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No. 98280-5

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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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.

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RESPONDENTS' SUPPLEMENTAL BRIEF

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A. INTRODUCTION

Gabriel Anderson, then fifteen years old, was killed because the Ferndale School District (“District”) allowed his PE teacher at Windward High School (“WHS”) to conduct an unnecessary, spontaneous, off-campus excursion in violation of District policy. Another student was killed and two other students were injured in the ill-fated excursion.

Division I correctly determined that the District owed a duty of care to Gabriel and that there were questions of fact as to foreseeability and cause-in-fact, particularly given the expert testimony of Gabriel’s Estate’s well-qualified experts.

Because there were fact issues as to foreseeability and causation, the Estate’s claims against the District were not barred on the basis of legal causation, particularly in a case where the duty arose out of the special relationship between Gabriel and the District, a duty the District has acknowledged. This Court should affirm Division I’s opinion and afford the Estate its day in court.

B. STATEMENT OF THE CASE

Division I opinion clearly recited the facts and procedure in the case. Op. at 2-4. The material facts in the case, contrary to the District’s assertion in its petition for review at 3, *are* in dispute. That is exactly why summary judgment was inappropriate here.

For example, the District claims in its petition for review at 4 that the ill-fated excursion here was not subject to the District's field trip policy. *See* Appendix. That was *hotly contested* below. Policy 2320 required 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. The District's Mark Hall testified that a "field trip" and "excursion" were synonymous terms. CP 509. Assistant Superintendent Scott Brittain said Policy 2320 and the applicable procedures applied to excursions taken by District students. CP 459. Dr. Dennis Smith, the Estate's expert, also so testified. CP 348-50 (Policy 2320 applied to field trips or excursions).

But even if the policy did not apply, former Superintendent of Public Instruction Judith Billings testified that if it did not apply, as former WHS PE teachers Rick Brudwick and Jill Iwasaki believed it did, then the District's leadership failed to tell District principals like Tim Keigley, as it should have done. CP 380. Dr. Smith concurred. CP 349-50.

Moreover, SPI Billings testified that such a "spur of the moment" excursion was unwise in any event. CP 379 ("A teacher should also plan ahead when taking students off campus."). As Dr. Smith, himself a former school superintendent, 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 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.

When the District claims in its petition at 4 that teacher Evan Ritchie had permission from Keigley, WHS's former principal, for this excursion, that is *false*. See Appellants' Br. at 6 n.3. As Division I charitably put it, Principal Keigley's statements about what Ritchie told him about the excursion were "inconsistent."<sup>1</sup> Keigley was even confused

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<sup>1</sup> 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 W. 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. And this was also not Ritchie's first time taking students on excursions without complying with Policy 2320. CP 310.

about whether there were crosswalks on the portion of W. Smith Road where the collision occurred. His declaration stated that a crosswalk is present on the west end of W. Smith Road when no crosswalk exists there; the crosswalk is on the road's east end near the Greene's Corner store. CP 238.

When the District claims no District witness testified that parental permission for excursions was necessary, pet. at 4, it *ignored* the testimony of former WHS PE teachers Brudwick and Iwasaki, both of whom *required* parental permission before any off-campus excursions could take place. CP 372, 470, 473, 475. Brudwick pointedly testified: "We didn't leave campus until – for our first walk until everybody had these on file." CP 470, 475. When asked if he ever took students off campus without parent/guardian permission, Brudwick answered "No." CP 476. Iwasaki 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.

When the District claims that Ritchie's impromptu excursion furthered an educational purpose, pet. at 3-4, that, too, was contested. Dr. Smith testified that discussion of summer plans does not constitute an "educational purpose." CP 352. Ritchie had on-campus fields and gyms available to his PE class. *Id.*

When the District claims (as it did repeatedly in its Court of Appeals brief) that Gabriel and other students regularly walked on the same street, pet. at 13-14, that *distorts* the different physical characteristics of the portion of W. Smith Road where Ritchie took the students and the walk to Greene’s Corner store. WHS was a modified closed campus, although that policy was not clear, according to Dr. Smith. CP 365. If that was 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 W. Smith Road in the opposite direction from the collision site, and is accessed from a designated crosswalk. CP 406, 418. It is located in the 20 mph school zone. The collision location had no crosswalk and was in a 40 mph speed zone.<sup>2</sup>

