STATE OF MINNESOTA

IN SUPREME COURT

A17-0063

Court of Appeals

Lillehaug, J.
Dissenting, Anderson, J., Gildea, C.J.
Took no part, Thissen, J.

JeanAnn Fenrich, individually,
and as trustee for the heirs of
Gary Fenrich,

Appellant,

vs.

Filed: November 21, 2018
Office of Appellate Courts

The Blake School, et. al.,

Respondents.

Kenneth R. White, Law Office of Kenneth R. White, P.C., Mankato, Minnesota; and

Jennifer L. Thon, Jones Law Office, Mankato, Minnesota, for appellant.

Nicole R. Weinand, Law Office of Thomas P. Stilp, Golden Valley, Minnesota, for respondents.

S Y L L A B U S

1. A school does not owe a duty of care to another if the harm is caused by a third party's conduct, unless there is a special relationship between the plaintiff and the school and the harm to the plaintiff is foreseeable; or the school's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.

2. Because the school was not *in loco parentis* or operating as a common carrier, there was no special relationship between the school and members of the general public injured by a vehicle driven by a student during an athletic-team trip to an out-of-town event.

3. Summary judgment on the issue of whether the school's own conduct created a foreseeable risk that a vehicle driven by a student during an athletic-team trip to an out-of-town event would injure members of the general public was improper in the circumstances of this case.

Reversed.

O P I N I O N

LILLEHAUG, Justice.

A 16-year-old high-school student caused a fatal accident while driving his cross-country teammates and a volunteer coach to an extracurricular athletic competition in Sioux Falls, South Dakota. Gary Fenrich was killed and his wife, appellant JeanAnn Fenrich, was severely injured. She brought a negligence action against respondent The Blake School ("the school"). The district court granted the school's motion for summary judgment, concluding that, as a matter of law, the school did not owe a duty of care to members of the general public. The court of appeals affirmed, but on a different ground, holding that the school's conduct did not create a foreseeable risk of injury to a foreseeable plaintiff. Because summary judgment was not proper in the circumstances of this case, we reverse the court of appeals.

FACTS

On November 12, 2011, shortly before 11:00 a.m., Gary Fenrich was driving northbound on Minnesota Highway 15 in Watonwan County. His wife, JeanAnn Fenrich, was in the front seat on the passenger side. An oncoming car crossed over the centerline and collided with the Fenrichs. Gary was killed and JeanAnn suffered serious injuries.

The car that crossed the centerline was driven by T.M., a 16-year-old boy. T.M. was a member of the school's cross-country team. He was driving himself, two other members of the team, and the team's volunteer coach as part of a team trip to Sioux Falls.

The team had participated in the interscholastic Minnesota State High School League ("the League") season, which had just ended. But T.M. and his teammates were going to the Nike Cross Nationals Heartland Regional meet in Sioux Falls. The Nike meet was not a League-sponsored event and, because it occurred after the League's official season had ended, the team's coaches were not allowed to help prepare the team for it. Nevertheless, both the head coach and the assistant coach assisted the team as the Nike meet approached.

The Nike meet was listed on the team's official schedule, which was posted on the team website.[1] At least four posts were made on the website referencing the upcoming Nike meet. For example, during the League season, the head coach sent an email to the team members and parents stating: "Sunday, November 13th, the Nike Heartland Regional

[1] The team had a website that the coaches used to convey information to students and parents throughout the season. The website, authorized by the school's athletic director, bore the school's logo and colors. The school manual provided that use of the school's logo "instantly identif[ies] a communication or material as from, or of, this [s]chool."

meet in Sioux Falls. All varsity and top JV runners encouraged to participate. Talk to [the assistant coach] for details."

Team members were instructed to tell the coaches in writing if they were planning to attend the Nike meet. Fourteen members of the team signed up, and the assistant coach paid the team's $300 bulk meet-participation fee.

Because the official League season had ended, and in an effort to comply with League rules, the assistant coach arranged for a volunteer coach—a recent graduate of the school—to run practices the week before the Nike meet. The assistant coach emailed the team: "All practices are run by Captains, (and [the volunteer coach]) this week."

Although the team members were nominally responsible for arranging their own lodging and transportation to the Nike meet, the team's coaches helped coordinate the arrangements. On November 7, the assistant coach sent out the following email to a team parent:

> I am stopping by the school before practice to make sure everyone has coordinated rides and rooms for this weekend. If [your son] gets a chance, it would be nice if he could get [in] an easy run before dinner.
>
> We are very excited with the number of runners that signed up for the meet (officially completed as well, as I submitted/paid early this morning). This will be a lot of fun and a great way to end the sea[s]on.

Two days later, the coaches received an email from T.M.'s mother that read, in relevant part:

> [T.M.], his dad and I just finished a conversation about transportation for the race this weekend. It sounds like [T.M.] (and the boys) would like to have a caravan down and back with you. We are very comfortable with [T.M.'s] driving skills and he's legal now to have passengers, and we are fine with him taking our car. Given the long distance though, we would like to know

> that he is following you, and won't be venturing to Sioux Falls and back without an adult at least in [the] rear view mirro[r]s. All we would need is you to confirm that is the plan . . . . Please know that [T.M.'s father] is willing to drive as well, if you would prefer that, but we understand also that 'Coach plus kids' sounds like a more fun venture for [T.M.] and the boy team runners . . . .

The assistant coach called the head coach to ask whether he was comfortable with T.M. driving. The head coach replied that he did not get involved with those decisions. The assistant coach then replied to the email stating: "That works, we will drive in a caravan at a safe speed!"

On the morning of November 12, the students met at the assistant coach's house in Chanhassen for the two-car "caravan" to Sioux Falls. The assistant coach estimated that they would be on the road for about five hours. The majority of the team rode with the assistant coach, including the assistant coach's own son.

Three people rode with T.M.: two students and the volunteer coach, who was located in the back seat behind T.M. Although T.M.'s mother stated that T.M. could legally drive multiple passengers, this assertion is not supported by the record. T.M. obtained his driver's license on June 17, 2011, and all three of his passengers, including the volunteer coach, were under the age of 20. *See* Minn. Stat. § 171.055, subd. 2(c) (2016) ("For the first six months of provisional licensure, a provisional license holder may not operate a motor vehicle carrying more than one passenger under the age of 20 years who is not a member of the holder's immediate family.").

Before departing, the assistant coach gave no driving instructions to either T.M. or the volunteer coach. Nor did the volunteer coach give T.M. any instructions.

