

No. 98280-5

No. 79655-1-I

COURT OF APPEALS, DIVISION I,
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 political
subdivision of the State of Washington;

Respondent,

and

WILLIAM KLEIN and JANE DOE KLEIN and the marital
community comprised thereof;

Defendants.

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A. INTRODUCTION

In violation of the Ferndale School District's ("District") long-standing, broad common law duty to protect him while he was under its care and custody, 15-year-old Gabriel Anderson was killed by a driver who fell asleep and ran off the road striking him and other students. Gabriel was on an off-campus excursion undertaken by his physical education ("PE") teacher without his grandmother's permission and contrary to District policy.

The trial court erred in ruling as a matter of law that Gabriel's Estate failed to prove that such a traffic accident was foreseeable, applying the wrong standard for foreseeability. In doing so, the trial court improperly intruded upon the jury's fact-finding function on a matter that is clearly a question of fact under Washington law.

This Court should reverse the trial court's summary judgment order and afford the Estate its day in court before a jury for Gabriel's tragic, and unnecessary, death.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

1. The trial court erred in entering its February 15, 2019 order dismissing the Estate's claims against the District.

(2) Issues Pertaining to Assignment of Error

1. Where the District owed Gabriel a protective duty and there was ample testimony, including that of the District's own expert, his teacher who took the students on the improper off-campus excursion, and the Estate's experts, that a driver leaving the roadway and striking pedestrians was within the zone of danger for an off-campus excursion on roadways such as the one in this case, did the trial court err in determining that Gabriel's death was unforeseeable as a matter of law? (Assignment of Error Number 1).

2. Similarly, where fact issues abounded as to whether Gabriel's death was caused by the District's negligence in allowing an unnecessary off-campus excursion, without his grandmother's permission and contrary to District policy, would the trial court have erred in ruling on causation as a matter of law? (Assignment of Error Number 1).

C. STATEMENT OF THE CASE

Gabriel Anderson was a student in the Ferndale School District in Whatcom County, attending Windward High School ("WHS"). CP 6-7, 15-16. WHS was ostensibly a modified closed campus. CP 239, 514. While the District and WHS had policies and procedures in place for staff taking students off campus, if teachers wanted to take students off campus, they had to follow "Field Trip, Excursions and Outdoor Education" (Policy No. 2320) and "Field Trip, Excursion and Outdoor Education Procedure" (Policy No. 2320 P-1) (collectively referenced hereafter as "Policy 2320"). CP 379, 461-64. *See* Appendix. The terms "field trip" and "excursion" are not defined in that Policy. Scott Brittain, the District's assistant superintendent and a member of the District's

executive team, CP 448-49, testified while a “field trip” would be a “well-planned-long-in advance field trip that takes a lot of logistics,” an “excursion” under Policy 2320 “does not take nearly the time and energy to plan...” and “it would be much more local, or could be repetitive.” CP 458. In an excursion, students would stay “within the confines of the area, being the city,” so that an excursion under Policy 2320 would be in the Ferndale area. CP 458-59. The District’s Mark Hall testified that a “field trip” and “excursion” were synonymous terms. CP 509. Brittain said Policy 2320 and the applicable procedures would apply to excursions taken by District students. CP 459.

Policy 2320 requires a teacher, among other requirements, to:

- Submit a field trip request form to the principal or designee a minimum of four weeks prior to the event;
- Following principal/designee approval, send parents and guardians notification/information letter and permission form as soon as possible, but no later than three weeks prior to the scheduled activity or trip. Notification and permission form include detailed information regarding goals, destination, date, departure and return times, transportation, appropriate dress, anticipated expenditures, meals, safety and behavior standards, telephone numbers, and a request for any health/medical-related information;
- Make provision to ensure that students are not left at an activity or trip site;
- Make plans for keeping groups together as appropriate;
- Provide the principal with a list of students and chaperones taking part in the activity.

CP 461-62. The principal or designee then must:

- Review and approve or disapprove the field trip request as soon as possible, but no less than three weeks prior to the event. “Approval” requires that the principal/designee will have confirmation for all aspects of the field trip, including financial, transportation and student health factors;
- Ensure that prior notification to parents or guardians is disseminated and that student permission slips have been obtained;
- In the event that a field trip opportunity becomes available in a way that does not fit the above timelines, the principal/designee may approve the field trip if all issues (e.g., financial, transportation, student health) are fully addressed.

CP 462-63.

Consistent with Brittain’s testimony, Policy 2320 also applied to “walking classes” or regularly scheduled trips off campus. Two former District PE teachers, Rick Brudwick and Jill Iwasaki, confirmed that Policy 2320 applied to classes leaving the WHS campus. Brudwick was a PE teacher at the District’s Ferndale High School for 34 years, who utilized the District’s “Parent/Guardian Permission for Daytime Student Travel” form for a “walking class” for Ferndale High School PE students. CP 372, 475.¹ As part of their regular curriculum, PE students in Brudwick’s walking class would take walks off campus during their class period around Ferndale. CP 473. Before any student could leave campus,

¹ Brudwick had his own “Walking Contract for Mr. Brudwick’s Walking Class” that he utilized *in addition* to the District’s form that he treated as mandatory, requiring parental permission. CP 374-75, 468-69.

however, Brudwick received parent/guardian permission, or the students never left campus. CP 470, 475. He stated: “We didn’t leave campus until – for our first walk until everybody had these on file.” *Id.* When asked if he ever took students off campus without parent/guardian permission, Brudwick answered “No.” CP 476. Iwasaki, WHS’s PE teacher prior to Evan Ritchie, testified that she could not recall a time when she took students off campus without having their parent/guardian sign and return a field trip permission form for the student. CP 480. She also testified that WHS did a community service day to pick up trash along West Smith Road that required students to obtain parent/guardian permission by having their parent/guardian sign the field trip/excursion permission form. CP 490.

On June 10, 2015, Ritchie suddenly² decided to take his morning

² Former Superintendent of Public Instruction Judith Billings testified that such a “spur of the moment” excursion was unwise. CP 379 (“A teacher should also plan ahead when taking students off campus.”). As Dennis Smith, the Estate’s expert, testified:

There is a clear and compelling reason why school districts like FSD establish policies for off campus field trips and enforce these policies through their site principals. What occurred at Windward High School was precisely the type of poor decision making that a school district seeks to prevent through such a policy. One can only imagine the chaos that would be created in a K-12 school system if teachers could simply walk up to their principal on any given morning and inform the principal that they wished to take their class on an off-site field trip to the nearby park, shopping mall, fire station, downtown city hall, community swimming pool or one of any number of venues near the school – all because they just because they felt like it that day. Chaos would surely ensue with parents not knowing their child was being

and afternoon PE classes, 24-25 students, without a chaperone or other adult assistance, off campus for a walk with no educational purpose to it (merely discussing “summer plans”). CP 310, 352, 491-92.³ The District *admitted* Ritchie did not seek additional teachers to supervise the students. CP 16. The District *admitted* that he did not obtain parent/guardian permission. CP 16, 18. The District *admitted* that “the off-campus walk was not authorized in compliance with the District’s policy on Field Trips and Excursions.” CP 15, 17, 18.

Ritchie left campus with Gabriel and the other students walking down West Smith Road, past the school safety zone (where the speed limit is a legally reduced 20 miles per hour) to the end of the sidewalk adjacent to a truck body shop. CP 492. Vehicles on the road were traveling at

removed from the safe confines of the school; with no established travel route or emergency procedures in place; and, without any assurance of adequate supervision. The FSD School Board Policy #2320 and the accompanying procedure is intended to prevent just this type of random decision making at the site level...

CP 350.

³ Ritchie claimed that he had the approval of WHS’s former principal, Tim Keigley, for the impromptu walk. CP 312, 491-92. Keigley stated he remembered very little about the morning of June 10, 2015. He did not remember if he knew Ritchie was taking his PE class for a walk down West Smith Road. CP 500-01. Keigley said he learned after the incident where Ritchie had gone with his class and it was his understanding “...they didn’t go beyond where the sidewalk ends.” CP 501. Keigley’s memory suddenly improved in his declaration where he claimed he spoke in detail about the excursion with Ritchie. CP 367. This clearly created a credibility issue for the jury.

This was also not Ritchie’s first time taking students on excursions without complying with Policy 2320. CP 310.

times up to 40 miles per hour, the posted speed limit. CP 16, 187, 403. At times, the students were spread out over 250 meters and some were out of his line of sight and already back at the school. CP 493-94. The District *admitted* that the students were spread out. CP 16. Ritchie allegedly instructed the students on the way back to WHS to cross West Smith Road on the west end at any time to get back to the north side of West Smith Road. CP 494-95. He did not instruct them to stay on the north side of the street, nor did he tell them to use the crosswalks. *Id.* The District *admitted* that students crossed the Road without using crosswalks. CP 16.

