SUPREME COURT NO. 91775-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

APPEAL FROM THE COURT OF APPEALS

DIVISION II

No. 45832-2-II

N.L.,

Respondent,

v.

BETHEL SCHOOL DISTRICT,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF THE REPONDENT

This answer is filed by the Plaintiff, N.L.

II. DECISION BELOW

The Honorable Susan Serko, of the Pierce County Superior Court, erroneously granted summary judgment in favor of the Defendant Bethel School District (BSD). Plaintiff, N.L., appealed. In a published opinion, the Court of Appeals Division II reversed the trial court's grant of BSD's summary judgment, and the matter was remanded to the trial court. *N.L. v. Bethel Sch. Dist.*, ___Wn. App. ___, 348 P.3d 1237 (2015).[1]

III. RESTATEMENT OF ISSUE FOR REVIEW

Whether the trial court erred when it granted BSD's motion for summary judgment where N.L. submitted ample evidence creating material issues of disputed facts and N.L.'s evidence, along with reasonable inferences therefrom, supported a finding that BSD owed a duty, breached its duty, and the breach was a proximate cause of the injury (rape) committed by a registered sex offender student against N.L.

IV. STATEMENT OF THE CASE

This case involved BSD's negligent decision to permit a registered sex offender student, Nicholas Clark (Clark), who was known to have committed numerous sexual offenses against younger female students, to

[1] This opinion is attached as Appendix A.

attend a high school immediately adjacent to a junior high, and to have unfettered and unmonitored access to female junior high students, including the Plaintiff, N.L. Given the offender-student's dangerous propensities, BSD failed to take reasonably prudent steps to protect N.L. from dangers presented by this offender-student. Given Clark's lengthy history of sexually offending against female students on and off campus, it was highly foreseeable that he would commit another sexual assault. BSD did nothing to monitor or supervise Clark.

A. Registered sex offender Clark's BSD student file.

Nicholas Clark attended BSD from Kindergarten through 12th grade.[2] His BSD discipline file is replete with instances of physically assaulting students, sexually assaulting female students, highly sexualized talk and behaviors, bullying, and general disobedience at school.[3] Clark was reprimanded, disciplined, or written up for the aforementioned behaviors more than 78 different times.[4] He was suspended from school approximately 19 different times.[5] A brief summary of Clark's disturbing history in the Bethel School District from 1st through the 8th grade, includes, but is not limited to, the following: physical assault of a teacher

[2] CP 119-268; CP 119-137 (Clark's Kindergarten through 6th Grade records); CP 138-201 (Clark's 7th-9th grade records); CP 202-268 (Clark's 10th-12th grade records).
[3] *Id.*
[4] CP 119-268.
[5] *Id.*

(2nd grade)[6]; assault on a student (4th, 5th, and 7th grades); impulsive behaviors (6th grade); use of racial epithets, sexual language, sexual gestures, bringing pornography to school (all 7th grade); and repeated use of sexualized language, drawing sexual pictures, use of homophobic slurs, grabbing a female student's crotch, and engaging in "sexual harassment" (all 8th grade).[7]

During Clark's 9th grade year, he: engaged in a fist-fight off campus;[8] physically assaulted a female student; punched a male student in the groin; had inappropriate pictures on his binder; approached a female student and engaged in a "humping motion" on her rear end; was disruptive on the school bus; and sexually assaulted a younger female student.[9] Clark's sexual assault of the female student entailed forcibly

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[6] For efficiency, the grade in which the conduct occurred will be indicated as follows: (2^{nd}) for 2^{nd} grade, and so on.

[7] *See*, CP 119-201.

[8] CP 179, Discipline log for Clark indicates "10/27 left campus to fight." CP 182, Discipline Report for this event states, "Nick left campus to fight another student during the school day. Suspension effective 10/28/2003- 10/30/2003." BSD's argument at summary judgment and in its petition for review included that it had no duty to N.L once she was lured off campus by the sex offender, and raped. However, the fact that BSD has suspended Clark for going off campus to fight another student shows the disingenuous nature of this argument. Moreover, BSDs "no duty" argument seeks to obfuscate the issue, "but for" BSDs negligence in failing to protect 14 year old N.L. from Clark, N.L. would never have left the campus with Clark and be raped. Moreover, given the abysmal history of Clark's school disciplinary record and his countless sexual offenses committed against young girls, it was highly foreseeable that he would reoffend against yet another young girl, and BSD did nothing to protect N.L. from him.

[9] CP 138-201, 190-194; 269-283. See also, CP 179-180, which is the discipline log created by BSD faculty for Clark's 9^{th} grade year. CP 179-180 documents three separate

grabbing her, kissing her mouth, breast, and neck. He also grabbed her buttocks and pushed his penis into her groin.[10] The female student was two years younger than Clark.[11] As a consequence of this sexual assault, Clark was convicted of the crime of Attempted Indecent Liberties and was required to register as a sex offender and placed on probation for a year. During the probationary period, he was prohibited from being around children who are two or more years younger than him without supervision.[12]

During Clark's 10th grade year, in December 2004, Bethel High School (BHS) was notified that Clark was a registered sex offender.[13] During that school year, he physically assaulted a student, and was truant and disruptive.[14] In January 2005, while Clark was on probation, he sexually assaulted a female student on a BSD bus.[15] This matter was "investigated" by BHS Assistant Principal Mishra.[16] There are minimal notes from Mishra in Clark's discipline file, and those notes read, "puts

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acts of sexual misconduct by Clark in a three month period: assaulting a student by hitting student in the "groin"; making a "humping motion" behind a female student; and committing the crime of indecent liberties against a female student.