Finally, when the District asserts that Ritchie “properly” conducted his excursion, it cites only its own expert’s opinion for that proposition. Pet. at 4, 12. Omitted from that discussion is any reference to applicable statutes or countervailing expert testimony. For example, RCW 46.61.250(2) sets a general policy on safe pedestrian practices and requires

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<sup>2</sup> The trial court was 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 Gabriel was killed.

pedestrians to walk face on-coming traffic to the extent practicable.<sup>3</sup> Steven Harbinson, the Estate's well-qualified accident reconstruction expert, CP 398-99, testified pointedly that Ritchie was negligent because the students were on the wrong side of the road where they could be struck by the Klein vehicle. CP 395. He also testified that Ritchie's supervision of the excursion was lax; the students were spread out, they were allowed to cross W. Smith Road wherever they chose rather than at designated crosswalks within the lower speed school zone, and they were unchaperoned. *Id.* Ritchie's cavalier operation of the excursion caused the students to be struck by an inattentive driver like Klein, killing Gabriel and another student, and seriously injuring two others.

In fact, in its answer, 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.

Finally, the District has *conceded* that foreseeability was a fact issue associated with the scope of its duty arising out of Gabriel's special relationship with it, and that the Estate adduced substantial evidence

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<sup>3</sup> See, e.g., *Stutz v. Moody*, 3 Wn. App. 457, 476 P.2d 548 (1970); *Zook v. Baier*, 9 Wn. App. 708, 514 P.2d 923 (1973).

creating a genuine issue of material fact on that question both by choosing not to substantively address duty/foreseeability in its Division I briefing and making a concession on that point in its petition for review at 9.<sup>4</sup>

C. SUMMARY OF ARGUMENT

Gabriel Anderson was killed because the District allowed his PE teacher to undertake an impromptu excursion that had no educational value and that violated District Policy 2320 on field trips. That teacher then conducted the excursion in a negligent fashion, without other adult supervision, so that the students were widely dispersed on a busy road where vehicles traveled at a fast rate of speed, and were walking on the wrong side of the road. A driver fell asleep, and plowed into Gabriel and other students. Besides Gabriel, another student died and two were injured.

The District has conceded, as it must, that it owed a duty of care to Gabriel and the other students arising out of their special relationship. It has also conceded that fact questions were present as to the foreseeability of the collision on W. Smith Road in Ferndale.

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<sup>4</sup> The District's case morphed on appeal. The trial court did not decide this case on the basis of causation, as *neither* cause-in-fact nor legal causation was addressed substantively *anywhere* in the court's written ruling. CP 569-70; op. at 6 n.3. Rather, it decided the case on an erroneous interpretation of foreseeability in the duty context, ruling on that factual issue as a matter of law.

Given the evidence adduced by the Estate, particularly the expert testimony, there were fact issues as to cause-in-fact, an issue that generally is reserved to the jury.

On legal causation, given the District's concession on duty and its scope, and given that this is a case involving a special relationship between the District and Gabriel, traditional principles of legal causation do not bar the Estate's action. The policy rationale for the District's duty of care to Gabriel and the other students on the illicit, ill-fated excursion appropriately support the view that connection between the District's negligence and Gabriel's tragic death is not too remote or insubstantial to permit liability to attach to the District. The District owed a duty to Gabriel and the scope of that duty is limited only by foreseeability principles; legal causation does not afford the District a free pass for its egregious negligence that harmed its students.

#### D. ARGUMENT

##### (1) Standard 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).

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). And where there are significant witness credibility issues present in a case, *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."), as here, or when experts come to differing conclusions on key issues, *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*, 192 Wn.2d 1023 (2019) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate."); *Leahy v. State Farm Mut. Auto. Ins. Co.*, 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018), as here, summary judgment is inappropriate.

(2) The District Concedes that the Trial Court Erred on Duty/Foreseeability

The District has *conceded* that it owed a broad protective duty to students like Gabriel arising out of its special custodial relationship, standing *in loco parentis* to them. It has also conceded that foreseeability of such a duty is a question of fact for the jury. Pet. at 9 (“Ferndale does not challenge the Court of Appeal’s [sic] analysis of the duty owed.”).