T.M. followed the assistant coach's car. During a brief stop outside of Mankato, the assistant coach reminded T.M. to "make sure we keep it safe and keep rolling." He provided no specific instructions as to how "we keep it safe." Thereafter, the vehicles turned southbound onto Highway 15, a two-lane highway.

As the vehicles approached Lewisville, in Watonwon County, the volunteer coach was in the back seat using his phone. According to the volunteer coach, T.M. was probably distracted by his own phone.[2] As a result, T.M. swerved over the centerline of the highway, into oncoming traffic, and his car collided with the Fenrichs' vehicle. JeanAnn was severely injured, and Gary was killed.

After the accident, police interviewed the assistant coach and the volunteer coach. The volunteer coach described himself as "an assistant coach with the Blake Cross Country Team" and told police that "we all drove down as a team." The assistant coach told police that he had already talked to the school and told them that any future trips would need to be by bus. He also said: "[W]hy would [T.M.] even be driving that far . . . . I don't know why I didn't just say . . . what are we doing with a 16 year old driving this distance?"

In November 2014, Fenrich, in her individual capacity and as her husband's trustee, brought an action in Watonwan County against the school, the head coach, the assistant coach, and the volunteer coach. She pleaded claims of wrongful death, negligence, and negligence per se against all defendants, and also asserted negligent supervision and vicarious liability claims against the school.

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[2] Another occupant of the vehicle told police that he believed there was a 70 percent chance that T.M. playing with his phone was a cause of the accident.

In April 2015, the district court dismissed Fenrich's claim of negligence per se. The court also dismissed all claims against the head coach and assistant coach, concluding that the applicable statute of limitations had expired.

In May 2016, the school and the volunteer coach each moved for summary judgment, arguing that they owed no legal duty to members of the general public and that T.M. was not acting as an agent of the school or the volunteer coach. In August 2016, the district court denied the motion because (1) "a reasonable person [could] draw a conclusion that The Blake School assumed control and supervision over the cross country team's transportation to and from and participation in the Nike Meet," and (2) there were sufficient facts "for a reasonable person to find that [T.M.] was acting as an agent of the school and/or [the volunteer coach]."

In October 2016, the district court issued an order dismissing Fenrich's claims of negligence and negligent supervision, concluding that, although the school may have owed a duty to its students, neither the school nor its volunteer coach owed any duty of care to non-student third parties such as Fenrich. The court observed that Fenrich's only remaining claim was for wrongful death on a vicarious liability theory.

In November 2016, following the school's request for reconsideration, the district court dismissed the volunteer coach from the lawsuit because no direct claims remained against him. The district court also dismissed Fenrich's vicarious liability claim because a June 2014 settlement agreement between Fenrich and T.M.'s family (and insurers) released T.M., T.M.'s father, and their principals from all claims. With no claims remaining, final judgment was entered.

Fenrich appealed, arguing that the district court erred by determining as a matter of law that the school owed no duty of care. The court of appeals affirmed the district court's grant of summary judgment, but on different grounds. The court first concluded that "a school may have a duty of reasonable care to prevent harm caused by a student who drives a private vehicle in connection with a school-sponsored extra-curricular activity," and that the evidence, taken in the light most favorable to Fenrich, "is capable of proving that the school assumed control and supervision over [the team's] transportation to and from the Nike meet and, thus, is capable of proving that this is a case of misfeasance." *Fenrich v. Blake School*, 901 N.W.2d 223, 230–31 (Minn. App. 2017).

Having concluded that a school *may* "have a duty to protect the general public from injury caused by a student," the court then considered whether "the risk of a collision between T.M.'s vehicle and the Fenrichs' vehicle was foreseeable." *Id.* at 232. The court concluded that, as a matter of law, "the summary-judgment record does not contain evidence that is capable of proving that the probability that T.M. would cause an automobile accident was high enough to make [it] foreseeable." *Id.* at 232–33. Accordingly, the court held that "[t]he district court did not err by granting the school's motion for summary judgment with respect to Fenrich's claim that the school was negligent." *Id.* at 234.

We granted Fenrich's petition for review.

ANALYSIS

Fenrich appeals from an order granting summary judgment in favor of the school on her claim of negligence. Summary judgment is only appropriate when "there is no

genuine issue as to any material fact and [a] party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. We review a grant of summary judgment de novo to determine "whether there are any genuine issues of material fact and whether the court erred in its application of the law to the facts." *Commerce Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). In conducting this review, "we view the evidence in the light most favorable to the nonmoving party . . . and resolve all doubts and factual inferences against the moving parties." *Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015). As we have emphasized recently, summary judgment on the issue of duty is " 'inappropriate when reasonable persons might draw different conclusions from the evidence presented.' " *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008)); *see also Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017).

I.

This case involves a claim of negligence. "Negligence is the failure to exercise the level of care that a person of ordinary prudence would exercise under the same or similar circumstances." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014) (citation omitted). "A defendant in a negligence action is entitled to summary judgment when the record reflects a complete lack of proof on any of the four elements necessary for recovery: (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Louis v. Louis*, 636 N.W.2d 314, 318

(Minn. 2001). This case turns on the first element of a negligence claim: the existence of a duty of care.

As a general rule, "a person does not owe a duty of care to another . . . if the harm is caused by a third party's conduct." *Doe 169*, 845 N.W.2d at 177–78. There are two exceptions to this rule. The first is "when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable." *Id.* at 178. The second is when "the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). If either the "special relationship" or the "own conduct" exception applies, a negligent defendant may be held liable to a plaintiff for harm caused by a third party.

In this case, the district court granted summary judgment for the school because it concluded, as a matter of law, that the school owed only a duty of care to its students, not to the general public. The court of appeals disagreed, but affirmed the grant of summary judgment because it concluded that there was not a foreseeable risk of injury to a foreseeable plaintiff. *Fenrich*, 901 N.W.2d at 234. These decisions require that we consider what duty, if any, a school has to the general public.

At the threshold, the school urges us to adopt a categorical rule that, as a matter of law, a school never owes a duty of care to non-student third parties for injuries resulting from student conduct. We recognize the obvious—schools are important for our civilized society—but, having no precedent that creates this exception, we see no good reason to carve out schools from basic principles of tort law. Like any other Minnesota person or entity, a school does not owe a duty of care to the general public if the harm is caused by a

third party's conduct. But this rule is subject to two exceptions: (1) if there is a special relationship between the plaintiff and the school and the harm to the plaintiff is foreseeable; or (2) if the school's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff. *See Doe 169*, 845 N.W.2d at 178.

