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,

Respondent.

RESPONDENT'S RESPONSE BRIEF TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent, Angela Evans, the plaintiff at the Superior Court and Appellant before the Court of Appeals, asks the Court to deny Petitioners, Tacoma School District No. 10's Petition for Review. Alternatively, should the Court be inclined to grant review of the issues raised by Petitioner, Respondent respectfully requests that the Supreme Court consider those issues raised within this Answer by Respondent. *See* RAP 13.4(d) ("if the party wants to seek review of any issues that is not raised in the petition for review, including issues that were raised but not decided by the Court of Appeals, the party must raise those new issues in an answer").

II. COURT OF APPEALS DECISION

The Respondent concurs with the description of a Court of Appeals decision provided by Petitioner at Page 1 of its Petition for Review. It is also conceded that a full and complete copy of the published opinion of the Court of Appeals, which now can be found that 195 Wn. App. 25 (2016), is attached within Petitioner's appendix.

III. ISSUES PRESENTED FOR REVIEW PURSUANT TO RAP 13.4(d)

1. Did the trial court err in dismissing Respondent's "failure to report" claim when there was at least a question of fact as to whether or not the School District, and its personnel, **should have known** that Respondent's daughter was potentially being subjected to abuse as defined by RCW 26.44.020(1)?

2. Did the Court of Appeals err by affirming the trial court's dismissal of respondent's "failure to report" claim when there was at least an issue of fact as to whether or not the

School District and its personnel **should have known** that Respondent's daughter was a victim of abuse as defined by RCW 26.44.020(1)?

3. Did the trial court and the Court of Appeals unduly restrict Respondent's failure to report claim pursuant to RCW 26.44.030, to events occurring prior to the 18th birthday of JM (Respondent's daughter), when the legislature has found that inappropriate relationships between school personnel and students are a crime up to the point the student is 21 years of age and it would violate such public policy to unduly limit such a claim in a manner which fails to protect students between the ages of 18 and 21?

IV. STATEMENT OF THE CASE

A. Factual Background of Case

JM was born on December 24, 1994 and turned 18 on December 24, 2012. (CP 236). In 2013, her mother Angela Evans learned that JM was having an inappropriate relationship with a Tacoma School District (TSD), security guard named Jesse Brent. She learned of such an inappropriate relationship when she reviewed a copy of JM's phone bill and noticed hundreds of texts and phone calls from Mr. Brent's phone number. (CP 235-240; CP 295). Concerned that Mr. Brent's conduct potentially was criminal Ms. Evans reported the matter to the Tacoma Police Department and provided them with a copy of the list of text messages with Mr. Brent's phone number highlighted from October 2012 to December 2012. (CP 235-240). The Tacoma Police Department were able to quickly determine that Mr. Brent, a full-time school security guard, had an extensive arrest history including several assaults, including several DV-burglary, assaults, vandalism, violations of DV no contact orders,

driving with license suspended and several DV court order violation reports. (CP 235-240).[1]

Mr. Brent started working as a campus security officer for TSD on September 24, 2009, and started as the only security officer at a campus location known as SAMI (an alternative Tacoma High School campus location which focuses on math and science education). Despite the above-referenced extensive criminal history, Mr. Brent, under oath, in his application and disclosure statements to the School District stated that he had no criminal history and did not reveal the above-referenced information. (CP 259; 282; 284-86; 288-89; 291-92).

In a statement provided to the police, JM admitted that she started speaking with Mr. Brent daily by phone as early as October 2012, before school, after school and late at night. (CP 245). According to JM she physically began spending time with Mr. Brent in August 2012 by attending church with him. (CP 254). A Tacoma School District investigation subsequently found that there were over 10,000 text messages between JM and Mr. Brent between December 16, 2012 and May 21, 2013. (CP 257).

Following the institution of this lawsuit, it was subsequently learned that teachers had significant concern about the inappropriate attention of Mr. Brent was providing to students, and in particular JM.

[1] At the time in question it was well established that it constituted "first degree sexual misconduct with a minor" for an employee of a school district to have sexual intercourse with a student even if that student was between the ages of 18 and 21. See *State v. Hirschfelder*, 170 Wn. 2d 536, 242 P.3d 876 (2010); RCW 9A 44.093(1)(b) ("a registered student" was a minor for purpose of statute if they are a registered student and are persons up to the age of 21).

