

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 public school district of the State of
Washington,

Respondent,

And

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

Defendants.

RESPONDENT'S BRIEF

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1. INTRODUCTION AND RESPONSE TO STATEMENT OF ISSUES

This is an appeal from a grant of summary judgment. Judge Raquel Montoya-Lewis of Whatcom Superior Court found for Ferndale School District on foreseeability and proximate factual/legal cause. (Letter Opinion at CP 569-570). The rulings were correct and the dismissal should be upheld.

2. RESPONSE TO ASSIGNMENT(S) OF ERROR

Appellants’ have conflated all of the legal issues into one Assignment of Error.¹ That Assignment of Error is argumentative, circular, and imports facts not in evidence. *See* RAP 10.3(a)(4).

The appeal should properly be broken down into three elements, as it was before the trial court:

i. Whether the trial court applied the proper standard of care for a school district taking students on an off-campus walk.

It did. The Court applied the Supreme Court’s most recent restatement of a school district’s custodial duty from *Hendrickson v. Moses Lake School District*, 192 Wn.2d 269, 428 P.3d 1197 (2018).

ii. Were alleged shortcomings in the District’s process the cause-in-fact of Gabriel’s death?

¹ Appellants’ sole Assignment of Error then has two listed sub-parts. Even within the subparts, subpart #1 improperly conflates “duty of care” and “foreseeability.” Subpart #2 improperly conflates cause-in-fact and legal cause.

The trial court found that actions such as the teacher not wearing a reflective vest, the number of chaperones, not using a marked crosswalk to cross the street and walking in a “bunched up” group were not causes-in-fact of this collision. The decision can be upheld on that basis.

iii. Should legal cause extend to this crash?

The trial court dismissed this case in its gatekeeper function, using legal cause analysis. That ruling is reviewed for errors of law, and should be upheld.

Although the trial court’s Letter Opinion references “foreseeability,” it ruled on standard of care and proximate and legal cause. This Court should affirm on each of those bases.

Here, this Court should apply the “mixed considerations of logic, common sense, justice, policy and precedent” that legal-cause analysis requires, to find that school districts simply should not face liability for deciding to use historically safe public sidewalks for high school students to walk upon, regardless of the fact that it is foreseeable that sometimes “vehicles leave roadways.” *See King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974). Alternatively, this Court should affirm on any other basis contained in the record.

3. STANDARD OF REVIEW

Appellants have misstated the standard of review. This case was resolved by the trial court on foreseeability and proximate (legal) cause.

Legal cause is a question of law for the court. *See Minahan v. Western Wash. Fair Assoc.*, 117 Wn. App. 881, 888, 73 P.3d 1019 (2003).

Although this Court reviews “cause in fact” rulings *de novo*, it reviews a trial court’s determination of legal cause for an error of law. *See Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999); *Lowman v. Wilbur*, 178 Wn.2d 165, 308 P.3d 387 (2013); *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). For the portion of this case that was resolved on the District’s conduct as too remote from the cause of the injury to impose liability, this Court should review for errors of law. *See Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998) (“Unlike factual causation, which is based on a physical connection between an act and an injury, legal cause is grounded in policy determinations as to how far the consequences of a defendant's acts should extend. Thus, where the facts are not in dispute, legal causation is for the court to decide as a matter of law.”) *See also City of Seattle v. Blume*, 134 Wn.2d 243, 252, 947 P.2d 223 (1997) (“The issue of proximate cause is reviewable on appeal as a question of law”); *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 359-60, 961 P.2d 952 (1998) (“[L]egal cause is decided by the court as a question of law.”).

4. STATEMENT OF THE CASE

The material facts of this case are not in dispute. The Ferndale School District formerly operated a “choice” high school, Windward High School, which had an average yearly enrollment of 68-170 students (CP 236-237). The high school was housed in a small former elementary school building, at the intersection of Northwest and Smith Roads, in rural Bellingham. Decedent Gabriel Anderson was a freshman student and nearing the end of his first school year at Windward.

