

FILED
SUPREME COURT
STATE OF WASHINGTON
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No. 98280-5

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

FERNDALE SCHOOL DISTRICT, a political
subdivision of the State of Washington;

Petitioner,

and

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

Defendants.

RESPONDENTS' RESPONSE TO
WSAJ FOUNDATION AMICUS BRIEF

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A. INTRODUCTION

Gabriel Anderson died needlessly because the Ferndale School District (“District”) was negligent in allowing his PE teacher at Windward High School (“WHS”) to conduct an unnecessary, off-campus excursion in violation of District policy in a haphazard, negligent fashion. Another student was killed and two other students were also injured due to the District’s negligence.

The amicus brief of the Washington State Association for Justice Foundation (“WSAJF”) demonstrates why legal causation principles do not bar the Estate’s action. The WSAJF brief supports the Estate’s position that legal causation does not preclude the Estate’s action where the District’s duty to Gabriel arose out of the special relationship between Gabriel and the District, a duty the District has acknowledged, and there were fact issues as to foreseeability and but for causation.

B. STATEMENT OF THE CASE

The WSAJF correctly articulates the essential facts and procedure herein. WSAJF br. at 1-3. That recitation is consistent with the facts and procedure set forth in the Estate’s supplemental brief. Resp’ts suppl. br. at 1-9.

By contrast, the District’s brief takes liberties with the facts, ignoring a central principle in cases addressing summary judgment.

Washington courts, and this Court in particular in its *de novo* review of the trial court’s summary judgment order,¹ must treat the facts, and reasonable inferences from those facts, in a light most favorable to the Estate as the non-moving party to determine if a genuine issue of material facts is present. CR 56(c); *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

The District’s factual claims are inconsistent with that cardinal principle. For example, the District claims that Ritchie had the students “under close supervision.” Pet’r suppl. br. at 1. That assertion is belied by the facts herein and the Estate’s accident reconstruction expert Steven Harbinson’s contrary testimony. CP 393, 395. The District repeats a claim that on the illicit excursion the students experienced “the same risks” that they encountered leaving school and going to lunch. Pet’r suppl. br. at 8. That, too, is untrue. *See* resp’ts suppl. br. at 6.² The District wants this Court to believe the excursion had a “beneficial educational purpose.” There was no such purpose, as Dr. Dennis Smith noted – a discussion of “summer plans” bears no relationship to the

¹ This Court reviews summary judgment orders *de novo*. *McDevitt v. Harborview Med. Ctr.*, 179 Wn.2d 59, 64, 316 P.3d 469 (2013).

² When the District suggests that this negligently-conducted excursion, lacking educational purpose, and undertaken in violation of District Policy 2320 was a walk “on a safe, public sidewalk under a teacher’s supervision, where students routinely walk to and from school every day,” pet’r suppl. br. at 16, it ignores contrary facts and expert testimony of former SPI Judith Billings, former school superintendent, Dr. Dennis Smith, and accident reconstructionist Steven Harbinson.

curriculum of a PE class. CP 352. The District’s assertion, pet’r suppl. br. at 15, that there was no “age-appropriate outdoor track” is false, particularly in the context of a case where a walk to discuss summer plans was at issue, not a track competition; the high school had *ample* on-campus facilities for PE classes generally, and certainly for a walk to discuss summer plans. CP 352. Finally, the District’s argument on causation, pet’r suppl. br. at 18-19, conveniently *ignores* the Harbinson testimony that the students were arrayed on the *wrong side* of W. Smith Road by Ritchie’s negligent conduct of the excursion; they could not see Klein coming so as to avoid his vehicle. CP 395.

This Court should ignore the District’s factual assertions and hue to the core facts set forth in the WSAJF amicus brief and the Estate’s supplemental brief.

C. ARGUMENT

(1) The District Owed a Duty to Gabriel and There Is a Fact Question as to the Foreseeability of His Harm

WSAJF’s brief clearly articulates the duty owed by the District to Gabriel and the other students killed or injured on the ill-fated, illicit off-campus excursion. As WSAJF notes, that duty arises out of the special relationship between the District and its students, who have no choice but to subject themselves to the District’s control. That duty is rooted in the

Restatement (Second) of Torts § 315(b) and the *Restatement (Third) of Torts* § 40, and has been discussed in *numerous* Washington cases. WSAFJ br. at 5-13. The scope of that duty is limited only by principles of foreseeability, a question of fact. *Id.* at 5-6.

Here, the District *concedes* that owed a duty to Gabriel and that there were questions of fact as to foreseeability by *abandoning* that issue at Division I and not advancing a foreseeability argument anywhere in its petition for review. RAP 13.7(b). *See Sargent v. Seattle Police Dep't*, 179 Wn.2d 376, 401, 314 P.3d 1093 (2013) (failure to assign error to issue in petition for review forecloses Supreme Court review).