One teacher, a Carol Brouillette acknowledged that she witnessed Mr. Brent in her classroom "carrying on" with students and she knew that it was inappropriate and disruptive but nevertheless she never informed administration regarding her serious concerns regarding such conduct. (CP 300-02).

The Assistant Principal at SAMI Kristin Tinder acknowledged that other teachers had complained about Mr. Brent spending too much time in her classroom socializing with students for no legitimate work related reason. (CP 308-309). Ms. Tinder also was aware that Mr. Brent's brother-in-law, a security guard at Stadium High School named Lipscomb, where Mr. Brent also worked, was being investigated and later convicted of having sex with underage students. (CP 309). Despite the fact that Tacoma School District had detailed policies regarding boundaries between staff and students, and acknowledged awareness that Mr. Brent was violating such boundaries, until Ms. Evans raised her concerns to the police department and the Tacoma School District no investigation of Mr. Brent was ever conducted, despite the fact that his inappropriate attentions to JM should have been rather obvious. (CP 230-233; CP 308-29).

The obviousness of the inappropriate\boundary violation nature of the JM/Brent relationship was discussed in a declaration submitted before the trial court in opposition to the School District's motion for summary judgment regarding respondent's "failure to report" claim. That

declaration was signed by former student Kuammesha Moore and provided:

> I am a former student of SAMI from the years of 2009 through 2013. I graduated from SAMI in June of 2013. I am currently a student at Pacific Lutheran University in Parkland, Washington. I have known Jasmine McFadden since sixth grade. We both went to middle (Hunt Middle School) and high school SAMI) together. I considered Jasmine a friend and school acquaintance. During our entire Junior year at Sami, from September of 2011 to June of 2012, it was obvious that Jesse Brent had some sort of inappropriate romantic/flirtatious relationship with Jasmine McFadden. Mr. Brent would always be around Jasmine in classes and on the campus. For example, in my English class, was a teacher assistant in the class and Carol Brouillette was the teacher. In that English class during the entire junior year, Mr. Brent would come into the class and stand or sit in the back of the class and talk to and flirt with Jasmine the entire period, even to the point where Ms. Brouillette had to tell Mr. Brent to stop talking in the class. There was no reason for Mr. Brent to have come to this class on a daily basis, he was supposed to be patrolling the campus. Ms. Brouillette most definitely observed and acknowledged the presence of Mr. Brent and Jasmine and it was obvious to all the students that the relationship and attention that Mr. Brent was showing Jasmine was inappropriate, flirtatious and appeared romantic. Students made comments in the class in front of Ms. Brouillette about the inappropriate relationship where she would hear such as "Why don't you do your job? Why so much attention for Jasmine?" The statements to Jesse were serious; it may have sounded as if the students were joking, but they weren't. There was a teacher in the portable during these encounters. The teacher would not send Jesse out. The teacher was able to see or notice this because she was in the portable with us, but she didn't say anything. She allowed Jesse to sit in there and fawn over Jasmine during the entire junior year, from September 2011 to June 2012.
>
> Mr. Brent engaged in the same conduct all over the campus with Jasmine. For example, Mr. Brent would meet Jasmine at her car and walk with her through the front gate and generally on the campus. I know that several administrators saw Mr. Brent walking and exclusively talking and flirting with Jasmine, including Mr. Ketler (Head Director), Ms. Tinder, various teachers like Ms. Amy Hawthorne, Johnny

> Divine, Mr. Higgins and Bethany Schmidt. I observed all these teachers and administrators stare at Mr. Brent and Jasmine together. This was an everyday occurrence. At lunch time, a group of male students would state Jesse, "Man, don't you have a wife?" or "that's a little girl you are flirting with."

Declaration of Moore, CP 335-336.

Based on these facts the Court of Appeals correctly found that Ms. Evans, was a foreseeable victim, who has a cause of action against the School District for negligent hiring, retention, supervision and\or training. Further, it is noted that the Court of Appeals opinion correctly determining that such a cause of action is available to Ms. Evans, as a parent, for failing to report abuse under RCW 26.44.030.