Because Windward’s campus was a former elementary school, it had a very rudimentary playground, with a less-than-standard sized, cement track not suitable for engaging high school students in P.E.-type activities. (CP 310). Furthermore, many students at Windward were highly uninterested in traditional athletics or sports. (CP 310). So, at various times, P.E. teacher Evan Ritchie would take his high school students (ages 14-18) walking for exercise. They would go along Smith Road, on a five-and-a-half foot, raised, paved sidewalk, buffered from the roadway by an eight-foot marked shoulder. (CP 310-311). They would walk along the side border of their campus, into the residential neighborhood and up the road 0.68 miles, then cross the road, turn around and come back. The roadway was straight, flat, and had excellent visibility. It was not busy during school hours (CP 311).



(CP 194).

Ritchie obtained permission from the school administration when he took students on this walk on the sidewalk during P.E. class. The school did not obtain permission slips from parents, because it was not a field trip requiring formal parental approval. (CP 237-38, 312). Every Ferndale witness has testified that permission slips were not necessary, since the activity was confined within a single class period and furthered

the specific educational purpose of the class. (CP 237-38). The students were under Ritchie's direction and instruction throughout the activity and were always back in time for their next class. (CP 238). Appellant's brief mischaracterizes District testimony to argue that field trip permission slips were required. This argument is addressed below.

On June 10, 2015, Ritchie provided the students with instructions for topics to discuss during the walk, and safety precautions, and began the walk. (CP 312). The students walked safely on the sidewalk to their turn-around point .68 miles from school. (CP 313-314). They safely crossed W. Smith Road and began returning to school. (CP 313-314).

Ritchie and Gabriel were walking side by side on the sidewalk. (CP 314). They were .2 miles from the school when defendant William Klein, with his own young child in the back seat, fell asleep. (CP 52-61). Klein's vehicle left the roadway, swerved across the shoulder, hit and went up and over the raised curb, and onto the sidewalk striking Gabriel and other students. (CP 52-61). Ritchie was still talking with, and was within two feet of, Gabriel when he was struck. (CP 314).

Appellants seize upon the school's "admissions" - that drivers sometimes fall asleep and that cars sometimes leave the roadway - to argue that foreseeability is established. They rely strictly on cases like *McLeod v. Grant County School Dist.*, 42 Wn.2d 316, 320, 255 P.2d 360

(1953) (holding that if the harm fell within a general field or zone of danger which should have been anticipated, the injury was “foreseeable” for purposes of “duty” analysis.). Appellants want to give undue effect only to the trial court’s repeated use of the phrase “not foreseeable” in the letter opinion, then point out contradictory testimony in the record and argue that the trial judge therefore erred in finding the accident “unforeseeable.” (See Appellants’ Brief at 9, 23, 25-27) (“Ritchie conceded the foreseeability of drivers falling asleep at the wheel was within a student’s field of danger.”).

The following colloquy with the Court at oral argument is indicative of how appellants want to characterize this case:

Counsel: It’s been long established that *the duty is the general field of danger*. So I believe... according to Washington state law and how these are examined, is that the question is not is it foreseeable that—that Mr. Klein—that it would happen exactly in this particular way. I believe the question is, was it foreseeable that a student * * * walking on a sidewalk could be hit by vehicle traffic. And that does happen. And we hear that. And I believe summary judgment is inappropriate because we’re hearing it from Mr. Ritchie himself, saying, ‘Yeah I know that cars drive off the road.’ * * * So I believe it’s within that general field of danger.

(RP at 23-26) (emphasis added); *see also* Appellant’s Brief at 27 (“Klein’s conduct was in the general field of danger for Gabriel * * * the trial court erred in intruding upon the jury’s fact-finding role.”).

But, as case law recognizes, “duty” plus “foreseeability” does not automatically equal liability. Instead, the Court must take legal causation into account:

[T]he issues regarding whether duty and legal causation exist are intertwined. *See Taggart v. State*, 118 Wash.2d 195, 226, 822 P.2d 243 (1992); *Hartley v. State*, 103 Wash.2d 768, 779, 698 P.2d 77 (1985). This is so because some of the policy considerations analyzed in answering the question whether a duty is owed to the plaintiff are also analyzed when determining whether the breach of the duty was the legal cause of the injury in question. However, a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation. This would nullify the legal causation element and along with it decades of tort law. Legal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise.

Schooley, 134 Wn.2d at 479 (emphasis added).

Here, the District argued, and the trial court agreed, that while the general fact of cars leaving a roadway is within the realm of foreseeable possibility (*i.e.*, Klein’s conduct was within the possible “zone of danger,” and thus was “foreseeable” in a *McLeod* sense), this tragic accident was simply not foreseeable in a *Schooley* sense (*i.e.*, legal cause did not extend that far).

