SUPREME COURT NO. 93471-1

COURT OF APPEALS NO. 47612-6-II

SUPREME COURT
OF THE STATE OF WASHINGTON

TACOMA SCHOOL DISTRICT NO. 10,

Petitioner,

v.

ANGELA EVANS, Individually,

Respondent.

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR REVIEW

Charles P.E. Leitch, WSBA No. 25443
Angela N. Marshlain, WSBA No. 37118
Of Attorneys for Petitioner Tacoma
School District No. 10

PATTERSON BUCHANAN
FOBES & LEITCH, INC., PS

2112 Third Avenue, Suite 500
Seattle, WA 98121
Tel. 206.462.6700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Rules

Washington Constitution

In her Answer to Tacoma School District # 10's Petition for Review, Respondent Angela Evans raised a new issue: whether summary judgment was proper on Ms. Evans' claim for negligent failure to report child abuse or neglect pursuant to RCW 26.44.030 (hereafter "failure to report claim"). In compliance with CR 13.4(d), the District has limited its argument in this reply to this issue.

I. FACTS RE: MS. EVANS' FAILURE TO REPORT CLAIM

Ms. Evans' daughter, J.M., turned 18 years of age on **December 24, 2012**. *See* CP 154 at 32:1-8. J.M. was a student at one of the District's high schools, the Science and Math Institute ("SAMI"), until the time of her graduation in **June of 2013**. Ms. Evans contends that in or around late-August of 2013, after J.M.'s 18th Birthday and graduation, she learned that her daughter was in a relationship with Jesse Brent, a District classified employee at SAMI. *See Id.* at 37:10-38:3. Ms. Evans claims that prior to that time, she did not know who Mr. Brent was or that he was a District employee. *See Id.*

A. No Observed Evidence of Abuse or Neglect

During the time both Mr. Brent and J.M. were at SAMI, there were no staff members who observed any behavior by Mr. Brent that led them to believe that he was engaged in an inappropriate relationship with J.M., or any other student. Former SAMI counselor Paul McGrath never

saw Mr. Brent engaging in any conduct with any student, let alone with J.M., that struck him as being inappropriate in nature. *See Id.* 386-88. Similarly, at no time did SAMI Co-Director Kristin Tinder observe Mr. Brent ever singling out any student, including J.M. *See Id.* 392-93. While teachers had expressed concern with Mr. Brent spending too much time in their classrooms and socializing with students in general, Ms. Tinder never had any concerns about him singling out particular female students, including J.M., based upon her observations or the reports she received. *See* CP 392-93.

In addition, SAMI teacher Carol Brouillette recalls that the only thing she observed Mr. Brent doing was "hanging out in the back and talking to students and being in the way." *Id.* 397; *see also Id.* 398-99.

Ms. Brouillette stated that Mr. Brent's general socializing with students, including students other than J.M., was not unique to Ms. Brouillette's classroom. *See Id.* 397. And Ms. Brouillette did not state that Mr. Brent focused his socializing on J.M. or any other particular student. *See generally* CP at 397-99. Further, Ms. Brouillette never felt that Mr. Brent's relationship with students was dangerous, only informal and unprofessional. *See Id.* 399.

Kummesha Moore's declaration, excerpted at length in Ms. Evans' response, merely states that students and District personnel saw

Mr. Brent and J.M. frequently flirt and talk to each other. *See* CP 335-36. But Ms. Moore's declaration does not state that any student or District personnel knew or believed that abuse or neglect was occurring. *Id.* 335-36. Thus, while Ms. Moore's declaration may provide evidence of inappropriate behavior, it does not provide any evidence supporting that District personnel had reasonable cause to believe that J.M. was being abused or neglected.

B. Ms. Evans Reports *After* J.M. Turned 18 and Graduated

On September 1, 2013, almost three (3) months after J.M. graduated from SAMI and almost nine (9) months after J.M. turned 18 years of age, Ms. Evans sent an email to SAMI Assistant Principal/Co-Director Kristin Tinder stating: "This involves an illegal relationship between my daughter when she was 17 by your security guard Jesse Brent. I have documentation and will await your call." *Id.* 163. Ms. Evans admits that this email was the first time she had communicated to anyone at the District about Mr. Brent. *See Id.* 157-58.

The following morning, Ms. Evans sent Ms. Tinder yet another email, which read: "It was a misunderstanding." *Id.* 165. To clarify what seemed to be two vastly conflicting messages sent by Ms. Evans within a 24-hour time period, Ms. Tinder asked Ms. Evans if there was any inappropriate conduct between Mr. Brent and J.M. of which Ms.