In arguing for a categorical exception, the school directs us to *Gylten v. Swalboski*, 246 F.3d 1139 (8th Cir. 2001). In that case, the Eighth Circuit was asked to decide whether, applying Minnesota law, a school could be held liable for negligently failing to supervise a student who, while driving to football practice, caused a car accident that injured the non-student plaintiff. *Id.* at 1141–42. In holding that the school did not owe a duty of care, the court considered only whether there was a special relationship between the school and the general public giving rise to a duty of care. *Id.* at 1143. The court did not address the "own conduct" exception, much less create for schools a categorical exclusion from tort liability. *Gylten* is not persuasive authority here.[3]

II.

Having declined to create a categorical exclusion from liability for schools, we next consider whether there was a "special relationship" between the school and the general public on these facts. Fenrich argues that a special relationship existed between the

[3] The Eighth Circuit decided *Gylten* in 2001, long before we filed several significant decisions addressing duty-of-care and foreseeability issues in negligence cases. *See, e.g.*, *Senogles v. Carlson*, 902 N.W.2d 38 (Minn. 2017); *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623 (Minn. 2017); *Doe 169 v. Brandon*, 845 N.W.2d 174 (Minn. 2014); *Domagala v. Rolland*, 805 N.W.2d 14 (Minn. 2011).

Fenrichs and the school under *in-loco-parentis* and common-carrier theories. Neither theory, however, fits the facts.

In loco parentis "refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption . . . ." *London Guarantee & Acc. Co. v. Smith*, 64 N.W.2d 781, 784 (Minn. 1954). We have never held that a school generally stands *in loco parentis* with its students, and we will not do so today. *Cf. Hollingsworth v. State*, No. A14-1874, 2015 WL 4877725, at *4 (Minn. App. Aug. 17, 2015) ("Hollingsworth concedes that schools generally do not owe a duty of care *in loco parentis* to protect students."). Moreover, in this case, the school did not generally assume "the obligations incident to the parental relation." *Smith*, 64 N.W.2d at 784.

Alternatively, Fenrich argues that a special relationship existed because T.M.'s vehicle was a "school bus," thus triggering a duty of care between the school and the Fenrichs under a common-carrier theory. This argument is meritless. The statutory definition of "school bus" does not include the type of vehicle that T.M. was driving. *See* Minn. Stat. § 169.011, subd. 71(a) (2016) (defining "school bus" by excluding "a vehicle . . . qualifying as a type III vehicle under paragraph (h)"); *id.*, subd. 71(h) (defining "type III vehicle" as "passenger cars . . . having a maximum manufacturer's rated seating capacity of ten or few people, including the driver, and a gross vehicle weight rating of 10,000 pounds or less").

III.

There being no special relationship, we next analyze the "own conduct" exception. *Doe 169*, 845 N.W.2d at 178; *Domagala*, 805 N.W.2d at 23. We consider whether: (1) the school's own conduct, (2) created a foreseeable risk, (3) to a foreseeable plaintiff.

A.

We start with the phrase "own conduct." In analyzing a defendant's "own conduct," we have drawn a distinction between misfeasance and nonfeasance. Misfeasance is "active misconduct working positive injury to others." *Doe 169*, 845 N.W.2d at 178 (quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 56 (5th ed. 1984)). Nonfeasance is "passive inaction or a failure to take steps to protect [others] from harm." *Id.* (alteration in original); *see also* Restatement (Second) of Torts § 314 cmt. c (Am. Law Inst. 1965) (discussing the origins of the distinction between misfeasance and nonfeasance). If a defendant's conduct is mere nonfeasance, that defendant owes no duty of care to the plaintiff for harm caused by a third party. *Doe 169*, 845 N.W.2d at 178.

We cannot conclude, as a matter of law, that the school's conduct was mere nonfeasance. Instead, viewing all of the evidence, and the reasonable inferences from it, in favor of Fenrich, we agree with the district court and the court of appeals that the school went beyond passive inaction by assuming supervision and control over its athletic team's trip to Sioux Falls.

Our decision in *Verhel ex rel. Verhel v. Independent School District No. 709*, 359 N.W.2d 579 (Minn. 1984), is highly instructive. In *Verhel*, members of the high school cheerleading team spent the night "decorating with posters the homes of the football

players for the opening game." *Id.* at 584. Early in the morning the cheerleaders were involved in a car accident. *Id.* at 583. An injured cheerleader sued the cheerleader-driver and the high school, arguing that the high school negligently supervised the driver. *Id.* We framed the issue of duty as whether the school district exercised or assumed "supervision and control over [the] student organization and its activities by appropriate agents of the school district." *Id.* at 586. We concluded that the school district had assumed control and supervision over the cheerleading team. *Id.* at 587. In reaching this conclusion, we found it significant that (1) cheerleading was an organization "approved by the school," (2) "[t]he cheerleaders were governed by the . . . [League] rules," (3) "[t]he school provided a paid supervisor for the squad, and supervising transportation arrangements was a part of the supervisory function," (4) the cheerleading squad held practices in the summer, (5) over the summer the team's faculty supervisor "kept in contact with the squad through the team captains . . . . visited some of the practice sessions . . . . [and] signed purchase orders," and (6) "[s]everal cheerleaders testified that they considered their participation in the bannering mandatory." *Id.* at 587–88. Given these facts, we concluded that "it is not unreasonable to hold that the school district's responsibility continued in the summer." *Id.* at 588.

It followed, we said, that the school "had a duty to supervise, by the exercise of reasonable care, the planning and conduct of the bannering activity of the cheerleaders" and "a duty to instruct properly and adequately the supervisor it assigned to the cheerleading squad." *Id.* at 589. The instructions given to the supervisor were insufficient because they "were general and nonspecific" and the supervisor "was relatively young and inexperienced." *Id.*

The facts that created a duty in *Verhel* are strikingly similar to those of this case, and, viewed in a light most favorable to Fenrich, a reasonable fact-finder could find that they constitute misfeasance. Here, the school assumed responsibility over the activity of the team members. The head coach strongly encouraged the entire team to participate in the Nike meet and 14 team members registered. The assistant coach paid the bulk registration fee. The coaches were active in preparation for the meet, including the assistant coach attending one of the practices and recruiting a volunteer coach to run them.

