STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0812

Shona Tahiro, parent and natural guardian of
Ramaden Waliye, a minor,
Appellant,

vs.

The Higher Ground Academy,
Defendant,

Pride Transportation Bus Services LLC, et al.,
Respondents,

Metropolitan Transportation Network, Inc., et al.,
Defendants.

Filed March 24, 2025
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CV-22-6272

Scott Wilson, Scott Wilson Law Firm, PLLC, Minneapolis, Minnesota; and

Gregory J. Walsh, Walsh & Gaertner, P.A., St. Paul, Minnesota (for appellant)

Anthony J. Novak, Patrick H. O'Neill III, Larson King, LLP, St. Paul, Minnesota (for respondents)

Taylor Brandt Cunningham, Conlin Law Firm, LLC, Minneapolis, Minnesota (for amicus curiae Minnesota Association for Justice)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the grant of summary judgment dismissing her negligence-based claims against respondents, a school bus driver and his employer, for personal injuries suffered by appellant's child, who was struck by a vehicle before boarding a school bus, arguing that respondents owed a duty to the child. The district court concluded that no duty was owed and granted respondents' summary-judgment motions. We affirm.

FACTS

On February 27, 2020, R.W., the seven-year-old son of appellant Shona Tahiro, walked with his brother and adult aunt to catch his school bus. At that time, the school bus driver had displayed his eight-way flashers and extended the stop sign on the bus. As R.W. crossed the street to board the bus, he was struck by a pickup truck driven by Daniel Hernandez (the collision). Hernandez, who had ignored the flashers and stop sign, was initially charged with criminal vehicular operation, then pleaded guilty to a charge of careless driving.

Appellant brought this action against respondent Pride Transportation Services and its employee, respondent bus driver Siyad Abdullahi Abdi.[1] Respondents respectively

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

[1] Appellant also brought claims against RW.'s school, defendant Higher Ground Academy; and defendant Metropolitan Transportation Network, Inc., and its employee defendant

moved for summary judgment to dismiss appellant's claims. Their motions were granted, and appellant challenges those decisions, arguing that respondents had a duty to R.W.[2]

DECISION

We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. *Montemayor v. Sebright Prods. Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotations omitted). A reviewing court must view the evidence in the light most favorable to the nonmoving party. *Fenrich v. The Blake School*, 920 N.W.2d 195, 201 (Minn. 2018). To create a genuine issue of material fact, the nonmoving party must present sufficient evidence to permit reasonable persons to draw different conclusions and create more than a metaphysical doubt as to the factual issue. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

"To recover on a claim of negligence, a plaintiff must prove: (1) the existence of a duty of care; (2) a breach of that duty; (3) an injury; and (4) that the breach of the duty was

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Temetrius Nickerson, who was driving a school bus that was stopped at the intersection when the collision occurred. These defendants also moved for summary judgment and their motions were granted. Those decisions were not appealed.

[2] Amicus Curiae Minnesota Association for Justice (MAJ) filed a brief on behalf of appellant. MAJ argues that "this Court should employ the correct (and simpler) legal framework—despite the parties' presentation of the issues" and that "[p]ublic policy supports imposing a duty on school bus drivers." But this court "cannot create public policy." *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000), *rev. denied* (Minn. May 16, 2000). Moreover, MAJ is making a different argument than appellant. "Under the principle of party presentation, we generally do not consider arguments raised for the first time on appeal nor do we decide issues raised solely by an amicus." *In re NorthMet Project Permit to Mine Application Dated December 2017*, 959 N.W.2d 731, 755 (Minn. 2017) (quotations omitted). For this reason, we do not address the issue raised by MAJ.

a proximate cause of the injury." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). The existence of a duty of care is both "a question of law that we review de novo" and "a threshold question[,] because a defendant cannot breach a nonexistent duty." *Id.*

It is undisputed that Abdi's bus was at the stop before R.W., his brother, and his aunt arrived on foot and that the harm to R.W. was caused by the act of Hernandez, a third party, before R.W. had reached the bus. "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." *Id.* at 177-78. There are two exceptions to this rule: (1) when a special relationship exists between plaintiff and defendant and the risk of harm to the plaintiff is foreseeable and (2) "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Id.* at 178. Because appellant does not argue that a special relationship existed between R.W. and either Pride or Abdi, only the own-conduct exception is relevant here.

