Supreme Court No. 89210-5

Court of Appeals, Division I, No. 67645-8-I

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 MEMORANDUM OF WASHINGTON COUNCIL OF SCHOOL ATTORNEYS

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Council of School Attorneys ("WCSA") is a non-profit organization that consists of 93 members of the Washington State Bar who represent or are employed by school districts.

STATEMENT OF THE CASE

WCSA relies on Petitioner's statement of the case.

INTRODUCTION

This case presents an issue of serious significance to school districts. When an organization has a protective relationship with children, can it be held liable for a criminal assault against one of those children by an employee or volunteer without notice of the dangerous propensities of the employee or volunteer? Until this case, the answer to that question has been, "No."

The decision below says, "Yes." True, the defendant was a church. But the opinion repeatedly compares the duty owed by a church to the duty owed by a school. *See, e.g., N.K. v. Corp. of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints*, 175 Wn. App. 517, 529 (2013) ("a church's duties to its youth are the same as a school's"); *id.* at 532 ("the church has the same duty owed by a school"). Further, the Court of Appeals relies on cases from the school context, such as *McLeod*

v. Grant County Sch. Dist. 128, 42 Wn.2d 316, 255 P.2d 360 (1953). Unfortunately, the Court of Appeals ignored key factors that make *McLeod* distinguishable, while ignoring other important cases from the school context that would have required a different outcome, such as *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108 (1992).

The decision below conflicts with decisions from this Court and prior decisions of the Court of Appeals. It may significantly expand the liability of schools for criminal misconduct by teachers, other employees, and volunteers, and therefore increase the cost of insurance and burden the already pinched budgets of school districts. WCSA therefore asks this Court to grant the petition for review.

ARGUMENT

WCSA agrees with this Court that "[s]exual abuse of children by school teachers is a terrible atrocity." *Bellevue John Does 1-11 v. Bellevue Sch. Dist.*, 164 Wn.2d 199, 205, 189 P.3d 139 (2008) (en banc). But the atrocity of the act does not determine the liability of the school.

The starting point for cases like this is the general rule that there is no duty "to protect others from third party criminal conduct." *Hutchins v. 1001 Fourth Ave. Associates*, 116 Wash. 2d 217, 227, 802 P.2d 1360 (1991). There is an exception when "a special relationship exists between the

defendant and either the third party or the foreseeable victim of the third party's conduct." *Id.* (quotation marks omitted).

If there is a special relationship, the duty extends only to reasonably foreseeable criminal conduct. "If the risk of harm which befell the plaintiff as a result of the defendant's acts was not reasonably foreseeable ... then, as to that plaintiff, no duty respecting that act was owed." *King v. City of Seattle*, 84 Wn.2d 239, 248, 525 P.2d 228 (1974).

"Washington courts have been reluctant to find criminal conduct foreseeable." *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 205 n.3, 943 P.2d 286 (1997). It is certainly less foreseeable than ordinary negligence. *Hutchins*, 116 Wn.2d at 230. Thus, in most circumstances "the defendant may proceed upon the assumption that others will obey the law." *Id.*

The decision below notes that a defendant's duty differs depending on whether the special relationship is with the perpetrator or with the victim. *N.K.*, 175 Wn. App. at 526. That may be true. But until this case, no matter the source of the duty, the foreseeability analysis has remained the same and has always been determined based, in part, on whether the defendant knew or should have known about the dangerous propensities of the perpetrator. *See Wilbert v. Metro. Park Dist. of Tacoma*, 90 Wn. App. 304, 309, 950 P.2d 522, 524 (1998) ("The Washington cases analyzing

foreseeability have focused upon the history of violence known to the defendant.").[1]