Long ago, this Court articulated this duty arising out of the special relationship between schools and students in *Briscoe v. School District No. 123, Grays Harbor County*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949), a case involving injuries to a student at the hands of fellow students in a game on school grounds during the afternoon recess, stating:

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

*Accord, McLeod v. Grant Cty. School Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953); *Christensen v. Royal Sch. Dist. No. 160*, 156 Wn.2d 62, 70, 124 P.3d 283 (2005) (discussing special relationship); *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 430, 378 P.3d 162 (2016); *Hendrickson v. Moses Lake Sch. Dist.*, 192 Wn.2d 269, 277, 428 P.3d 1197 (2018) (noting special custodial relationship).

In fact, under this duty arising out of the special relationship between districts and students, districts must even *anticipate* harm to students. *Id* at 277.<sup>5</sup> Under that broad protective duty, a district has “the responsibility of reasonable supervision.” *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 18, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014); *J.N. By and Through Hager v. Bellingham Sch. Dist. No.*

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<sup>5</sup> The District implied that it is essentially immune from suit because its duty is *in loco parentis* and parental liability in Washington is “limited.” Pet. at 18. In *Zellmer v. Zellmer*, 164 Wn.2d 147, 188 P.3d 497 (2008), for example, this Court made clear that parental immunity was confined to situations involving negligent parental upbringing of a child, but not to intentional harms, wanton or willful misconduct, or situations where the parent stands outside the parental role such as in the operation of an automobile. *Accord, Smelser v. Paul*, 188 Wn.2d 648, 398 P.3d 1086 (2017); *Woods v. H.O. Sports Co. Inc.*, 183 Wn. App. 145, 333 P.3d 455 (2014) (negligent parental conduct, as in the operation of a boat or car is different than negligence associated with parental control, discipline, or discretion). The parental immunity doctrine, designed to protect parental upbringing of a child, has no application to a school district. And the District *nowhere* advanced this argument in its trial court motion pleadings, CP 26-47, 528-36, and it was foreclosed from doing so for the first time in a petition for review. RAP 2.5(a); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998). The Court should decline to address this argument.

501, 74 Wn. App. 49, 57, 871 P.2d 1106 (1994) (reversing summary judgment in favor of a school district where a first grade student was repeatedly sexually assaulted by fourth grader in boys' restroom).

The duty arising out of the District's special relationship with Gabriel and the other students is limited only by principles of foreseeability, a *question of fact*. *Anderson v. Soap Lake Sch. Dist.*, 191 Wn.2d 343, 369 n.19, 423 P.3d 197 (2018). Op. at 7. As noted *supra*, the trial court decided the case by ruling that the *specific accident* here was unforeseeable as a matter of law. CP 35, 352. That was error, as the District now *concedes*. Pet. at 9.

That concession on foreseeability is appropriate because this Court has *repeatedly* made clear the foreseeability analysis requires only that the risk fall within the "general field of danger;" the *specific harm* that occurred is not the focus of the analysis. *McLeod, supra; N.L.*, 186 Wn.2d at 430-31. *See also, Berglund v. Spokane Cty.*, 4 Wn.2d 309, 103 P.2d 355 (1940); *Rikstag v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969); *Hopkins v. Seattle Pub. Sch. Dist. No. 1*, 195 Wn. App. 96, 380 P.3d 584, *review denied*, 186 Wn.2d 1029 (2016); *Quynn v. Bellevue Sch. Dist.*, 195 Wn. App. 627, 383 P.3d 1053 (2016). A risk is unforeseeable only if it is "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod*, 42 Wn.2d at 323; op. at 5-9.

The Estate adduced *ample* evidence that Gabriel's death was within the zone of danger for an improper impromptu off-campus excursion, negligently conducted. The Estate's experts so testified. Dr. Dennis Smith stated:

It is my opinion, the tragic event that occurred on the June 10, 2015 Windward High School field trip was reasonably foreseeable. In Mr. Ritchie's deposition he acknowledges that the additional dangers involved in taking student off campus, included "*distracted drivers, drivers who drive faster than the posted speed limits, drivers losing control, driving off the side of the road and drivers falling asleep*". Despite knowing all of the dangers involved in a field trip/excursion of this nature, Mr. Ritchie took no additional precaution to safe guard his students. There was no additional adult accompanying Mr. Ritchie, students were walking several hundred yards apart from one another, there were no reflective vests worn, students crossed streets outside of the crosswalk and the list goes on.