The trial court expressly acknowledged the District’s duty of care to adopt reasonable precautions against foreseeable injuries. The trial judge did not misperceive the “zone of danger” test. (*See* CP 569-570). For summary judgment purposes, the court is also presumed to have

accepted the District witnesses' testimony (and common knowledge) that there is a foreseeable risk that cars sometimes leave roadways. But then the court also recognized that "legal causation should not be assumed to exist every time a duty of care has been established." *Schooley*, 134 Wn.2d at 480. And, given the facts presented, the court ruled as a matter of law that legal liability simply did not extend to the act of taking high school students for a walk on a public sidewalk along an otherwise very safe roadway, even if "duty and foreseeability concepts alone indicate liability could arise." *Schooley*, 134 Wn.2d at 479; *see Tyner v. Dept. of Soc. & Health Services*, 141 Wn.2d 68, 821 P.3d 1148 (2000).

It was clearly significant to the court that Gabriel's guardian allowed him to regularly walk along, and across, the very same street without any type of supervision:

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. (CP 569-570).

Admittedly, the trial court's letter opinion rather imprecisely used the term "foreseeability" for both concepts; that is, for both "zone of danger" and "legal cause." (*See* CP 569-570). The trial court is certainly

not the first to struggle with precision in articulating the difference. *See, e.g., Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) (“Because of the historical imprecision in terminology and the interrelationship of concepts, the rationale in many negligence cases combines aspects of causation, intervening events, duty, foreseeability, reliance, remoteness, and privity.”); *see also* William L. Prosser, *The Law of Torts* 244–45 (4th ed. 1971) (“Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the others”); *Travis v. Bohannon*, 128 Wn. App. 231, 115 P.3d 342 (2005) (“[T]he analyses of duty and proximate cause often overlap”). But, reading the trial court’s letter opinion as a whole, along with the transcript of oral argument, her ruling becomes clear. Despite the admitted fact that a vehicle leaving a roadway is within the zone of danger that one could encounter while using any public sidewalk, liability does not attach for lack of legal cause. (CP 569-570).

On review, this Court should follow the directive from *Schooley*. It should not stop at “duty,” but should take the second step of analysis and should review legal cause separate and apart from zone of danger foreseeability discussed in *McLeod*. As the trial court did, this Court

should find that taking high school students for a walk on a public sidewalk routinely used by the public and school students (including Gabriel – *with his guardian’s permission*), along a long straight road protected by a wide, marked shoulder in the middle of a clear, bright day, simply does not create legal cause. This is consistent with the standard of care imposed on parents, and therefore, on the District when standing *in loco parentis*.

5. ARGUMENT

The trial court properly dismissed this case on summary judgment for the reasons that follow.

A. The Trial Court Properly Applied the District’s Duty of Reasonable Care

Appellants’ imprecise Assignment of Error ranges from the scope of the protective duty of a school district, to breach, to foreseeability. (Appellant’s Brief at 1-2). To keep the analysis clear, this Court should first look at whether the trial court properly understood and applied the District’s duty to Gabriel Anderson.

Appellants’ brief additionally sets out a lengthy history of cases discussing the duty of *in loco parentis*. The goal of this lengthy recitation was to set the stage for a school’s duty to anticipate a broad range of

foreseeable dangers—not just the obvious risk, but anything within the “zone of danger.” See *McLeod*, 42 Wn.2d at 320; *J.N. By and Through Hager v. Bellingham School Dist. No. 501*, 74 Wn. App. 49, 871 P.2d 1106 (1994).

The School District acknowledges that duty remains to this day. It was affirmed again in two recent Supreme Court opinions: *Hendrickson v. Moses Lake School Dist.*, 192 Wn.2d 269, 428 P.3d 1197 (2018) (“Moses Lake had a duty to take ordinary, reasonable care to protect Hendrickson from foreseeable harm.”); and *Anderson v. Soap Lake School Dist.*, 191 Wn.2d 343, 368, 423 P.3d 197 (2018) (“An injury may be foreseeable even if it occurred off school grounds or involved an intentional tort. As long as the harm was within the general field of danger which should have been anticipated, it is foreseeable.”)

