NO. 45832-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

N.L.,

Appellant,

v.

BETHEL SCHOOL DISTRICT,

Respondent.

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Appellant N.L. files this appeal to reverse the trial court's Order granting summary judgment in favor of the Defendant, Bethel School District (BSD). In response to BSD's motion for summary judgment, Appellant provided the trial court with ample evidence to defeat summary judgment including: an expert report establishing that BSD's failures and negligence was a proximate cause of the rape of the fourteen-year-old Appellant, deposition transcript excerpts detailing the numerous failures of BSD to protect the Appellant from the registered sex offender student, and a copy of the sex offender student's school file that is replete with instances of sexual assaults and acts of sexual misconduct committed against young girls on and off campus. The evidence presented to the trial court by the Appellant in and of itself was sufficient to create an issue of material fact that should have precluded the entry of summary judgment. Accordingly, the Appellant asks this Court to reverse the trial court's summary judgment ruling and remand this case back for trial on the merits.

B. ASSIGNMENTS OF ERROR

Assignment of Error No. 1

The trial court erred when it ruled that no issues of material fact existed and that BSD was entitled to summary judgment as a matter of law.

Issues Pertaining to Assignment of Error No. 1

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

C. STATEMENT OF THE CASE

This case involves Bethel School District's negligent decision to permit a registered sex offender student, who was known to have committed numerous sexual offenses against younger female students, to attend a high school immediately adjacent to a junior high, and to have unfettered and unmonitored access to female junior high students, including the Appellant. Given the registered sex offender student's

dangerous propensities, BSD failed to take those reasonably prudent steps to protect the Appellant form the dangers presented by this registered sex offender student. Given the lengthy history of this sex offender offending against female students on and off campus, it was highly foreseeable that the registered sex offender student would commit another sexual assault, and BSD did nothing to stop him.

The Bethel School District is located in Pierce County, and has approximately 18,000 students enrolled.[1] Bethel Senior High School is located a short distance away from the Bethel Junior High School campus.[2] The track/football field links the two campuses together.[3]

1. Sex offender Clark's BSD school file:

Nicholas Clark attended the Bethel School District (BSD) from Kindergarten through 12th grade.[4] His BSD discipline file is replete with instances of physically assaulting students, sexually assaulting female students, inappropriate sexual talk and behaviors, bullying, and general disobedience at school.[5] Clark was reprimanded, disciplined, or written up

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[1] CP 118 (As is customary, Appellant will refer to the various portions of the record as "CP" for Clerk's papers followed by the page number).

[2] CP 312-314.

[3] *Id.*

[4] 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).

[5] *Id.* The hard copy of Clark's school discipline file was purposefully destroyed by the District. The hard copy of the file was destroyed after counsel for Appellant had submitted a Public Records Act request for Clark's file. The file was destroyed in violation of the District's own policy. See CP 457-486. At the summary judgment stage,

for the aforementioned behaviors more than 78 different times.[6] He was suspended from school approximately 19 different times.[7] The following is just a brief summary of Clark's disturbing history in the Bethel School District:[8]

1st Grade (1995-96): Clark needs to "work on" his self control.

2nd and 3rd Grade (1996-98): In 2nd grade, Clark physically assaults a teacher, and is suspended.

4th Grade (1998-99): Clark has "real problems getting along with his peers"; he physically assaults another student, and is suspended

5th Grade (1999-00): Clark has difficulty controlling his behaviors. Clark assaults a third grader, chipping his tooth, and is suspended.

6th Grade (2000-01): Clark "acts on impulse" and his behavior is an ongoing area of concern.

7th Grade (2001-02): Clark's behavior markedly deteriorating from start of year to end. He calls a student a "black monkey" and is disciplined for using a racial slur; he assaults a student, and is suspended; he brought a pornographic video to school; he engages in "graphic

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reasonable inferences from BSD's destruction of key evidence, includes the inference that even more egregious conduct would have been detailed in Clark's actual file.

[6] *CP 119-268*

[7] *Id.*

[8] CP 119-137 (K-6th grades); CP 138-201 (7th-9th grades); CP 202-268 (10th-12th grades).

depictions" in class and "sexual innuendos"; he assaulted several students; he called a female student an "inappropriate" name; he made gestures with his crotch and middle finger and tongue in class; he engaged in repeated sexualized talk in the classroom; he was suspended for assaulting a student.