In rendering this opinion, I rely upon my training, education and experience in the field of education. It is my opinion that in the absence of proper planning and supervision, and with the failure of the school and teacher to undertake even the most basic precautions as set forth for the protection of the students, the event should have been reasonably foreseeable to the District.

CP 356. Former SPI Judith Billings testified:

26. I also disagree with Ms. Kraizer's and Ms. Barry's opinion that it was not reasonably foreseeable that Gabriel Anderson would be harmed when Mr. Ritchie took the students off campus on June 10, 2015.

27 In fact, Ms. Kraizer indicated in her deposition it was foreseeable that there could be harm to the students in

Mr. Ritchie's class when they went off campus, but this is at odds with some of the other opinions she expressed.

28. Any reasonable principal and teacher should be aware there are different risks and dangers when taking students off campus.

29 These included, but are not limited to, the heightened danger and risks associated with vehicle traffic and the likelihood that vehicles could hit pedestrians.

30. In this matter, Mr. Ritchie's deposition testimony is clear, and Ms. Kraizer agreed in her deposition, that he was aware vehicle sometimes driver off of the road, he was aware drivers can fall asleep at the wheel, he is aware crashes occurs and he was aware that pedestrians could be hit by vehicles.

31. That is precisely what happened on June 10, 2015, when Defendant William Klein struck Gabriel Anderson.

32. It is my opinion that the injury and death of Gabriel Anderson on the June 10, 2015 was reasonably foreseeable.

CP 381-82.

The District's own expert agreed:

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?

...

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?

...

THE WITNESS: It is foreseeable that there could be harm.

CP 515. Even Ritchie himself concurred:

- 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.

Moreover, the Estate provided evidence from government agencies like the National Traffic Safety Administration and the Washington Traffic Safety Commission on pedestrian-vehicle accidents in the United States generally and in Whatcom County specifically. CP 394.<sup>6</sup>

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<sup>6</sup> 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 found that 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/>.

Division I correctly addressed duty/foreseeability, op. at 7-9; Gabriel and the other students were in the zone of danger, as the District now *concedes*.

(3) Division I Correctly Addressed Proximate Cause as a Question of Fact Here

Cause-in-fact is ordinarily a question of fact for the jury.<sup>7</sup> The District's argument on cause-in-fact is disingenuous particularly where it has conceded that Gabriel's death was *foreseeable*, within the zone of danger for such an improper excursion by not arguing otherwise in its brief, as noted *supra*.<sup>8</sup>

*Ample* evidence below supported the proposition that the District's negligence proximately resulted in Gabriel's death. Op. at 9-12. The Estate offered *extensive* evidence on proximate cause, including the

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<sup>7</sup> *E.g., 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); *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"); *Mehlert v. Baseball of Seattle Inc.*, 1 Wn. App. 2d 115, 404 P.3d 97 (2017) (genuine issue of material fact was present as to whether absence of handrails on ramp leading to Mariners team store caused plaintiff's fall); *Tessema v. Mac-Millan Piper, Inc.*, 5 Wn. App. 2d 1047, 2018 WL 5251954 (2018) (question of fact present as to whether staircase was unsafe due to icy conditions of which defendant had notice causing plaintiff's slip and fall, particularly in light of expert testimony); *Behla v. R.J. Jung, LLC*, 11 Wn. App. 2d 329, 453 P.3d 729 (2019), *review denied*, 460 P.3d 180 (2020) (reaffirms that proximate cause is fact question for jury and rejects reliance on contention that facts are "speculative," stating "speculation is a specious word. One person's proof may be another person's speculation." Court states that "the trial court should give the benefit of the doubt as to causation to the plaintiff and only dismiss a claim to the extent the court can decide that all reasonable people would conclude causation to be speculative.").

