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Standard Ins. Co., 49 Or App 731, 735–36, 621 P2d 583 (1980).

This process is so open for abuse that Oregon law actually cuts off the insurers' ability to void policies after two years. Under ORS 743.168 a life insurance policy becomes incontestable, meaning it cannot be voided based on representations in the application, two years after the date of purchase. The policy can still be voided for non-payment of premiums, and claims can still be subject to exclusions. However, after two years, the insurer cannot deny a claim for statements made in the application.

In Nelson's case, his representations in his application matched his records, so the insurer could not rescind the policy. However, they still refused to pay the claim.

Nelson's policy contained a series of exclusions, including an exclusion for accidental death resulting from "being under the influence of any drug, narcotic or controlled substance unless taken or used as prescribed by a physician." Based on the coroner's findings and the number of missing pills at the time of his death, the insured alleged Nelson had not been taking his painkillers as prescribed, and, therefore, it would not pay the claim.

Under any insurance policy, the insured has the burden to prove coverage for a loss under the terms and conditions of a policy. *ZRZ Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, 349 Or 117, 138, 241 P3d 710 (2010), adh'd to as modified on recons, 349 Or 657, 249 P3d 111 (2011). For life insurance policies, assuming the insured has passed away and named a beneficiary, this is generally a given. Once the insured establishes coverage, the burden shifts to the insurer to prove an exclusion under the policy. *Stanford v. Am. Guar. Life Ins. Co.*, 280 Or 525, 527, 571 P2d 909 (1977), appeal after remand, 281 Or 325, 574 P2d 646 (1978).

Under the exclusion applied by the insurer for Nelson, the case quickly began to resemble a wrongful death case. The question became how the prescription medication had effected Nelson prior to his death, and how the parties could identify what happened to the 12 missing pills.

The parties started with depositions of the hospital staff who had prescribed the drug to Nelson. These doctors and nurses confirmed the prescription amounts and instructions but could not say whether Nelson took the drugs as prescribed. The depos moved on to the emergency personnel who found Nelson and their observations of the scene, again without any factual confirmation one way or the other about pills found or ingested. The final depositions were of the experts who opined on the potential causes of death and the coroner who made the official assessment of the cause of death.

The coroner was the key deposition in the case. The coroner had identified a lethal dose of painkillers as the cause of death, yet a review of the autopsy report showed the coroner had tested Nelson's blood and found painkiller at the amount of ">2mg/l." This was confusing as all medical information and toxicology studies on the drug indicated a significantly higher dose would be needed to have a lethal effect.

Upon questioning, the coroner admitted his equipment was not capable of testing for levels that would be toxic, and upon registering the highest level that he could test for, he simply listed it as the cause. After additional questioning he admitted that from a scientific standpoint, he had no clue as to whether Nelson in fact had a lethal amount of drug in his blood at the time of death. Without solid evidence of the amount of painkiller in Nelson's blood at the time of his death, the case was able to resolve.

Finding solutions

We all buy insurance to protect us in times of tragedy and crisis. When the crisis hits and our insurance provider lets us down, our loss is compounded. Health claims and life claims can be particularly difficult as the need for coverage can be extremely pressing and the reasons for denial can be intensely personal. I chose the above cases to illustrate there are solutions. Insurers sometimes deny without reading the policy, coroners sometime call a death without reasonable factual support. Once the insured dives past the medical terminology and the hurt feelings, the cases look a lot like any other contract. As with any other contract, we can fight back, and we can win.

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SPECIAL RELATIONSHIPS IN EDUCATION

Kevin Brague

By Kevin Brague
OTLA Guardian

At the beginning of the school year, Student X was choked by Student A. Student X is a medically fragile elementary boy (known to the school) and Student A is another boy in his classroom. Student X's parents witnessed the first incident of choking and let the teacher know. Teacher affirmed the boys would be watched and separated. Student A proceeded to choke Student X a number of additional times over the ensuing months. School personnel were notified of each instance or witnessed the incident of choking and affirmed the boys would be watched and separated. Ultimately, Student A's choking compromised an implanted medical device within Student X requiring life-threatening surgery to replace the device.

Parents of Student X brought suit against the school district as guardians *ad litem* for their son and on their own behalf for the medical bills and injuries they experienced. The complaint seeks tort claim limits on behalf of Student X and parents of Student X.

What is the relationship between Student X and school district, and what is the relationship between parents of X and school district?