Unfortunately, according to the Court of Appeals, the evidence presented by a Respondent below, only established the existence of an inappropriate flirting and/or attention relationship between Mr. Brent and [JM]" thus there's insufficient evidence to establish the presence of "abuse or neglect" as defined by RCW 26.44.020(1). Such a holding is disturbing in that the presence of such an inappropriate relationship alone should have been sufficient to spur an investigation by responsible public school officials to make a determination as to whether or not "abuse or neglect" as defined by the above-referenced statute was in fact occurring. The Court of Appeals holding in that regard serves to encourage ignorance on the part of responsible school officials who, provided such guidance, can avoid liability by "sticking their head in the sand," as opposed to alertly and proactively protecting students from harms being perpetrated by school district employees.

V. ARGUMENT WHY REVIEW SHOULD NOT BE GRANTED ON THE ISSUES PRESENTED WITHIN PETITIONER'S PETITION

It is respectfully submitted that the Supreme Court should deny the school district's petition for review because the district has failed to establish any of the grounds, set forth within RAP 13.4(b), justifying a grant of review. The appellate court in determining that a parent has a cause of action against a school district for negligent hiring, retention, supervision and/or training was consistent with prior precedent and did nothing more than apply well-established law to the factual mosaic the case presented.

It must be recalled that these claims were subject to review under standards applicable to a dismissal under CR 12(b)(6). Under Washington law, dismissal under CR 12(b)(6) is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. See *Reid v. Pierce County*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). Additionally, the Court must accept as true the allegation in plaintiff's complaint and any reasonable inferences therefrom. *Id.* citing to *Chamber-Castanes v. King County*, 100 Wn.2d 275, 278, 669 P.2d 451 (1983). Further, under 12(b)(6) standards, the Court must use hypothetical facts, not part of the record, in arriving at its determination whether any set of facts could exist that could justify recovery. See *Kenney v. Cook*, 130 Wn. App. 36, 123 P.3d 508 (2005). The Court must take all the facts

alleged in the complaint, as well as hypothetical facts, and view them in a light most favorable to the non-moving party. *M.H. v. Corporation of Catholic Archdiocese of Seattle*, 168 Wn. App. 183, 188, 252 P.3d 914 (2011).

It has long been recognized within the State of Washington that an employer can be liable for an employee's actions, even criminal assaults on a third person, if the employer has a reason to believe that an undue risk of harm exists because of employment. See *LaLone v. Smith*, 39 Wn.2d 167, 172, 234 P.2d 893 (1951). Indeed claims of negligent hiring, supervision and retention may have existed within the State of Washington since as early as 1913. See *Peoples v. Puget Sound's Best Chicken Inc.*, 185 Wn. App. 691, 345 P.3d 811 (2015).

As discussed in *Rucshner v. ADT, Security Systems, Inc.*, 149 Wn. App. 665, 680, 204 P.3d 271 (2009), when an employee is acting outside the scope of his employment the relationship between the employer and the employee gives rise to a limited duty, owed by the employer to "foreseeable victims" to prevent the task, premises or instrumentalities entrusted to an employee from endangering others. Citing to *Betty Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999) (citing *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997).

As in *Rucshner,* here the ultimate issue is whether or not a parent would be a foreseeable victim under the circumstances of this case such a question of fact should be resolved by a jury.

Further, Washington law has recognized in a variety of instances that where an injury to a child also can inflict injury upon a parent. See RCW 4.24.010 (cause of action by a parent for injury and/or death of child); see also RCW 26.44.010; *Tyner v. DSHS*, 141 Wn.2d 68, 76-80, 1 P.3d 1148 (2000) (recognizes causes of action relating to negligent investigation of child abuse and/or failing to report child abuse can be brought both on behalf of a parent and/or child).

Thus, particularly given the standard of review applied by the Court of Appeals (relating to motions brought pursuant to CR 12(b)(6)), the Court of Appeals was absolutely correct in holding the following with respect to this claim:

> Given these assumptions, we hold that it is possible to conceive of facts under which it would be foreseeable to the district that if Brent was engaging in sexual conduct with a student, that conduct might harm the parent's relationship with that student. Notion that a parent might suffer harm in this situation is not so extraordinary that we can say as a matter of law that such harm is unforeseeable under any circumstances.

Simply because an earlier case, examining an entirely different branch of negligence law concluded that a parent did not have a claim against a school district, under an entirely different set of facts, does not detract from this conclusion. See *Jachetta v. Warden Joint Consolidated School District*, 142 Wn. App. 819, 176 P.3d 545 (2008).