<sup>8</sup> The trial court never ruled on proximate cause. CP 569-70.

crucial expert testimony of former SPI Billings, CP 383, Dr. Smith, CP 348, 356, 369, and accident reconstructionist Harbinson. Dr. Smith was blunt in his opinion on causation:

In direct violation, and in total disregard to this Board policy and applicable procedures, Mr. Ritchie took the 25 students under his care and supervision on an unauthorized field trip over one mile away from Windward High School. At times throughout this walking field trip students were spread out from 100 - 500 yards from one another (the length of one to five football fields) as they traveled on streets with speed limits up to 40 miles per hour and crossed streets outside of the designated crosswalks. All of this occurred with only one adult supervising 25 young adolescents. This disastrous and spur of the moment decision on the part of the teacher was a proximate cause of the death of Gabriel Anderson and could have been prevented had this last minute, poorly planned, and ill supervised field trip not occurred. Additionally, this field trip was conducted without any apparent advance planning, educational benefit, parent notification or school principal approval - all in violation of FSD school policy and applicable procedures.

CP 348. Harbinson's expert testimony was equally damning as to the District's negligence:

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 cross walks, 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.

At its most basic, cause-in-fact means that but for the party's action, the damage-causing incident would not have occurred, *Channel v. Mills*, 77 Wn. App. 268, 272-73, 890 P.2d 535 (1995),<sup>9</sup> and that is precisely what the Estate documented here on *multiple* levels, as Division I observed. Op. at 11-12. For example, on causation:

- Dr. Smith testified that Ritchie's spur-of-the-moment excursion without parental permission should not have occurred *at all* as there was no educational benefit in it. CP 348, 352;

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<sup>9</sup> See *Estate of Jones v. State*, 107 Wn. App. 510, 15 P.3d 180 (2000), *review denied*, 145 Wn.2d 1025 (2002) (fact question on causation where State was negligent in evaluating juvenile offender allowing him to be placed in community setting where he could escape and kill decedent).

- Ritchie's ill-fated excursion with the students required parental permission in accordance with Policy 2320.<sup>10</sup> Both SPI Billings and Dr. Smith testified that the excursion was unsafe and violated District policy and it should not have been approved. CP 346-90. If the excursion had not occurred, Gabriel would obviously still be alive;
- Brudwick and Iwasaki testified that District staff believed Policy 2320 applied to classes leaving the WHS campus, requiring parental permission. They required parental permission before PE class students could go on an excursion. CP 364-66; 378-79. Gabriel's grandmother, his guardian, never gave permission for the excursion, and would not have done so if asked. CP 433-34. Again, the absence of such permission meant that the excursion would not have taken place;
- Harbinson testified that Ritchie's conduct of the excursion was not only unsafe because it violated the District's policy, it was unsafe because the students were spread out, allowed to cross W. Smith Road wherever they chose, at other than designated crosswalks within the lower speed school zone and were unchaperoned. CP 395. His cavalier operation of the excursion caused the students to be struck by an inattentive driver like Klein.

But for *any* of these actions, Gabriel would not have been killed.

As Division I discerned, *op. at* 9-12, fact questions abounded on cause-in-fact. Ritchie's impromptu excursion to discuss summer plans was unnecessary and not agreed to by Gabriel's grandmother, as the District's Policy 2320 commanded. It occurred along a road where cars could travel up to 40 miles per hour without regard to traffic-related dangers, there was no crosswalk, and students were walking on the wrong side of the street.

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<sup>10</sup> The District's own personnel were themselves confused about the nature of Ritchie's action. Appellants' Br. at 31 n.22.

All of these causation-related facts were for the jury to assess. Division I correctly applied this Court's traditional cause-in-fact analysis in finding genuine issues of material fact here.

(4) Legal Causation Principles Do Not Bar the Estate's Claims Against the District

Although legal causation was an afterthought for the District below and not the basis for the trial court's decision,<sup>11</sup> the District focuses on that principle in this Court. As with duty, this Court analyzes legal causation based on mixed considerations of logic, common sense, justice, policy, and precedent. *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985). Division I correctly applied this Court's teachings on legal causation, op. at 12-15, particularly where the District's duty to Gabriel arose out of its special relationship with him.

