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COURT OF APPEALS, DIVISION 1 NO. 67645-8-1

SUPREME COURT
OF THE STATE OF WASHINGTON

N.K., an individual proceeding under a pseudonym,

RESPONDENT

v.

CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF
JESUS CHRIST OF LATTER-DAY SAINTS, A FOREIGN
CORPORATION SOLE REGISTERED TO DO BUSINESS IN THE State of
Washington, et al.,

PETITIONERS

AMICUS BRIEF IN SUPPORT OF PETITION FOR REVIEW

FILED
OCT 29 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Karen A. Kalser, WSBA No. 25429
HELSELL FETTERMAN LLP
1001 Fourth Avenue, Suite 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Amici Curiae Congregations

 ORIGINAL

TABLE OF CONTENTS

I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. STATEMENT OF THE CASE	3
III. INTRODUCTION.....	3
IV. ARGUMENT.....	4
A. The Court should grant the Petition to review the conflict between the Supreme Court and Court of Appeals rulings regarding foreseeability.	4
B. The Court should accept the Petition to consider issues implicated by imposing a new retrospective standard.	5
C. The N.K. ruling alters the ability to dispose of cases through summary judgment where appropriate.	8
V. CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES

C.J.C. v. Corp. of Catholic Bishop of Yakima, 138 Wn.2d 699, 985 P.2d 262 (1999)..... 3

Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S.Ct. 213, 141 L.Ed 2d 451 (1998)..... 8

Marquay v. Eno, 662 A.2d 272, 280 (N.H. 1995) 5

N.K. v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints, 175 Wn. App. 517, 526 (2013)..... 5

N.K. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, et al., Division 1, No. 67645-8-1 (Sept. 20, 2013) 2

OTHER AUTHORITIES

2 J.Story, Commentaries on the Constitution, sect. 1398, p.272 (5th ed. 1891)..... 8

Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994)..... 8

I. IDENTITY AND INTEREST OF AMICUS CURIAE

Amici herein are the congregations of religious faithful organized within the Pacific Northwest Conference of the United Methodist Church, the congregations organized within the Olympia Diocese of the Episcopal Church in the United States of America under the leadership of the Bishop of Olympia, the Right Reverend Greg Rickel, and the congregations organized within the Presbytery of Seattle of the Presbyterian Church (hereafter, collectively, “the Congregations”). The Congregations serve the religious needs of their congregants, provide a physical place of religious worship, engage in community support and charity, carry out the religious mission of their faiths, and foster the religious life of their faithful.

Each of the Congregations is the regional governing entity of a group of church congregations in the Seattle area. Each of the Congregations includes individual churches that are presently sponsoring Boy Scout troops or have sponsored Boy Scout troops in the past. Ministering to children is a historic and deeply rooted aspect of each Congregation’s work and is essential to their mission of teaching spiritual truth and moral values in each generation of prospective believers.

Sexual abuse is antithetical to such truths and values. Like the social community at large, the Congregations have worked studiously to address the community-wide evil and risk of childhood sexual abuse. The

Congregations readily acknowledge their desire and intent, as well as their social, moral and legal obligations, to protect young people from the risk of sexual abuse while under their care.

However, the Congregations, like any social institution, cannot fulfill their mission where they are retroactively burdened with open-ended constructive knowledge and ensuing liability arising from a standard of inquiry that did not exist at the time that decades-old sexual abuse allegedly occurred. The Court of Appeals' decision in *N.K. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, et al., Division 1, No. 67645-8-1 (Sept. 20, 2013)* has expanded the limiting element of foreseeability to a point far beyond actual or constructive knowledge of the risk of sex abuse posed by a particular individual, the standard for liability long-established by this Court.

Although shifting liability standards will most directly affect older cases of alleged abuse, the Congregations anticipate a deleterious impact on current and future ministry programs if the *N.K.* generalized standard becomes final. The cost of insurance for tort liability in youth ministry is likely to become prohibitively expensive or altogether unavailable. Youth programs of the Congregations that include social interaction outside of a structured classroom setting, the most effective kind of youth ministry, will become disfavored. And support for outside organizations like the Boy

Scouts may very well be curtailed. Each of these burdens will weigh heavily on the Congregations' ministry to their youngest audience, who represent the Congregations' future.

II. STATEMENT OF THE CASE

The Congregations rely on Petitioners statement of the case.