Relationships and responsibilities

It is well recognized in Oregon, and other jurisdictions, a school has a special relationship with its students. *See, Fazzolari v. Portland Sch. Dist. No. 1J*, 303 Ore. 1, 19 (1987); *See also, C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal 4th 861, 138 Cal Rptr 3d 1, 270 P3d 699 (2012); *Carabba v. Anacortes Sch. Dist.*, 72 Wash 2d 939, 435 P2d 936 (1967); and *Jerkins v. Anderson*, 191 NJ 285, 922 A2d 1279 (2007). The special relationship is a heightened duty on the part of the school to protect the student from harm. *See, Shin v. Sunriver Preparatory Sch., Inc.*, 199 Or App 352, 367 (2005) and *Piazza v. Kellim*, 360 Or 58 (2016). This is "apart from any general responsibility not unreasonably to expose people to a foreseeable risk of harm," and the "scope of th[at] obligation does not exclude precautions against risks of crime or torts merely because a third person inflicts the injury." *Fazzolari*, 303 Or at 19, 20.

When a parent sends a child to a public school, the child is entrusted to the school's custody, care and supervision. This requires the school not to unreasonably expose its students to a foreseeable risk of harm. Notably, this is the position of nearly a majority of other jurisdictions and U.S. District Court, Oregon. Judge Mosman of the U.S. District Court, District of Oregon held that "the Oregon Supreme Court would likely recognize a special relationship between a public school and a public school student." *Taissa & Ray Achcar-Winkels v. Lake Oswego Sch. Dist.*, No. 3:15-cv-00385-YY, 2017 US Dist LEXIS 80404, at *11 (D Or May 25, 2017). Despite arguments from defense lawyers to the contrary, the Oregon School Boards Association agrees with this position, "OSBA notes that schools have a heightened duty to keep students safe, given their *in loco parentis* relationship with them." *Doe v. Medford Sch. Dist.* 549C, 232 Or App 38, 44-45 (2009).

Thus, the special relationship that exists between a public school and its students allows for the recovery of physical injury, but also for injuries without physical impact or touching.

The heightened duty in the special relationship between schools and students is aligned with the elements of a premises liability claim. The students are

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invitees (compulsory by law via ORS 339.010 and 339.020), which requires a school to make its premises safe and exercise reasonable care to eliminate the danger or warn the students/parents of the danger.

In student-on-student assault cases, the premises liability claim often supports the negligence claim. It has the added benefit of shifting the burden of notice from the plaintiff back to the school. *See, Ragnone v. Portland School Dist. No. 1J*, 291 Or 617, 621 n 3, (1981) [business operator's obligation to make its premises reasonably safe for its invitees includes taking into account the use to which the premises are put]. Schools are very aware of the danger some of its students pose. From my experience in representing children in special education and children hurt by others at school, it is rare an assailant does not have antecedent behaviors.

A school will often defend a case against it on the premise it did not have notice that any particular child at any particular moment would engage in any particular behavior. This argument could be rebutted through a public records request to the local police or sheriff's office for the number of calls, citations and arrests at your client's school. These records will often show that throughout the school year similar types of bad behavior were addressed at school. This evidence does not require a release or motion to obtain an exception or relief from the privacy laws protecting student records. This also helps provide evidence the school might not have exercised reasonable care to eliminate the danger or warn your client of the danger. I have yet to find evidence of a school sending out a notice to its families warning them there were instances of sexual harassment/assault on campus this year or any number of physical assaults. Admittedly, these may not be the strongest of arguments, but this evidence may be the turning point in mediation, or the evidence that tips the judge or jury in your client's favor.

Supervise and protect

A special relationship exists between a parent and a school based on a school's undertaking of a duty to supervise and protect.

Historically, common law recognizes a parent's entitlement to maintain an action for injury to the child. This right is not based on familial relations, but on the technical relation of master and servant. *Schleiger v. Northern Terminal Co.*, 43 Or 4, 10 (1903). Common law held the damages recoverable were measured by the pecuniary loss suffered by the parent (master) resulting from the injury to the child (servant). In common law, it was incompatible with the minor's condition that his earnings should inure to his personal benefit while he is in the service of his parent — the minor's earnings belong to the parent. *Id.* at 11. There may be a special relationship between a parent and school because the education of a child inures to the economic benefit of the parents. *See* e.g. ORS 109.010 "Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances." Nevertheless, the recovery of damages may be limited to economic damages. *See* ORS 30.010 and *Beerbower v. State*, 85 Or App 330, (1987). *Tomlinson v. Metro. Pediatrics, LLC*, 362 Or 431 (2018) may be the start to opening the door for a parent's recovery for non-economic damages. To get to damages, a special relationship between the school and the parent must be found.