Regarding legal causation, this Court has long understood that there is a connection between duty and legal causation, particularly where fact questions are present as to foreseeability, the principle that governs the scope of any duty of care. *Lowman v. Wilbur*, 178 Wn.2d 165, 171-72, 309 P.3d 387 (2013). Indeed, the *McLeod* court indicated that issues of foreseeability and legal causation revolve around the same principle of

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<sup>11</sup> The central focus of the District's petition was legal causation, pet. at 5-9, an issue it raised only in passing in the trial court. CP 41-43, 333-35, and that the trial court *never reached*. CP 569 ("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."). Op. at 6 n.3.

whether the harm is within the general field of danger:

Having given full consideration to the factor of foreseeability in discussing the allegations as to negligence, it is not necessary to cover the same ground in dealing with proximate cause. We have held that it is for the jury to decide whether the general field [sic] of danger should have been anticipated by the school district. If the jury finds respondent negligent in not having anticipated and guarded against this danger, then it is not for the court to say that such negligence could not be a proximate cause of a harm falling within that very field of danger.

42 Wn.2d at 365.<sup>12</sup> See also, *Michaels*, 171 Wn.2d at 611 (“The analysis of whether a duty is owed and legal causation exists are intertwined.”).

This Court has subsequently reinforced that legal causation is closely associated with duty – whether, as a matter of policy, the connection between the defendant’s misconduct and the plaintiff’s ultimate harm is too remote or insubstantial to permit liability to attach. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The *Schooley* court held that legal causation principles did not bar a claim by a minor injured when a grocery store illegally sold liquor to

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<sup>12</sup> Indeed, the core of the legal causation analysis is foreseeability:

Legal cause is proved by establishing foreseeability, which is determined by looking to the natural and probable consequences of the act complained of; when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability.

65 C.J.S. *Negligence* § 201.

another minor and that minor injured the plaintiff.<sup>13</sup>

Later, in *Lowman*, a case largely ignored by the District, this Court emphasized the connection between duty and legal causation. In fact, the Court noted that the legal causation and analysis should begin with a review of duty. *Id.* at 169. Noting the connection between duty and legal causation, *id.* at 171, the Court held that where the jury found that the plaintiff passenger's injuries sustained when the driver lost control of her vehicle, left the road, and struck a utility pole placed too close to the roadway were within the scope of a municipality's duty to roadway users, the plaintiff's injuries were not too remote and legal causation did not foreclose liability. The Court observed that many of the same concerns that guide the duty analysis apply with equal force as to legal causation. *Id.* "[P]olicy considerations that support imposition of a duty will often compel the recognition of legal causation, so long as cause in fact is established under the relevant facts." *Id.* See also, *Wuthrich v. King County*, 185 Wn.2d 19, 366 P.3d 926 (2016) (in roadway design case

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<sup>13</sup> Because it cannot prevail on the basis of this Court's recent legal causation jurisprudence, the District invented an arcane three-step analysis it alleges *Schooley* requires and relies on *King v. City of Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974), an overruled case, for its position on legal causation. Pet. at 5-9. The central issue of *King* was whether a municipality could tortiously interfere with a business expectancy of a developer by denying a building permit. This Court held that it could not, only to reverse course in *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989) and *City of Seattle v. Blume*, 134 Wn.2d 243, 947 P.2d 223 (1997) to conclude that such a claim was possible. This Court's more recent discussions of legal causation in *Schooley* and *Lowman* are more cogent than the *King* court's treatment of legal causation.

involving overgrown blackberry bushes obstructing motorist views at intersection, Court found proximate cause was a fact question for jury and rejected county's legal causation argument that it lacked notice of hazard of overgrown bushes; county had notice of the overgrown bushes and fact that no prior accidents occurred at intersection related to breach of duty and not causation); *State v. Frahm*, 193 Wn.2d 590, 444 P.3d 595 (2019) (Court holds that even under the narrower rule of legal causation applicable in criminal cases than in civil cases, legal causation was satisfied in a case where a drunk driver caused an accident on I-5 in Vancouver, a Good Samaritan stopped to assist the accident victim, and was himself then killed in a subsequent collision at the site; the drunk driver was legally the cause of the Good Samaritan's death for purposes of a vehicular homicide prosecution).

