focus shall be on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the

child....” (§ 300.2.)

As our Supreme Court has explained, “application of [Government Code] section 815.6 requires that the enactment at issue be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must *require*, rather than merely authorize or permit, *that a particular action be taken or not taken*. [Citation.]” (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498, 93 Cal.Rptr.2d 327, 993 P.2d 983, last italics added.) Section 300.2 does not require a public agency to take any *particular action*. Rather, it recites legislative goals and policies that must be implemented through a public agency’s exercise of judgment. (See *Ibarra v. California Coastal Com.* (1986) 182 Cal.App.3d 687, 694, 227 Cal.Rptr. 371 .) Section 300.2 cannot reasonably be interpreted to impose a mandatory duty on public agencies to guarantee the ****178** safety of dependent children in all circumstances.

***981** Moreover, Michael’s duty argument is belied by the statutory requirement that public agencies place dependent minors alleged or adjudged to come within section 300 in “nonsecure” facilities, and to segregate them from minors who are detained for delinquency. (§ 206.) “The term ‘nonsecure facility’ means a facility that is not characterized by the use of physically restricting construction, hardware, and procedures and which provides its residents access to the surrounding community with minimal supervision.” (*Ibid.*)

To comply with section 206, Polinsky adopted a written AWOL (absent without leave) policy that prohibits the physical restraint of a child over 12 years of age who is not developmentally delayed.⁴ In a 1998 “Security Inspection Report,” County’s Juvenile Justice Commission wrote: “It is the intent that [Polinsky] *not* be a secure lock-up facility, and it is not considered one. It is the type of setting where children must feel safe but not incarcerated as if they committed a crime. This philosophy presents issues that inhibit normal techniques of securing facilities that would resist intrusion or AWOL activity.” (Original underscoring.)

Under section 206, the public agency’s control over the “ingress and egress” of juvenile dependents in a nonsecure facility is characterized as being “no greater than that exercised by a prudent parent.” (§ 206.) Caretakers of dependent children are said to act in loco parentis. (*In re Nicole B.* (1979) 93 Cal.App.3d 874, 880, 155 Cal.Rptr. 916.) In *Gibson v. Gibson* (1971) 3 Cal.3d 914, 922, 92 Cal.Rptr. 288, 479 P.2d 648, the court abolished parental tort immunity. However, a parent’s negligence liability is typically based on a direct nexus

between his or her affirmative conduct, such as the operation of a car, and the child’s injury. (See *id.* at p. 921, 92 Cal.Rptr. 288, 479 P.2d 648.) The *Gibson* court explained that although a parent does not have “carte blanche to act negligently toward his [or her] child,” “the parent-child relationship is unique in some aspects, and ... traditional concepts of negligence cannot ***982** be blindly applied to it.” (*Ibid.*) Michael cites no authority to support a contention that a parent owes a duty to an adolescent to prevent him or her from running away from home.

Michael also relies on Polinsky’s “Child Care Worker Manual,” which provided that “[s]taff must be alert, knowing where each child is at all times; staff is expected to supervise and maintain appropriate play activities. Children are to be within view at all times.” The manual also stated that “[c]hildren must always be supervised by an authorized adult while at [Polinsky]. Under no circumstances is a child to be out of the sight of ... staff or another ****179** designated adult unless the child is sleeping.” Further, it was Polinsky’s policy to assign a worker to an individual child in a variety of circumstances, including “[c]hronic AWOL behaviors.”⁵

The term “enactment” as used in [Government Code section 815.6](#) means “a constitutional provision, statute, charter provision, ordinance or regulation.” ([Gov.Code, § 810.6](#).) “This definition is intended to refer to all measures of a formal legislative or quasi-legislative nature.” (Cal. Law Revision Com. com., 32 [West’s Ann. Gov.Code](#) (1995 ed.) foll. § 810.6, p. 155.) The term “regulation,” as used in [Government Code section 810.6](#) means “a rule, regulation, order or standard, having the force of law, adopted ... as a regulation by an agency of the state pursuant to the Administrative Procedure Act [Act].” ([Gov.Code, § 811.6](#).)

“The ... Act rulemaking provisions apply to *most state agencies* and their regulations. [Citations.] There are significant exceptions, however, both as to the agencies and types of regulations covered. [Citation.]” (9 Witkin, *Cal. Procedure* (4th ed. 1997) *Administrative Proceedings*, § 32, p. 1085, original italics; [Gov.Code, § 11340 et seq.](#)) For instance, the Act does not apply to “[a] regulation that relates only to the internal management of the state agency” or “[a] regulation that is directed to a specifically named person or to a group of persons and does not apply generally throughout the state.” ([Gov.Code, § 11340.9](#), subs.(d) & (i).) Michael does not contend, and has not demonstrated, that Polinsky’s employee manual constitutes an administrative regulation within the meaning of the Act. Accordingly, the manual imposed no mandatory duties on County or its employees. (See *Hucko v. City of San Diego* (1986) 179 Cal.App.3d

520, 522, fn. 1, 224 Cal.Rptr. 552.)