The assistant coach also took active responsibility for coordinating transportation to, and lodging at, the Nike meet. As he put it, "we all drove down as a team." He expressly approved the plan to have T.M.—and not T.M.'s father or another adult—drive team members and the volunteer coach more than 200 miles to Sioux Falls. The assistant coach decided that the volunteer coach, a teenager, would ride with T.M. But he did not give the volunteer coach any safety instructions—such as to sit in the front seat, to pay attention (rather than be distracted by electronic devices), and to make sure that T.M. drove responsibly. Nor did the assistant coach give any instructions to T.M., except, during a break, to "keep it safe and keep rolling." Based on these facts, a reasonable factfinder could conclude that the school's own conduct was misfeasant.

The school, though, asserts that the assistant coach was acting solely in his capacity as a parent, and not as an agent—a coach—of the school. This assertion merely creates an issue of fact. On the one hand, League rules barred the assistant coach from acting in his coaching capacity in the lead-up to the Nike meet, and on at least one occasion he expressly told a team parent that he (and the head coach) were not involved in preparing the team for

the meet. On the other hand, there are facts and reasonable inferences suggesting that he was acting as a coach. Among other things, he posted on the team website that the Nike meet would be "a great way to end the season"; he paid the registration fee for the team; he expressly agreed that T.M. would drive other students; and he told police that he had talked to the school about providing safer transportation to future team events. These facts suggest that the assistant coach was acting on behalf of the school in connection with the team's trip to Sioux Falls.

The dissent attempts to distinguish *Verhel* on the ground that the victim was a student, and the Fenrichs were not students. But a fair reading of *Verhel* shows that the school's duty was based on conduct that created a foreseeable risk of injury to a foreseeable plaintiff, not on the status of the victim. As we said in *Verhel*:

> Such [driving] behavior, or misbehavior, by unsupervised students is to be expected and is precisely the harm to be guarded against by the exercise of the school district's supervision. We cannot hold, as a matter of law, that the conduct of these unsupervised students or the accident as it occurred was not reasonably foreseeable nor that the school district's negligent failure to supervise was not the proximate cause of Verhel's injury. We conclude . . . that, at best, these issues are for the finder of fact.

359 N.W.2d at 590. To cabin *Verhel* to student plaintiffs would exempt schools from liability for injuries to foreseeable victims, a form of tort immunity not granted to other organizations.

Viewing the evidence in the light most favorable to Fenrich, we agree with the court of appeals that Fenrich "is capable of proving that this is a case of misfeasance."[4]

[4] Whether an alleged tortfeasor's "own conduct" is misfeasance or nonfeasance is a question of law. *See Brower v. N. Pac. Ry. Co.*, 124 N.W. 10, 11 (Minn. 1910) (deciding

B.

We now turn to the question of foreseeability: whether the school's own conduct created a foreseeable risk to a foreseeable plaintiff. *See Doe 169*, 845 N.W.2d at 178. "Foreseeability in the context of duty is an issue that is ordinarily reviewed de novo." *Id.* The school argues, and the court of appeals held as a matter of law, that the risk of T.M. crashing into the Fenrichs' vehicle was not foreseeable. We disagree.

"When determining whether a danger is foreseeable, we 'look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.' " *Foss v. Kincade*, 766 N.W.2d 317, 322 (Minn. 2009) (quoting *Whiteford ex rel. Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998)). "In close cases, the issue of foreseeability should be submitted to the jury." *Domagala*, 805 N.W.2d at 27; *see also Senogles*, 902 N.W.2d at 48; *Montemayor*, 898 N.W.2d at 629; *Bjerke v. Johnson*, 742 N.W.2d 660, 667–68 (Minn. 2007).

In deciding whether summary judgment should have been granted on the issue of foreseeability, again, we must view all of the evidence and the reasonable inferences from it in favor of the non-moving party, Fenrich. When we apply that standard, we conclude that, in the circumstances of this case, whether T.M.'s driving created an objectively reasonable expectation of danger to the public is at least a "close call," and thus summary

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that a railroad's undertaking was an act of misfeasance, and not one of nonfeasance, assuming the facts stated in the complaint). But when there are genuine issues about what the defendant did or the responsibilities it assumed, a court may not be able to decide the question by summary judgment on a paper record.

judgment was improper. *See Senogles*, 902 N.W.2d at 48; *Montemayor*, 898 N.W.2d at 633.

On the one hand, T.M.'s parents told the assistant coach that they were comfortable with T.M. driving. T.M. was licensed, and there is no evidence in the record that T.M. had a history of reckless or negligent driving. T.M. was following the assistant coach's vehicle, and the accident occurred during the day. Unlike *Verhel*, where the students had been driving all night, no evidence suggests that T.M. was tired. 359 N.W.2d at 590.

On the other hand, T.M. was not an adult, but was a teenager (age 16), who had been licensed for less than 6 months. He was driving a lengthy distance with no adults—only other teenagers—in the car. He could not legally drive multiple passengers who were under the age of 20. In preparation for the drive, the assistant coach provided no instructions to T.M., except, shortly before the accident, to "keep it safe and keep rolling." The assistant coach did tell the volunteer coach, another teenager, to ride in the car with T.M., but gave no specific instructions to the volunteer coach to monitor T.M.'s driving, or to ensure that T.M. did not become distracted while driving. Nor did the assistant coach tell the volunteer coach to sit in the front passenger seat, where T.M.'s driving could have been better supervised.

Without adult supervision in the car, the record suggests that T.M. became distracted by an electronic device while driving, and that distraction caused the fatal accident. The record also shows that the volunteer coach himself may have been distracted by an electronic device. A reasonable factfinder could conclude that, under these circumstances, it was foreseeable that a teenage driver on a long trip, in a car with three other teenagers,

could get distracted and collide with another driver. *See Bjerke*, 742 N.W.2d at 667 ("It is not necessary that a defendant have notice of the exact method in which injury will occur 'if the possibility of an accident was clear to the person of ordinary prudence.' " (quoting *Connolly v. Nicollet Hotel*, 95 N.W.2d 657, 664 (Minn. 1959))). Indeed, the assistant coach said as much when, in a statement to police after the crash, he asked, "what are we doing with a 16 year old driving this distance?"