More specifically, this Court has *routinely* rejected legal causation arguments in the school district setting where the special relationship between a district and a student is present. *E.g.*, *McLeod*, 42 Wn.2d at 365; *N.L.*, 186 Wn.2d at 437-38. In *N.L.*, this Court rejected a school district's legal causation argument where an 18-year-old student who was a registered sex offender persuaded a 14-year-old he met at joint middle school-high school track practice to leave campus with him and took her to his house where he raped her. Indeed, as Division I noted in its opinion

at 14, the District fails to cite *a single case* in the school district liability setting that applies legal causation to deny liability, given the school districts' broad protective duty owed to students under their care and custody.

In the context of duty arising out of a special relationship, this Court has concluded that a court's resolution of the duty issue is largely dispositive as to legal causation. For example, in *Hertog ex rel. S.A.H. v. City of Seattle*, 138 Wn.2d 265, 979 P.2d 400 (1999), a case involving a special relationship, a "take charge" duty, this Court stated that legal causation is "intertwined with the question of duty," *id.* at 284, and held that the existence of a duty was dispositive of legal cause in the context of a special relationship. *Id.* at 284 ("where a special relationship exists based upon taking charge of the third party, the ability and duty to control the third party indicate that a defendant's actions in failing to meet that duty are not too remote to impose liability"). *Accord, Joyce v. Dept. of Corrections*, 155 Wn.2d 306, 318, 119 P.3d 825 (2005) (citing *Hertog* as controlling on the issue of legal cause for claims based on § 319).

The District refuses to acknowledge the majority holding in *Lowman* and disclaims any relationship between the duty it acknowledged it owed to Gabriel and the other students, and legal causation. Division I was correct to reject its analysis. *Op.* at 15 ("Ferndale's urging that we

uncouple legal causation analysis from duty analysis runs counter to the Supreme Court's teachings in *Lowman*.").

The District contends that Division II's decision in *Channel* applies here. That case addressed an intersection collision and whether the favored driver's excessive speed could be the proximate cause of a vehicular collision. The court concluded that if the favored driver's excessive speed coincidentally places a vehicle at a particular place at a particular time and the collision ensues, the favored driver's speed cannot be the proximate cause of the collision. From this proposition regarding vehicular speed, the District hopes to universalize Division II's holding to conclude that the Estate can *never* prove legal causation. The District *vastly* overstates *Channel*'s holding. Pet. at 9-10, 14-16.

First, Division II itself recognized that *Channel* was more limited in its scope that the District portrays. That court specifically noted:

Nothing said so far means that a claimant cannot prove causation (*i.e.*, both cause in fact and legal cause) by showing that but for excessive speed, the favored driver, between the point of notice and the point of impact, would have been able to brake, swerve or otherwise avoid the point of impact.

*Id.* at 278-79.

Second, *Channel* predates this Court's analysis of legal causation

in cases like *Schooley* and *Lowman*.<sup>14</sup> Indeed, in the roadway design setting, this Court has analyzed the legal causation issue arguably in a different fashion in *Lowman* where this Court held that if the jury found negligent placement of a utility pole was a cause of the plaintiff's injuries, it "cannot be deemed too remote for purposes of legal causation." 178 Wn.2d at 171. In other words, if cause-in-fact is established and the injuries are within the scope of the duty owed, "there is no basis to foreclose liability." *Id.* at 172.

In this case, there was more than mere coincidence as between a favored and disfavored driver brought together in an intersection collision. A jury should be entitled to address causation accordingly. But for the District's violation of Policy 2320 as to parental permission or principal approval of Ritchie's unnecessary impromptu excursion, the excursion would not, and should not, have occurred, and Gabriel would be alive today. *And* but for Ritchie's negligent conduct of the illicit excursion, Gabriel and the other students would not have been in harm's way. Specifically, had Ritchie obeyed the law about the students walking on the correct side of W. Smith Road, the Klein vehicle would not have struck the students. *Either* facet of the Estate's proximate cause argument is not too attenuated to satisfy legal causation.

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<sup>14</sup> *Channel* has never been cited in an opinion by this Court, according to Westlaw.

Applying principles of logic, common sense, justice, policy, and precedent, as dictated by the *Schooley* court, 134 Wn.2d at 479, the connection between the harm to Gabriel and the District's negligence was not too tenuous or remote, as a policy matter, particularly given the District's concession that foreseeability is a fact question, as Division I opined, op. at 14, in the setting of the District's protective duty owed to Gabriel, a duty that even extends to *anticipating* foreseeable harms to students in its care and custody. Division I honored this Court's legal causation jurisprudence; the District's legal causation argument is contrary to *Schooley* and *Lowman*.