8th Grade (2002-03): In this school year, Clark: Clark brings sexually suggestive photos and "derogatory" pictures to class that offended a female substitute teacher; Clark picked on a younger student; he defaced a library book by drawing a picture of a breast and a penis in library book; he wrote on a female student's jacket, "I'm a faget [sic]. Kick me. I'm a loser. I'm a fucking retard" and was suspended; Clark was disruptive in class; he grabbed a female student's crotch on the bus and was suspended; on May 13, 2005, Clark engaged in "sexual harassment" and "admitted to touching and comments that is considered inappropriate," and suspended (his file includes "see statements" but no statements were provided in Discovery);[9] Clark expressed disturbing thoughts about death and killing; he was also suspended from Archery class.

9th Grade (2003-04): In this school year, Clark: was suspended from school for a fight off campus;[10] Clark was suspended for physically

[9] See Footnote 5, supra, regarding BSD's destruction of Clark's school file.
[10] 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

assaulting a female student in PE class; Clark punched a male student in the groin, and was suspended; Clark had inappropriate pictures on his binder; he went up to a female student and made a "humping motion" on her backside; Clark was disruptive on the bus.

Significantly, on June 4, 2004, while Clark was in the Ninth Grade, Clark sexually assaulted a younger female student.[11] He forcibly grabbed her and kissed her mouth, breast, and neck. He grabbed her buttocks and pushed his penis into her groin area. For this, Clark was convicted of the crime of Attempted Indecent Liberties and was required to register as a sex offender.

According to BHS Clark's conduct involved: "Nick has grabbed a female student and gave an unwanted kisses. The kisses were located on

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the school day. Suspension effective 10/28/2003- 10/30/2003." BSD's argument at summary judgment included that it had no duty to the Appellant once she left the BSD campus, at the request of the sex offender, and was 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.

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

the mouth, breast, and neck area. He also had grabbed her buttocks and pushed her pelvis into his groin."[12]

The Pierce County Sheriff's Office (PCSO) investigated this matter; the victim was two years younger than Clark.[13] After the PCSO investigated the matter, Clark was charged with the criminal sex offense of Indecent Liberties.[14] He later pled guilty to an amended charge of Attempted Indecent Liberties, for which he was required to register as a sex offender, placed on probation for a year, and during the probationary period was prohibited from being around children two years younger than him, or more, without supervision.[15]

10th Grade (2004-05): During this school year, BHS receives information on November 2004, that Clark is a registered sex offender;[16] Clark physically assaults a student, and is suspended; Clark was disruptive in class and rude to his teacher; Clark left class without permission; Clark was truant and disruptive; Clark was disruptive in class and drew "inappropriate" pictures in class; and disruptive in class.

In January 2005, while he is still on probation for his underlying sexual offense, Clark sexually assaulted a female student on a

[12] CP 190.
[13] CP 269-283; the victim was 13 years old.
[14] Id.
[15] Id.
[16] CP 206-207.

District bus.[17] This matter was "investigated" by BHS Assistant Principal Mishra.[18] There are only minimal notes from Mishra in Clark's discipline file, and those notes read:

-puts hands on front of bra

-puts hands down front of pants

-takes out penis, asked her to touch it.[19]

Clark was subject to an emergency expulsion; however it is not clear that this matter was ever reported to law enforcement.[20] Mishra testified that Clark was subjected to an emergency expulsion because "his presence would be a danger to himself or other people."[21]

11th Grade (2005-06): During this school year, Clark: is disruptive in class on multiple occasions; he physically and verbally harassed a younger student on the District Bus; he violated bus conduct rules; Clark was not in class; and he physically assaulted a student.

12th Grade (2006-2007): During this school year, Clark has three separate bus misconduct or disciplinary forms in his file that are

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[17] CP 211-216.

[18] 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.

[19] 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.

[20] CP 202-268; CP 388 (lines 14-25) CP 389 (lines 1-17).

[21] CP 376-387.

illegible.[22] Clark is found inside the girls' bathroom at school and is suspended; during class he yells out "Fuck" and "My dick hurts"; Clark's in class behavior results in detention; Clark's conduct in class results in Saturday school; he is observed engaging in "hanky panky" in the hallway with a female student; Clark leaves class and never returns; Clark is truant; Clark "burns rubber" in the parking lot and is suspended; Clark is disruptive in class; Clark assaults a student and is suspended; Clark again assaults a student during PE class, and is suspended.[23]

2. Bethel School District fails to monitor or supervise or protect young girls from registered sex offender Clark:

On December 7, 2004, Bethel High School Principal Wanda Riley-Hordyk received notification that Clark, a 10th grader, was a registered sex offender.[24] Upon receipt of the notification that Clark was a registered sex offender BHS Principal Riley did not inform Clark's teachers of his sex offender status.[25] Principal Riley-Hordyk violated the District Policy on sex offender notification when she failed to inform Clark's individual

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[22] CP 236, 237, 241.The original of these forms was destroyed by the District. See CP 457-486..