The possibility that teen drivers may be distracted by other teens and electronics is not in any way remote or attenuated. *Cf. Doe 169*, 845 N.W.2d at 178–79. Other courts have specifically recognized that inattentive teen driving, and the resultant heightened risk of causing an accident, are foreseeable. *See, e.g.*, *Riddick v. Jim Hay Co.*, 119 Cal. Rptr. 546, 551 (Cal. Ct. App. 1975) (noting "the incontrovertible fact that young drivers tend to be inattentive and reckless"); *Martinelli v. City of Chicago*, 989 N.E.2d 702, 712 (Ill. Ct. App. 2013) ("[I]t is well known that people do various things that lead to distracted driving . . . . Stating the obvious, this era's drivers are distracted on a regular basis by their apparent need to remain in constant communication on their cell phones . . . . [N]o rational thinker could think such conduct would be legally unforeseeable.").

Contrary to the dissent's assertion, we announce no new rule of law today, much less "a major departure from our jurisprudence." Every organization active in Minnesota—whether for-profit, nonprofit, religious, fraternal, educational, or otherwise—has long been subject to the black-letter common-law rule that it may be liable for the negligence of others

if its own conduct creates a foreseeable risk of injury to a foreseeable plaintiff.[5] Today we apply that rule in the procedural posture of this case: summary judgment.

As we did in two recent cases involving the issue of duty of care in the context of summary judgment, we decide today that foreseeability is at least a close call, meaning that summary judgment on the element of duty was not appropriate and the case should have been tried. *See Senogles*, 902 N.W.2d at 48; *Montemayor*, 898 N.W.2d at 633. Nothing in our decision prevents the district court from deciding by trial whether the facts show misfeasance or nonfeasance. And nothing in our decision prevents the school from arguing at trial the specific elements of negligence: that the school had no duty because its conduct did not create a foreseeable risk of injury to Fenrich; that the school did not breach a duty; and that the school's conduct was not the direct and proximate cause of the injuries.

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals.

Reversed.

THISSEN, J., not having been a member of this court at the time of submission, took no part in the consideration or decision of this case.

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[5] Thus, the dissent's concern that, once school lawyers with "gimlet eyes" read this opinion, they will cause school-affiliated organizations to disband is overwrought. Our decision merely applies a long-established rule of law to some unusual facts; specifically, how a school may have exposed itself to liability by seeking, simultaneously, to sponsor—and yet not sponsor—its athletic team's out-of-town trip.

D I S S E N T

ANDERSON, Justice (dissenting).

The court has significantly expanded the potential liability of schools by holding that respondent The Blake School is potentially liable to the general public for the negligence of a student who, at the suggestion of his parents and with their express written consent, drove his family's personal vehicle to a post-season weekend athletic event.

Understanding what this dispute is *not* about is helpful. Unlike the ordinary course of motor vehicle accident litigation, appellant JeanAnn Fenrich makes no claims in this litigation against either the driver or the owner of the car; those claims have settled. Instead, she is directing her claims at a third party not involved in the accident—the high school where the driver was attending at the time of the accident.

The threshold issue on appeal is whether the school owed a duty to protect Fenrich and her husband. The existence of a duty depends "on the relationship of the parties and the foreseeable risk involved." *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168–69 (Minn. 1989). "Ultimately, the question is one of policy." *Id.* at 169. Although "[t]he existence of a legal duty to protect another person presents an issue of law" that is decided by the court, *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999), the court in this case effectively delegates the duty determination to a jury. The injuries suffered by Fenrich and her husband are tragic, but the court's holding here is an unwise expansion of potential liability, created by an unwarranted expansion of duty. *Cf. Senogles v. Carlson*, 902 N.W.2d 38, 49 (Minn. 2017) (Anderson, J., dissenting) ("The court opens the door to a

significant, and unwarranted, expansion of social host liability."). Because I conclude that the school has no duty as a matter of law, I respectfully dissent.

I.

The duty analysis in this case is different from the typical motor vehicle negligence case. The issue here is not whether the driver or the owner of the vehicle had a duty to the persons injured by the negligence of the driver. Rather, the issue is whether the school had a duty to protect members of the general public who were injured by the negligent driving conduct of one of its students.

"Minnesota law follows the general common law rule that a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177–78 (Minn. 2014). In other words, a person generally "has no duty to control the conduct of a third person to prevent that person from causing injury to another." *Lundgren v. Fultz*, 354 N.W.2d 25, 27 (Minn. 1984) (citing Restatement (Second) of Torts § 315 (Am. Law Inst. 1965)). Consequently, this case implicates narrow exceptions to the general rule that a person does not have a duty to "protect others from harm caused by a third party's conduct." *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996).

A duty to protect may exist when "there is a special relationship between the parties." *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). To conclude that a special relationship exists, we assume that the harm to be prevented must be one that the defendant is "in a position to protect against and should be expected to protect against." *Erickson*,

447 N.W.2d at 168. I agree with the court that there is no special relationship here that would give rise to a duty on the part of the school to protect the general public.

But, in limited circumstances, a person may also be liable for harm caused by a third party's conduct "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). More specifically, we have imposed "a duty of reasonable care to prevent foreseeable harm when the defendant's conduct creates a dangerous situation." *Id.* at 26; *see, e.g.*, *Delgado v. Lohmar*, 289 N.W.2d 479, 484 (Minn. 1979) (holding that trespassing hunters, who "engaged in an extremely dangerous activity, hunting with high-powered guns[,]" should have foreseen that "the landowner may come out and ask [them] to leave"). We have defined the defendant's "own conduct" to "mean misfeasance, which is 'active misconduct working positive injury to others.' " *Doe 169*, 845 N.W.2d at 178 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 56 (5th ed. 1984)). In contrast, nonfeasance is " 'passive inaction or a failure to take steps to protect [others] from harm.' " *Id.*

In this case, the court concludes that a jury reasonably could find that the school's own conduct constitutes misfeasance. But the facts the court relies upon, even when viewed in the light most favorable to Fenrich, cannot be reasonably characterized as "misconduct," active or otherwise, and cannot form the basis of Fenrich's negligence claims against the school. *Doe 169*, 845 N.W.2d at 178. It is a fundamental tort principle that a negligence claim must be rooted in a "wrong" in relation to the persons injured. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928).

In fact, the school's conduct cannot even be described as active conduct generally. Rather, the court's analysis focuses on the *failure* of the coaches to act—their failure to veto the family's plan to have the student drive to the meet, their failure to tell the father that he should drive to the meet, and their failure to give specific safety instructions to the student. Even though it was the student's mother who proposed that the student drive their family vehicle to the meet—specifically stating that she and the father were "very comfortable with [his] driving skills" and that he was "legal now to have passengers"—the court essentially concludes that the failure of the school to take affirmative steps to prevent the student from driving or to somehow ensure that he was driving responsibly may be treated as active misconduct.[1] Moreover, the court implicitly holds that allowing a teenager to drive with other teens in the car creates "a dangerous situation." *Domagala*, 805 N.W.2d at 26.