Evans was aware. *See* CP 167. Ms. Evans responded by confirming that she was rescinding her report after speaking with Mr. Brent, stating "I feel at this point there was no inappropriate relationship." *Id.* 169. At that time, Ms. Tinder responded by thanking Ms. Evans for clarifying that there was no issue regarding any inappropriate conduct involving J.M. and Mr. Brent. *See Id.* 171.

On September 4, 2013, Ms. Evans again wrote to Ms. Tinder and shared that she had also reported the matter to law enforcement over the weekend and had similarly advised law enforcement that there was no need to conduct any further investigation beyond what had been done between the time of her initial report and the time that she rescinded her accusations. *See Id.* 173. Ms. Evans followed-up on the above correspondence by sending a short letter, dated September 2, 2013, to both the Tacoma Police Department and the District, stating:

> To whom it may concern,
>
> I Angela Evans referencing police report case number 13-2440682 (information report) filed on September 1st 2013, involving Jesse Brent and my daughter [J.M.]. I have investigated the incident and feel confident that nothing inappropriate transpired between Mr. Brent and my daughter at any time.
>
> There is no reason to proceed with any further investigation of this matter.

Id. 175. Nonetheless, the District placed Mr. Brent on administrative leave on September 4, 2013. CP at 262, 274. He subsequently resigned. CP at 327.

At this time, there has been no determination that J.M. and Mr. Brent were ever involved in an inappropriate relationship while J.M. was a student at SAMI. Law enforcement investigated but did not pursue criminal charges against Mr. Brent. Furthermore, at no time has J.M. ever alleged that she was ever involved in any type of an inappropriate relationship with Mr. Brent.

II. PROCEDURAL HISTORY

On June 13, 2014, Ms. Evans filed suit against only the District, asserting numerous legal claims, including a failure to report claim. *See* CP 1-6. The Superior Court granted CR 12(b)(6) dismissal of all Ms. Evans' claims ***except*** her failure to report claim. The Superior Court then granted summary judgment to the District on Ms. Evans' failure to report claim. On appeal, the Court of Appeals affirmed summary judgment on Ms. Evans' failure to report claim, correctly holding that Ms. Evans failed to provide any evidence that the District personnel had reasonable cause to believe that J.M. was being abused or neglected prior to her 18th birthday. *Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 12, 2016 WL 3853744 at *12, __P.2d__ (2016).

III. ARGUMENT

The Court of Appeals correctly held that because Ms. Evans did not present sufficient evidence to create an issue of material fact that a District employee had reasonable cause to believe that J.M. had suffered abuse or neglect prior to her 18th birthday, the Superior Court properly granted summary judgment for the District on Ms. Evans' failure to report claim. Importantly, Ms. Evans' failure to report claim was dismissed on summary judgment, which "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). Summary judgment is appropriate when reasonable persons could reach but one conclusion from the evidence presented. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

Because Ms. Evans presented no evidence that the District or its personnel had reasonable cause to believe J.M. was abused or neglected prior to her 18th birthday on December 24, 2012, or even prior to her June 2013 graduation, this Court should affirm the Court of Appeals' holding that the Superior Court did not err in granting summary judgment in the District's favor on Ms. Evans' failure to report claim. It is also the District's position that summary judgment may be affirmed on two alternate grounds. First, Ms. Evans lacks standing to bring a failure

to report claim under RCW 26.44.030. Second, the District is not a mandatory reporter under RCW 26.44.030.

A. The Court of Appeals correctly held that RCW 26.44.030's plain language limits its mandatory reporting requirement to children under 18.

This Court should affirm the Court of Appeals' holding that RCW 26.44.040 limits its mandatory reporting requirement to children under 18. "Where the statutory language is clear and unambiguous, the statute's meaning is determined from its language alone; we may not look beyond the language nor consider the legislative history." *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708, 985 P.2d 262 (1999). A three part test determines whether a statute creates an implied cause of action: (1) "whether the plaintiff is within the class for whose especial benefit the statute was enacted," (2) "whether legislative intent, explicitly or implicitly, supports creating or denying a remedy," and (3) "whether implying a remedy is consistent with the underlying purpose of the legislation." *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 542, 374 P.3d 121 (2016).

RCW 26.44.030 provides that a report must be made when there is reasonable cause to believe a child under the age of 18 has suffered abuse or neglect. RCW 26.44.030(1)(a) states in part:

> When any...professional school personnel...has reasonable cause to believe that a **child** has suffered abuse or neglect, he or she shall report.

(Emphasis added). RCW 26.44.020 explicitly defines "child" as "any person under the age of 18 years of age."