The District agrees with these statements of its duty. The trial court’s Letter Opinion clearly sets out that same understanding. In fact, the court quoted at length from *Hendrickson*, including that “school districts have the duty to exercise such care as an ordinarily responsible and prudent person would exercise under the same or similar circumstances,” and that “the school district must take certain precautions to protect the pupils in its custody from dangers to be reasonably anticipated.” (CP at 569-570). In short, the trial court correctly understood and applied school

district “duty” analysis, including a duty to protect against the full range of foreseeable dangers. (CP 569-570).

However, as pointed out in the Statement of the Case above, “a court should not conclude that the existence of a duty automatically satisfies the requirement of legal causation.” *Schooley*, 134 Wn.2d at 479 (holding that if the existence of duty automatically satisfies the requirements of legal causation, “this would nullify the legal causation element and along with it decades of tort law.”).

Yet this is exactly the error of over-simplified thinking that appellants assert—that because the District had a custodial duty to protect Gabriel from foreseeable danger, and because there was evidence presented that “cars leaving roadways” is foreseeable, the analysis should end. Instead, as the *Schooley* Court did, this Court should resist appellants’ invitation to error. This Court can properly identify the duty, find that the District held that duty, and find that cars leaving roadways is within the general zone of danger. But “[e]ven when duty and foreseeability concepts indicate liability can arise, legal causation allows a court to limit liability for sound policy reasons. *Schooley*, 134 Wn.2d at 479.

The trial court found this particular accident unforeseeable *as a matter of law*. It considered the guardian’s statement, in hindsight, that she would not have allowed Gabriel to go for the walk on that day on the

sidewalk of W. Smith Road. However, it also considered the guardian's testimony that she regularly and without condition permitted him to walk along and across the very same road at lunch, without supervision, and that she was aware of him doing so. The trial court also considered that Gabriel routinely rode his bike on similar streets, including along busy roads from the city of Ferndale (where he lived) to Bellingham and around other places in Whatcom County. (CP 139-154). In summary, the court took into account the leeway granted to a guardian and the school to make judgment calls about allowing a *high school student* to encounter the basic level of risk posed by "traffic." The court did not err in its interpretation of the District's duty, nor did it ignore the "vehicles leave roadways" testimony. It simply performed the "next step" analysis required by *Schooley* to find lack of legal cause. That was a determination of law, reviewed for errors of law, which should be affirmed.

B. The Trial Court Properly Concluded That Alleged District Shortcomings Were Not a Cause-in-Fact of This accident

The appellants alleged several specific shortcomings of the District as causes in fact of this collision. Appellants presented evidence about the teacher not wearing a reflective safety vest, the lack of chaperones, failing to make students walk on the sidewalk facing traffic, and not crossing at a designated crosswalk at the turn-around (where there is no marked

crosswalk). The trial court was keenly aware that this accident was caused by a driver who fell asleep and hit students while they were on a sidewalk – not when they were crossing the road:

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.

(CP 570).

The District acknowledges that proximate factual cause is usually a jury question unless reasonable minds could not differ. *See Hertog v. City of Seattle*, 138 Wn.2d 265, 282-83, 979 P.2d 400 (1999). Here, reasonable minds could not differ. Driver Klein fell asleep in the middle of the day without any warning, drove up onto the sidewalk, and hit the first few students in his vehicle’s path. Whether the students had been walking in a more bunched up group, or whether the teacher had been wearing a vest, would have made no difference at all.²

² Appellants tried below, and have tried again on appeal, to argue that if the students had been required to walk on the north sidewalk for both the outbound and returning walk, instead of switching to the south sidewalk for their return to school, they would not have been in the area where Klein swerved. (CP 328, 337; Appellant’s Brief at 37). Either, they argue, if the students had been facing traffic, they might have had enough time to respond when the car started swerving toward them. (CP 393) (“[I]f students were walking on the north side of West Smith Road, they would not have been struck by Defendant William Klein.”). On appeal, they argue that if the class “would have been walking on the north side of West Smith Road, [they] would not have been struck by defendant William Klein.” (Appellant’s Brief at 37).

The appellants' major contention under "cause in fact" is that the District did not request, or obtain, permission slips from parents (or guardians) for this trip. The appellants argue that if the District had done so, Gabriel's guardian would not have signed one. In this way, he would never have been on the sidewalk in a location to be struck by Klein. (Appellant's Brief at 9) ("Gabriel would not have been in harm's way.").