[10] CP 269-283.
[11] *Id.*; the female student was 13 years old.
[12] *Id.*
[13] CP 206-207.
[14] *See* CP 202-268.
[15] *Id.*, CP 211-216.
[16] CP 357-391 (Deposition excerpts of Mishra); CP 359 (lines 18-25); CP 360 (lines 1-5); 25-53. Assistant Principal Mishra did not understand the mandatory reporting requirement under RCW 26.44.030, to include when a student commits a sexual offense against another student.

hands on front of bra," "puts hands down front of pants," and "takes out penis, asked her to touch it."[17] For these behaviors, Clark was subjected to an emergency expulsion because "his presence would be a danger to himself or other people," however, it is not clear that this matter was ever reported to law enforcement.[18]

During his 11th and 12th grade years, Clark's assaultive and sexually-charged behaviors continued unabated.[19] In 11th grade, Clark: physically and verbally harassed a younger student on a BSD bus; violated bus conduct rules; skipped class; and physically assaulted a student.[20] In the 12th grade Clark: was written-up three separate times for bus misconduct; was found inside the girls' bathroom at school; yelled out "Fuck" and "My dick hurts" during class; was observed engaging in "hanky panky" in the hallway with a female student; left class and never returned; was truant; was disruptive in class; and assaulted two different students.[21] During his 12th grade year, Clark raped N.L.

B. BSD failed to monitor or supervise Clark, and failed to protect N.L. from registered sex offender Clark.

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[17] CP 216; CP 363-391. Mishra testified that if he took witness statements from involved parties, and that those witness statements should have been included in Clark's disciplinary file. Those statements were not included in Clark's file provided in discovery.
[18] CP 202-268; CP 388 (lines 14-25) CP 389 (lines 1-17), CP 376-387.
[19] *See,* CP 202-268.
[20] *Id.*
[21] *Id., see also,* CP 236, 237, 241.

In December 2004, BHS School Principal Wanda Riley-Hordyk (hereinafter Riley) received notification that Clark, a 10th grader, was a registered sex offender.[22] Upon receipt of the notification that Clark was a registered sex offender, Riley did not inform Clark's teachers of his sex offender status.[23] Principal Riley violated the BSD policy on sex offender notification when she failed to inform Clark's individual teachers of his sex offender status.[24] According to BSD Assistant Superintendent Brophy, there "really wasn't a policy relative to monitoring" sex offender students enrolled in the district.[25] Dr. Brophy further testified that BSD did not have a policy or practice for monitoring sex offender students or developing a safety plan for the student.[26]

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[22] CP 206-207; Dep. Riley at p. 115.

[23] CP 332-333, Dep. Riley:

> Question: As you sit here today, do you know the teachers that you informed that Nick Clark was a registered sex offender?
> Riley: Do I know if I told teachers?
> Question: Yeah.
> Riley: I told teachers that we have sex offenders in our building, but I am not at liberty to tell you their names.

[24] CP 335, District Policy #3143 reads in pertinent part: "District Notification of Juvenile Offenders: A court will notify the common school in which a student is enrolled if the student has been convicted...for any of the following offenses: a sex offense.... The principal must inform any teacher of the student and any other personnel who should be aware of the information." See also, CP 394 (lines 1-11) Dep. Brophy, Assistant Superintendent, who testified that not only was it District policy to inform a sex offender student's six teachers of his status, but that it was also "absolutely" the best practice to do so.

[25] CP 398 (lines 2-25), 399 (lines 1-22).

[26] *Id.*, CP 297-305; *See* expert report of Judith Billings detailing model policies adopted by Washington State schools for the monitoring, supervision, and faculty notification of registered sex offender students.

Riley testified at deposition that she had an "unwritten" process in place for the monitoring of sex offenders, which included having a special meeting with the registered sex offender's counselor, and having assistant principals involved in the monitoring of the sex offender.[27] However, Riley's testimony on this point is subject to doubt, as Assistant Superintendent Brophy, BSD Athletic Director (and BSD Director of Campus Safety) Dan Heltsley, Clark's BHS counselor, and Riley's assistant principals refute Riley's testimony.[28] Dr. Brophy, Mr. Heltsley, the counselor, and the assistant principals at BHS were not familiar with Riley's "unwritten" process for monitoring sex offenders like Clark, nor did the aforementioned BSD faculty ever recall being involved in such a process.[29] In fact, neither Clark's BHS counselor, nor the Campus Safety Director, nor the Assistant Principals were ever made aware that Clark was a registered sex offender.[30]

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[27] CP 319 (lines 23-25); 320-330 (lines 1-17).

[28]Dep. Alayna Septon, BHS Counselor CP 338 (lines 12-25); 339-341 (lines 1-9); Dep. Hay, BHS Assistant Principal CP 344-349 (lines 1-7); Dep Mishra BHS Assistant Principal CP 361 (lines 5-25), 362 (lines 1-6); 364-367 (lines 1-20), 387-389 and 363-391 generally; Dep. Brophy, Assistant Superintendent CP 398 (lines 2-25), 399 (lines 1-22); Dep Heltsley, Athletic Director and Director of Campus safety CP 418-419; 420 (lines 7-25); 421 (lines1-13); 422 (lines 3-25); 423-426(lines 1-9); 427-429; 430-438.

[29] *Id.*

[30] Dep. Alayna Septon, BHS Counselor, CP 338-341; Dep. Hay, BHS Assistant Principal, CP 344-349; Dep. Mishra, BHS Assistant Principal, CP 361-362; 364-367; 387-389; and 357-391 generally. *See also*, Dep. Hay, CP 344-349; 351-356, wherein Assistant Principal Hay describes the one time she can recall ever having a monitoring plan in place for a student (not Clark) who engaged in "sexually aggressive" conduct at school. Accordingly, it was possible for BHS to monitor a student such as Clark, but BHS simply chose not to.