In addition, the school personnel must have received "a credible written or oral report alleging abuse" to trigger this duty. RCW 26.44.030(1)(b)(iii). RCW 26.44.030(2) specifically states:

> The reporting requirement of subsection (1) of this section does not apply to the discovery of abuse or neglect that occurred during childhood **if it is discovered after the child has become an adult**. However, if there is reasonable cause to believe other children are or may be at risk of abuse or neglect by the accused, the reporting requirement of subsection (1) of this section does apply.

(Emphasis added). This court has recognized an implied cause of action for a violation of RCW 26.44.030, but that implied cause of action is limited by RCW 26.44.030's terms, and therefore, is limited to children under 18. *See, e.g., Beggs v. State, Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 77-78, 247 P.3d 421 (2011); *Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 422, 167 P.3d 1193 (2007).

B. This Court should reject Ms. Evans' new argument that RCW 26.44.030 should be extended to adults under the age of 21.

For the first time in her response to the District's petition for review, Ms. Evans argues that in the name of public policy this Court should (1) somehow merge RCW 26.44.020-.030 with RCW 9A.44.093-

.096's criminal prohibition on sexual misconduct, (2) disregard RCW 26.44.020's plain language explicitly limiting its applicability to children under 18, and (3) hold that RCW 26.44.030's implied cause of action for failing to report extends to **adults** under 21. Br. of Resp. at 11-12. As a threshold matter, this Court should not consider Ms. Evans' argument because it was raised for the first time on appeal. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 117, 126, 330 P.3d 190 (2014).

Ms. Evans' argument may also be rejected on the merits. As explained above, Chapter 26.44 RCW's plain language explicitly limits its mandatory reporting requirement to suspected abuse or neglect of **children** under **18**. This plain language must control. *See C.J.C.*, 138 Wn.2d at 708. The criminal sexual misconduct statutes that Ms. Evans cites, RCW 9A.44.093-.096, do not create an implied cause of action. First, because Ms. Evans is not a child who was sexually abused, the Plaintiff is not within the class for whose especial benefit the statute was enacted. Second, because RCW 9A.44.093-.096 does not mandate or even address a reporting requirement, legislative intent does not explicitly or implicitly support creating or denying a remedy for failure to report. Finally, implying a remedy for ***failure to report*** abuse is not consistent with the underlying purpose of RCW 9A.44.093-.096, because

those statutes are designed to punish crimes, not failures to report crimes. *See Kim*, 185 Wn.2d at 542.

Furthermore, even if RCW 9A.44.093-.096 somehow created or extended an implied cause of action for failure to report, those statutes extend liability for sexual misconduct to adults under 21 only if they are **currently enrolled students**. *See* RCW 9A.44.093-.096. As explained below, Ms. Evans does not present any facts that any District personnel had reasonable cause to believe that J.M. was the victim of abuse prior to her June 2013 graduation.

C. The Court of Appeals correctly held that Ms. Evans did not present sufficient evidence to create an issue of material fact on her failure to report claim.

This Court should affirm the Court of Appeals' holding that Ms. Evans did not present sufficient evidence to create an issue of material fact on her failure to report claim. RCW 26.44.020(1) defines "Abuse or neglect" as "sexual abuse, sexual exploitation, or injury of a child by any person under circumstances which cause harm to the child's health, welfare, or safety, excluding conduct permitted under RCW 9A.16.010."

J.M. turned 18 years of age on December 24, 2012, and graduated in June of 2013. Ms. Evans is unable to prove that any District employee ever received a credible report creating reasonable cause to believe that J.M. was the victim of abuse or neglect prior to her

turning 18 years old on December 24, 2012, or even prior to her ceasing to be an enrolled student after her June 2013 graduation.

Ms. Evans' self-serving assertions that someone knew that J.M. was an abuse victim prior to turning 18 or graduating, but failed to report it, are entirely unsupported. Ms. Evans cannot identify even a single District employee whom she thinks had reasonable cause to believe that J.M. was the victim of abuse or neglect prior to turning 18 years of age or graduating in June of 2013:

> Q: And who do you believe at SAMI knew about an inappropriate relationship **before she graduated** between Jesse Brent and your daughter besides the two of them?
>
> A: Students
>
> [...]
>
> Q: Okay. Besides students, any staff?
>
> A: Yeah.
>
> Q: Who?
>
> A: I'm not sure.
>
> Q: So sitting here today, you can't tell me who knew?
>
> A: I'm sorry.