To make this argument, appellants have repeatedly mischaracterized the testimony of Scott Brittain to spin it into testimony that this trip required a permission slip. Then, appellants build on that testimony with a declaration from Gabriel's custodial grandparent, who averred, "If I had been asked on June 10, 2015 if Mr. Ritchie could take Gabriel off campus, * * * I would have said 'no'." CP at 432-433. Appellants convert that argument into a "cause in fact" type proposition: that if the District had asked for permission, and his guardian had said no, "Gabriel would not have been on the excursion where his death occurred." (Appellant's Brief at 9).

There is no duty for users of a sidewalk to walk only on the sidewalk on the side of the road facing traffic. *See* RCW 46.61.250. Further, the trial court properly rejected this argument under a *Channel v. Mills*-type analysis. *See Channel v. Mills*, 77 Wn. App 268, 890 P.2d 535 (1995). Akin to "excessive speed as a proximate cause" cases, simply walking in the location where an accident occurred, as opposed to on the other side of the street, is not evidence of negligence. *See id.* at 274 ("[S]peed is not a proximate cause if it does no more than bring the favored and disfavored drivers to the same location at the same time, and the favored driver has the right to be at that location[.]").

The entire underpinning of this argument turns on a false characterization of Scott Brittain's testimony--one which the trial court expressly addressed and rejected at oral argument. (RP at 26-27) ("I think you're mischaracterizing what he said. * * * I don't think he agreed that this was an excursion."). Scott Brittain testified that the District had a "Field Trips and Excursions" Policy 2320 and an accompanying Procedure 2320P. (CP 317-321). Brittain testified that, "If there's a field trip, it would be an expectation that the principals would follow these procedures." (CP at 457). He then testified about the difference between a field trip and an excursion (terms used in the policy), and testified:

So, a field trip, as I would define it, would be a well-planned, long-in-advance field trip that took a lot of logistics. An excursion is—does not take nearly the time and energy to plan in that case. There's a lot of details to a field trip. Excursion in this case, or in my understanding, would be a far—it would be much more local, or it could be repetitive. * * * They would stay within the—more than likely, they would stay within the confines of the area, being the city.

(CP at 457-460). However, Brittain also testified that regardless of his perceived differences between a field trip and an excursion, the walk on June 10 was neither and did not invoke the requirements of Policy 2320, including obtaining parental permission:

- Q. You're saying Mr. Ritchie taking the kids off campus that day was not a field trip, correct?
- A. No, ma'am.
- Q. And you're saying it's also not an excursion, correct?

A. No, ma'am.

(CP at 550).

Every other Ferndale School District witness similarly testified that the walk on June 10, 2015 was not subject to the field trip and excursion policy, including the Superintendent (CP at 566-67), Executive Director of Student Services (CP at 560), Windward's principal and every member of the Executive Team. (CP 546-550, 554, 559-560).

While appellants now assert that Gabriel's guardian would have declined permission if asked to sign a permission slip, as previously indicated she had allowed Gabriel to routinely and freely leave campus, unaccompanied, to walk along and across the same street at lunchtime. He was also permitted to bike on numerous streets along Whatcom County that were similar if not greater risks than walking on a sidewalk .2 miles from school. (CP 139-154). In short, appellants' attempt to create a policy violation out of Policy 2320 is simply not supported by evidence in the record, nor was it causative of this event. The lack of a permission slip was not a "but for" cause of this collision. *See, e.g., Cho v. City of Seattle*, 185 Wn. App. 10, 16-22, 341 P.3d 309 (2014) (holding that failure to install pedestrian signal was not the cause in fact of a pedestrian's injury and upholding grant of summary judgment).

C. The Trial Court Properly Ruled That Legal Cause Does Not Extend This Far

Finally, for reasons discussed above, this Court should be reviewing the trial court's determination that there was not legal cause for "errors of law." Under a legal cause analysis, the court "still retains its gatekeeper function and may determine that a municipality's actions were not the legal cause of the accident." *Keller v. City of Spokane*, 146 Wn.2d 237, 252, 44 P.3d 845 (2002); *see also McCoy v American Suzuki Motor Corp.*, 136 Wn.2d 350, 359, 961 P.2d 952 (1998) ("[T]he court often exercises its gatekeeper function by dismissing an action without trial for lack of legal cause if the defendant's actions are too remote a cause of plaintiff's injuries.").