The school's conduct here is far different from the type of conduct that we have characterized as misfeasance, and therefore giving rise to potential liability in other cases. For example, in *Domagala*, we held that "forcefully shaking a bucket attachment" to a skid

[1] There is no evidence that the school's coaches ever communicated directly with the student driver before the weekend of the meet about his transportation arrangements. While acknowledging that the runners were supposed to be "responsible for arranging their own lodging and transportation to the meet," the court cites an e-mail from the assistant coach (who also was a parent of one of the students travelling to the meet) to a parent of one of the other runners, indicating that the assistant coach was "stopping by the school before practice to make sure everyone has coordinated rides and rooms for this weekend." The student driver was not at practice that day. It was the mother of the driver who suggested the driving arrangements in an e-mail to the assistant coach. She merely asked the assistant coach to "confirm that is the plan"; the assistant coach responded by stating, "That works."

loader that was hanging vertically by one pin was misfeasance. *Id.* at 27–28. The school did nothing like that here. At best, the school's conduct constitutes nonfeasance, and the court's decision constitutes a major departure from our jurisprudence.

Further, the court's analysis suggests that the assistant coach, who was driving ahead of the student's vehicle, and the volunteer coach, who was a passenger in the student's vehicle, had a duty to control or influence the conduct of the student driver. According to the court, a reasonable fact-finder could conclude that "the school's own conduct was misfeasant," in part, because "the assistant coach decided that the volunteer coach would ride with [the student]," and "did not give the volunteer coach any safety instructions—such as to sit in the front seat, to pay attention (rather than be distracted by electronic devices), and to make sure that [the student] drove responsibly." But we have previously held that "a passenger has no duty to members of the public to control the operation of a motor vehicle . . . ." *Olson v. Ische*, 343 N.W.2d 284, 288 (Minn. 1984). In declining to impose a duty on the passenger in *Olson*, even where the driver was intoxicated, we declined to assume that a passenger "somehow shares in the management of the motor vehicle" or that the driver would be "amenable to the passenger's influence." *Id.* at 287–88. In this case, however, by focusing on the lack of "adult supervision in the car," the court assumes, without basis, that adult supervision could have prevented the student from becoming distracted.[2] *See Lundgren*, 354 N.W.2d at 27 ("Implicit in the duty to control is the *ability* to control."); *Olson*, 343 N.W.2d at 288 (citing Restatement

[2] As the court notes, the "adult" supervision in this case was provided by a volunteer coach who was 19 years old at the time, a "teenager," and a former student at the school.

(Second) of Torts § 315 cmt. b (Am. Law Inst. 1965) (suggesting no duty on the part of a passenger to control a driver who is inattentive or otherwise driving negligently)). Moreover, when proposing the "caravan," the mother of the driver simply asked that he not drive to the meet "without an adult at least in rear view mirrors"—in another vehicle.

The court also relies on *Verhel ex rel. Verhel v. Independent School District No. 709*, 359 N.W.2d 579 (Minn. 1984), explaining that, because the assistant coach "took active responsibility for coordinating transportation" to the meet, "[t]he facts that created a duty in *Verhel* are strikingly similar here." Even if the school's coaches helped coordinate transportation and other logistics, there is a critical difference between *Verhel* and this case. *Verhel* involved a *student* who was injured by another student—not a member of the general public. In *Verhel*, we described the school district's duty as the duty " 'to protect *its students* from injury resulting from the conduct of other students under circumstances where such conduct would have been reasonably foreseen and could have been prevented by the use of ordinary care.' " *Id.* at 586 (emphasis added) (quoting *Sheehan v. St. Peter's Catholic Sch.*, 188 N.W.2d 868, 870 (Minn. 1971)). Our decision in *Verhel* was premised on the school district's duty to "supervise students engaged in extracurricular activities so as to provide for their safety and welfare with respect to foreseeable hazards associated with such extracurricular activities." *Id.* at 586. We reasoned: "Where a school district has assumed control and supervision of all activities of a school club operated under its auspices, *parents of participants* have a right to rely upon that assumption." *Id.* at 587 (emphasis added). As the Eighth Circuit recognized, it is "[t]he relationship between a

school district and its students" that "creates the duty." *Gylten v. Swalboski*, 246 F.3d 1139, 1143 (8th Cir. 2001).

By contrast, this case does not involve injury to another student. Rather, it involves injuries to members of the general public who had no relationship with or even a connection to the school. The circumstances here readily distinguish this case from *Verhel*. While we have previously held that a school has a duty to use ordinary care to protect its students from injury resulting from the conduct of other students, we have never before imposed a duty on a school to protect the general public from injury caused by a student's negligence off of school grounds.

Finally, the court's announcement of a new rule that makes misfeasance a fact question for the jury is an unsettling development in our duty jurisprudence. Although the determination of misfeasance versus nonfeasance is straightforward in this case, we have previously acknowledged "the confounding complexity of characterizing a defendant's action or inaction as misfeasance or nonfeasance." *Domagala*, 805 N.W.2d at 22; *see also Brower v. N. Pac. Ry. Co.*, 124 N.W. 10, 11 (Minn. 1910) (stating that "the distinction between misfeasance and nonfeasance is sometimes fanciful"). Further, the legal issue of duty—which we have long viewed as a matter of public policy for the court, *cf. Gradin v. St. Paul & D. Ry. Co.*, 14 N.W. 881, 882 (Minn. 1883)—will increasingly be decided by juries, particularly in light of the court's recent cases on foreseeability, which now make "close cases" the rule rather than the exception, *see infra* section II.A. In sum, the court's decision on misfeasance will create confusion and inconsistency in future litigation.

II.

The court also concludes that there is a genuine issue of material fact as to whether the injuries to Fenrich and her husband were foreseeable. "Even if the ability to control another's conduct exists, there is no duty to control that person unless the harm is foreseeable." *Lundgren*, 354 N.W.2d at 28. The court's decision on foreseeability misapplies traditional tort doctrines. After examining the development of the concept of duty in tort law and the history of our duty determinations in "close cases," I conclude that this case is not close.

A.