While returning to WHS, with his back to oncoming traffic, Gabriel and three other students were struck on the south side of West Smith Road by William Klein's black SUV outside of the school safety zone (the 20 mph reduced speed zone surrounding the WHS campus) when Klein fell asleep at the wheel and drove off the road. CP 8-9, 16-17, 403, 406-15 (pictures of roadway). Gabriel was 15 years old when he died. CP 6, 14-15. Gabriel's classmate, Shane Ormiston, was also killed, and two of his classmates, Michael Brewster and Kole Randall, were gravely injured. CP 9, 17. As the District *admitted*, Gabriel had no fault in his death. CP 19.

The Estate filed a timely notice of claim with the District to which it did not respond. CP 6-7, 15. The Estate then filed the present action in

the Whatcom County Superior Court on November 30, 2015 against William Klein. CP 1-4. It subsequently filed an amended complaint also suing the District. CP 5-13. Both defendants answered. CP 14-25. The District moved for summary judgment, asking that the Estate's claims be dismissed. CP 26-47. The Estate opposed the entry of an order on summary judgment. CP 324-45. The case was assigned to the Honorable Raquel Montoya Lewis, who agreed with the District in a memorandum opinion dated January 9, 2019. CP 569-70. The trial court entered a formal order on February 15, 2019 granting the District's motion for summary judgment and certifying the order under CR 54(b), as requested by the Estate. CP 645-51.⁴ This timely appeal followed. CP 652-62.

D. SUMMARY OF ARGUMENT

The trial court erred in concluding that the District did not owe a duty of care to Gabriel Anderson. Plainly, Washington law provides that the District owed a protective duty to Gabriel, a student under its care and custody, even though his death occurred off-campus. The scope of the District's duty is limited only by foreseeability principles. Properly applied, foreseeability is a fact question for the jury and does not require

⁴ The District attempted to have the trial court make findings on summary judgment. CP 571-82. That was plainly improper. RAP 9.12. Such "findings" are superfluous on summary judgment and have long been disregarded on appeal by this Court. *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243, review denied, 118 Wn.2d 1004 (1991).

that a school district have knowledge of the specific risk of harm, but only whether the student is in a more general “field of danger.” Ample evidence documented that Gabriel was within the field of danger created by the District’s staff taking him and other PE students for an unnecessary excursion along a roadway near WHS, an excursion that itself was conducted in an unsafe manner by the District staff.

Similarly, although the trial court did not base its decision on causation, it would have erred had it concluded as a matter of law that the District’s negligence in condoning the off-campus excursion did not proximately result in Gabriel’s death. But for the District’s negligence in violating its own policy regarding off-campus excursions, this educationally unnecessary excursion would not have occurred; in particular, the District failed to secure his grandmother’s permission for the excursion. Gabriel would not have been on the excursion where his death occurred. Also, but for the District’s negligent conduct of the actual excursion itself, Gabriel would not have been in harm’s way.

Gabriel’s Estate is entitled to its day in court before a jury to seek appropriate redress from the District for its negligence that lead to Gabriel’s tragic, and unnecessary, death.

E. ARGUMENT

(1) Standard of Review on Summary Judgment

Summary judgment is a drastic remedy “appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would truly be “useless.” *Wheeler v. Ronald Sewer Dist.*, 58 Wn.2d 444, 446, 364 P.2d 30 (1961). The District as the moving party, bore the burden of establishing its right to judgment as a matter of law.

In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party, here, Gabriel’s Estate. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Where there are significant witness credibility issues present in a case, as here, it has long been the rule in Washington that summary judgment is inappropriate. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) (“Credibility issues involving more than collateral matters may preclude summary judgment.”).

Also, when experts come to differing conclusions on key issues, that creates an issue of fact for the jury. In a case involving alleged insurer bad faith, this Court put the point succinctly:

At the summary judgment stage with which we are concerned, both appeared qualified to render opinions whether the accident caused Leahy's DM. There was a clear conflict between two experts on a central question: causation. Could this insurer, on this record, claim that there was no genuine issue of material fact on the reasonableness of its action in solely relying on its expert? We think not.

Leahy v. State Farm Mut. Auto. Ins. Co., 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018). See also, *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010). *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.3d 134 (2012) (experts in disagreement on cause of auto crash); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 295 P.3d 816 (2013) (differing opinions in medical negligence action as to cause of patient's injury); *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017), *review denied*, 435 P.3d 274 (2019) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate.").

This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

(2) The Trial Court Erred in Granting Summary Judgment to the District on Duty

(a) The District Owed Gabriel a Broad Protective Duty of Care⁵

Washington law has long recognized the existence of a special relationship between a school district and its students that obligates the district to protect students in its custody from reasonably anticipated dangers. The District has *admitted* that such a duty exists. CP 9-10, 18. (“The District admits that it has a duty to protect its students including Gabriel Anderson from reasonably foreseeable dangers.”).⁶ This standard was articulated by our Supreme Court as early as *Briscoe v. School District No. 123, Grays Harbor County*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949),⁷ a case involving injuries to a student at the hands of fellow students in a game on school grounds during the afternoon recess. In reversing a dismissal of the plaintiff’s action, the Court stated:

...when a pupil attends a public school, he or she is subject to the rules and discipline of the school, and the protective

⁵ Generally, duty is a question of law for the court. *Munich v. Skagit Emergency Comms. Ctr.*, 175 Wn.2d 871, 877, 288 P.3d 328 (2012). As will be noted *infra*, the scope of any duty is bounded by principles of foreseeability, a question of fact for the jury.

⁶ The Office of the Superintendent of Public Instruction has made a district’s obligation to safeguard student safety crystal clear, noting in its training module “What Every Employee Must Be Told:” “Even before education, a school district’s *primary responsibility is the safety of the students.*” CP 378 (emphasis added). The District owed Gabriel an *in loco parentis* duty of reasonable care to protect him from foreseeable harm.

⁷ See also, *Gattavara v. Lundin*, 166 Wash. 548, 554, 7 P.2d 958 (1932) (district owed a duty where it allowed cars to traverse school grounds during school hours); *Rice v. School Dist. No. 302 of Pierce Cty.*, 140 Wash. 189, 248 Pac. 388 (1926) (live electric wire).

custody of the teachers is substituted for that of the parent.

As a correlative of this right on the part of a school district to enforce, as against the pupils, rules and regulations prescribed by the state board of education and the superintendent of public instruction, 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 among which dangers we think should fairly be included the danger incurred from playing games inherently dangerous for the age group involved, or likely to become dangerous if allowed to be engaged in without supervision. *See 2 Restatement, Torts* (1934) 867, § 320.

The extent of the duty thus imposed upon the respondent school district, in relation to its supervision of the pupils within its custody, is that it is required to exercise such care as an ordinarily reasonable and prudent person would exercise under the same or similar circumstances.

Five years after *Briscoe*, our Supreme Court again discussed a school district's special duty in *McLeod v. Grant County School Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953). The Court noted that a District's custodial role imposes a duty of "special application" to prevent third persons from harming students. *Id.* at 322. Citing the *Restatement (Second) of Torts*, § 320,⁸ the *McLeod* court explained:

⁸ That section of the *Restatement* provides:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of third persons, and (b) knows or should know if the necessity and opportunity for exercising such control.

Id. A school district owes a special duty to its students to anticipate dangers that may reasonably be anticipated and to take reasonable precautions to prevent harm to the students from occurring. *Id.* at 320. Foreseeability limits the scope of a district's protective duty; an occurrence is not foreseeable unless it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *Id.* at 323.

Among the foreseeable risks to students are intentional torts. The *McLeod* court found a school district potentially breached its duty to a

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- a) knows or has reason to know that he has the ability to control the conduct of the third persons, and
 - b) knows or should know of the necessity and opportunity for exercising such control.