Legal cause rests on policy grounds and is concerned with how far a defendant's liability should extend. *See Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1965). Legal cause is

not susceptible of a conclusive and fixed set of rules, readily formulated. '[Legal liability] is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent...the best use that can be made of the authorities on proximate case is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other.

King v. City of Seattle, 84 Wn.2d 239, 250, 525 P.2d 228 (1974) (quoting 1 Thomas Atkins Street, *The Foundations of Legal Liability* 110 (1906)).

The focus is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *See Medrano v. Schwendeman*, 66 Wn. App. 607, 611, 836 P.2d 833 (1992).

Here, the trial court issued a lengthy, well-reasoned letter opinion, setting out its thinking on the “mixed considerations of logic, common sense, justice, policy, and precedent” that governed this case. *See Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013). In doing do, it briefly touched on the fact that a parent’s duty of reasonable care nonetheless allows a parent to “subject” a child to some level of risk, which is implicit in living a normal human experience. (CP at 569). The trial court then reached a “policy determination[] as to how far the consequences of a defendant's acts should extend.” *See Crowe v. Gaston*, 134 Wn.2d 509, 951 P.2d 1118 (1998).

While it is a rare case in which the parties admit that a duty exists, and admit some level of “foreseeability” of the type of event that occurred, and yet “legal cause” is absent, *this is such a case*. *See Cunningham v. State of Washington*, 61 Wn. App. 562, 811 P.2d 225 (1991) (holding that negligent road design was not a legal cause when the intoxicated driver drove full speed into an obstruction that was fully visible); *see also Maltman v. Sauer*, 84 Wn.2d 975, 981, 530 P.2d 254 (1975) (holding that

the party causing a principal accident should not be liable for the subsequent crash of a rescue helicopter hundreds of miles away, as a matter of public policy); *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985) (holding that the state should not be liable for injuries caused by a driver simply because the state failed to revoke driver's license); *Medrano v. Schwendeman*, 66 Wn. App. 607, 836 P.2d 833 (1992) (holding that a misplaced power pole was not the legal cause of collision because county should not be required to protect against the consequences of a criminally reckless driver.) Such cases are amenable to resolution on summary judgment, because the policy determination of how far liability should extend is one for the Court. *See McCoy*, 136 Wn.2d at 360 (“[T]he court exercises its gatekeeper function by dismissing an action without trial for lack of legal cause if the defendant's actions are too remote a cause of plaintiff's injuries.”).

Here, as stated by accident reconstruction expert, David Wells, “the roadway where this accident occurred was about as safe as you can make any road.” (CP 157). The traffic lanes are each twelve feet wide. There is an eight foot wide shoulder between the fog line and the curb. (CP 157). It is wider than a typical road. There is a six-inch raised curb, protecting the five-and-a-half foot wide sidewalk. The roadway and sidewalk were in excellent condition. (CP 157). The road is mostly flat

and straight, with no visibility issues. There are pedestrians routinely using the roadway and sidewalks, including students walking to and from school. (CP 157). There has only been one other pedestrian-related accident in the entire area, *in the last ten years* – and that occurred in the crosswalk of the intersection to the east of the school. It happened during the summer when a young male ran between cars that were stopped at the intersection, and jumped into the path of a slow moving vehicle. (CP 158). In other words, there have been no similar accidents.

The specific area where the students were located when they were struck had also been previously studied and approved as a Safe Walk Route by the District, pursuant to the procedures set forth in WAC 391-141-340. (CP 269, 306). Further, Ritchie had taken PE students walking along this sidewalk around 30 times without any issues. (CP 310).

It is uncontroverted that Klein had been driving at around 32-34 mph when he fell asleep, and that it took about one second from when his vehicle left the roadway until he impacted Gabriel Anderson. (CP 186-87). There was simply no warning and no time to react.

As the District argued at oral argument,

Every time you go on a road, whether you're driving or walking or riding a bike, it involves some—some level of risk. But it's not an unreasonable level of risk to allow Gabe to cross West Smith Road or allow him to walk on the sidewalk or to ride his bike from Cornwall Park to downtown Bellingham or from his house in

Ferndale to Meridian High School. It's a level of risk that we have to accept. And there's no negligence on the part of a parent or a school for allowing that.