See CP 159-60 at 138:14-139:1 (emphasis added). Even Ms. Evans herself had no knowledge of any alleged inappropriate relationship or abuse, which would have triggered a duty to report, prior to her daughter turning 18 years old or graduating from high school:

> Q: Okay. Let me ask it this way. Did you talk to anybody at SAMI about an inappropriate relationship between your daughter and Mr. Brent before she graduated?
>
> A: Well, the answer would be no, because I didn't know about the inappropriate relationship.

See Id. at 138:6-11.

By the time Ms. Evans contacted the District in **September of 2013** to report an alleged inappropriate relationship between J.M. and Mr. Brent, J.M. was almost 19 years old and had already graduated. *See Id.* 155-56 at 37:10-38:3; *Id.* 163. At that time, J.M. was no longer a "child" under RCW 26.44.030 and accordingly, there was no longer a mandatory duty to report any alleged abuse. *See* RCW 26.44.030(2).

Furthermore, Ms. Evans made it clear to the District that she had, herself, already reported the allegations to law enforcement. *See* CP 173, 175. Accordingly, any report that Ms. Evans is suggesting should have been made to CPS and/or law enforcement in September of 2013, after J.M. had turned 18 and graduated, would have been duplicative of the report she had already made to law enforcement and would have warranted the same results. In addition, once Ms. Evans almost immediately recanted her allegations against Mr. Brent in her September 2, 2013 email, and then confirmed that she no longer believed that anything inappropriate had transpired while J.M. was a minor, her report

of abuse was no longer credible and there was no longer any reasonable cause to believe that any abuse had occurred during J.M.'s childhood. Any duty to report under RCW 26.44.030 ceased to exist at that time.

Ms. Evans claims that District staff members observed Mr. Brent inappropriately flirting and socializing with students during class time, and that those observations triggered a duty to report under RCW 26.44.030. *See* Br. of Resp. at 4-5. Again, it is important to note that at no time has J.M., the theoretical target of Mr. Brent's "unacceptable conduct," ever alleged, claimed or stated that Mr. Brent ever, at any time, acted in an inappropriate manner.

Regardless, as the Court of Appeals correctly held, flirting and inappropriate attention does not constitute abuse or neglect. While boundary invasions such as flirting and inappropriate attention towards students may be highly inappropriate and may violate District policy, such behavior does not meet the stringent definition of abuse.

At no time did SAMI Co-Director Kristin Tinder observe Mr. Brent ever singling out any student, including J.M. *See* CP 392-93. While teachers had expressed concern with Mr. Brent spending too much time in their classrooms and socializing with students in general, Ms. Tinder never had any concerns about him singling out particular female

students, including J.M., based upon her observations or the reports she received. *See Id.*

Ms. Brouillette, like all other District staff, never had reasonable cause to believe J.M. was being abused by Mr. Brent prior to the time she turned 18 years of age. The only conduct Ms. Brouillette observed was Mr. Brent "hanging out in the back and talking to students and being in the way." *Id.* 397; *see also Id.* 398-99. Ms. Brouillette stated that Mr. Brent's general socializing with students, including students other than J.M., was not unique to Ms. Brouillette's classroom. *See Id.* 397. And Ms. Brouillette did not state that Mr. Brent focused his socializing on J.M. or any other particular student. *See generally* CP at 397-99. Further, Ms. Brouillette never felt Mr. Brent's relationship with students was dangerous, only informal and unprofessional. *See* CP 399.

Ms. Moore's declaration presents evidence that students and District personnel saw Mr. Brent flirt and talk with J.M. But this declaration does not provide evidence that District personnel had a reasonable cause to believe J.M. was being abused or neglected. Rather, at worst, Ms. Moore's declaration supports that District personnel knew about inappropriate flirting and talking between Mr. Brent and J.M. However inappropriate this alleged conduct may have been, it does not

rise to a reasonable belief of abuse and neglect sufficient to create a duty to report.

In sum, Ms. Evans did not present sufficient evidence to create an issue of material fact that a District employee had reasonable cause to believe that J.M. had suffered abuse or neglect prior to turning 18 years of age or graduating. Therefore, this Court should affirm the Court of Appeals' holding that the Superior Court properly granted summary judgment to the District on Ms. Evans' failure to report claim.

D. Other reasons for granting summary judgment to the District on Ms. Evans' failure to report claim.

It is the District's position that two other reasons independently justify affirming summary judgment to the District on Ms. Evans' failure to report claim. First, Ms. Evans lacks standing to assert a failure to report claim under RCW 26.44.030. Second, the District is not a mandatory reporter under RCW 26.44.030.