Comment d to that section required the District to *anticipate* danger to its students:

One who has taken custody of another may not be required to exercise reasonable care for the other's protection when he knows or has reason to know that the other is in immediate need of it, but also to make careful preparations to enable him to give effective protection when the need arises, and to exercise reasonable vigilance to ascertain the need of giving it.

student raped by other students in an unlocked, unsupervised room under the playing field bleachers. *Id.* at 318. The Court noted that the question was not whether the school should have anticipated forcible rape by 12-year-olds, but whether a “darkened room under the bleachers might be utilized during periods of unsupervised play for acts of indecency between school boys and girls.” *Id.* at 322. In other words, “the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” *Id.* at 321. Safeguarding children from the general danger would have protected the rape victim from the particular harm. *Id.* In such a context, the intentional misconduct of third parties is considered foreseeable despite the fact that there was no allegation of prior misconduct of a similar nature by the offending student. *Accord, M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 193, 252 P.3d 914, *review denied*, 173 Wn.2d 1006 (2011) (confirming that for purposes of foreseeability risk had to be in general field of danger where special relationship is present).⁹

⁹ This Court in *J.N. By & Through Hager v. Bellingham School Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994), reached a similar result. There, a first grade student was repeatedly sexually assaulted by a fourth grade student on school grounds in the boys’ rest room. The trial court granted summary judgment to the school district. This Court reversed a summary judgment for the school district, stating: “[W]here the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the protection of other children

In *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005), the Court described the duty owed by a district in a case where a teacher engaged in sexual conduct with a student. In rejecting the notion that an underage student's "consent" to the sexual conduct could constitute contributory fault, the Court explained the special relationship between the school and its students:

...a school has a "special relationship" with the students in its custody and a duty to protect them "from reasonably anticipated dangers." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 44, 929 P.2d 420 (1997) (citing *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953)). The rationale for imposing this duty is on the placement of the student in the case of the school with the resulting loss of the student's ability to protect himself or herself. *Niece*, 131 Wn.2d at 44, 929 P.2d at 420. The relationship between a school district and its administrators with a child is not a voluntary relationship, as children are required by law to attend school. *See McLeod*, 42 Wn.2d at 319, 255 P.2d 360. Consequently, "the protective custody of teachers is mandatorily substituted for that of the parent."

Id. at 70. Given the vulnerability of children under the care of school districts, the Court also ruled that contributory fault could not be asserted by a school district against a student. *Id.* at 70-71.

from the potential for harm caused by such behavior." *Id.* at 60. The district there had ample notice of the violent history of the student who committed the assaults, even though it did not have the notice of the student's specific violent behavior, a fact important to the trial court. *Id.* at 56.

Similarly, in *N.L. v. Bethel School Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016), a student who was a registered sex offender persuaded a 14-year old fellow student to leave campus where he later raped her. Our Supreme Court had little difficulty in reversing a summary judgment in the school district’s favor, reaffirming yet again that school districts have a special protective duty regarding children in their care. *Id.* at 430. That duty extends to off-campus activities. *Id.* at 431-35.¹⁰ The Court also reaffirmed that for purposes of the foreseeability analysis, the risk had to fall within “the general field of danger,” and need not be a specific harm that befell the student. *Id.* at 430-31. An intervening act does not render the risk unforeseeable. *Id.* at 435-36. Moreover, the Court rejected the trial court’s determination of proximate cause as a matter of law where there was a fact question as to whether the district should have allowed a registered sex offender to be in contact with a vulnerable female student at all. *Id.* at 436-39.

The most recent Supreme Court treatment of a school district’s duty to students is *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269,

¹⁰ Prior cases had indicated that a district’s special duty extends to off-campus activities. *E.g.*, *Carabba v. Anacortes School Dist. No. 103*, 72 Wn.2d 939, 435 P.2d 936 (1967) (athletics) or even extracurricular activities. *Sherwood v. Moxee School Dist. No. 90*, 58 Wn.2d 351, 363 P.2d 138 (1961) (death during lettermen’s initiation ceremony); *Travis v. Bohannon*, 128 Wn. App. 231, 238, 115 P.3d 342 (2005) (injuries occasioned from use of a hydraulic log splitter in the course of an off-campus extracurricular “work day.”).

428 P.3d 1197 (2018). There, the Court again affirmed the broad protective duty owed by school districts to students in their care, stating that when parties have a special custodial relationship, like the relationship between a school district and its students, they enter a larger pool of risk and are required to take affirmative precautions for the aid or protection of such students. This duty extends to all reasonably foreseeable harm even when that harm is caused by third parties. As a result, school districts have a duty to *anticipate* dangers which may reasonably be anticipated, and to then take precautions to protect the students in their custody from such dangers. *Id.* at 277.¹¹

In sum, there can be little question that under well-established Washington law, the District owed Gabriel a broad protective duty, standing *in loco parentis* to him while he has in its care and custody.

(b) There Was a Question of Fact on the Foreseeability of Gabriel's Harm

The District tried to characterize “a sleeping driver,” as an “improbable” and/or criminal occurrence that was unforeseeable as a matter of law. CP 35, 532. The trial court seemingly agreed with the District, intruding upon the jury’s function in concluding that Gabriel’s

¹¹ In that case, a student was severely injured by a radial table saw in woodshop. The Court held that the duty at issue was not “heightened” and an instruction so stating need not be given, but nevertheless reaffirmed the principle that a district has a protective duty as to students in its care, requiring a district to anticipate risks and account for them. *Id.* at n.3.

death was unforeseeable as a matter of law. CP 570. In so doing, it erred by misapplying the requisite foreseeability analysis. The District's duty was not limited only to circumstances where the "District had any knowledge of Klein's dangerous driving propensities," or when there was a "history of similar occurrences [car accidents]," as the District contended. CP 35-36. Foreseeability was not an issue for the trial court in any event because it is a *fact question*. *McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 764, 344 P.3d 661 (2015) (foreseeability principles apply both as to the existence of a duty and its scope; where a duty exists, foreseeability defines the scope of the duty and is a question of fact).

Generally, liability is not predicated upon the ability to foresee the exact manner in which an injury may be sustained. *Berglund v. Spokane County*, 4 Wn.2d 309, 103 P.2d 355 (1940). Specifically, a school's *in loco parentis* duty requires it take reasonable care in protecting students from the "general field of danger which should have been reasonably anticipated," not the specific harm. *McLeod*, 42 Wn.2d at 321. A school district's duty is "to anticipate dangers which may reasonably be anticipated, and then to take precautions to protect the pupils in its custody from such dangers." *N.L.*, 186 Wn.2d at 431 (citing *McLeod*, 42 Wn.2d at 320). The trial court should have looked to whether the harm to Gabriel

fell within the general field of danger for an excursion off-campus.

In numerous cases, Washington courts have rejected a “specific injury” analysis of foreseeability. The *McLeod* court roundly rejected the same argument the District made below to avoid its duty in this case: “...counsel unjustifiably restrict the issue when they ask us to focus attention upon the specific type of incident which here occurred—forcible rape...Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated.” *Id.* The exact mechanism of injury need not be foreseen:

The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.

Id.

The Supreme Court’s decision in *Rikstag v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969), although pertaining to causation, is illustrative of why the trial court was wrong. The Court reaffirmed that “it is not...the unusualness of the act that resulted in injury to plaintiff that is the test of foreseeability, but whether the result of the act is within the ambit of hazards covered by the duty imposed upon defendant.” *Id.* at 269. There, the plaintiff decedent passed out in tall grass at night and was killed by the

defendant who was looking for him and accidentally drove over him. The Court determined that a jury could find that operating a truck unreasonably included the harm sustained by the plaintiff, getting run over in the tall grass. *Id.*

Our Supreme Court reaffirmed this foreseeability yet again in *Hendrickson*, noting that this duty requires districts “to protect their students from foreseeable harm, even when that harm is caused by third parties.” 192 Wn.2d at 276.

This foreseeability analysis must be made in the specific context of the District’s broad protective duty arising out of its special *in loco parentis* relationship of students as this Court has noted in school liability cases. *See, e.g., Hopkins v. Seattle Public School District No. 1*, 195 Wn. App. 96, 380 P.3d 584, *review denied*, 186 Wn.2d 1029 (2016) (failing to give an instruction addressing the special protective relationship of a district to a student in conjunction with foreseeability was error); *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 383 P.3d 1053 (2016) (foreseeability is affected by the special relationship of a district to its students and its duty to anticipate dangers and to take precautions against them).

It is likely that the trial court was confused on the foreseeability analysis because the District tried to import the standard for foreseeability

in *McKown* and similar premises liability cases to the school district setting.¹² In *McKown*, the Court determined that for a premises owner's duty of care to invitees, third party intentional conduct was foreseeable *only* if there is a history of prior similar incidents on the premises within the prior experience of the premises owner that are similar in nature and location to the present incident, sufficiently close in time and sufficiently numerous. Here, the trial court was concerned the stretch of road in question "had no particular danger associated with it and, as both parties agreed, there had been one vehicle-pedestrian accident in the last ten years prior to this one." CP 570. The trial court focused on the wrong question. As noted above, the issue is whether the risk is within the general field of danger for the plaintiff. *No Washington case* has applied *McKown's* standard of foreseeability for premises owners to school districts.