It is undisputed that Principal Riley failed to inform the next door Bethel Junior High administrators that Clark was a registered sex offender.[31] It is also undisputed that the District did not have a policy requiring that the athletic coach of a registered sex offender student must be informed if that sport involves the sex offender intermingling with younger students.[32] Assistant Superintendent Brophy testified that it would be best practice to notify coaches in such a circumstance that was present during the track season when Clark raped N.L.[33] Principal Riley did not inform Clark's head track coach of the fact that he was a registered sex offender, nor was the coach given a safety plan for Clark, asked to look out for high-risk behaviors of a sexual nature exhibited by Clark, or asked to protect young female students from him.[34]

C. Registered sex offender student Clark's grooming, luring, ruse and rape of N.L.

Bethel High School is located a short distance away from the Bethel Junior High School campus; the track/football field links the two campuses together.[35] In April 2007, during Clark's 12th grade year at

[31] Dep. Hay, BHS Assistant Principal, CP 350-351; Dep. Riley, 317-318; Dep. Mishra, 390-391.

[32] Dep. Brophy, Assistant Superintendent BSD, CP 395-397.

[33] *Id.*

[34] Dep. BHS Head Track Coach Patrick Mullen (2006-2007), CP 402- 405; 406-408; 414-415.

[35] CP 312-314.

BHS, 14-year-old N.L. was in the 8th grade at Bethel Junior High.[36] N.L. was a good student and athlete, and had decided to sign up for track during her 8th grade year.[37] The Bethel Junior High track team and the BHS track team used the same track and field for practice.[38] N.L. was on the junior high track team, and the registered sex offender student, Clark, was on the senior high track team.[39]

Clark was introduced to N.L. on the track field during a joint junior high-high school track practice.[40] After the introduction on the track field, and prior to the rape of N.L., Clark began grooming N.L. for sexual contact. He started texting N.L.[41] The text messages from Clark to N.L. were "dirty" texts, and contained sexual connotations.[42] Young N.L. naively thought that Clark's texts were a request to go to lunch with her.[43] Clark lied to N.L. about his true age (18), and told her he was only 16 years old.[44] The District did not inform junior or senior high track coaches that they had a sex offender on their team, and as a consequence, coaches

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[36] Dep. N.L. CP 451-452.
[37] *Id.* CP 441-443.
[38] Dep. Heltsley, Athletic Director, CP 424-426.
[39] Dep. Mullen, BHS Head track coach, CP 409-413; Dep. N.L., CP 446-447.
[40] Dep. N.L., CP 446-448
[41] Dep. N.L.,CP 448-450.
[42] *Id.*
[43] *Id.*
[44] Dep. N.L., CP 451-452

did not monitor the conduct of the sex offender or keep him away from younger female students like N.L.[45]

Clark used a ruse and urged N.L. to skip track practice in order to go to Burger King for lunch.[46] During scheduled afterschool track practice, Clark picked up N.L. in his car and told N.L. he had forgotten something and needed to go back to his home.[47] N.L. went inside Clark's home, and once inside his bedroom, Clark forcibly raped N.L.[48] N.L. expressed her lack of consent through words ('no") and conduct (resistance, no matter how slight).[49] It is undisputed that N.L. was raped by Clark, after which he dropped her off at track practice where she caught the bus to go home.[50] It is undisputed that N.L. was a virgin at the time of the rape.[51] The matter was reported to the police, and Clark was prosecuted and convicted.[52] N.L. and her family did not know that Clark

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[45] Dep. BHS Head track coach Patrick Mullen (2006-2007), CP 402-408; 414; See also, Dep. Heltsley, Athletic Director, and Director of Campus Safety, CP 418-438.

[46] Dep. N.L., CP 452-456.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*, Clark committed the crime of rape by at least three different alternative means: Rape of Child in the Third Degree, RCW 9A.44.079; Rape in the Third Degree (lack of consent), RCW 9A.44.060; and Rape in the Second Degree (forcible compulsion), RCW 9A.44.050.

[51] Dep. N.L., CP 445

[52] CP 285-296, Certification for Determination of Probable Cause, and judgment and sentence. Dep. N.L., CP 444, N.L. did not report the rape to the police initially because she was "14 and I didn't know what to do."

was a registered sex offender until after the police investigated the matter.[53]

D. N.L.'s expert, Judith Billings.

The trial court was presented with the expert report of Judith Billings. [54] Ms. Billings was the former Superintendent of Public Instruction for the State of Washington. Ms. Billings sets forth in her report the standard of care for students in Washington schools. Ms. Billings opined that student safety is of paramount concern and must be a priority for school districts. Even BSD's own mission statement acknowledged this standard of providing "a safe educational environment."[55]

Ms. Billings sets forth in great detail the failures on the part of BSD to adopt and implement model policies regarding registered sex offender students, to inform appropriate faculty, including coaches and the neighboring junior high, among other faculty, of Clark's sex offender status. She further opined that the applicable standard of care for a district was to have created a safety plan for Clark that monitored his whereabouts, set expectations of his behavior, and protected younger female students, notified coaches, faculty, teachers and the neighboring

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[53] Dep. N.L., CP 456.

[54] CP 297-305.

[55] *Id.* at CP 299.

junior high of his status, to name but a few protective measures. Billings concluded, based upon her review of the record, that BSD's failure to notify faculty, coaches, and the junior high of Clark's status and history, as well as failing to develop a safety plan to monitor Clark, as "deliberate indifference to the safety of students, particularly younger female students.[56]

Ms. Billings opined as follows: "But for the indifference and inaction of Bethel School District, N.L. would more probably than not, NOT have been taken by Nicholas Clark to his home, raped and suffered the documented, extensive consequences of that event."[57]

E. Trial and Appellate Court history.

In August 2012, N.L. filed a lawsuit in Pierce County Superior Court against Defendant BSD.[58] In January 2014, the trial court issued its order granting Defendant's motion for summary judgment, finding that "the issue [was] not so much the duty as the causation element, and on that basis [the court] . . . dismiss[ed] the case."[59] In January 2014, N.L. timely appealed.[60]

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[56] *Id,* at CP 301.
[57] *Id.*, at CP 303.
[58] CP 1-9.
[59] CP 500-501.
[60] CP 502-505.