[23] N.L. was raped by Clark during Clark's 12th grade year. Clark's actions, including grooming of N.L., will be discussed in a later section.

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

[25] CP 332-333, Dep. Riley-Hordyk:
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.

teachers of his sex offender status.[26] According to District Assistant Superintendent Brophy there "really wasn't a policy relative to monitoring" sex offender students enrolled in the district.[27] Dr. Brophy further testified that the District did not have a policy or practice for monitoring the sex offender student or developing a safety plan for the student.[28]

Riley-Hordyk 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.[29] However, Riley's testimony on this point is subject to doubt, as Assistant Superintendent Brophy, District Athletic Director (and District Director of Campus Safety) Dan Heltsley, Clark's BHS counselor, and Riley's assistant principals refute Riley's testimony.[30] Dr. Brophy,

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[26] 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.

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

[28] *Id. See Appellant's expert report detailing model policies adopted by Washington State schools – except BSD – for the monitoring, supervision, and faculty notification of registered sex offender students. CP 297-305.*

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

[30] 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

Mr. Heltsley, the counselor and the assistant principals at BHS are not familiar with Riley's "unwritten" process for monitoring sex offenders like Clark, nor does the aforementioned District faculty recall ever being involved in such a process.[31] 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.[32]

It is undisputed that Principal Riley failed to inform the next door Bethel Junior High administrators that Clark was a registered sex offender.[33] 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.[34] Assistant Superintendent Brophy has testified that it would be best practice to notify coaches in such a circumstance that was

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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.

[31] *Id.*

[32] 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.

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

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

present during the Spring 2007 track season.[35] Principal Riley did not inform Clark's Spring 2007 head track coach of the fact that he was a registered sex offender, nor was the coach given a safety plan for Clark, or asked to look out for high-risk behaviors of a sexual nature exhibited by Clark, and to protect young female students from him.[36]

3. Registered sex offender student Clark's grooming and rape of N.L.:

In April 2007, the Appellant, fourteen-year-old N.L., was in the eighth grade at Bethel Junior High.[37] N.L. was a good student and good athlete, and had decided to sign up for track during her eighth grade year.[38] Track season starts in approximately late February and ends prior to Memorial Day in late May.[39] The Bethel junior high track team and the Bethel Senior High track team used the same track and field for practice.[40] N.L. was on the junior high track team, and the registered sex offender student, Clark, was on the senior high track team.[41]

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[35] Id.
[36] Dep. BHS Head Track Coach Patrick Mullen (2006-2007), CP 402- 405; 406-408; 414-415.
[37] Dep. N.L. CP 451-452.
[38] Id. CP 441-443.
[39] Dep. Mullen, BHS Head track coach, CP 413..
[40] Dep. Heltsley, Athletic Director, CP 424-426.
[41] Dep. Mullen, BHS Head track coach, CP 409-413; Dep. N.L., CP 446-447.

The sex offender student, Nicholas Clark, was introduced to N.L. on the track field during a joint junior high-high school track practice.[42] 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.[43] The texts from Clark to N.L. were "dirty" texts, and contained sexual connotations.[44] Young N.L. naively thought that Clark's texts were a request to go to lunch with her.[45] Clark lied to N.L. about his true age (18), and told her he was only 16 years old.[46] 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 did not monitor the conduct of the sex offender or keep him away from younger female students, like N.L.[47]

Clark urged N.L. to skip track practice in order to go to Burger King for lunch.[48] Once in the car, Clark told N.L. he had forgotten something and needed to go back to his home.[49] N.L. went inside Clark's home, and once inside his bedroom, Clark forcibly raped N.L.[50] N.L.

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[42] Dep. N.L., CP 446-448

[43] Dep. N.L.,CP 448-450.

[44] Id.

[45] Id.

[46] Dep. N.L., CP 451-452

[47] 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.

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

[49] Id.