Foreseeability turns not on "whether the precise nature and manner of the plaintiff's injury was foreseeable, but on whether 'the possibility of an accident was clear to the person of ordinary prudence.' " *Domagala*, 805 N.W.2d at 27 (quoting *Connolly v. Nicollet Hotel*, 95 N.W.2d 657, 664 (Minn. 1959)). Accidents "within the realm of any conceivable possibility" are not necessarily foreseeable. *Whiteford ex rel. Whiteford v. Yamaha Motor Corp.*, 582 N.W.2d 916, 918 (Minn. 1998). Instead, we "look at whether the specific danger was objectively reasonable to expect." *Id.* Foreseeability is "ordinarily 'properly decided by the court' " as a matter of law. *Domagala*, 805 N.W.2d at 27 (quoting *Alholm v. Wilt*, 394 N.W.2d 488, 491 n.5 (Minn. 1986)). Nonetheless, we have said that the question of foreseeability should be decided by the jury in "close cases." *Senogles*, 902 N.W.2d at 43; *accord Montemayor*, 898 N.W.2d at 629; *Doe 169*, 845 N.W.2d at 178

n.2; *Domagala*, 805 N.W.2d at 27 n.3; *Bjerke v. Johnson*, 742 N.W.2d 660, 667–68 (Minn. 2007); *Whiteford*, 582 N.W.2d at 918; *Lundgren*, 354 N.W.2d at 28.[3]

But from where does this "close cases" rule come?

Like many historic concepts in tort law, the "close cases" rule probably originates in litigation against railroads in the mid-nineteenth century. In his treatise on torts, Thomas Cooley remarked that some courts considered the duty to guard against certain injuries to be a question of fact. Thomas M. Cooley, *A Treatise on the Law of Torts* 669 (1879); *see, e.g.*, *Spencer v. Milwaukee & Prairie du Chien R.R.*, 17 Wis. 503, 509 (1863) (holding that it was not error for a court to charge the jury with deciding whether a railroad had a duty to protect a passenger who opened a railway car's window and extended his arm slightly out the window).

Today, we probably would categorize the issues in *Spencer* as examples of proximate cause or contributory negligence. But *Spencer* is really about whether the railroad owed a duty to passengers who used the windows of a railcar for their desired purpose, to allow passengers some reprieve from the hot and stuffy confines of the railcar. *See Spencer*, 17 Wis. at 509; Cooley, *supra*, at 669. In modern parlance, *Spencer* raised the question of whether it was foreseeable that passengers would put their arms out the window but also whether passengers should foresee that the railroad would not clear all obstructions within an arm's length of the railcar.

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[3] The developments in our "close cases" jurisprudence have sparked some academic commentary. *See, e.g.*, Mike Steenson, *Duty, Foreseeability, and* Montemayor v. Sebright Products Inc., 39 Mitchell Hamline L. J. Pub. Policy & Practice 31, 44–47 (2018).

The most famous exposition of these rules is in *Palsgraf v. Long Island Railroad Company*, 162 N.E. 99 (N.Y. 1928). In *Palsgraf*, Chief Judge Cardozo explicitly links the two concepts of duty and foreseeability:

> [T]he orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty . . . . The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension . . . . The range of reasonable apprehension is at times a question for the court, and at times, if varying inferences are possible, a question for the jury.

Id. at 100–01.

Our first acknowledgement of this interaction between duty, foreseeability, and the questions to be determined by a jury was in *Connolly v. Nicollet Hotel*, 95 N.W.2d 657, 664 (Minn. 1959) (citing *Palsgraf*, 162 N.W. at 100). In *Connolly*, a pedestrian was injured while she was walking along a sidewalk adjacent to the Nicollet Hotel. *Id.* at 661. She heard a noise that "sounded like a small explosion" and saw something strike the sidewalk in front of her. *Id.* As she looked up, "a mud-like substance" struck her left eye, which resulted in the loss of sight in that eye. *Id.* at 661–62. The pedestrian sued the Nicollet Hotel, alleging that the object that struck her had come from the hotel. *Id.* at 660–62. At the time of the incident, the Nicollet Hotel was hosting an annual convention for the Junior Chamber of Commerce. *Id.* at 662. The hotel was aware that the guests of the convention were littering the premises with broken glasses and bottles and otherwise damaging hotel property. *Id.* at 665. We held that the hotel's notice of the guests' conduct gave rise to a question of fact as to whether the injury to the pedestrian was foreseeable, and that it was a question for the jury. *Id.* at 665.

Palsgraf and *Connolly* exemplify the line between a close case, where "varying inferences are possible," *Palsgraf*, 162 N.E. at 101, and a clear case. *Connolly* was a close case because the hotel was aware of guest misconduct similar to the misconduct that injured the pedestrian. *See* 95 N.W.2d at 665. But we left it to the jury to determine whether it was foreseeable that a guest would throw a mud-like substance from a hotel window to the sidewalk below, strike a pedestrian in the eye, and cause injury. *Id.* "[I]t was plainly a question for the jury to say whether under these unusual circumstances the defendants should have anticipated an accident such as happened and whether they should have taken some precautions by way of securing additional police or watchmen to supervise the conduct of their patrons." *Id.* at 666.

Palsgraf, on the other hand, was not a close case, and a judicial determination was made that no duty existed. *See* 162 N.E. at 101. The facts of that case show that while attempting to board a train, a man dropped his package carrying fireworks, thereby causing an explosion and injuring Palsgraf, who was standing on the train platform at the time. Chief Judge Cardozo noted that nothing about the package of fireworks gave notice of its explosive qualities. In his words:

> If the guard had thrown [the package] down knowingly and willfully, he would not have threatened the plaintiff's safety, so far as appearances could warn him. His conduct would not have involved, even then, an unreasonable probability of invasion of her bodily security. Liability can be no greater where the act is inadvertent.

Id.

B.

With these principles in mind, I turn to the facts of this case. Here, the court concludes that this case is a "close case" because the student was only recently licensed, he was "unsupervised," and he was driving a significant distance. Further, the court cites the general inexperience of teenage drivers and the modern peril of distracted driving. I disagree. This is not a close case.

It is useful to view this dispute through the lenses of *Connolly* and *Palsgraf*. Unlike the knowledge of the hotel in *Connolly*, 95 N.W.2d at 665, the school here had no affirmative notice that the student was a poor or negligent driver. In other words, whereas the hotel had notice that its guests were rowdy, the school had no notice of any unreasonable risk posed by the student driver and therefore had no duty. Just like the lack of notice regarding the contents of the package in *Palsgraf*, 162 N.E. at 101, the circumstances here did not indicate any reasonably foreseeable danger to anyone. In fact, the student's mother had vouched for her son's driving skills.