The Court of Appeals reversed the trial court, holding that "(1) BSD owed a duty of reasonable care to protect NL and monitor Clark, and (2) genuine issues of material fact exist as to whether BSD breached its duty and whether that breach was a proximate cause of NL's injury." *N.L.*, at 1239-40.

Notably, the Court of Appeals observed that "the question of whether NL's harm was foreseeable [was] a question for the jury[,]" *Id.* at 1244, the "unrebutted expert opinion itself [was] sufficient to preclude summary judgment[,]" and N.L. "presented sufficient evidence to preclude summary judgment that BSD's breach was a proximate cause of her injury." *Id.*

V. ARGUMENT

A. The Court of Appeals' decision followed this Court's precedent.

In its Petition for Review, BSD asserts that the decision in this case "departs from the rules established by *McLeod* and *Coates*."[61] Pet. at 10. Further, BSD argues that, "At the time of her injuries, N.L. was not on

[61] *McLeod v. Grant County School District No. 128*, 42 Wn. 2d 316, 255 P.2d 360 (1953); and *Coates v. Tacoma Sch. Dist. No. 10*, 55 Wn.2d 392, 347 P.2d 1093 (1960); respectively.

campus and therefore not within the physical custody of BSD." *Id.*[62] BSD's contentions fail.

In this case, the Appellate decision was in accord with *McLeod*. *McLeod* stands for the proposition that "the duty of a school district . . . is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." *Id.* at 320. Here, BSD failed to anticipate dangers that were reasonably anticipated: Clark's dangerous propensities to sexually offend against young girls. Nor did BSD take precautions to protect students from Clark.

Moreover, the Court of Appeals held that N.L. "presented evidence of a genuine issue of material fact as to whether BSD breached its duty in the way it monitored Clark." *N.L.*, at 1244. As this Court has held, "'If ... there is room for reasonable difference of opinion as to whether [an] act was negligent or foreseeable, the question should be left to the jury.'" *McLeod,* at 323 (quoting Restatement of Torts § 453 cmt. a (1934)). The Appellate court decision is consistent with *McLeod*.

BSD's interpretation of *Coates* is also unavailing. BSD claims that that "This Court held that the school district did not owe the student a duty of care because the injuries occurred off-campus on a weekend . . . " Pet. at 10. In this case, the breach of the duty owed N.L. occurred on campus.

[62] BSD appends a "physical custody" requirement not found in this Court's *McLeod* decision.

But for the failures of BSD to: monitor, supervised, alert faculty to the fact that Clark was a registered sex offender with a history of sexually offending against young girls, and other failures, Clark would never have groomed and lured N.L. off campus to rape her. *N.L.*, at 1243. The rape occurred when both N.L. and Clark should have been at track practice, and after the rape N.L. was returned to campus by Clark, where she got on the school bus to go home. *Coates* is factually distinguishable. BSD completely failed to "anticipate dangers which may reasonably be anticipated, and then take precautions" to protect the N.L. *McLeod*, at 320. A reasonable school district would have taken measures to supervise Clark and protect students like N.L. from him. For these reasons, the Appellate decision in this case was in harmony with the decisions of this Court.

B. There is no conflict between decisions of the Court of Appeals.

The Court of Appeals followed its own precedent in this case. BSD asserts that the *N.L* decision is inconsistent with *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 747 P.2d 1124 (1987), but the only inconsistency is with the facts. BSD argues that the dispositive factors in *Scott* were time and place, but the *Scott* court acknowledged that "The liability of a school is not limited to situations involving school hours,

property, or curricular activities." *Scott*, at 44 (citing *Sherwood v. Moxee School Dist. No. 90,* 58 Wn.2d 351, 363 P.2d 138 (1961)). BSD's attempt to draw a bright line at school campus boundaries is inconsistent with Washington law.

In *Scott*, the plaintiffs failed to present evidence that the offending teacher had any history of offending, let alone that the school knew that the teacher had offended. *Scott*, at 43. This case stands in stark contrast because unlike in *Scott*, Clark's sexually inappropriate conduct is well documented in his student file, including his criminal sex offense conviction, and status as a registered sex offender. *N.L.*, at 1240. BSD was well aware of Clark's dangerous history of sexual violence and did nothing to protect N.L.

As the Appellate court in N.L. stated, "This case is more like *J.N.* where the nexus between the school district's failure to take action in response to its knowledge of potential danger and the plaintiff's specific injury were closely connected and not too remote." *N.L.*, at 1243-44 citing *J.N. v. Bellingham Sch. Dist. No. 501, 74 Wn. App. 49, 60 (1994)*. The school district in *J.N.* had notice of the offending student's "aggressive and disruptive behavior in school" before the student committed sexual assault. *Id.* at 51. In this case, BSD was aware of numerous sexual assaults committed by the offending student before he was allowed to

have access to N.L. at school, lure her off school campus, and rape her. *N.L.*, at 1240-41. The Appellate decision in this case is entirely consistent with Court of Appeals precedent. BSD's petition must be denied.

C. The *N.L.* decision applies long standing Washington law and precedent, and no new issues of substantial public interest are at issue.