III. INTRODUCTION

Fourteen years ago, the Washington State Supreme Court issued its rulings in *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 985 P.2d 262 (1999) (en banc). Faith communities, schools, child caring agencies and other non-profit social entities have relied on its holding to guide them in evaluating liability and addressing resources to fulfill their missions.

The Court of Appeals now overturns that reliance and retrospectively imposes a new, broader liability that could not have been anticipated, a foreseeability standard that allows for liability even in cases where the defendant did not know and had no reason to know the perpetrator posed a risk of harm. Such a retrospectively imposed burden threatens the financial security and mission of every community of faith that has historically ministered to youth. The Congregations therefore join with the LDS Church in asking this Court to grant the petition and reaffirm C.J.C.

IV. ARGUMENT

A. The Court should grant the Petition to review the conflict between the Supreme Court and Court of Appeals rulings regarding foreseeability.

This Court unambiguously addressed and established whether “churches ... [are] subject to the same duties of reasonable care as would be imposed on any person or entity in selecting and supervising their workers, or protecting vulnerable persons within their custody, so as to prevent reasonably foreseeable harm.” *C.J.C.*, 138 Wn.2d. at 722.

The Court specifically noted that its decision was “limited,” because a church is not an “insurer against all harm occasioned by its agents simply because the work situation fortuitously provides an opportunity to perpetrate the harm.” *Id.* at 276-77. A church can only be held liable where it has a special relationship with either the victim or the perpetrator and has “brought into contact or association with the [victim] a person whom the [church] knows or should know to be **peculiarly likely** to commit intentional misconduct.” *Id.* (quoting *Marquay v. Eno*, 662 A.2d 272, 280 (N.H. 1995)) (emphasis added).

However, the Court of Appeals has now set aside the requirement in *C.J.C.* for imposing liability where the church knew or should have known that a person was “peculiarly likely” to commit intentional misconduct. Instead, the Court of Appeals substituted a standard that “the danger of

sexual abuse by an adult volunteer was one the church should reasonably have anticipated.” *N.K. v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-day Saints*, 175 Wn. App. 517, 526 (2013). The court shifted the standard from particular knowledge of a particular actor, to a generalized awareness that childhood sexual abuse occurs. This is a vital distinction, and this Court should review a decision that creates a standard so in conflict with the precedent set in *C.J.C.*

B. The Court should accept the Petition to consider issues implicated by imposing a new retrospective standard.

Adopting the new broad foreseeability standard pronounced in *N.K.* does not merely impact current cases or harm that may occur in the future. Because Washington has a special statute of limitations for childhood sexual abuse (RCW 4.16.340), cases can be and are brought many decades after the acts occurred. Indeed, in this particular matter, the acts alleged occurred 36 years ago, in 1977. Thus, the Congregations face liability based on new standards of which they had no notice nor could predict and protect against at that time, and post-dating the *C.J.C.* decision.

As noted above, the *C.J.C.* court rooted its decision in traditional understanding of actual and constructive knowledge related to foreseeability of a particular threat. The *C.J.C.* court cited “well established principles” of the special relationships between an organization, its staff,

and persons served, and detailed how its decision was consistent with prior cases that imposed liability where a specific risk of harm was known or should have been known. Specifically, the *C.J.C.* court did not impose liability on those cases where there was no specific knowledge. *C.J.C.* at 725 and cases cited therein. Petitioners and other Amici have pointed out the numerous decisions that have followed *C.J.C.* by upholding the requirement that a plaintiff establish actual or constructive knowledge that an individual was peculiarly likely to commit intentional misconduct. The Congregations should be able to rely on such precedent in guarding against harm and liability.

Instead, the *N.K.* Court of Appeals turns this well-established traditional understanding on its head and expands potential liability for long past acts. It fairly can be argued that the Congregations and other similarly situated could have considered “well established principles” in evaluating liability in the years prior to *C.J.C.* and that the *C.J.C.* Court merely recognized those principles that were already known to potential civil defendants. Conversely, the *N.K.* incorporates a level of knowledge and understanding of childhood sexual abuse as it exists today and then expands the scope of liability to include cases where it concedes there was no specific knowledge of the risk of danger, because of a general argument that

risks we now recognize or guard against, could or should have been guarded against four decades ago:

Therefore even if there was no evidence that the church knew about specific past incident of child sexual abuse in scouting, we would decline to decide as a matter of law that sexual abuse by adult scout volunteers was unforeseeable by the church.