Rather, in this case, ample evidence documented the fact that Gabriel was within the "general field of danger" occasioned by the District's negligence. For example, the National Highway Traffic Safety

¹² Below, the District attempted to overcome its clear duty by arguing employer and premises liability case law, such as *Minahan v. Western Washington Fair Ass'n*, 117 Wn. App. 881, 73 P.3d 1019 (2003), *review denied*, 151 Wn.2d 1007 (2004) and *Raider v. Greyhound Lines, Inc.*, 94 Wn. App. 816, 975 P.2d 518, *review denied*, 138 Wn.2d 1011 (1999). Neither case involves a school district's broad *in loco parentis* duty to children. *Minahan* concerns whether an employer or school is liable for telling an adult, not a student, where to park and how to load equipment. 117 Wn. App. at 885. *Raider* is a premises liability case. 94 Wn. App. at 817-18. The District argued that *Minahan* and *Raider* demonstrate that it had no duty to protect Gabriel from foreseeable criminal conduct. CP 27, 34-37. Not so, given the school district duty cases cited *supra*.

Administration (“NHTSA”) found that in 2013 a pedestrian was killed in a crash every 111 minutes, and another pedestrian injured in a crash about every 8 minutes; the yearly pedestrian fatality totals in the United States are in the several of thousands. CP 394.¹³

Case law also confirms that vehicular traffic hitting pedestrians is eminently foreseeable.¹⁴ In *Berglund*, the Supreme Court found a car swerving out of its lane, across the road, and into a pedestrian infant was foreseeable, *rejecting* the argument advanced by the District here and adopted by the trial court that the exact accident must be foreseeable:

Respondent further contends that since it is alleged in the complaint that the automobile which struck the child left its proper lane and collided with the infant pedestrian on the wrong side of the bridge, the injury was not reasonably foreseeable, and that therefore the county could not be charged with negligence in failing to make proper provision for persons using the bridge on foot. In other words, respondent contends, in effect, that negligence can

¹³ This national data is confirmed by other sources. In a 2018 study by the AAA Foundation for Traffic Safety, hit-and-run crashes are on the upswing. The majority of such crashes and fatalities from them involve vehicles striking pedestrian. In 2018, 2049 people were killed in such incidents, of whom 1229 were pedestrians. For Washington State in the same year, 13 people were killed. *See* <https://newsroom.aaa.com/2018/hit-run-deaths-hit-record-high/>.

The Washington Traffic Safety Commission also publishes important data on fatalities and serious injuries that are vehicle-related. In Whatcom County for 2015-17, there were 5 pedestrian fatalities and 26 serious injuries involving vehicles. <https://wtsc.wa.gov/research-data/quarterly-target-zero-data/>.

¹⁴ Indeed, the Legislature has imposed a duty on drivers to anticipate children on roadways. RCW 46.61.245(1). That statute commands that “every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child...upon a roadway.”

be predicated only upon ability to foresee the exact manner in which injury may be sustained. That is not the correct test. The formula applicable to a finding of negligence is whether or not the general type of danger involved was foreseeable. ‘* * * the courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if ‘foreseeability’ refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbably and highly unexpected, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.’ Harper on Torts, 14, § 7. See, also, Restatement of Torts, 1173, § 435.

The general type of harm threatened here was that of personal injury resulting from being struck by a passing automobile. While there may be a greater probability that a pedestrian will be struck by an automobile approaching along the pedestrian’s side of the road than by one approaching on the opposite side, it is a well known fact that automobiles do, at times, for one reason or another, forsake their lane of travel and proceed in face of oncoming traffic. The records of every court about with such instances. It cannot be held, as a matter of law, that such occurrences are so highly extraordinary or improbably as to be wholly beyond the range of expectability.

The general danger, in this case, under the situation which obtained, included not only the risk of harm from automobiles passing along one side of the bridge, but included the risk arising from automobiles approaching along the opposite side and suddenly swerving over to the side along which the pedestrian was proceeding.

4 Wn.2d at 319-20. Similarly, in *Thompson v. Devlin*, 51 Wn. App. 462, 754 P.2d 1003 (1988), Division II reversed a summary judgment for a

school district in a case where a driver ran a red light, ignored a school traffic patrol officer standing with a stop flag in the road, and ran into a student. Division II held that it was foreseeable that a student could be run over when a school district failed to take reasonable care in supervising and helping students cross a street. *Id.* at 464, 471.

Finally, under the particular facts of this case, the risk posed by drivers like Klein to persons on the roadway was plainly within the field of danger for such pedestrians. The Estate adduced ample testimony that it was foreseeable that Gabriel would be injured or killed on such an off-campus excursion. Both of the Estate's experts, Dr. Dennis Smith and former Superintendent of Public Instruction Judith Billings, unambiguously so testified. CP 355-56, 381-82. As noted *supra*, the existence of a dispute among experts, as here, on an issue appropriately subject to expert opinion like foreseeability confirms the existence of a *question of fact* for the jury.

Even Sherryll Kraizer, the District's own expert, indicated in her deposition it was foreseeable that there could be harm to the students in Ritchie's class when they went off campus:

So going back in time to the point where Mr. Ritchie asked Mr. Keigley to go off campus, is it your testimony today that Mr. Keigley – it was fine for him to let Mr. Ritchie go off campus with his PE classes that day?

MR. SIMMONS: Object to form.

THE WITNESS: He gave him permission.
(By Ms. O'Brien) Okay. Is it your testimony that it wasn't foreseeable that there could be harm to those students if they went off campus?
MR. SIMMONS: Object to form.
THE WITNESS: *It is foreseeable that there could be harm.*

CP 515. (emphasis added).

Ritchie's own testimony also created a fact question. He acknowledged that there were dangers in taking students off campus, including distracted drivers, drivers who drive faster than the posted speed limits, drivers losing control, driving off the road, drivers driving into sidewalks and drivers falling asleep:

Q Do you believe generally there are dangerous drivers on the road?

A That possibility exists every day, yes.

Q And it existed back in 2015?

A Yes, it did.

Q Do you believe some drivers are distracted when they drive?

A I am very much aware that there are distracted drivers.

Q Do you believe some drivers drive faster than the speed limit?

A I am aware that some drivers drive faster than the posted speed limit, yes.

Q Do you believe some drivers lose control of their cars?

A I have seen evidence of drivers losing control of their cars.

Q Do you believe drivers sometimes drive off the road?

A Yes, I'm aware that drivers sometimes drive off the side of the road.

Q And that was something you were aware of in 2015?

A Yes, it is.

Q And do you believe drivers sometimes drive onto sidewalks?

A Yes, I'm aware that drivers sometimes, rarely, infrequently, drive onto sidewalks.

Q But that that can happen?

A It can happen.

Q Do you believe drivers can fall asleep while they're driving?

A It is possible for drivers to fall asleep while they're driving, yes.

Q Have you ever fallen asleep while you were driving?

A I have.

Q When was that?

A I don't remember the year exactly. But I did fall asleep once while driving.

CP 488-89. In effect, Ritchie *conceded* the foreseeability of drivers falling asleep at the wheel was within a student's "field of danger" under the circumstances here, as he had fallen asleep at the wheel himself. *Id.*

The harm Gabriel sustained by being struck by Klein's vehicle was foreseeable,¹⁵ and the trial court erred in intruding upon the jury's fact-finding role; Klein's conduct was in the general field of danger for Gabriel and his fellow students. Summary judgment should have been denied.

(3) The District's Negligence Proximately Caused Gabriel's Death

¹⁵ Even third party *criminal* conduct may be within the field of danger. Our Supreme Court in *McLeod* and *N.L.* found that criminal acts of others, the rape of students, were foreseeable. Factually, there is no criminal conduct in this case, as Klein was acquitted of all charges. Klein was negligent in falling asleep while driving. Legally, as addressed above, the exact mechanism of harm need not be determined, but instead whether the harm was within the general field of danger. *See Hendrickson*, 428 P.3d at 1202.

Just as the court erred in determining foreseeability as a matter of law, it erred in intruding upon the jury's function as to causation. To the extent that the trial court decided proximate cause as a matter of law, it erred.¹⁶ Proximate cause in Washington has two elements: legal cause¹⁷ and cause-in-fact. *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985). "Cause in fact" refers to the actual, "but for," cause of the injury, *i.e.*, "but for" the defendant's actions the plaintiff would not be injured. *Id.* Because there can be more than one cause of a harm, causation is often referred to as a "chain" of events without which a harm would not have happened. *See, e.g., Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 884, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013).¹⁸ In Washington, proximate cause is classically a *question of fact*.