The *N.L* decision was predicated upon application of well-established tort principles and precedent. The District's argument that this decision will result in an "enormous expansion of school district liability" should not be well taken. From a factual standpoint, BSD's argument must be rejected. N.L.'s expert, Judith Billings opined that the Office of the Superintendent of Public Instruction had available "model policies" for the monitoring, supervision, and establishment of a safety plan for registered sex offender students since 2006.[63] Accordingly, the District's "substantial public interest" argument fails because these model policies have been in place for years at our State's agency for public instruction. The Court of Appeals decision is not charting new waters on the subject matter of protecting students from and monitoring registered sex offenders in the school. Accordingly, the District's argument must be rejected.

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[63] CP 302, "Washington model policy and procedure regarding release of information concerning sexual offenders, available in December 2006 – which Bethel failed to adopt until 2012 – outlined in detail the need for a safety plan, who should be involved in its development, what should be included, how it should be monitored, and who should have access to it."

The District's next argues that the Pandora's Box of liability has been opened by the Appellate decision. This is not so. The Appellate decision applied long standing precedent, holding that the school stands in *loco parentis*, and as such must protect its students from reasonably foreseeable harms. *See McLeod* and *J.N.* BSD failed to take action in response to its knowledge of the dangers presented by Clark, based upon his lengthy history of sexual offenses. *N.L.*, at 10. Clark's sexual assault of N.L. was "closely related to" and of the same character as Clark's prior offenses. *Id.* at 11. The exact sequence of events that resulted in the rape of N.L. need not be foreseeable. *McLeod*, 42 Wn.2d at 322. The breach of the duty owed occurred on campus, and the Appellate decision does not expand the liability of school districts. Defendant's reliance on out of jurisdiction cases is simply not relevant, and cannot create an issue of substantial public interest in our State.[64]

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[64] *Kazanjian v. School Board of Palm Beach*, 967 So.2d 259 (2007), is distinguishable on its facts. The case involves students who left campus without permission, and were killed in an auto accident. Their death was not foreseeable. In the facts before this court, Clark's discipline file was replete with numerous sexual offenses; he was a registered sex offender who was permitted by BSD to have unfettered access to N.L., which allowed him to lure her from campus on a ruse and rape her. BSD knew of Clark's dangerous history and that made the rape of N.L. foreseeable. *Kazanjian* does not control. The facts in *Stoddart v. Pocatello School District,* 149 Idaho 679 (2010), are also distinguishable. That case held that the "location of the negligence rather than the location of the injury" was the relevant question. It found that the school's information concerning the shooters from 2.5 years earlier was insufficient to establish that the subsequent shooting, off campus, of a girl at her home was foreseeable. *Id.* 687. Clark's actions were foreseeable. Finally, *Hansen v. Westhampton Beach*, 73 A.D.3d 699 (2010), addressed a one-time incident involving the foreseeability of a student sustaining burns from a sterno candle.

VI. CONCLUSION

For the foregoing reasons, N.L. respectfully requests that this Court deny BSD's Petition for Review.

DATED this 26th day of June, 2015.

CONNELLY LAW OFFICES, PLLC

By:/s/ *Julie Kays*
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Attorney for N.L.

The case does not control, as the facts before this Court on the foreseeability of Clark's propensity for committing sexual offenses are well-established.

APPENDIX

A. Copy of the published opinion of Division II of the Court of Appeals

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

N. L., Appellant, v. BETHEL SCHOOL DISTRICT, Defendant	No. 45832-2-II PUBLISHED OPINION

SUTTON, J. — NL[1] appeals the superior court's summary judgment dismissal of her negligence claim against Bethel School District (BSD). NL sued BSD after she was sexually assaulted by a registered sex offender BSD student, Nicholas Clark, while the two were off school grounds. NL has asked us to determine whether BSD, which knew of Clark's sex offender status, owed a duty of care to protect NL and, if so, whether as a matter of law NL's sexual assault was within the general field of danger that BSD could have or should have reasonably anticipated. We hold that (1) BSD owed a duty of reasonable care to protect NL and monitor Clark, and (2) genuine issues of material fact exist as to whether BSD breached its duty and whether that breach was a proximate cause of NL's injury. We reverse and remand.

[1] We use initials in this opinion to protect the confidentiality of the juvenile involved.

FACTS

I. CLARK'S INITIAL CONTACT WITH NL

In April 2007, NL, age 14, attended eighth grade at Bethel Junior High School. Clark, age 18, attended the twelfth grade at Bethel High School. Both schools were part of BSD. The track and football fields link the two school campuses together. Clark and NL were members of their respective school's track teams. Both track teams held practices on the same track field at the same time at the end of the school day during track season.

At the end of April, a mutual friend introduced NL to Clark while they were on the track field for team practice. Clark lied to NL about his age, telling her that he was 16 years old. Clark and NL exchanged cell phone numbers and began sending text messages to each other that day.

The day after meeting NL, Clark urged her to skip track practice to go to nearby Burger King for lunch with him. Once in the car, Clark told NL he had forgotten something at home and needed to retrieve it. NL went into the house after Clark invited her inside, and once they were inside his bedroom Clark sexually assaulted NL. Clark returned NL to school so she could catch the school bus. NL told a friend that she had had sex with Clark and that information reached the junior high school who notified the police. A year later, in July 2008, Clark pleaded guilty to second degree assault and to failure to register as a sex offender.

II. BSD'S RECORDS ON CLARK

Clark attended school within BSD from kindergarten through twelfth grade. BSD's records show that it disciplined Clark more than 78 times and suspended him on 19 separate occasions.[2] BSD documented Clark's sexually inappropriate conduct in seventh, eighth, and ninth grades. During Clark's ninth grade year, Clark grabbed a girl in the hallway, kissed her on her mouth and breast area, grabbed her buttocks, and pulled her pelvis into him. Clark was convicted of attempted indecent liberties due to this conduct, and BSD suspended him for the remainder of the school year over this incident. As part of Clark's sentence, he was put on probation for 12 months and required to register as a level one sex offender, which he did.