The analysis for finding special relationships in Oregon is established in *Conway v. Pac. Univ.*, 324 Or 231, 240-41, (1996). It is the degree of control over the subject matter of the relationship. The "party who is owed the duty is placed in a position of reliance upon the party who owes the duty; that is, because the former has given responsibility and control over the situation at issue to the latter, the former has a right to rely upon the latter to achieve a desired outcome or resolution." *Conway* at 240.

A parent of a student is required to send their child to school. ORS 339.010 and 339.020. A public school district shall admit free of charge all persons between the ages of 5 and 19 who reside within the school district boundaries. ORS 339.115. Public school districts are bodies corporate and have control of the district schools and are responsible for educating children residing in the district. ORS 332.072.

A school exercises complete independent judgment over a child during the school day. A school district dictates when school begins and ends, what instructional material is taught, when it is taught, how it is taught, when breaks are taken, when children can leave, when they can talk, when they are to be silent, when they may be active, when they must sit still, when they must continue work at home, when they are disciplined, how they are disciplined, when a child can eat and when a child can use the bathroom. The defendant exercises complete and total control over the children in its custody and no individual parent can dictate change to a school's decisions and processes.

A parent of a public school child/student is placed in a position of wholly relying upon the school for the control, care, wellbeing and education of the child. Parents are legally mandated to send their child to school. Parents enjoy the correlating right to rely upon the school for their child's education and safety through supervision of all school activities. *Ragnone*, *supra*.

Parents of Student X complained about the choking incidents and sought assistance from school personnel to keep further choking incidents from occurring. The school failed to reasonably act, which allowed the choking behavior by Student A to continue to the point of damaging Student X's implanted medical device.

Conway and the statutory obligation to surrender one's child to a school creates a special relationship between the parent and school. Arguably, parents may seek noneconomic damages without any physical injury based on their special relationship with the school.

The Oregon Supreme Court recognizes a person may recover purely emotional distress damages without physical injury. *Curtis v. MRI Imaging Servs. II*, 148 Or App 607 (1997) aff'd *Curtis v. MRI Imaging Servs. II*, 327 Or 9, 16, (1998). Specifically, "where the defendant's conduct infringed on some legally protected interest apart from causing the claimed distress, even when that conduct was only negligent." *Id.* at 614. The Oregon Supreme Court affirmed this principal in *Tomlinson v. Metro. Pediatrics, LLC*, 362 Or 431, 452-454 (2018) [if the plaintiff establishes a negligence claim based on physical injury or the invasion of some other legally protected interest, then the pain for which recovery is allowed includes both emotional and physical].

Recovery for emotional distress damages is allowed when the plaintiff establishes a negligence claim based on physical injury or invasion of some other legally protected interest. *Curtis*, *supra*. The legally protected interest "refers to a sort of 'duty' that is distinct from *Fazzolari*-like foreseeability. The identification of such a distinct source of duty is the sine qua non of liability for emotional distress damages unaccompanied by physical injury." *Curtis* at 618. This "legally protected interest" may be found when a party has a legal duty designed to protect the plaintiff, which may be found in the law or in the common law. *Philibert v. Kluser*, 360 Or 698, 705, (2016). Purely emotional distress damages may be recovered when the plaintiff can point to "statutes, constitutional provisions, regulations, local ordinances, and the historical and evolving common law." *Id.* at 706.

Safety to learn

In the context of schools, such sources of law include statutes, local ordinances (*i.e.*, board policies) and the common law. Many school districts have adopted these policies. One such board policy reads (in part), "The plan is designed to assure every student a safe, healthy environment in which to learn." Another board policy reads (in part), "All students shall be under assigned adult supervision at all times when they are in school, on school grounds, traveling under school auspices or engaging in school-sponsored activities." These board policies should create legally protected interests. ORS 332.107.

In the case of Student X and parents of Student X, the trial court agreed with much of the above analysis and denied the school district's motion to dismiss their claims. The trial court recognized the special relationships of Student X and parents of Student X with the school district, however, it denied the parents' non-economic damages claim. Another trial court rejected all my arguments in a case involving an injured kindergarten student and his mother. These cases are active and continue toward trial.

The good news is the special relationship doctrine appears to be expanding. It allows us to hold school districts/government accountable and improve the safety and overall school environment for Oregon's students.

Kevin Brague's practice includes personal injury and specifically students injured at or by educational institutions including civil rights from kindergarten through graduate school. Brague contributes to OTLA Guardians at the Sustaining Member level. The Brague Law Firm is located at 4504 S. Corbett Ave., Ste. 200, Portland, OR 97239. He can be reached at kevin@braguelawfirm.com or 503-922-2243.