Michael's reliance on *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 150 Cal.Rptr. 1, 585 P.2d 851 is misplaced. In *Hoyem*, a *983 10-year-old boy was injured after leaving the school campus without permission. The court held the school district was not exonerated from liability as a matter of law for claims that it negligently supervised the child on school grounds. The court relied on former title 5 of the California Administrative Code, section 303, which provided: " 'A pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school.' " (*Hoyem, supra*, at p. 514, 150 Cal.Rptr. 1, 585 P.2d 851; Cal.Code Regs., tit. 5, § 303.) The court explained it "ha[d] no doubt that this rule is at least in part for the pupils' protection, and that the school authorities therefore bore the duty to exercise ordinary care to enforce the rule." (*Hoyem, supra*, at p. 514, 150 Cal.Rptr. 1, 585 P.2d 851.) Here, County and its employees had no statutory duty to ensure that Michael not leave Polinsky. *Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 110 P.2d 1044 and *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 87 Cal.Rptr. 376, 470 P.2d 360 are similarly unhelpful.

We are sympathetic to Michael's plight. We are, however, constrained to hold that County and Flaven were entitled to summary judgment on the grounds they had no mandatory duty to prevent him from running away from Polinsky. While perhaps one-on-one care should have been provided Michael, the decision was discretionary, not mandatory.

B

Michael contends he raised triable issues regarding whether Polite and Johnson **180 were independent contractors as opposed to "special employees" of County, and thus the summary judgment for them and STAT was improper. "Whether a person is an employee or an independent contractor is ordinarily a question of fact but if from all the facts only one inference may be drawn it is a question of law." (*Brose v. Union-Tribune Publishing Co.* (1986) 183 Cal.App.3d 1079, 1081, 228 Cal.Rptr. 620.)

" 'An "independent contractor" is generally defined as a person who is employed by another to perform work; who

pursues an "independent employment or occupation" in performing it; and who follows the employer's "desires only as to the results of the work, and not as to the means whereby it is to be accomplished." [Citations.] The most significant factor in determining the existence of an employer-independent contractor relationship is the right to control the manner and means by which the work is to be performed. [Citations.] "If control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent *984 contractor relationship is established." [Citations.]' [Citation.]" (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 431, 277 Cal.Rptr. 807.)

"A 'special employment' relationship arises when an employer lends an employee to another employer and relinquishes to the borrowing employer all right of control over the employee's activities. [Citation.] The borrowed employee is 'held to have two employers—his original or 'general' employer and a second, the 'special' employer." ' [Citation.]" (*Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1247–1248, 250 Cal.Rptr. 718.) During periods of "transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492, 162 Cal.Rptr. 320, 606 P.2d 355.) "The special employment relationship and its consequent imposition of liability upon the special employer flows from the borrower's power to supervise the details of the employee's work." (*Ibid.*)

The trial court determined that "defendants have established, and plaintiff has failed to controvert, that Polinsky controlled and directed the essential duties of defendant's work...." (Original capitalization omitted.) We agree with this assessment. In declarations, Polite and Johnson stated they (1) received their work schedules and daily work assignments from Polinsky, (2) "received training in the performance of [their] duties as ... residential care worker[s] from County employees,"⁶ (3) were "expected to follow and implement ... County ... policies and procedures for Polinsky," (4) were "under the supervision and received direction in performance of [their] duties from a Residential Care Supervisor and other County employees in supervisory positions," and (5) were not supervised by STAT in the performance of their work at Polinsky. An employee supervisor at Polinsky testified in deposition that workers provided by STAT "were supervised in the same manner as any County employee."

Michael offered no evidence suggesting County did not control the manner and means by which Polite and

Johnson performed ****181** their work. Evidence that STAT contracted to provide County a “certain number of man hours of work per year” and assigned Polite and Johnson to Polinsky does not create a triable issue of material fact.

The court correctly determined that Polite and Johnson were “special employees” of County. Accordingly, as with the County and Flaven, no duty ***985** to prevent Michael from running away from Polinsky can be attributed to Polite, Johnson or STAT.

DISPOSITION

The judgments are affirmed.

BENKE, Acting P.J., and **HUFFMAN**, J., concur.

All Citations

91 Cal.App.4th 974, 111 Cal.Rptr.2d 173, 01 Cal. Daily Op. Serv. 7371, 2001 Daily Journal D.A.R. 9055

Footnotes

- 1 Polinsky is a facility operated by County.
- 2 Michael also named the driver of the car that struck him, his grandfather and other defendants, but they are not involved in this appeal.
- 3 All further statutory references are to the Welfare and Institutions Code except where otherwise specified.
- 4 Polinsky’s AWOL policy states: “[Polinsky] does not condone runaway behavior and reasonable precautions should be taken to discourage this unacceptable method of leaving the facility. While it is recognized that for some older children running away has become an adaptive response to situational pressure, such behavior is considered high risk. For this reason it is difficult to prevent a child from running away from an unlocked facility like [Polinsky]. [¶] Staff can help minimize runaway behavior.... Diligent supervision, active programming, and concerned sensitive staff can and do make a difference with the majority of children....”
The policy advocated AWOL prevention by having staff do such things as “build rapport with each new child who enters [Polinsky],” “be available when a child wants to talk,” “be alert to AWOL plans and use active supervision techniques,” “be aware of the location and change of location of each child at all times,” “[o]pposing the minor by ... creat[ing] a barrier to the child’s movement,” and “[f]ollowing the minor.”
- 5 Michael had apparently run away from Polinsky on a previous occasion.
- 6 Michael asserts that “[t]here was no job training at [Polinsky], only staff and resident interaction.” However, in his responsive separate statement, Michael conceded it was undisputed that “Johnson and Polite received training to perform their job duties from ... County.”

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on the date stated below, I caused to be delivered a true and correct copy of the following document(s), to the following:

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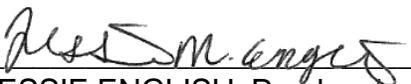
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October 05, 2020 - 4:33 PM

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