The own-conduct exception requires an analysis of three points: first, was the relevant conduct the actual misfeasance required by the exception, or was it merely nonfeasance; second, was the risk foreseeable; and third, was the plaintiff foreseeable. *Fenrich*, 920 N.W.2d at 203. Misfeasance is defined as "active misconduct working positive injury to others," while nonfeasance is "passive inaction or a failure to take steps to protect [others] from harm." *Id.*

School buses are equipped to simultaneously display eight-way flashers and extend a stop sign. Prior to this appeal, appellant argued that these flashers and the extended stop sign were engaged to signal motorists, not children, and that Abdi had engaged them too

late to enable Hernandez to stop in time to avoid the collision. For instance: (1) appellant's memorandum opposing summary judgment claimed that the own-conduct exception applied because of "Abdi's own conduct in failing to give a sufficient warning *to other motorists*" and quoted the rule that school buses "are equipped with yellow and red lights that flash alternately *to warn drivers that they are stopping to load or unload students*" (emphasis added); (2) the hearing transcript showed that appellant's attorney said Abdi "activated his amber warning signals . . . *to block the vehicles coming from the south, heading north*" and that the situation "was created by Mr. Abdi *in his failing to adequately warn Mr. Hernandez* that these children were about to cross the street," not in Abdi's failure to adequately tell the children it was safe to cross the street (emphasis added); and (3) the district court's memorandum stated that appellant (A) had argued that the own-conduct exception applied because Abdi *failed to give sufficient warning to motorists*, (B) "appear[ed] to argue that . . . the stop [sign] arm was extended without adequate time *for motorists to see it and respond to it*," and (C) had "allege[d] that Abdi did not engage the bus safety devices *early enough to prevent the collision*."

Except for stating that "[appellant] alleges that Abdi gave 'false signals' but . . . there is no evidence in the record that such false signals occurred," the district court does not refer to appellant arguing either that Abdi used the eight-way flashers to signal the children or that Abdi's use of the flashers was too early. In fact, the district court said it "under[stood] [appellant] to allege that Abdi did not engage the bus safety devices early enough to prevent the collision." The district court reasoned that "the 'own conduct' identified by [appellant was] a failure to give sufficient warning to Hernandez such that he

could [avoid hitting R.W.]" and concluded that "the conduct [appellant] alleges, by its character, amounts to nonfeasance," which would defeat the own-conduct exception.

Perhaps in response to the district court's conclusion, appellant does not mention Abdi's failure to warn Hernandez early enough in his appellate brief; rather, he argues that Abdi committed misfeasance by turning on his eight-way flashers too early as "false signals" to the children that it was safe to cross the street.[3] But this argument imposes on a bus driver a duty of care to a child who was not yet on the bus or even near it, but still approaching it from the other side of an intersection, and who was in the custody of his adult aunt.

Such a duty of care is contrary to Minnesota caselaw. *Vogt v. Johnson* concerned a decedent seven-year-old child who, "as the bus approached the intersection and before it reached it, . . . left his companions at the curb, darted into the highway, and was struck and killed by an automobile coming from the opposite direction." 153 N.W.2d 247, 249 (Minn. 1967). The supreme court in *Vogt* noted that "[t]he alleged negligence of the operator of the bus must be viewed in light of the duty he owed to the child at the time and place of the accident" and rejecting the plaintiff's view that the bus driver should have anticipated that his speed as he approached the intersection "would increase or diminish the danger of

[3] It is arguable that appellant is raising a new negligence theory on appeal, in violation of *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("Nor may a party obtain review by raising the same general issue litigated below but under a different theory."). *See also Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979) (holding that a party cannot raise a new negligence theory on appeal); *Sec. Bank of Pine Island v. Holst*, 215 N.W.2d 61, 62 (Minn. 1974) (stating that it is elementary that a party cannot shift position on appeal). We address appellant's new argument in the interest of completeness.

harm which might result from the combination of careless driving on the part of the motorist coming from the opposite direction and the unpredictable conduct of a child standing at the curb." *Id.* at 251. The supreme court then affirmed the grant of judgment notwithstanding the verdict to the bus company, reasoning that:

> At the time the accident occurred, the driver's responsibility for the safety of the child had not come into existence. The child had not come within the scope of the driver's duty to care for or to protect him. . . . [T]he evidence of negligence presented by this record is too remote and tenuous to support actionable negligence.

Id. Here, as in *Vogt*, neither Pride, the bus company, nor Abdi, the driver, had assumed supervision and control over R.W., who was still approaching the bus; moreover, R.W. was still under the supervision and control of another adult, his aunt.

More recently, the supreme court in *Fenrich* reversed the summary judgment granted to a school by the district court and affirmed by this court. 920 N.W.2d at 207. The supreme court concluded that the school was arguably liable for misfeasance when a student who was driving team members to an athletic event had a head-on collision that caused the death of the oncoming driver because "the school went beyond passive inaction [i.e. nonfeasance] by assuming supervision and control over its athletic team's trip," specifically by "assum[ing] responsibility over the activity of the team members" and having an assistant coach "t[ake] active responsibility for coordinating [students'] transportation." *Id.* at 203-04; *see also Verhel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 587-88 (Minn. 1984) (holding that a school district had a duty in relation to a summer car accident caused by student cheerleaders because the school district "had assumed

control and supervision over the cheerleading squad" even during the summer). Here, neither Pride nor Abdi had assumed any control or supervision over R.W. when a motorist's careless driving caused the accident.

Affirmed.