¹⁶ The Court's letter opinion seems to focus solely on foreseeability as the basis for its ruling; CP 569, but the Estate anticipates that the District will seek to raise causation anew on appeal.

¹⁷ The legal causation analysis focuses on whether, as a matter of policy, the connection between the ultimate result and the defendant's at is too remote or insubstantial to impose liability. *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998).

¹⁸ Tortfeasors may act independently and breach separate duties, yet the conduct of both may concur to produce the injury. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 182-82, 159 P.3d 10 (2007), *aff'd*, 166 Wn.2d 27, 204 P.3d 885 (2009). Concurrent negligence of a third party does not break the chain of causation between original negligence and the injury. *Travis*, 128 Wn. App. at 242. If the defendant's original negligence continues and contributes to the injury the intervening negligence of another is an additional cause. *Travis*, 128 Wn. App. at 242. It is not a superseding cause and does not relieve the defendant of liability. *Travis*, 128 Wn. App. at 242. Only intervening acts which are *not* reasonably foreseeable are deemed superseding causes. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 807, 733 P.2d 969 (1987); *Anderson v.*

Martini v. Post, 178 Wn. App. 153, 164, 313 P.3d 473 (2013) (“Cause in fact is usually a jury question and is generally not susceptible to summary judgment”); *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 611, 257 P.3d 532 (2011) (where the evidence is conflicting, cause in fact is to be resolved by the trier of fact).¹⁹ Vehicular traffic striking students is “within the ambit of hazards covered by the duty imposed upon the defendant,” and there are disputed factual questions preventing summary judgment. *Rikstad*, 76 Wn.2d at 268; *McLeod*, 42 Wn.2d at 321. Here, as with the issue of foreseeability, the presence of conflicting expert opinions on causation confirms the existence of a *question of fact*.²⁰

Dreis & Krump Mfg. Corp., 48 Wn. App. 432, 442, 739 P.2d 1177, *review denied*, 109 Wn.2d 1006 (1987); *Albertson v. State*, 191 Wn. App. 284, 361 P.3d 808 (2015); *Pamplin v. Safeway Services, LLC*, 198 Wn. App. 1045, 2017 WL 1410341 (2017). Superseding cause was not an issue here.

¹⁹ The *Martini* court stated:

The plaintiff, however, need not prove cause in fact to an absolute certainty. *Gardner v. Seymour*, 27 Wn.2d 802, 808, 180 P.2d 564 (1947). It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm more probably than not happened in such a way that the moving party should be held liable." *Little [v. Countrywood Homes, Inc.]*, 132 Wn. App. 777, 781, 133 P.3d 944 (2006) [citing *Gardner [v. Seymour]*, 27 Wn.2d 802, 808-09, 180 P.2d 564 (1947)]. The evidence presented may be circumstantial as long as it affords room for "reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not." *Hernandez v. W. Farmers Ass'n*, 76 Wn.2d 422, 426, 456 P.2d 1020 (1969) (quoting *Wise v. Hayes*, 58 Wn.2d 106, 108-09, 361 P.2d 171 (1961)).

Martini, 178 Wn. App. at 165.

²⁰ As will be noted *infra*, ample expert evidence supported Gabriel’s position that fact questions were present as to causation.

(a) The District's Violation of Its Own Policy on Off-Campus Excursion Proximately Caused Gabriel's Death

But for the District's violation of its own policy, Gabriel would not have died. Keigley should not have allowed Ritchie to take students off campus without parent/guardian permission, whether it was part of the normal curriculum or a single trip off campus. The June 10, 2015 off campus excursion was subject to Policy 2320.²¹ District staff could not take students off campus at any time without advance planning or parent/guardian permission. There were good reasons why this is so. Policy 2320 clearly delineated the mandatory requirements of staff prior to taking students on a field trip, which included advance planning, parent/guardian permission, arranging for chaperones, making plans to keep the group together and providing a list of all students on the field trip/excursion.

²¹ The District claimed below that the terms "excursion" and "field trip" are synonymous. CP 43-44, 528-32. But that makes little sense and is belied by the testimony of Brittain, Hall, Brudwick, and Iwasaki. In any event, each word must mean something distinct. It has long been an interpretive principle in Washington law that courts do not interpret statutory or contract language so as to render a portion meaningless or superfluous. *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) (statute); *Snohomish Cty. Pub. Transp. Benefit Area Corp. v. FirstGroup Am., Inc.* 173 Wn.2d 829, 840, 271 P.3d 850 (2012).

Ritchie and Keigley violated the District's own standard practice for taking students off campus.²² Instead of following the required safety procedures mandated by Policy 2320 before taking students off campus, Ritchie decided to abandon procedure, as noted *supra*. Keigley should have analyzed Ritchie's request to take his PE classes off campus that day according to Policy 2320.²³ There was no pre-planning for a field trip of questionable educational value at best.²⁴ Instead, Ritchie made the decision to expose his students to 40 miles per hour traffic minutes before class started. Ritchie did not tell Keigley he would be the only teacher on the trip and that there would be no other chaperones or supervisors. This was in direct violation of District policies and procedures.

²² The District itself appeared to be confused about what its excursion protocol exactly meant. While Sherryll Kraizer, the District's liability expert, opined school districts should have a procedure in place any time a child goes off campus, CP 514, Dr. Paul Douglas, a member of the District's executive team responsible for overseeing principals, stated he was not familiar with any written procedure for principals to follow when determining whether a class may go off campus when it is not a field trip or excursion. CP 520. Superintendent Linda Quinn testified that she could not recall at the time prior to June 10, 2015 that she discussed policies and procedures for taking students off campus with Keigley. CP 525. In addition, Quinn did not train any District principals on students going off campus. *Id.*

²³ Keigley may not have known where Ritchie was going. For example, his declaration indicates there is a crosswalk on the west end of West Smith Road, when there is no cross walk on the west end of West Smith Road as the only crosswalk is on the east end by Greene's Corner. CP 238.

²⁴ The off campus trip should not have occurred at all in any event. It had little or no educational value, while posing grave risks that should have been calculated into Ritchie's decision before taking students on this field trip/excursion. CP 352. There were ample fields tracks and gym availability at WHS for PE requirements. and the use of these facilities posed no additional risk or danger to his students. *Id.*

What occurred at WHS was precisely the type of poor decision making that a school district seeks to prevent in Policy 2320. Parents would not accept teachers simply walking up to their principal on any given morning and informing the principal that they wished to take their class on an off-site field trip to some nearby park, shopping mall, fire station, downtown city hall, community swimming pool or one of any number of venues near the school – all because they just because they simply felt like it that day, without regard for student safety were in place to prevent the kind of tragedy that occurred on June 10, 2015, but none of them were followed by Keigley or Ritchie.

Critically, Keigley never should have allowed Ritchie to take his PE class off campus on June 10, 2015 without specific parent/guardian permission in place. Wanita Anderson was Gabriel’s guardian for the purpose of giving or refusing permission for him to go on field trips at WHS. CP 433. Her expectation was that Gabriel would remain on campus for the entire school day, except for going across the street at the marked, designated crosswalk to Greene’s Corner occasionally for lunch, unless the District obtained her permission to take him off campus. *Id.*²⁵

²⁵ The trial court’s questions of counsel in argument reflected the view that Anderson’s permission for Gabe to go to Greene’s Corner somehow translated into permission for the excursion at issue. RP 20-21. This notion was prompted by the arguments of the District’s counsel to this effect. RP 13-14. This is, however, an “apples and oranges” proposition.

She did not recall receiving any document describing that Ritchie would take Gabriel off campus during PE classes whenever he saw fit to do so. *Id.* Wanita was never asked if Ritchie could take Gabriel off campus on June 10, 2015. *Id.* If District staff had asked her if Ritchie could take Gabriel off campus to walk along a 40 mile per hour road outside of a school zone, for no reason other than to discuss summer plans, along a route that required students to cross outside of marked, designated crosswalks and walk with his back to oncoming traffic, *she would have said, “no.” Id.*²⁶

As previously noted, WHS was a modified closed campus, although that policy was not clear, according to Dennis Smith. CP 365. If that were the District’s policy, students were, however, allowed to leave campus to certainly narrowly prescribed, prearranged locales like the Greene’s Corner store. The store is a half mile down West Smith Road in the opposite direction, and is accessed from a designated crosswalk. CP 406, 418. It is located in the 20 mph school zone. The trial court was flatly wrong when it asserted in its letter ruling that “The area where he walked [to Greene’s Corners] is in the same area where the accident occurred. CP 660. That store is *not* in the same place as where Gabe was killed.