Following his conviction and registration as a sex offender, Clark continued to engage in disruptive and inappropriate conduct at school. Two months after BSD received notice of Clark's sex offender status, while Clark was still on probation in his tenth grade year, he sexually assaulted a female student on the bus. In the twelfth grade, Clark physically assaulted one student, verbally harassed another student, yelled obscenities in class, went inside the girl's bathroom, assaulted two students on two different occasions, and left class and did not return.

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[2] BSD's original file on Clark has been destroyed. Because it received a pre-suit Public Records Act request, BSD scanned Clark's entire file and returned it to the High school, which retained the file in accordance with its retention schedule. The file was later shredded in accordance with that retention schedule because the high school was not instructed to preserve the file. NL received the scanned version in April 2012. Some of the documents were not readable. *See* Clerk's Papers (CP) at 457-486.

III. BSD's Monitoring of Clark

Wanda Riley-Hordyk served as the high school's principal while Clark was a student there. On December 7, 2004, Riley-Hordyk received notice from Pierce County that Clark was a level one registered sex offender. BSD policy required Riley-Hordyk to inform Clark's teachers and other personnel of his sex offender status, but she never did so.[3] Riley-Hordyk did not tell the high school's teachers the names of any registered sex offenders in attendance; she told them only that some students were registered sex offenders "but [she was] not at liberty to [disclose those students'] names." CP at 333. BSD's Assistant Superintendent, Michael Brophy, testified that it is "absolutely best practice" and consistent with written policy for the principal to tell the registered sex offender's teachers, who come into contact with that student regularly, about the student's status. CP at 394.

BSD did not have a specific policy requiring that the athletic coach of a registered student sex offender be informed of the student's status if that sport involved the student sex offender intermingling with younger students. If a coach were a certified teacher, it may have been the responsibility of the principal to disclose the name to the coach as well, but Brophy testified that was not a "solid practice" at the time. CP at 395-96. Clark's track coach, a certified teacher, did not recall Riley-Hordyk informing him of Clark's sex offender status nor of any other student's

[3] BSD policy #3143 mandates principals to inform teachers of sex offender registration as follows: "District Notification of Juvenile Offenders: A court will notify the common school in which a student is enrolled if the student has been convicted . . . for any of the following offenses: a sex offense . . . . The principal must inform any teacher of the student and any other personnel who should be aware of the information." CP at 335.

sex offender status. Nor did Riley-Hordyk inform the junior high school track coach that Clark was a registered sex offender.

In 2007, BSD did not have any established policy or procedure for monitoring students who were registered sex offenders. Riley-Hordyk testified that she had an "unwritten" process in place to monitor student sex offenders that included a meeting between the counselor for the student sex offender and the assistant principals who are involved in monitoring students. CP at 319-330. None of the other high school or BSD administrators were aware of or involved in this process, including BSD's Assistant Superintendent Brophy; BSD's Athletic Director and Director of Campus Safety, Dan Heltsley; or the high school's other assistant principals.

Riley-Hordyk did not routinely formulate a safety plan procedure with registered sex offenders, but she met with the sex offender students individually to review the high school's code of conduct and had them affirm by their signature that those students (1) knew that the school was aware of his or her offender status, and (2) understood the code of conduct. BSD did not have a policy that required school administrators to formulate safety plans with sex offender students. Riley-Hordyk did not create a written safety plan for supervising Clark during his probation in tenth grade or after she received notice of Clark's registration as a sex offender.

IV. PROCEDURE

NL sued BSD, alleging negligence because BSD had a duty to protect her from the dangerous propensities of a fellow student and it breached that duty by failing to monitor Clark. BSD moved for summary judgment and dismissal. In opposition to BSD's motion, Judith Billings, former Washington State Superintendent of Public Instruction, provided unrebutted expert opinion on the standard of care for a school district, its duty to monitor and develop a safety plan for Clark,

and inform administrators of his sex offender status to protect its students. Billings opined that "[b]ut for the indifference and inaction of Bethel School District, NL would more probably than not, not have been taken by Nicholas Clark to his home, [sexually assaulted] and suffered the documented, extensive consequence of that event." CP at 303 (capitalization omitted).

The superior court granted BSD's motion, ruling that (1) BSD's duty did not extend to NL's harm because the harm occurred off school grounds, and (2) the harm was not reasonably foreseeable as a matter of law. NL appeals.

ANALYSIS

We review an order granting summary judgment de novo and perform the same inquiry as the trial court. *Durland v. San Juan County*, 182 Wn.2d 55, 69, 340 P.3d 191 (2014). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We view all facts and inferences in the light most favorable to the nonmoving party. *Kok v. Tacoma Sch. Dist. No. 10*, 179 Wn. App. 10, 17, 317 P.3d 481 (2013), *review denied*, 180 Wn.2d 1016 (2014). To prove a negligence claim, a plaintiff must show (1) that the defendant owed a duty to him or her, (2) the defendant breached that duty, (3) injury, and (4) a proximate cause between defendant's breach and plaintiff's injury. *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013).

NL argues that the trial court erroneously granted BSD summary judgment because she presented sufficient evidence that (1) BSD owed a duty of reasonable care to protect her and monitor Clark, and (2) genuine issues of material fact existed as to whether BSD breached its duty to protect her and whether BSD's breach was a proximate cause of her injury. We agree.