[50] Id.

expressed her lack of consent through words ('no") and conduct (resistance, no matter how slight).[51] It is undisputed that N.L. was raped by Clark.[52] It is undisputed that N.L. was a virgin at the time of the rape.[53] After the rape, Clark told N.L., to say that that she consented or that he would get in "trouble."[54] The matter was reported to the police, and Clark was prosecuted and convicted.[55] N.L. and her family did not know that Clark was a registered sex offender until after the police investigated the matter.[56]

4. Appellant's expert Judith Billings:

The trial court was presented with the expert report of Judith Billings. [57] As this Court likely knows, 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 State schools. Ms. Billings opines that student safety is of paramount concern and must be a priority for school districts. Even

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[51] Id.

[52] 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), 9A.44.050.

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

[54] Dep. N.L., CP 454-45.

[55] 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."

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

[57] CP 297-305.

BSD's own mission statement acknowledges this standard of providing "a safe educational environment."[58]

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 opines 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 from him, notified coaches, faculty, teachers and the neighboring junior high of his status, to name but a few protective measures. Billings concludes, 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.[59]

Ms. Billings opines as follows: "But for the indifference and inaction of Bethel School District, N.L. would more probably than not,

[58] Id. at CP 299.
[59] Id, at CP 301.

NOT have been taken by Nicholas Clark to his home, raped and suffered the documented, extensive consequences of that event."[60]

D. PROCEDURAL BACKGROUND

On August 30, 2012, Appellant filed her lawsuit in Pierce County Superior Court against Defendant Bethel School District.[61] On January 10, 2014, the trial court issued its order granting Defendant's motion for summary judgment.[62] On January 27, 2014, Appellant filed her notice of intent to appeal the trial court's ruling with this Court.[63]

E. ARGUMENT

1. The Trial Court Erred by Granting Summary Judgment Where Numerous Disputes of Material Fact Were Presented

As set forth above, the facts as presented by the Appellant, and all reasonable inferences therefrom, control for the purposes of a motion for summary judgment. Here, the trial court did not follow the required standard for summary judgment because it considered the facts in the light most favorable to the Defendant. The trial court clearly ignored the fact that BSD had an obligation to monitor sex offender Clark to ensure the safety of other students, especially younger female students. In this case, BSD not only failed to follow its own policy (#3143) that requires that

[60] Id., at CP 303.
[61] CP 1-9.
[62] CP 500-501.
[63] CP 502-505.

teachers must be informed of a sex offender student, but BSD fell far below the recognized standard of care for School Districts by failing to adopt the model policy that provides for the development of a safety plan for the registered sex offender student.[64] Moreover, BSD further breached its duty of care by failing to notify the nearby junior high, or put into place a plan to closely monitor and supervise the sex offender. The trial court further ignored yet another reasonable inference from the evidence: that Clark should never have been enrolled in at Bethel High School when the school was so close to his target victim pool: junior high girls. But for BSD's failures, the Appellant would never have met Clark at track practice; instead she would have been protected from Clark and never raped. Given the abysmal, sexually aggressive and dangerous behaviors of Clark, it was reasonably foreseeable that Clark would sexually assault yet another younger female student. Appellant provided the trial court with evidence sufficient to raise a material issue of fact as required under CR 56(c).

As this Court knows well, the burden of proving that a case should be summarily dismissed rests with the moving party, BSD in this case. The trial court "must consider the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party."

[64] Report of Judith Billings, CP 298-305.

Sheriff's Ass'n. v. Chelan County, 109 Wn.2d 282, 294-95, 745 P.2d 1 (1987); see also CR 56(c). Summary judgment "must be denied if a right of recovery is indicated under any provable set of facts." *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 393, 558 P.2d 881 (1976). "A trial is not useless but absolutely necessary where there is a genuine issue as to any material fact." *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). Summary judgment must be denied "if the record shows any reasonable hypothesis which may entitle the non-moving party to relief." *Mostrom v. Pettibon*, 25 Wn.App. 158, 162, 607 P.2d 864 (1980). Questions of proximate cause are also generally questions for the jury.[65] *See e.g., Schooley v. Pinch's Deli Market, Inc.*, 80 Wn.App. 862, 874, 912 P.2d 1044 (1996), aff'd, 134 Wn.2d 468, 951 P.2d 749 (1998). With regard to the appropriate appellate standard of review, this Court reviews determinations on summary judgment de novo. *Enterprise Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961 (1999).

Here, the trial court ruled as follows: "I do not believe that the schools are the guarantors of safety; and certainly a teacher, an administrator, a coach is not in the role of a CCO, community corrections officer. To me, the issue is not so much the duty as the causation element,

[65] See also, Shah v. Allstate, 130 Wn.App. 74 (2005) (trial court erred when it dismissed negligence claim against insurance agent, when proximate cause question was for the jury).

and on that basis I'm going to dismiss the case and grant summary judgment for the defense."[66] VRP 18.