²⁶ The District argued below that parent/guardian permission was not required to take kids off of the “closed campus” because parents “could opt out.” CP 44-45. However, Anderson did not recall ever receiving a communication about this “opt out” policy. CP 433. The District never explained what “opting out” of the closed campus meant, nor did it produce any documentation whatsoever to support this defense. The only mention ever of this unwritten “opt out” was in Keigley’s declaration. CP 239.

The District argued another unwritten rule that as long as a teacher gets the principal’s permission, students can be taken off campus without parent/guardian permission. CP 238. This was contrary to Policy 2320 itself, and there is no support for it in any of the documents the District produced. Nor are teachers trained about this unwritten rule. PE teachers Brudwick and Iwasaki also clearly did not assume they could take PE classes off campus without parent permission. In fact, as noted *supra*, Brudwick testified that if the parent/guardian permission form was not signed, the students never left campus. CP 470.

Keigley should have refused Ritchie's request to take his PE class off campus on for lack of parent/guardian permission, lack of advance planning and failure to follow policies, procedures and practices in the school district. Conducting a walking excursion about "summer plans" alongside a road with traffic traveling at 40 miles per hour is senseless, especially when it is done without parent/guardian knowledge or permission. Had Gabriel been on campus for PE, as he was required to be because there was no parent/guardian permission and WHS was a closed campus, he would have been protected from traffic-related dangers. But for Keigley allowing Ritchie to take his PE class off campus on June 10, 2015, Gabriel would still be alive today.

(b) Ritchie's Negligent Conduct of the Off-Campus Excursion Proximately Caused Gabriel's Death

In addition to whether the off campus excursion should have occurred *at all* is the question of how Ritchie conducted the excursion. But for Ritchie's failure to apprise students in his charge of the dangers of proceeding along the road, or to take appropriate precautions during that excursion, Gabriel would not have died. That Ritchie failed to properly note pedestrian safety rules during the excursion is documented in detail in the extensive declaration of Steven Harbinson, a well-qualified accident reconstructionist. CP 391-92, 398-99.

District administrators expected that teachers and principals would make sure that students followed pedestrian rules when walking off campus. In addition to collecting permission forms signed by parents/guardians, as noted *supra*, Brudwick disseminated a “Walking Contract for Mr. Brudwick’s Walking Class” that discussed safety guidelines. CP 374-75. That document, for example, advised students: “Cross only at designated crosswalks when possible.” CP 374. When describing taking students off campus, Linda Quinn, the superintendent of FSD, indicated she “...would want a teacher to follow pedestrian rules.” CP 337, 366-67.

The District’s expert, Janet Barry, indicated in her declaration that there is a “Ferndale School District Safe Route to School map for Windward High School” attached as Exhibit 3 that was generated by the District pursuant to WAC 392-141-340. CP 269. But this document was criticized by the Estate’s expert, Steven Harbinson:

10. No information was provided on when or how Exhibit 3 to Barry’s declaration was generated.

11. My general understanding is that documents such as Exhibit 3 to Ms. Barry’s declaration are generated for the purpose of school district securing funding for transportation, not as a comprehensive safety assessment or review.

12. In addition, no information was regarding when the document was generated, who produced the

document at Ferndale School District (“FSD”), for what purpose the document was produced, who contributed to the determining the “walk area,” among many other pieces of information. None of this information was included in her declaration in support of FSD’s motion for summary judgment. Without this information and other information, Exhibit 3 to Ms. Barry’s declaration is meaningless for determining whether those routes around Windward High School were “safe.”

CP 392-93.²⁷

Keigley alleged in his declaration (in contrast with his deposition testimony) that sometime prior to June 10, 2015, he discussed with Evan Ritchie “...safety and his path of travel” for taking his PE classes off campus, including Keigley’s expectation “...his class cross West Smith Road at the crosswalk on the west end and to exercise caution in crossing back over West Smith Road on the east end, where there are no crosswalks.” CP 238. Contrary to Keigley’s understanding, the only designated crosswalk was at the intersection of West Smith Road and Northwest Drive, directly adjacent to WHS’s location and within the school zone. CP 394, 418. There is no crosswalk at the west end of West Smith Road where Ritchie took his class and the children were killed or injured. Crossing the road *only* at designated, marked crosswalks and within school speed zones was preferable for student safety because there

²⁷ Former SPI Billings also critiqued reliance on this map in detail. CP 383-84.

is less risk of a student pedestrian being struck by a vehicle, and vehicles would be traveling at lower speeds under such circumstances. CP 395.

Harbinson's expert opinion was pointed and unambiguous:

26. If Mr. Ritchie and Mr. Keigley had ensured the students crossed West Smith Road only at designated, marked crosswalks, they would have crossed the road at the designated, marked crosswalk adjacent to Windward High School and within the school zone, walked along the north side of West Smith Road, turned around, and returned to the school by crossing again at the designated, marked crosswalk at the intersection of West Smith Road and Northwest Drive.

27. Instead, Mr. Ritchie and Mr. Keigley had students cross the west end of West Smith Road outside of designated, marked crosswalks when there was no reason to do so and they could have returned to Windward High School along the sidewalk on the north side of West Smith Road.

28. If Mr. Ritchie and Mr. Keigley had selected a route that complied with pedestrian rules and the expectations from FSD's superintendent by only crossing at designated, marked crosswalks, Gabriel Anderson's fifth period class would have been walking on the north side of West Smith Road on June 10, 2015 and would not have been struck by Defendant William Klein.

29. As a result, Gabriel Anderson would have not been hit by the vehicle and died at the scene.

CP 395.

Here, rather than keeping his students together as a group, Ritchie allowed them to disperse over a distance of 250 meters on the south side of

the road²⁸ and cross a busy street randomly against traffic rather than in a designated cross walk or in a school zone with its lowered speed limits. Had he been more attentive on his *ad hoc* excursion to the safety of the students under his charge, the death of two students and serious injury of two other would not have happened, as the Estate's experts testified.

In sum, there was ample evidence creating a question of fact as to "but for" causation, a question of fact for the jury.

(c) Legal Causation Principles Do Not Bar the Estate's Claim Against the District

As noted *supra*, proximate cause in Washington involves principles of "but for" and legal causation. Although the District argued the applicability of legal causation here, CP 41-43, 333-35, the trial court chose not to base its decision on that principle. CP 569. Legal causation

²⁸ The students should all have been on the road's north or "left" side of the road by statute. Harbinson testified: "Mr. Ritchie should have had students in Gabriel Anderson's fifth period physical education (PE) class walk on the north side of West Smith Road in order to perceive oncoming traffic and react to the danger of traffic as it was approaching rather than walking with their backs to oncoming traffic...[I]f students were walking on the north side of West Smith Road, they would not have been struck by Defendant William Klein." CP 393. RCW 46.61.250(2) states:

Where sidewalks are not provided any pedestrian walking or otherwise moving along and upon a highway shall, when practicable, walk or move only on the left-side of the roadway or its shoulder facing traffic when may approach the opposite direction and upon meeting an oncoming vehicle shall move clear of the roadway.

See State v. Tower, 199 Wn. App. 1004, 2017 WL 2154476 (2017) (when practicable, pedestrian should walk on side of road facing traffic).

does not apply here for many of the reasons the Estate has argued in connection with the foreseeability analysis *supra*.

Legal causation is grounded in policy considerations as to how far the consequences of a defendant's actions should extend, *N.L.*, 186 Wn.2d at 437, and particularly inapt in the school district duty setting. Indeed, in *N.L.*, assessing considerations of logic, common sense, justice, policy and precedent, the Court expressly *rejected* a legal causation argument, noting the expansive duty owed to students articulated in *McLeod* and the nature of sex offender registration. *Id.* at 438. The Court could not say that legal causation barred a claim by a female student against a school district that allowed a registered sex offender to contact that student at track practice, take her off campus, and rape her:

[W]e cannot say as a matter of law that a district's failure to take any action in response to being notified that Clark was a registered sex offender was not a legal cause of N.L.'s injury. Sexual assault by a registered sex offender is foreseeable, as is the fact that a much younger student can be convinced to leave campus by an older one.

Id. (citing cases).

It is no different here. Legal causation does not bar the Estate's claim.