175 Wn. App. at 531

The *N.K.* court obviates not only the requirement of showing particularized knowledge as to the individual offender, but does not even require any particularized knowledge that the group to which the offender belonged might or did have offenders within its mix. Simply a general knowledge that childhood sexual abuse occurs is sufficient to create a triable issue of fact.

This retroactively changes the standard that has been in effect since *C.J.C.* Retrospective laws are, indeed, generally unjust. 2 J.Story, Commentaries on the Constitution, sect. 1398, p.272 (5th ed. 1891). Retroactive lawmaking is of particular concern because of the temptation to use retroactive rules as a means of retribution against unpopular groups of individuals. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Retroactivity presents problems of unfairness because it can deny legitimate expectations and upset settled transactions. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S.Ct. 213, 141 L.Ed .2d 451 (1998).

If Washington intends to adopt a new standard of liability, based on understanding and knowledge that may have evolved since 1977, or since 1999, the Court should first grant review and give appropriate consideration to its impacts on expectations and fundamental fairness.

C. The N.K. ruling alters the ability to dispose of cases through summary judgment where appropriate.

Childhood sexual abuse is an evil. However, the third party supervisor of the alleged offender or protector of the child may not have had knowledge of the specific risk an offender posed, and under the balancing of considerations articulated in *C.J.C.*, should be entitled to summary judgment on that basis if appropriate. If liability can be imposed where there is no evidence of any actual or constructive knowledge concerning the particular individual, summary judgment will never be obtained. The Court of Appeals' loose application of a "general field of danger" standard without specific triggering knowledge of the danger, 175 Wn. App. at 526-27, could allow any societal recognition of a risk to defeat summary judgment.

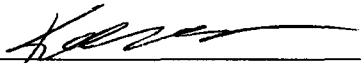
A court system that cannot authorize summary judgment is a court system that is overflowing with cases that cannot be resolved in a timely manner. Thus the Court should accept this matter to ensure that all public policy is being given due consideration.

V. CONCLUSION

The Congregations ask this Court to grant the LDS Church's petition.

Respectfully submitted this 21st day of October, 2013.

HELSELL FETTERMAN LLP

By 

Karen A. Kalsner, WSBA No. 25429
Attorneys for Attorneys for Amici Curiae
Congregations

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused a true and correct copy of this document to be served upon the following via email and U.S. Mail:

Attorney for N.K.

Michael Pfau
Darrell Cochran
Jason Amala
Pfau Cochran Vertetis Amala, PLLC
403 Columbia Street, Suite 500
Seattle, WA 98104
mike@pcvalaw.com
darrell@pcvalaw.com
Jason@pcvalaw.com

Attorney for N.K.

Gilion Dumas
Kelly Clark
O'Donnell Clark & Crew LLP
1650 NW Naito Parkway, Suite 302
Portland, OR 97209
giliond@oandc.com
kellyc@oandc.com

Attorney for Pacific Harbors Counsel

Francis Floyd
Thomas Nedderman
Amber Pearce
Flody, Pflueger & Ringer
200 West Thomas Street, Suite 500
Seattle, WA 98119
ffloyd@floyd-ringer.com
tnedderman@floyd-ringer.com
apearce@floyd-ringer.com

Attorney for Boys Scouts of America

Kelly Corr

William Squires, III

Barbara Kastama

Corr Cronin Michelson Baumgardner & Preece, LLP

1001 Fourth Ave, Suite 3900

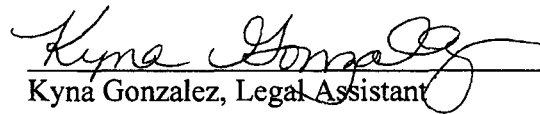
Seattle, WA 98154

kcorr@corrchronin.com

rsquires@corrchronin.com

bkastama@corrchronin.com

DATED this 21st Day of October, 2013, at Seattle, Washington.


Kyna Gonzalez, Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Gonzalez, Kyna D.
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Good afternoon:

Please see attached an Amicus Brief in Support of Petition for Review and an Amicus Memorandum of the Congregations in Support of Petition for Review for filing with the Court. If you have any questions, please contact our office. Thank you for your assistance in this regard.

Kyna D. Gonzalez
Legal Assistant to Andrew Kinstler, Katharine Brindley,
Brad Bagshaw, John Bergmann, Benjamin Nivison,
Lauren Parris and Jonathan Minear
Helsell Fetterman, LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154
(206) 689-2480