(RP at 36-38).

In light of this evidence, the Court was well within its legal discretion in ruling, as a matter of policy, that liability simply did not extend to the District's decision to take students on a walk down the same sidewalk they routinely used.

D. This Court Should Affirm on Any Basis in the Record

Finally, this Court can affirm the trial court on any alternative basis supported by the record and the pleadings, even if the trial court did not consider that alternative. *See Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 508, 84 P.3d 1241 (2004); *see also Robinson v. Hamed*, 62 Wn. App. 92, 104 n. 29, 813 P.2d 171, *review denied*, 118 Wn.2d 1002 (1991) (noting that an appellate court may affirm a trial court decision on any grounds supported by the record).

Here, the District's Motion squarely presented the issue of legal cause. (CP 42-43) ("Legal Cause should not extend liability to the act of 'allowing' high school students to walk along a public sidewalk."). Appellants chose not to provide any briefing in response to the legal cause argument. (CP 324-345). This Court is perfectly situated to reach the "mixed considerations of logic, common sense, justice, policy and

precedent...” that legal cause analysis requires. *See King v. City of Seattle*, 84 Wn.2d 239, 250, 525 P.2d 228 (1974).

1. Parents’ Reasonable Care Sets the Stage

The District argued below, and the trial court agreed, that:

[W]e would never say that -- that Wanita Anderson would be negligent for allowing her son [sic] to leave campus unattended and cross West Smith Road. And so the -- the standard of care of a school district is the same of a -- of a parent. It's, the Court is well aware, *in loco parentis*: in place of parent. It's not a heightened standard. And so if we're going to say that --that any of the parents who allow their kids to walk to school on a public sidewalk are not negligent, then why would we say that the School District is negligent for allowing the kids to -- to go on a walk?

(RP at 10). The District further argued:

So every -- you know, every time you -- you go on a road, whether you're driving or walking or riding a bike, it involves some -- some level of risk. But it's not an unreasonable level of risk to allow Gabe to cross West Smith Road or allow him to walk on the sidewalk or to ride his bike from Cornwall Park to -- to downtown Bellingham or from his house in Ferndale to Meridian High School. It's a level of risk that we have to accept. And there's no negligence on the part of a parent or a school for allowing -- for allowing that.

(RP at 11). This state has long recognized that parents are not negligent simply because something bad happens to their child while the child is in the parent’s care. (See *Cox v. Hugo*, 52 Wn.2d 815, 329 P.2d 467 (1958).

Then, even after Washington adopted the idea of “parental immunity” against general negligence claims, cases involving quasi-

parents³ continued to flesh out that the parental duty of supervision does not require minimizing every possible risk. For example, in *Carey v.*

Reeve, 56 Wn. App. 18, 781 P.2d 904 (1989), the Court noted:

The law does not require that parents or custodians do the impossible for children; [t]hey are not required to watch them every minute.” 57 Am.Jur.2d, supra § 377, at 785)... Thus, one with responsibility for a child's care “has no duty to foresee and guard against every possible hazard”, and will not be found to have negligently supervised a child unless he or she “had some knowledge that the child was frequenting a dangerous area, and failed to warn the child or to take other adequate precautions.” 57 Am.Jur.2d, supra § 377, at 784–85[.]

The case of *Cox v. Hugo*, supra, is also instructive. There, Deborah Cox, age 5, was severely burned when her clothing ignited while playing in or near the remains of a small trash fire started by the 13-year-old son of the Hugos at his mother's direction. On cross appeal, Deborah's parents claimed there was no evidence of negligence on their part, and the issue of contributory negligence should not have been submitted to the jury. The court agreed and stated:

There is no evidence of contributory negligence by Deborah's parents, unless we are prepared to hold that parents with five-year-old children, who let them go out of the house to play and do not keep them under constant surveillance during the period they are outside of the house, are negligent in their care of their children. We are not prepared to so hold. The law imposes no such impracticable standard. Parents are not required to restrain their children within doors at their peril. *Westerfield v. Levis Bros.* (1891), 43 La. Ann. 63, 9 So. 52; *Cox v. Hugo*, 52 Wash.2d

³ Because true biological and adoptive parents have immunity against general negligence claims, the cases discussing the parental duty of supervision are often found discussing the conduct of people like step-parents, grandparents, and those standing in the role of parent but who do not qualify for the immunity. See, e.g., *Carey v. Reeve*, 56 Wn. App. 18, 781 P.2d 904 (1989) (grandfather); *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008) (step-parent).

at 820, 329 P.2d 467; *see also Gabel v. Koba*, 1 Wash.App. 684, 688, 463 P.2d 237 (1969) (quoting W. Prosser, *Law of Torts* § 59 (3d ed.1964) (it is neither customary nor practicable for parents to follow children around with a keeper, or chain them to a bedpost).