F. CONCLUSION

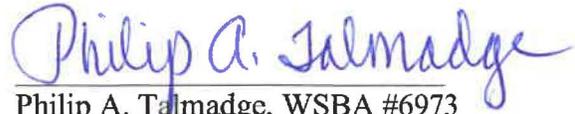
Washington law has long recognized a broad protective duty (*in loco parentis*) for school districts with respect to students under their charge. That broad protective duty extends to off-campus activities.

The trial court here erred in intruding upon the jury's function, ruling as a matter of law on foreseeability, and applying an incorrect standard for foreseeability at that. The risk to Gabriel in the unnecessary off-campus excursion was within the field of danger for such an excursion, as a jury is entitled to determine. Gabriel Anderson died tragically, and unnecessarily, as a result of the District's disregard for his protection by violating its own policy on off-campus excursions, failing to secure his grandmother's permission for the unnecessary excursion, and leading him along an unsafe path where the Klein vehicle could strike him and other students.

This Court should reverse the trial court's order on summary judgment and remand the case to the trial court for judgment on the merits. Costs on appeal should be awarded to the Estate.

DATED this 30th day of April, 2019.

Respectfully submitted,



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Seattle, WA 98126
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John R. Connelly, WSBA #12183
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(253) 593-5100

Attorneys for Appellants

APPENDIX

FERNDALE SCHOOL DISTRICT NO. 502
ADMINISTRATIVE PROCEDURES

No. 2320 P-1

FIELD TRIPS AND EXCURSIONS

I. GENERAL

As cited in Board Policy 2320, field trips are an extension of classroom learning activities. Each field trip is to be carefully planned such that it focuses in educationally-sound content integral to the curriculum. There shall be provision for sufficient adult supervision (parents and/or faculty members) to ensure the general safety, personal welfare of students during field trips and excursions, and attention to the unique health needs that some students have (e.g., life-threatening health conditions, 504 plans).

The opportunity to participate in field trip activities is a privilege granted to all students in the Ferndale School District. Participants are expected to conform to Board Policy No. 3200 and conduct standards established by the principal and/or designee. Standards of conduct which are in effect for the school also apply to school-sponsored activities or trips. Any student found to be in violation of policy or conduct standards is subject to disciplinary action.

For staff who take students on regularly scheduled, repeating day trips as part of the district's curriculum (e.g., life skills classes to the aquatic center, FHS Community Transitions Program to vocational training sites), it is only necessary for the supervising staff member to fill out the "Field Trip Request Form" (Attachment 1) and the parent/guardian to complete the "Parent/Guardian Permission Form" (Attachment 2) one time per semester. These forms do not need to be completed for each day field trip. The director of athletics/activities will handle these procedures and forms for all field trips and competitive meets run through that department.

II. PROCEDURES

A. For day field trips and excursions, the teacher will:

1. Check school and district calendars to ensure there are no scheduling conflicts.
2. Submit a Field Trip Request Form (Attachment 1) to the principal or designee a minimum of four weeks prior to the event.

FERNDALE SCHOOL DISTRICT NO. 502
ADMINISTRATIVE PROCEDURES

No. 2320 P-1

3. Upon approval by the principal/designee, submit the transportation request to the director of transportation as soon as possible and no later than one week in advance of the activity. If private cars are used, Administrative Procedures No. 8131 P-1 will be followed.
4. Following principal/designee approval, send parents and guardians notification/informational letter and permission form as soon as possible, but no later than three weeks prior to the scheduled activity or trip. Notification and permission form should include detailed information regarding goals, destination, date, departure and return times, transportation, appropriate dress, anticipated expenditures, meals, safety and behavior standards, telephone numbers, and a request for any health/medical-related information. (See Attachment 2)

Provisions are to be made to ensure that students are not left at an activity or trip site. This may be done by assigning an extra "emergency" vehicle to be driven by a chaperone, or, if a student is missing, leaving a chaperone at a checkpoint on the site who will be picked up and returned home at a later time.

5. Arrange for chaperones as appropriate.
 6. Make arrangements for students who do not take part.
 7. Make plans for keeping the group together as appropriate.
 8. Provide the principal with a list of students and chaperones taking part in the activity.
 9. Ferndale School District staff may not drive students on field trips in their own vehicle unless staff are participating under the "parent/guardian" role.
- B. The principal or designee will:
1. Review and approve or disapprove the field trip request as soon as possible, but no less than three weeks prior to the event. "Approval" requires that the principal/designee will have confirmation for all aspects of the field trip, including financial, transportation and student health factors.

FERNDALE SCHOOL DISTRICT NO. 502
ADMINISTRATIVE PROCEDURES

No. 2320 P-1

2. Ensure that prior notification to parents or guardians is disseminated and that student permission slips have been obtained.
3. In the event that a field trip opportunity becomes available in a way that doesn't fit the above timelines, the principal/designee may approve the field trip if all issues (e.g., financial, transportation, student health) are fully addressed.

III. OVERNIGHT FIELD TRIPS

- A. Follow general procedures for field trips and excursions along with the more stringent timelines and permissions noted below.
- B. The teacher must submit to the principal/designee a written plan (Attachment 1), including purpose and relationship to curriculum, supervision, itinerary, cost, housing, and the student costs (if any) as soon as possible, but no less than eight weeks prior to the projected field trip or excursion dates.
- C. In the event that a field trip opportunity becomes available in a way that doesn't fit the above timelines, the principal/designee may approve the field trip if all issues (e.g., financial, transportation, student health) are fully addressed.
- D. After approval by the principal/designee, the proposal is to be submitted to the superintendent as soon as possible so that the field trip item can be placed on the next board meeting's consent agenda.
- D. The principal/designee and/or teacher may be asked to attend the board meeting to answer any questions the board may have.
- E. Following approval by the principal/designee, the teacher will send parents and guardians the notification and permission form (Attachment 3) seven school weeks prior to the field trip/excursion dates. (Note: The teacher and principal will confer about any returned permission forms which indicate special health concerns/considerations. The principal will then review those special health concerns with the school nurse.) All such field trips are optional. Parent/guardian permission is required.
- F. Ferndale School District staff may not drive students on field trips in their own vehicle unless staff are participating under the "parent/guardian" role.

FERNDALE SCHOOL DISTRICT NO. 502
ADMINISTRATIVE PROCEDURES

No. 2320 P-1

Implemented 12-15-1995
Revised 02-27-2012
Revised 03-28-2012

16-2-02248-9
ORGMT 78
Order Granting Motion Petition
4906372



SCANNED

FILED IN OPEN COURT
2-15 20 19
WHATCOM COUNTY CLERK

By _____
Deputy

HONORABLE RAQUEL MONTOYA-LEWIS

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

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;

Plaintiffs,

v.

WILLIAM KLEIN and JANE DOE KLEIN and
the marital community comprised thereof, and
FERNDALE SCHOOL DISTRICT, a political
subdivision of the State of Washington;

Defendants.

NO. 15-2-02248-9

Flaw
~~PROPOSED~~ ORDER GRANTING
DEFENDANT FERNDALE SCHOOL
DISTRICT'S MOTION FOR SUMMARY
JUDGMENT AND DIRECTING ENTRY
OF FINAL JUDGMENT AS TO
DEFENDANT FERNDALE SCHOOL
DISTRICT AND STAYING THIS
MATTER AS TO DEFENDANT KLEIN
PENDING RESOLUTION OF APPEAL

THIS MATTER came before the Court on Defendant Ferndale School District's
Motion for Summary Judgment. The Court reviewed the motion and all materials filed in
support and opposition listed below:

1. Defendant Ferndale School District's Motion for Summary Judgment;
2. Declaration of David Wells in Support of Defendant's Motion for Summary Judgment;
3. Declaration of Evan Ritchie in Support of Defendant's Motion for Summary

[PROPOSED] ORDER GRANTING DEF. FSD'S
MTN. FOR SUMM. JUDG. - 1 of 4
(Cause No. 15-2-02248-9)

CONNELLY LAW OFFICES, PLLC

2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100 Phone - (253) 593-0380 Fax

CC:JA

- 1 Judgment;
- 2 4. Declaration of Timothy Keigley in Support of Defendant's Motion for
3 Summary Judgment;
- 4 5. Declaration of Bret Simmons in Support of Defendant's Motion for Summary
5 Judgment;
- 6 6. Declaration of Janet Barry in Support of Defendant's Motion for Summary
7 Judgment;
- 8 7. Declaration of Sherryll Kraizer in Support of Defendant's Motion for
9 Summary Judgment;
- 10 8. Plaintiffs' Opposition to Defendant Ferndale School District's Motion for
11 Summary Judgment;
- 12 9. Declaration of Wanita Anderson in Support of Plaintiffs' Opposition to
13 Defendant's Motion for Summary Judgment;
- 14 10. Declaration of Dennis Smith in Support of Plaintiffs' Opposition to
15 Defendant's Motion for Summary Judgment;
- 16 11. Supplemental Declaration of Dennis Smith in Support of Plaintiffs' Opposition
17 to Defendant's Motion for Summary Judgment;
- 18 12. Declaration of Judith Billings in Support of Plaintiffs' Opposition to
19 Defendant's Motion for Summary Judgment;
- 20 13. Declaration of Steven Harbinson in Support of Plaintiffs' Opposition to
21 Defendant's Motion for Summary Judgment;
- 22 14. Declaration of Marta L. O'Brien in Support of Plaintiffs' Opposition to
23 Defendant's Motion for Summary Judgment;
- 24 15. Defendant Ferndale School District's Reply to its Motion for Summary
25 Judgment; and
- 26 16. Supplemental Declaration of Bret Simmons in Support of Defendant Ferndale
27 School District's Reply.