In its supplemental brief, however, the District seemingly attempts to argue a revisionist, narrower view of its duty and foreseeability. Pet'r suppl. br. at 8-12. Its position on both issues contravenes this Court's well-developed precedents on both. *See, e.g., McLeod v. Grant Cty. Sch. Dist. No. 128*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953) (district must anticipate dangers and take precautions to avoid them); *N.L. v. Bethel Sch. Dist.* 186 Wn.2d 422, 378 P.3d 162 (2016).³ Moreover, the foreseeability element of duty is clearly one requiring only that the hazard be in the

³ For example, a *Restatement* § 315(b) duty does not require a "custodial" relationship, contrary to the District's claim in its brief at 10. *See Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 202, 943 P.2d 286 (1997) (business invitee); *H.B.H. v. State*, 192 Wn.2d 154, 170-74, 429 P.3d 484 (2018) (special relationship not confined to situations of physical custody or control; in case of foster children, test for special relationship is entrustment of a person's care to another, not physical custody).

general field of danger, as this Court held in numerous cases. *See, e.g., Berglund v. Spokane Cty.*, 4 Wn.2d 309, 319-20, 103 P.2d 355 (1940); *McLeod*, 42 Wn.2d at 321.

WSAJF's recitation on the District's duty and the foreseeability element of duty were correct and support the Estate's position.

(2) There Is a Fact Question as to Proximate Cause and Legal Causation Principles Do Not Bar the Estate's Claim

The WSAJF brief carefully sets forth the proper analysis of legal causation in the specific context of a case where the duty is one arising out of a *Restatement* § 315(b) special relationship and there are acknowledged questions of fact attendant upon foreseeability. WSAJF br. at 8-20. WSAJF supports the Estate's position that where such a duty is present and questions of fact exist regarding foreseeability and proximate cause,⁴ legal causation principles do not bar the Estate's action here. *Id.*

The District lacks support in Washington law for its position. It repeatedly cites to this Court's decision on legal causation in *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998) throughout its supplemental brief, but its reliance is misplaced. There, this Court *rejected* dismissal on legal causation grounds of the plaintiff's case against the store that illicitly supplied liquor to a minor who, in turn, provided it to

⁴ WSAJF did not specifically address the District's argument on proximate cause, pet'r suppl. br. at 17-19, and the Estate will not address it here, relying instead on its supplemental brief at 10-15.

another minor who was injured when thrown into a swimming pool after a drinking party. *Id.* at 480-81.

The District also attempts to “distinguish” recent legal causation decision of this Court out of existence. It has no real answer to *N.L.*, a case where this Court held that a claim was not barred by legal causation principles where a student sex offender took a student off-campus and raped her. 186 Wn.2d at 438-39 (given long history of sex offender registration and standard set forth in *McLeod*, “we 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 was foreseeable, as is the fact that a much younger student can be convinced to leave campus by an older one.”). It seeks to effectively overrule this Court’s decision in *Lowman v. Wilbur*, 178 Wn.2d 165, 309 P.3d 387 (2013), relying instead on the concurrence in that case for its position. Pet’r suppl. br. at 6-7. It fails to even cite *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926 (2016), another decision of this Court rejecting its position on legal causation. In fact, the county there argued that the defendant’s negligence was not foreseeable so legal causation should be rejected as to the County. *Id.* at 28. Citing *Lowman*, this Court stated: “...we have already rejected similar arguments.” *Id.* Where the risk was foreseeable,

i.e. in the general field of danger, as here, legal causation should not foreclose the Estate's case against the District.

Lacking support in Washington law for its position, the District is forced to pivot to foreign authorities for support, pet'r suppl. br. at 12-17, cases that would *undercut* this Court's longstanding treatment of the duty owed by school districts to the students under their care and control. The notion that a school district's duty to students under its care should not extend to "risks beyond what students encounter in daily life" is an invitation to retrenchment of school districts' duty of care to their students, pure and simple. Most students do not encounter the risks of athletic competition or other extracurricular activity "in daily life." Does the District seek immunity for students from the hazards associated with such activities? *See, e.g., Carabba v. Anacortes Sch. Dist. No. 103*, 72 Wn.2d 939, 435 P.2d 936 (1967) (District liable for student's wrestling injury); *N.L., supra* (off-campus sexual assault); *Swank v. Valley Christian School*, 188 Wn.2d 663, 398 P.3d 1108 (2017) (death of student football player attributable to concussion during high school football game).

WSAJF correctly requested this Court to reject the District's attempt to overrule *sub silentio* past precedents of this Court on duty/foreseeability in the guise of a causation argument. WSAJF br. at 19-20.

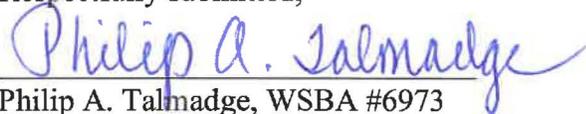
D. CONCLUSION

Gabriel Anderson died unnecessarily as a result of the District's negligence. The WSAJF makes clear that where the District owed Gabriel a duty of care *in loco parentis* arising under its special relationship with Gabriel as a student under its charge, and there were fact questions on foreseeability and proximate cause, attested to by the Estate's experts, legal causation principles did not bar the Estate's action.

Like Division I, this Court should reverse the trial court's order on summary judgment to give the Estate its day in court. Costs on appeal should be awarded to the Estate.

DATED this 5th day of October, 2020.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Respondents' Response to WSAJ Foundation Amicus Brief* in Supreme Court Cause No. 98280-5 to the following parties:

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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: October 5, 2020, at Seattle, Washington.



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