This is demonstrated by *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108 (1992), which involved claims based on both types of duty. In *Peck*, a teacher engaged in criminal sexual misconduct with a student on school premises. The student brought claims based on both the school district's duty to control the teacher (negligent hiring and supervision), and based on its duty to protect the student. The Court of Appeals affirmed summary judgment. Regarding the employment claims, the Court held that the school district was not negligent in hiring or supervising the teacher because "[t]here is no evidence that the District ... knew or in the exercise of ordinary care should have known that he was unfit for employment as a school librarian." *Id.* at 289. Then, addressing the custodial-relationship claim, the Court of Appeals, citing *McLeod*, explained that schools have a duty to protect students from all reasonably foreseeable harms. *Id.* at 292-93. But this did not change the foreseeability analysis. "These rules draw

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[1] *See also Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993) (affirming summary judgment in favor of medical clinic where "no prior knowledge of Dr. Nakata's behavior by the Clinic or any of its shareholders or staff"); *Doe v. Corp. of President of Church of Jesus Christ of Latter-day Saints*, 141 Wn. App. 407, 445, 167 P.3d 1193 (2007) (affirming summary judgment where "the LDS Church, unlike the church in *C.J.C.*, had not been warned that Taylor had previously abused children or made inappropriate advances toward them"); *Smith v. Sacred Heart Med. Ctr.*, 144 Wn. App. 537, 544, 184 P.3d 646 (2008).

us back to the same question already addressed: Did the district know, or in the exercise of reasonable care should it have known, that Siau [the teacher] was a risk to its students?" *Id.* at 293. Because there was "nothing in the record to so indicate," the Court of Appeals affirmed summary judgment. *Id.*

Thus, *Peck* demonstrates that regardless of whether the claim is for negligent employment or is based on a custodial relationship with the victim, when the basis for the claim is the criminal misconduct of an adult employee or volunteer, the major foreseeability factor is whether the employer "'*knows or should know*" that the employee is "*peculiarly likely to commit intentional misconduct.*'" *C.J.C.*, 138 Wn.2d at 723 (quoting *Marquay v. Eno*, 662 A.2d 272, 280 (N.H. 1995)) (emphasis added).

Absent evidence that the defendant had notice of the perpetrator's dangerous propensities, this Court has found that there was a question of fact as to foreseeability in only two circumstances: First, foreseeability is a question of fact when a criminal assault results from children being left unsupervised with access to private spaces. *See McLeod v. Grant County Sch. Dist. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953) (students were unsupervised in a gym with a storage space under the bleachers where the assault took place); *see also J.N. By & Through Hager v. Bellingham Sch.*

Dist. No. 501, 74 Wn. App. 49, 57, 871 P.2d 1106, 1111 (1994) (student was assaulted by another student in an unsupervised restroom). Second, foreseeability is a question of fact when the victim is "[p]rofoundly disabled" and "totally unable to protect herself" and there have been "prior sexual assaults" at the same facility. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 46, 50, 929 P.2d 420 (1997).[2]

But, again, the foreseeability of the harm does not change based on the source of the underlying duty, which is where the decision below goes wrong. That decision introduces an artificial distinction into the foreseeability analysis by suggesting that an act may not be foreseeable if the claim is based on a special relationship with the perpetrator, but may be foreseeable if the claim is based on a special relationship with the victim. And, critically, it does so by suggesting that what the defendant knows or should know about the perpetrator's dangerous propensities is irrelevant when the claim is based on a custodial relationship with the victim. *N.K.*, 175 Wn. App. at 526-27.