I. DUTY AND BREACH

The existence of a legal duty is a question of law that we review de novo. *N.K. v. Corp. of President Bishop*, 175 Wn. App. 517, 525, 307 P.3d 370 (2013), *review denied*, 179 Wn. 2d. 1005 (2013). Whether a defendant breached its duty is generally a question of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). Admissible expert opinion testimony on an ultimate issue of fact is sufficient to create an issue as to that fact, precluding summary judgment. *J.N. v. Bellingham Sch. Dist.*, 74 Wn. App. 49, 60-61, 871 P.2d 1106 (1994).

When a student is at school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent. *J.N.*, 74 Wn. App. at 57. A school district has a duty to exercise reasonable care, as a reasonably prudent person would under the circumstances, to protect students in its custody. *McLeod v. Grant County Sch. Dist.*, 42 Wn.2d 316, 320, 255 P.2d 360 (1953); *Briscoe v. Sch. Dist. 123*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949). Because a school district holds mandatory custody of a child, it has a duty to protect its students from harm by a third party that the district (1) knows or has reason to know that it has the ability to control the third party's conduct, and (2) "'knows or should know of the necessity and opportunity'" to exercise that control. *McLeod*, 42 Wn.2d at 320 (quoting RESTATEMENT OF TORTS § 320 (1934)). In determining whether BSD owed a duty to NL, we look at (1) the relationship between BSD and its students, NL and Clark, and (2) the general nature of the risk.[4] *McLeod*, 42 Wn.2d at 319.

[4] A duty to protect another from sexual assault by a third party may arise where the defendant has a special relationship with the tortfeasor that imposes a duty to control the third person's conduct *or* it may arise where the defendant has a special relationship with the other which gives the other a right to protection. RESTATEMENT OF TORTS § 315.

A school district's duty to exercise reasonable care extends only to foreseeable risks of harm. *J.N.*, 74 Wn. App. at 57. A school district's duty "is to anticipate dangers which may reasonably be anticipated, and to then take precautions to protect the pupils in its custody from such dangers." *McLeod*, 42 Wn.2d at 320. The particular sequence of events that led to the plaintiff's injury need not be foreseeable for a defendant school district to owe a duty to its students. *McLeod*, 42 Wn.2d at 322. Foreseeability is a question for the jury unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability." *McLeod*, 42 Wn.2d at 323. "'If . . . there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury.'" *McLeod*, 42 Wn.2d at 323 (quoting RESTATEMENT OF TORTS § 453 cmt. a (1934)).

A school district's knowledge of one of its student's dangerousness may give rise to a jury question of foreseeability. Here, BSD insists that its duty does not extend to Clark's sexual assault of NL committed off school grounds and the sexual assault was not within the general field of danger that BSD could have anticipated. We disagree. Our Supreme Court in *McLeod* held that the fact that the harm was caused by an intervening intentional criminal act did not "of itself exonerate a defendant from negligence." *McLeod,* 42 Wn.2d at 320. Rather, it was "a fact to be considered in determining whether such act was reasonably foreseeable." *McLeod*, 42 Wn.2d at 321. "[T]he pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated." *McLeod,* 42 Wn.2d at 321; *see also Christen v. Lee,* 113 Wn.2d 479, 492, 780 P.2d 1307 (1989).

This case is analogous to *J.N.*, where Division One of this court held that JN, a first grader who was sexually assaulted at recess by a fourth grader, presented a genuine issue of material fact by demonstrating that the school district knew about the fourth grader's dangerousness. *J.N.*, 74 Wn. App. at 60. Based on reports of assaultive and aggressive behavior toward other students, sexual language, and "some kind of trauma" that the fourth grader had experienced, the school knew that the fourth grader had the "propensity to assault." *J.N.*, 74 Wn. App. at 52-53, 60. "[W]here the disturbed, aggressive nature of a child is known to school authorities, proper supervision requires the taking of specific, appropriate procedures for the protection of other children from the potential for harm caused by such behavior." *J.N.*, 74 Wn. App. at 60. Thus, even if the fourth grader's sexual assault was outside the general field of danger, summary judgment was inappropriate because J.N. presented sufficient evidence that the school district had notice of the possibility of the specific harm inflicted. *J.N.*, 74 Wn. App. at 60.

Like the school district in *J.N.*, BSD owed NL a duty of reasonable care to protect her from reasonably foreseeable harm. NL presented evidence that BSD had a lengthy school discipline record on Clark with multiple instances of sexual conduct, including the incident that led to Clark's registration as a sex offender. Clark's sexual and assaultive behavior continued into the eleventh and twelfth grades, leading up to his sexual assault of NL. This evidence suggests that BSD was on notice of the possibility for the specific harm to NL, and BSD could have and should have reasonably anticipated that Clark would reoffend. Thus, it had a duty to reasonably protect NL from Clark's reasonably foreseeable acts.

In contrast, in *Kok*, we held that the school district's duty to exercise reasonable care did not extend to a student who was fatally shot at school by another student because the school district

could not have reasonably anticipated the harm that occurred. *Kok*, 179 Wn. App. at 13-14. At the time of the shooting in that case, none of the offending student's teachers or other professionals who had evaluated or treated the offending student had notified the school district that he was at risk of assaulting or killing another student at school. *Kok*, 179 Wn. App. at 20. Neither the offending student's behavior at school nor his medical records indicated "any assaultive behavior or tendencies." *Kok*, 179 Wn. App. at 20.

A school district does not owe a duty as a matter of law to a student when the nexus between the harm and the school district's alleged negligent action is too remote. *Coates v. Tacoma Sch. Dist.*, 55 Wn.2d 392, 396-97, 347 P.2d 1093 (1960); *Scott v. Blanchet High Sch.*, 50 Wn. App. 37, 44-45, 747 P.2d 1124 (1987). In *Coates*, our Supreme Court held that a defendant school district did not owe a duty of reasonable care when a student was involved in an accident on her way to a club initiation that was connected to the school only through an advisor. *Coates*, 55 Wn.2d at 394-95. Similarly, in *Scott*, Division One of this court held that a defendant school district did not owe a duty to a student who engaged in a romantic relationship with a teacher because the alleged sexual activities between the teacher and student did not occur at school, during afterhours counseling, or with the school's knowledge or consent. *Scott*, 50 Wn. App. at 41-42, 45.