Further, we considered the characteristics of the defendants in *Connolly*—hotel operators engaged in the sale of intoxicating liquor—but we did not solely rely on those characteristics. 95 N.W.2d at 664. The hotel knew that the young men attending the convention had engaged in extensive partying. *Id.* at 665. Moreover, we noted that it was common sense that intoxication would increase disorderly behavior. *Id.* But, in the end, in concluding that the negligent act was "within the range of foreseeability," we relied on evidence that the hotel had notice of the misconduct of the hotel's guests—specifically, "the indiscriminate throwing of glasses, bottles, and other objects in and about the

hotel . . . ." *Id.* Unlike our decision in *Connolly*, the court here relies almost exclusively on a supposition, without any evidence in the record, that teenage drivers are more likely to become distracted and have a heightened risk of causing an accident. Even if we grant the court these assumptions, there is nothing else in the record to indicate that the school should have realized that it had a duty to protect the general public from the driving conduct of *this* student.

A hypothetical helpfully illustrates what would make this case more like *Connolly* and less like *Palsgraf*. Suppose, as was suggested at oral argument, that a school official observed that a student's behavior indicated that he or she was intoxicated before that student drove to a school event. Then, just as in *Connolly*, the school would have notice of misconduct that might give rise to a duty to try to prevent the student from driving. The absence of that kind of notice here demonstrates how far removed this case is from *Connolly*.

I recognize, as the court emphasizes, that the court's decision allows a jury to determine whether a duty exists but does not mandate this determination. But that observation obscures the significant consequences that flow from this expansion of duty. Those consequences come from the mere fact that any third-party injury derived from student driving conduct is now a "close case" against the student's school that a jury must resolve based on the specific factors identified by the court for jury consideration.

As noted at the beginning of this dissent, we deal here not with traditional motor vehicle negligence analysis. No one disputes that a driver, a high school student or otherwise, owes a duty to other drivers. But now a school must consider whether it has a

duty to remote individuals based on actions taken by students in almost any context. All extracurricular, and co-curricular, activities, are now guaranteed a gimlet-eyed review by the school's lawyers. Schools have beneficial relationships with all manner of groups and individuals that support school activities, including parent-teacher organizations, athletic associations, booster clubs, and alumni. For purposes of limiting liability, do schools now need to consider whether these organizations should be disbanded or at least officially disaffiliated from the school?

My concerns are magnified by the fact-specific approach dictated by the court's analysis. In discussing the duty that might be imposed on the school, the court identifies at least nine distinct factors upon which a reasonable jury could conclude that the circumstances of this case "created an objectively reasonable expectation of danger to the public":

> [The student] was [1] not an adult, but was a teenager, [2] who had been licensed for less than 6 months. He was [3] driving a lengthy distance [4] with no adults—only other teenagers—in the car. [5] He could not legally drive multiple passengers who were under the age of 20. [6] [The student's] parents had asked that an adult drive ahead of [the student]. In preparation for the drive, [7] the assistant coach provided no instructions to [the student], except, shortly before the accident, to "keep it safe and keep rolling." [8] The assistant coach told the volunteer coach to ride in the car with [the student], but gave no specific instructions to the volunteer coach to monitor [the student's] driving, or to ensure that [the student] did not become distracted while driving. [9] Nor did the assistant coach tell the volunteer coach to sit in the front passenger seat, where the volunteer coach could have better supervised [the student's] driving.

Are all nine factors necessary to impose a duty on a school? Are some factors more important than others? Are there other factors that might be important to the analysis? Is the mere fact that a school allows students and parents the opportunity to publicize an event

to which students might drive enough to impose a duty on the school? The court's decision leaves schools with a lack of guidance on the scope of their duty.

III.

The court's ruling that the school may owe a duty to members of the general public under the circumstances of this case—an accident that took place over 100 miles from the school when a student drove to a post-season weekend athletic event at the suggestion, and with the express written permission, of his parents—represents a major expansion of school liability with troubling policy implications. There is no apparent limiting principle if the school here faces liability simply because the coaches helped coordinate some aspects of the trip and encouraged team members to participate. Because the court believes that "[t]he possibility that teen drivers may be distracted by other teens and electronics is not in any way remote or attenuated," Minnesota schools, both private and public, now risk liability to members of the general public whenever students drive themselves to or from a school activity, even when the school has no notice of any history of negligent or reckless driving. In *Verhel*, we made clear that we were not holding that a school is "liable for the safety of all students while in transit to or from a school activity . . . ." 359 N.W.2d at 586. In this case, however, with more attenuated relationships than in *Verhel*, the court essentially holds that a school may be liable for the safety of members of the general public when students drive to or from a school-encouraged activity.[4]

[4] Under the court's reasoning, a school district may now face liability to persons other than students and faculty even when high school students drive themselves to and from the school itself simply because the school district coordinates student transportation and provides a student parking lot.

Because there is no way to tell from the court's opinion what might be enough to trigger the imposition of a duty, the response from schools will necessarily be to ratchet back on school activities and relationships in order to limit financial exposure. While schools can require parents to sign releases of liability for the schools' students, as the school did here in connection with cross-country events during the official season, it is obviously not possible for schools to obtain releases of liability from individual members of the public.

When making a duty determination, courts typically consider policy factors, such as "the burden to the defendant and community of imposing a duty to exercise care with resulting liability for breach." *Domagala*, 805 N.W.2d at 26. For example, in a prior case, we held that a municipality did not assume a duty to protect individual members of the public with respect to the negligent inspection of the conduct of third persons for fire code violations where the plaintiffs already had a right of recovery against other defendants, reasoning:

> We are being asked to add another defendant; namely, the municipality involved. If such an expansion and change of the law is to occur, it is better that the legislature act in this field where extensive hearings can be conducted to consider the extent of the financial impact of such a basic change. It is quite apparent that we are unable to comprehend the ramifications of imposing a duty to enforce the law with reasonable care.

Cracraft v. City of St. Louis Park, 279 N.W.2d 801, 808 (Minn. 1979). But the court here dispenses with policy considerations and does not consider the ramifications of imposing an expansive duty on schools. Under the court's decision, a jury's determination on foreseeability often will be determinative.

All of this is unnecessary. The district court and the court of appeals correctly concluded that this unprecedented imposition of a duty on the school was not a close case. I agree and would affirm the court of appeals.

GILDEA, Chief Justice (dissenting).

I join in the dissent of Justice Anderson.