E. CONCLUSION

Gabriel Anderson died tragically, and unnecessarily, as a result of the District's negligence. Ultimately, Division I applied this Court's well-established precedents in reversing the trial court's decision. Under Washington's broad protective *in loco parentis* duty of school districts arising out of their special relationship with students under their charge, extending even to off-campus activities, the District owed Gabriel a duty of care. As the District now concedes, the trial court here erred in ruling as a matter of law on foreseeability; it applied an incorrect standard for foreseeability, and fact issues were present on foreseeability.

On causation, cause-in-fact was an issue for the jury and legal causation principles do not bar the Estate's action. The District disregarded Gabriel's protection by violating its own policy on off-campus excursions, failing to secure Gabriel's grandmother's permission for the unnecessary impromptu excursion, and disregarding traffic safety standards during the negligently-conducted excursion so that the Klein vehicle could strike him and other students.

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 8<sup>th</sup> day of September, 2020.

Respectfully submitted,



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Attorneys for Respondents

# 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.

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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

SCANNED

FILED IN OPEN COURT  
2-15 2019  
WHATCOM COUNTY CLERK

15-2-02248-9  
ORGMT 78  
Order Granting Motion/Petition  
4886972



By \_\_\_\_\_  
Deputy

HONORABLE RAQUEL MONTOYA-LEWIS

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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

*Proposed*  
~~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  
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- Judgment;
- 4. Declaration of Timothy Keigley in Support of Defendant's Motion for Summary Judgment;
- 5. Declaration of Bret Simmons in Support of Defendant's Motion for Summary Judgment;
- 6. Declaration of Janet Barry in Support of Defendant's Motion for Summary Judgment;
- 7. Declaration of Sherryl Kraizer in Support of Defendant's Motion for Summary Judgment;
- 8. Plaintiffs' Opposition to Defendant Ferndale School District's Motion for Summary Judgment;
- 9. Declaration of Wanita Anderson in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- 10. Declaration of Dennis Smith in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- 11. Supplemental Declaration of Dennis Smith in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- 12. Declaration of Judith Billings in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- 13. Declaration of Steven Harbinson in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- 14. Declaration of Marta L. O'Brien in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment;
- 15. Defendant Ferndale School District's Reply to its Motion for Summary Judgment; and
- 16. Supplemental Declaration of Bret Simmons in Support of Defendant Ferndale School District's Reply.

The Court now being fully advised on the matter finds that, for the reasons set forth in 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.

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18 THE HONORABLE RAQUEL MONTOYA-LEWIS

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Presented by:

CONNELLY LAW OFFICES, PLLC

By: Marta L. O'Brien  
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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  
Email: rmontoya@co.whatcom.wa.us  
(360) 778-5603  
Fax: (360) 778-5561  
Judge's Chambers and Courtroom on  
2<sup>nd</sup> 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 *Supplemental Brief of Respondents* in Supreme Court Cause No. 98280-5 to the following parties:

Mark Dietzler  
Lisa Liekhus  
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1001 Fourth Avenue, Suite 3300  
Seattle, WA 98154-1125

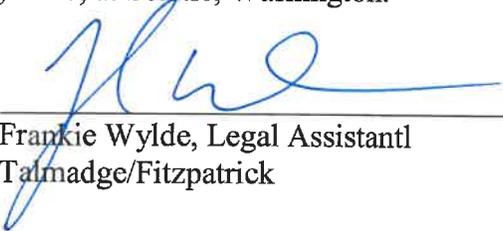
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Original E-Filed with:  
Supreme Court  
Clerk's Office

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: September 8, 2020, at Seattle, Washington.

  
\_\_\_\_\_  
Frankie Wylde, Legal Assistant  
Talmadge/Fitzpatrick

**TALMADGE/FITZPATRICK**

**September 08, 2020 - 3:35 PM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 98280-5  
**Appellate Court Case Title:** Bonnie I. Meyers, et al. v. Ferndale School District  
**Superior Court Case Number:** 15-2-02248-9

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**Comments:**

Respondents Supplemental Brief

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