This case is more like *J.N.*, where the nexus between the school district's failure to take action in response to its knowledge of potential danger and the plaintiff's specific injury were closely connected and not too remote. *J.N.*, 74 Wn. App. at 60. Unlike the defendant school districts in *Coates*, *Scott* and *Kok*, who did not have any knowledge to reasonably foresee the plaintiff student's harm, BSD had a lengthy discipline record of Clark's sexual behavior. BSD received notice of Clark's sex offender status more than two years before he assaulted NL. Yet

BSD took no action to monitor Clark or prevent further sexual assaults by Clark after receiving that notice with knowledge of Clark's other instances of sexual conduct. Clark's sexual assault of NL was closely related to and of the same character as BSD's knowledge of Clark's sexual conduct at school. NL's harm is not too remote from BSD's inaction to conclude that BSD did not owe NL a duty as a matter of law. We do not need to decide whether the specific sequence of events that resulted in NL's harm was reasonably foreseeable. *McLeod*, 42 Wn.2d at 322. NL presented sufficient evidence to have a jury determine whether Clark's risk to reoffend was within the general field of danger that BSD could have or should have reasonably foreseen. Thus, the question of whether NL's harm was foreseeable is a question for the jury.

Furthermore, viewing the facts in a light most favorable to NL, she also presented evidence of a genuine issue of material fact as to whether BSD breached its duty in the way it monitored Clark. Riley-Hordyk did not formulate a safety plan with Clark after BSD received notice of his sex offender registration status; BSD did not have a policy requiring her to do so. BSD did not have an established policy for monitoring registered sex offender students in 2007, either. Even though BSD policy instructed a principal to inform teachers of sex offender registration, Riley-Hordyk did not do so. The junior high school and high school track teams practiced on the same field that adjoined both schools at the same time of day, but Riley-Hordyk did not inform the junior high of Clark's sex offender status. Riley-Hordyk also failed to inform Clark's track team coach at the high school about Clark's status. NL's expert, Billings, testified on the ultimate issue of fact here that BSD had a responsibility to monitor and develop a safety plan for Clark. Billings' unrebutted expert opinion itself is sufficient to preclude summary judgment. *J.N.*, 74 Wn. App. at 60-61. Thus, the trial court should not have granted BSD's summary judgment motion.

II. PROXIMATE CAUSE

NL also argues that she presented sufficient evidence to preclude summary judgment that BSD's breach was a proximate cause of her injury. We agree.

A school district is liable only if its breach of a duty was a proximate cause of a plaintiff's injuries. *Travis v. Bohannon*, 128 Wn. App. 231, 240, 115 P.3d 342 (2005). Proximate cause has two elements: (1) Cause in fact, and (2) legal causation. *Lowman*, 178 Wn.2d at 169. Cause in fact or "but for" causation refers to the "physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause in fact is usually a question for the trier of fact. *Hartley*, 103 Wn.2d at 778.

Legal causation is grounded in policy considerations as to how far the consequences of a defendant's action should extend. *Lowman*, 178 Wn.2d at 169. To determine whether a defendant's breach of duty is too remote to hold the defendant liable as a matter of law, we evaluate "'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Lowman*, 178 Wn.2d at 169 (quoting *Hartley*, 103 Wn.2d at 779). An injury may have more than one proximate cause and a jury is to determine whether a third party's act is a superseding or a concurring cause. *Travis*, 128 Wn. App. at 242. The intervening act of another person may be an *additional* cause of the plaintiff's injury and does not necessarily relieve the defendant of liability if the harm was foreseeable from the defendant's original breach. *Travis*, 128 Wn. App. at 242. The existence of legal causation is a question of law. *Taylor v. Bell*, ___ Wn. App. ___, 340 P.3d 951, 960 (2014).

Taken in a light most favorable to NL, NL presented sufficient evidence to create a genuine issue of material fact as to whether BSD's breach was a proximate cause of injury to her. As to

cause in fact, NL presented evidence that BSD had not adopted any policies to create safety plans or to specifically monitor the activities of registered sex offender students in its schools. Contrary to BSD's policy, Riley-Hordyk failed to inform Clark's teachers of Clark's status. NL also presented Billings' expert opinion that BSD's failure to adopt policies to monitor and supervise sex offenders attending their schools was a proximate cause of NL's injuries.[5] As to legal causation, we cannot say that the harm to NL was "'so highly extraordinary or improbable'" that no reasonable person could be expected to anticipate it. *Seeberger v. Burlington N. R.R.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod*, 42 Wn.2d at 323.)

We hold that (1) BSD owed a duty of reasonable care to protect NL and monitor Clark, and (2) genuine issues of material fact exist as to whether BSD breached its duty and whether that breach was a proximate cause of NL's injury. We reverse and remand.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, J.

Melnick, J.
MELNICK, J.

[5] "But for the indifference and inaction of [BSD], [NL] would more probably than not, not have been taken by Nicholas Clark to his home, raped and suffered the documented, extensive consequence of that event." CP at 303 (capitalization omitted).

CERTIFICATE OF SERVICE

I, Marla H. Folsom, hereby certify that I filed the foregoing with the Supreme Court of Washington, and served same upon the following counsel of record via ABC Legal Messenger and via email below:

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A copy of the foregoing was also filed with the Court of Appeals, Division II.

DATED this 26th day of June, 2015.

s/Marla H. Folsom
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