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[2] In *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 224 P.3d 808 (2009), the plaintiff, a patient at a hospital, was repeatedly sexually assaulted by a nurse. The Court of Appeals explained, "In determining whether sexual misconduct by a staff member is foreseeable, this court may look to whether there were prior sexual assaults at the facility or by the individual in question." *Id.* at 767. In the absence of either, the court held that the nurse's actions "were not foreseeable." *Id.* at 766. The court distinguished *Niece* because in *Kaltreider* the plaintiff "was not completely impaired." *Id.*

For school districts, the problem with this artificial distinction is that plaintiffs can always rely on a custodial relationship with the victim and thus avoid the fact that there may be no evidence that the school district had notice of the perpetrator's dangerous propensities. One of the key facts supporting summary judgment in *Peck* was that the school district "checked [the teacher's] teaching certification and background when it hired him." *Peck*, 65 Wn. App. at 288-89. One of the most troubling aspects of the decision below is that there is no evidence that a thorough background check would have changed the outcome.[3] Simply put, *Peck* would probably have been decided differently under the standard announced by the Court of Appeals in this case, which is perhaps why the decision below does not cite *Peck*.

Even worse than the artificial distinction the decision below makes regarding foreseeability is the fact that it identifies no specific facts but simply announces that "the danger of sexual abuse by an adult volunteer was one the church reasonably should have anticipated." *N.K.*, 175 Wn. App. at 531. This is true, the Court of Appeals says, regardless of any

[3] It is true that there was apparently no evidence presented in this case that the LDS Church conducted a background check on the perpetrator. But there was also apparently no evidence presented that a background check would have revealed any prior misconduct, nor was there any evidence that it was the standard of care in 1977 to conduct background checks on such volunteers.

notice about the perpetrator's dangerous propensities and "even if there was no evidence that the church knew about specific past incidents of child sexual abuse in scouting ...." *Id.*

This is a breathtakingly broad notion of foreseeability with troubling implications for school districts, which rely not only on employed teachers, staff and administrators, but on parents, stepparents, de facto parents, guardians, grandparents, and thousands of others who volunteer in the classroom, as chaperones, or in various other capacities. If the decision below stands, school districts can be held liable for any criminal sexual assault by any adult without a showing of specific facts that show a concrete risk of harm.

As noted, the only cases where liability has been left open against a school district for sexual misconduct without notice that the perpetrator had dangerous propensities are those involving misconduct by another student. *See McLeod v. Grant County Sch. Dist. 128*, 42 Wn.2d 316, 255 P.2d 360 (1953); *J.N. By & Through Hager v. Bellingham Sch. Dist. No. 501*, 74 Wn. App. 49, 57, 871 P.2d 1106, 1111 (1994). And in these cases the key fact was that the students were left unsupervised. *See McLeod*, 42 Wn.2d at 322 (harm was foreseeable where children had access to a "darkened room ... during periods of unsupervised play"); *J.N.*, 74 Wn. App. at 58

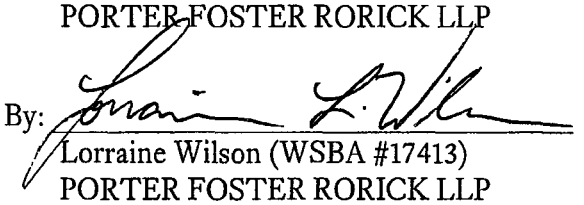
("Here, the general field of danger—harm to a pupil caused by another pupil—flowed from the arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised restrooms."). It is one thing to hold a school liable for not properly supervising impulsive students. It is another to hold a school liable for the criminal misconduct of the adults it relies on to supervise the students, at least in the absence of evidence that the school had notice of the perpetrator's dangerous propensities or at least some other specific reason to foresee a concrete risk of criminal misconduct.

CONCLUSION

If this decision stands, a school district could be held liable for the misconduct of any employee or volunteer without any notice of prior misconduct and no objective basis for believing the employee or volunteer was dangerous. That has never been the law in Washington. If it becomes the law, school districts will pay the price in the form of higher insurance premiums and significantly more liability. WCSA asks this Court to grant the petition for review and reaffirm long-standing cases, such as *Peck*, that properly balance a school district's responsibility to protect its students with reasonable limitations on liability.

DATED this 21st day of October, 2013

PORTER FOSTER RORICK LLP

By: 

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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 the foregoing document to be delivered via U.S. first class mail, with a courtesy copy via email, to:

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