Carey, supra, at 24. The same holding occurred in *Curran v. City of Marysville*, 53 Wash App 358, 766 P.2d 1141 (1989), where a grandfather allowed his 10-year-old granddaughter to be out of sight, but within earshot, playing on a sports court while he explored a nearby garden. She began misusing the equipment and injured herself. The court stated:

The measure of the duty owed is determined by what a reasonable person would do in the same circumstances and therefore varies in relation to the age, maturity, and intelligence of the child being cared for. 57 Am.Jur.2d, *supra* at §§ 88–89, 377.

* * *

Here, Stewart left Amber, a 10–year–old, unattended but within hearing distance for only a short time. There is no evidence from which we can infer that Stewart knew, or should have known, that the exercise court was somehow dangerous. Accordingly, we hold that Stewart did not breach the ordinary duty of care owed to a child by briefly allowing Amber to play without adult supervision.

Curran's affidavit sets forth only her conclusory statements that Stewart knew of Amber's need for adult supervision, and that he had observed her playing. Even interpreted in Curran's favor, we find this insufficient to raise a question of fact as to whether Amber, a child nearly 11 years old, and by all accounts a child of at least average intelligence, required exceptionally rigorous adult supervision.

Curran, 53 Wash App at 366.

Notably, in two of the out-of-state cases cited by the Carey court, the level of parental supervision was far more lax than what most modern reasonable parents would tolerate. In *Laite v. Baxter*, 126 Ga.App. 743, 191 S.E.2d 531 (1972), the court held there was no parental negligence as a matter of law in permitting a 12-year-old to enter an area of a river containing rapids without close adult supervision. In *Whitney v. Southern Farm Bur. Cas. Ins. Co.*, 225 So.2d 30 (La.App.1969), the court held there was no negligence as a matter of law for leaving 12-year-old unattended by an adult on a swimming outing. In those cases, like in Washington cases, the examination included the capacity of the particular child *vis-a-vis* the typical understanding of the risk to which they were being exposed.

In short, this Court can independently look at the activity undertaken—taking a capable group of 14-18 year-old high school students for a walk, on a public sidewalk, in a safe, familiar area with no history of accidents, under the supervision of a teacher—and determine as a matter of law that the conduct simply does not constitute negligence.

2. Schools “In Loco Parentis” duties

The Washington Supreme Court has recently been very careful to scale back and provide clarity about the types of risks that can be assigned on a public school district. See *Hendrickson v. Moses Lake School Dist.*, 192 Wn.2d 269, 428 P.3d 1197 (2018); *Anderson v. Soap Lake School*

Dist., 191 Wn.2d 343, 367-68, 423 P.3d 197 (2018). All recent case law affirms that the duty of care is measured both by the capacity of the individual being supervised, and the dangerousness to be expected from the activity that the adult “allows.”

This Court would only be affirming the obvious if it confirms, again, that school districts simply cannot ensure student safety, regardless of the activities they engage in or choose to forego. It is untenable to extend liability to the act of taking high school students for a walk on a sidewalk along a safe road near their school – especially when they are already engaging in this activity going to and from school as well as during lunch. *See, e.g., Claar ex rel Claar v. Auburn School Dist. No. 408*, 126 Wn. App. 897, 903, 110 P.3d 767 (2005) (holding that the district’s “duty towards Claar does not extend as far as Claar wants it to under these circumstances.”). This Court can affirm on that independent basis, given the facts in the record about the safety of this particular sidewalk. *See Syrovoy v. Alpine Resources, Inc.*, 80 Wn. App. 50, 55, 906 P.2d 377 (1995) (“[W]e affirm the decision of the trial court here based on an alternate theory developed in the briefs and well supported in the record.”).

6. CONCLUSION

The trial court's grant of summary judgment should be upheld on appeal.

DATED THIS 30th DAY OF MAY, 2019.

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