In this matter the Court of Appeals simply applied well-established precedent which indicates that claims of negligent retention, hiring, supervision and the like can be brought by "foreseeable victims."

Ultimately it should be left to a jury to make a determination as to whether or not a parent can be a foreseeable victim under the circumstances of this case.

VI. THE COURT SHOULD ACCEPT REVIEW OF THE ISSUES RAISED IN THE RESPONDENT'S ANSWER

In this case, it is the Appellate Court's determination that a parent has a cause of action under the terms of RCW 26.44.030, is correct and compelled by this Court's opinion in the above-cited *Tyner* case. However, having correctly made such a determination the Appellate Court's factual analysis of the proof presented below was as extremely troublesome:

> However, flirting or inappropriate attention does not necessarily constitute "abuse or neglect" as defined in RCW 26.44.020(1). Here, there is no evidence that Brent was sexually abusing, exploiting or otherwise injuring J.M. The type of flirting and inappropriate attention described in the record cannot be characterized as sexual abuse or exploitation. And Evans has presented no evidence that there were any signs that Brent's flirtations and inappropriate attention had developed into a *sexual relationship*. As a result, there is no evidence that district employees had reasonable cause to believe that Brent was sexually abusing J.M.

RCW 26.44.030(1)(a) requires that school professionals report "suspected abuse or neglect." Under the factual standards articulated within the Court of Appeals' opinion, it appears that in order for a parent to have a cause of action, the parent is required to establish that school

professionals had actual knowledge of abuse or neglect, not merely information creating a suspicion that such abuse exists.

Such a standard literally eviscerates statutory requirements and should be viewed as violative of public policy, warranting a grant of review under the terms of RAP 13.4(b)(4).

Further, it is also troubling that the Court of Appeals limited the inquiry as to whether or not the district was aware or witnessed any "abuse" of J.M. before she turned the age of 18.

While it is true that RCW 26.44.020(2) defines "a child" or "children" to mean a person "under the age of 18 years of age," to limit a cause of action for a failure to report to students below the age of 18 is contrary to public policy.

Indeed, it has been recognized in the criminal law context that it is a crime for a school district employee to sexually exploit a student up to the age of 21. See *State v. Hirschfelder*, 170 Wn.2d 536, 548-49, 242 P.3d 876 (2010). The reason why the criminal law prohibits sexual relationships between school employees and registered students, up to the age of 21 is that school employees hold a "special position of trust and authority" with respect to students. *Id.*

As such, it is respectfully suggested that based on such criminal prohibitions the Court should by way of an implied remedy under the terms of the criminal statutory scheme create a "gap filler" applicable to children between the ages of 18 and 21. See *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 74 P.2d 1258 (1990). Under the *Bennett* test there is simply

no question that the purpose of the criminal law referenced above would be coextensive with RCW 26.44. et. seq., and that Ms. Evans would fall within the class "especially benefitted" by the statutory enactment. There is no indication that by adopting the criminal statute that the Legislature intended to deny a civil remedy, which clearly would be consistent with statutory purposes of precluding abuse by school district employees of vulnerable students.

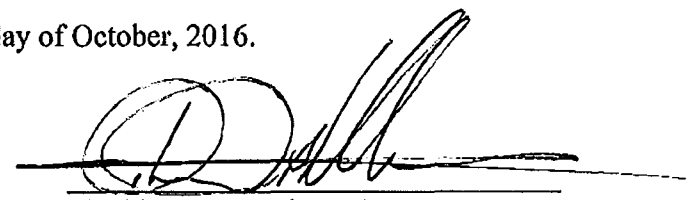
As such, if the Court is inclined to accept review of this case it also should accept and analyze the Respondent's issues.

VII. CONCLUSIONS

For the reasons stated above Petitioner's Petition for Review should be denied. The Court of Appeals applied well-established legal principles applicable to the claim at issue. The Court of Appeals' application of law was consistent with prior precedent.

Conditionally, and alternatively, should the Court be inclined to accept review it also should examine the factual sufficiencies of Respondent's failure to report claim, and examine whether or not such a claim should be limited to students below the age of 18, or should apply to all registered students up to the age of 21.

Dated this 10th day of October, 2016.



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Please find attached Respondent's Response brief.

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