28 The Court now being fully advised on the matter finds that, for the reasons set forth in
29 the Court's written opinion filed on January 9, 2019, which is attached as Exhibit A to this

1 order and incorporated herein by reference,

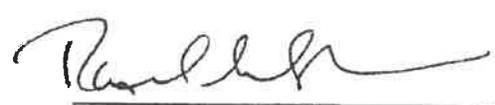
2 IT IS HEREBY ORDERED that the Court GRANTS Defendant's Ferndale School
3 District's Motion for Summary Judgment. Plaintiffs' claims against Defendant Ferndale
4 School District are hereby dismissed with prejudice;

5 The Court finds, based on the facts and considering all the relevant factors concerning
6 CR 54(b) certification, that there is no just reason to delay entering final judgment as to
7 Defendant Ferndale School District. For these reasons,

8 IT IS FURTHER ORDERED that, pursuant to CR 54(b), final judgment shall be
9 entered as to Defendant Ferndale School District, dismissing Plaintiffs' claims against
10 Defendant Ferndale School District, and allowing Plaintiffs to appeal the summary judgment
11 order as to Defendant Ferndale School District; and

12 IT IS FURTHER ORDERED that Plaintiffs' claims against Defendant Klein in this
13 matter shall be stayed pending Plaintiffs' appeal of the final judgment dismissing Plaintiffs'
14 claims against Defendant Ferndale School District.

15 DATED this 15 day of FEB, 2019.

16
17 

18 THE HONORABLE RAQUEL MONTOYA-LEWIS

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Presented by:

CONNELLY LAW OFFICES, PLLC

By: Marta L. O'Brien
John R. Connelly, WSBA No. 12183
Marta L. O'Brien, WSBA No. 46416
Jackson Pahlke, WSBA No. 52812
Attorneys for Plaintiffs

Notice of presentation waive and approved for entry:

LAW OFFICES OF MARK DIETZLER

APPROVED 2/15/19 verbally
Mark Dietzler, WSBA No. 20765
Attorney for Defendant William Klein

FILED
COUNTY CLERK

2019 JAN -9 P 3:55

Superior Court of the State of Washington

WHATCOM COUNTY
WASHINGTON

Hon. Raquel Montoya Lewis, Dept. 4
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Judge's Chambers and Courtroom on
2nd floor



Whatcom County Courthouse
311 Grand Avenue, Suite 301
Bellingham, Washington 98225

Send Judge's copies to:
PO Box 1144
Bellingham, WA 98227-1144

January 9, 2019

Re: Meyers et.al. v. Klein & Ferndale School District, 15-2-02248-9

Dear Counsel:

After reviewing the arguments and filings of the parties in this matter, this Court concludes that the Defendant Ferndale School District Motion for Summary Judgment should be granted.

The parties agree that Gabe Anderson, a 15 year old student at Windward High School, was struck and killed by a vehicle driven by defendant William Klein. Mr. Klein fell asleep while driving, crossed over a fog line and up onto a sidewalk, hitting & killing Gabe Anderson and another student, as well as seriously injuring two others. Anderson was on a walk with his P.E. class, led by teacher Evan Ritchie. The parties agree on the route taken, and where the accident took place, which was about .2 miles from the Windward High School campus.

The parties argue about the appropriate standard of care to be applied to these facts. The Court agrees with the Plaintiffs' that the Washington Supreme Court has conclusively answered this question in *Hendrickson v. Moses Lake School District*, 428 P.3d 1197 (2018). The Court in that case held: "We have long held that "[s]chool districts have the duty 'to exercise such care as an ordinarily responsible and prudent person would exercise under the same or similar circumstances.'" The Court went on, "the school district must 'take certain precautions to protect the pupils in its custody from dangers to be reasonably anticipated. . . The mere fact that the intervening act of a third part results in harm does not necessarily absolve the school district of liability. . . As long as the harm is reasonably foreseeable, a school district may be liable if it failed to take reasonable steps to prevent that harm." *Id.* 428 P.3d at 1201 (citations omitted). After its analysis of the history of the duty of care, the Court stated that "school districts have a duty to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." *Id.* 428 P.3d at 1202 (citations omitted). However, that is not a heightened duty of care, but rather a standard of ordinary care to protect their students from foreseeable harm. *Id.*

The Defendant school district here argues that the accident was not foreseeable, and further argues that the Plaintiffs cannot establish legal cause or proximate cause. The Defendants' prevail on the argument of foreseeability. The Plaintiffs argue that the school failed to exercise its duty of care by failing to utilize permission slips for field trips/excursions under

the Ferndale School District policy. Doing so, they argue, would have notified Gabe Anderson's guardians of this activity and allowed them to say 'yes' or 'no' to his participation. They point to other P.E. classes, like walking classes, that leave school campuses for long walks around the area and do so only after permission slips have been signed. Here, however, while teacher Ritchie agreed he had taken classes on walks several times over the course of his tenure at Windward High School, he did not do so on a regular basis as part of the curriculum. He chose to take the students on a less than 1.5 mile walk as a means of getting students out of the classroom and talking to other students.

Viewing the facts in the light most favorable to the non-moving party, the Plaintiffs fail to establish that this tragic accident was foreseeable on the part of the Defendant school district. The students did leave the school's premises, but did so with a teacher, within a defined school class period, as part of a P.E. class activity. While the school was a "closed campus," students could leave campus for lunch to walk up the road to a local café for lunch and they did so regularly. Gabe Anderson did so regularly, and had his guardians' permission to do so. While the Plaintiffs argue that the guardians had not given permission to the school for Gabe Anderson to participate in walking off campus with the class for P.E., the fact remains that he regularly left, *without adult supervision*, to walk to lunch and return to campus. The area where he walked is in the same area where the accident occurred. That stretch of road had no particular danger associated with it and, as both parties agreed, there had been one vehicle-pedestrian accident in the last ten years prior to this one.

In addition, as the Defendant school district points out, the accident occurred when the students were on the sidewalk walking back toward the school, well off the roadway itself. That a driver would fall asleep in the middle of the day on a bright, sunny afternoon, leave the roadway, and hit the students is not foreseeable for the school district. The Plaintiffs argue that there should have been more chaperones, that the teacher should have been wearing a reflective vest, and that the students should have been less "spread out" than they were on the return walk to the school. None of those actions, had they been taken, would have avoided this accident. Mr. Klein fell asleep. He did not see the students before he hit them, as all parties agree that he had no recollection of the accident and the accident itself resulted from him falling asleep at the wheel. There was simply no time for teacher Ritchie to react, nor any time for the students to either. Such an accident is not foreseeable.

Thus, the Court grants the Defendant Ferndale School District's Motion for Summary Judgment and dismisses the Plaintiffs' claims against it. The Court directs the Defendant's attorney to prepare orders reflecting this decision for the Court's signature.

Sincerely,



Raquel Montoya-Lewis
Superior Court Judge

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the following document: *Brief of Appellants* in Court of Appeals, Division I Cause No. 79655-1-I to the following parties:

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Law Offices of Mark Dietzler
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Seattle, WA 98154-1125

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Simmons Sweeney Smith PS
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Bellingham, WA 98225-4306

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Original electronically served via appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 30, 2019, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK

April 30, 2019 - 12:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 79655-1
Appellate Court Case Title: Bonnie I. Meyers, Appellant v. William Klein, Respondent
Superior Court Case Number: 15-2-02248-9

The following documents have been uploaded:

- 796551_Briefs_20190430121011D1721905_5299.pdf
This File Contains:
Briefs - Appellants
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A copy of the uploaded files will be sent to:

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Comments:

Brief of Appellants

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