1. Ms. Evans lacks standing to assert her failure to report claim under RCW 26.44.030.

Ms. Evans lacks standing to assert a claim under RCW 26.44.030 because she is not within the class of individuals intended to be protected by the statute. Ms. Evans brought her failure to report claim pursuant to RCW 26.44.030 against the District on behalf of herself, as the parent of her adult daughter, J.M. *See* CP 1-6. Importantly, Ms. Evans did *not*

bring a claim on behalf of her minor child, but rather alleged the District breached some duty owed to **Ms. Evans** under RCW 26.44.030.

The failure to meet RCW 26.44.030's mandatory reporting duty is enforceable in a civil suit through an implied cause of action. *See Beggs v. Dep't of Soc. & Health Servs.*, 171 Wn.2d 69, 77-78 (2011); *Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 141 Wn. App. 407, 422, 167 P.3d 1193 (2007). But the proper plaintiff in such an action is the victim that the statute is intended to protect – the minor child. *See State v. Warner*, 125 Wn.2d 876, 891, 889 P. 2d 479 (1995); *Beggs,* 171 Wn.2d at 77; *Doe,* 141 Wn. App. at 422. The statute at issue, RCW 26.44.030, and the case law interpreting its application, do not state or even imply that anyone outside the class of persons the statute was intended to protect—the child abuse victim—has the right to assert a claim under this statute. *Id.*

Ms. Evans has not alleged that she, herself, was the victim of child abuse or neglect. *See* CP 3-4. Her claim is based solely upon the District's alleged failure to report that her daughter, J.M., who is not a party to this action, was purportedly abused or neglected as a child. Because J.M. is no longer a minor, Ms. Evans cannot assert this claim on J.M.'s behalf. Furthermore, Ms. Evans has never asserted that J.M. is

incompetent or somehow lacks the capacity to bring legal claims on her own behalf. *See Id.* 2.

Thus, because Ms. Evans does not fall within the class of individuals RCW 26.44.030 was enacted to protect, the District did not owe her any duty under RCW 26.44.030. Accordingly, Ms. Evans lacks the legal standing to assert such a claim against the District, and this Court should affirm summary judgment to the District.

2. The District is not a "mandatory reporter" under RCW 26.44.030.

It is the District's position that the District is not a "mandatory reporter" under RCW 26.44.030 and Ms. Evans named no individual defendants. RCW 26.44.030 imposes a duty upon a number of classes of individuals, including "professional school personnel," to report all reasonable beliefs that a child is being abused or neglected. *See* RCW 26.44.030(1)(a). "Professional school personnel" is defined as including "teachers, counselors, administrators, child care facility personnel, and school nurses." RCW 26.44.020(19).

The District, the only named Defendant in this action, is not a "professional school personnel," but rather, a municipal corporation. *See* Wa. Const. art. VII, § 1; RCW 28A.320.010. While its employees may constitute "professional school personnel," Ms. Evans has failed to name

any employee as a co-defendant, or even identify any employee by name whom she alleges had knowledge which caused there to be a reasonable belief that J.M. was being abused or neglected prior to turning 18 years of age. *See* CP 1-6.

Because the District has no reporting duties under the statute, it is not a proper Defendant. Ms. Evans has failed to name the defendant whom she asserts violated the reporting duties provided by RCW 26.44.030. Accordingly this Court should affirm summary judgment to the District.

IV. CONCLUSION

The District respectfully requests that this Court affirm the Court of Appeals' holding that the Superior Court properly granted summary judgment on Ms. Evans' failure to report claim because Ms. Evans did not present sufficient evidence to create an issue of material fact that any District personnel had reasonable cause to believe that J.M. had suffered abuse or neglect prior to turning 18 years of age. Alternatively, this Court should affirm summary judgment because Ms. Evans lacks standing to bring a failure to report claim under RCW 26.44.030, and the District is not a mandatory reporter under RCW 26.44.030.

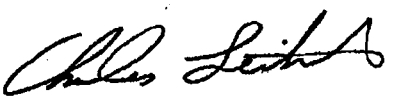
//

//

//

RESPECTFULLY SUBMITTED this 25th day of October, 2016

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.



By:_____
Charles P. E. Leitch, WSBA 25443
Angela N. Marshlain, WSBA No. 37118
Of Attorneys for Defendant

CERTIFICATE OF SERVICE

I, Karen L. Yun, hereby certify that on this 25th day of October, 2016, I filed the foregoing Petitioner's Reply in Support of Petition for Review on the Supreme Court of the State of Washington ***VIA EMAIL*** and caused the same to be served upon each and every attorney of record as noted below:

Via Legal Messenger

Mr. Thaddeus P. Martin
Law Office of Thaddeus P. Martin
7121 – 27th Street W
University Place, WA 98466

I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on October 25, 2016.

Karen L. Yun
Legal Assistant