The trial court granted summary judgment solely on the basis of "causation" therefore finding that BSD in fact owed a duty of care to N.L. to protect her from Clark. As is often the case, evidence of breach of duty informs causation. Evidence of breach of duty is not necessarily evidence of proximate cause; such evidence may be admissible on the issue of proximate cause as well as breach of duty. See *Taggart v. State*, 118 Wn.2d 195, 226 (1992) (the question of legal causation is so intertwined with the question of duty that the former may be answered by addressing the latter). Accordingly, Appellant will address BSD's breach of duty insofar as it relates to the sole reason for the trial court's erroneous grant of summary judgment: causation.

a. Duty:

Of course, the trial court's ruling, as set forth above, held that schools are not responsible for the safety of its students. This is incorrect. BSD's own mission statement concedes that it is responsible for the safety of its students. Appellant's expert opined on standard of care for a reasonably prudent district is to ensure student safety – especially regarding registered sex offender students. And common sense dictates

[66] The VRP (verbatim report of proceedings) designation will be used, and the pages are: 1-19.

that schools owe a duty to ensure the safety of its students from the dangerous propensities of a fellow student – in this case a registered sex offender student with a long and dangerous history of sexually assaulting younger females.

In determining whether the district owed a legal duty to N.L., courts look at the relationship between the parties, and the general nature of the risk. *McLeod v. Grant County School District No. 128*, 32 Wn.2d 316, 319 (1953). It is well established that when "a pupil attends a 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. v. Bellingham School District*, 74 Wn.App. 49, 56-57 (1994), citing *McLeod*, supra at 319-20. The supervisory duty of a school extends to off campus and extracurricular activities under the supervision of district employees, such as coaches, band directors and the like. *Travis v. Bohannon*, 128 Wn.App. 231, 239 (2005), citing *Carraba v. Anacortes School Dist. No. 103,* 72 Wn.2d 939 956 (1967). The duty imposed is one of reasonable care, "as it supervises the pupils within its custody, the district is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances." *J.N.,* supra at 57; citing *Briscoe v. School District 123,* 32 Wn.2d 353, 362 (1949), and McLeod, supra, at 319-20. The duty of the district is to "anticipate dangers

which may reasonably be anticipated, and then take precautions to protect the pupils in its custody from such dangers." *McLeod,* at 320.

Here, the Appellant presented evidence that BSD neither monitored, nor supervised, nor alerted faculty to the fact that Clark was a registered sex offender with a history of sexually offending against young girls. Appellant presented evidence, and reasonable inferences therefrom, that BSD failed to supervise, monitor, restrict Clark from activates where he would interact with the junior high, alert faculty, alert the adjacent junior high, or place Clark in an alternative school where he could be supervised even more closely. The district completely failed to "anticipate dangers which may reasonably be anticipated, and then take precautions" to protect the Appellant, who was in its custody, from the dangers presented by Clark. *McLeod*, supra at 320. A reasonable school would have done all of the above.

When the facts are viewed, as they were not by the trial court, in the light most favorable to the Appellant, it is clear that BSD did not exercise reasonable care in this case. The trial court erred in granting summary judgment to Defendant. Appellant presented evidence that BSD owed a duty of care to the Appellant, and that BSD breached the duty of care it owed to the Appellant when it failed to act as a reasonably prudent person would to protect her from a registered sex offender student who

had a well documented and dangerous history of offending against younger female students.

The District owed the then 14-year-old Appellant a duty of reasonable care, which includes protecting her and others from the predatory registered sex offender, Clark. Because the District failed to take any efforts whatsoever to monitor, curtail, supervise, restrict Clark, he was able to have unfettered access to the Appellant on campus during a joint Junior and Senior high track practice. It was at this school sponsored event, that Clark was free to intermingle with young girls, including the Appellant. It was at this school sponsored event that Clark approached the Appellant, and began to groom her for sexual contact. Here, the District's breach of the duty owed to Appellant is evidence supporting proximate cause. Taggart, supra. But for the District's failures to take the actions any reasonable person would to protect young girls from a registered sex offender student, Clark would never have had the opportunity to interact with Appellant and groom her for sexual assault, and lead her off camps to rape her.

b. Proximate cause:

The trial court erred when it granted summary judgment to BSD on the grounds that "causation" could not be established as a matter of law.

Appellant presented ample evidence of causation, and the trial court's ruling must be reversed for a trial on the merits.

"Breach and proximate cause are generally fact questions for the trier of fact." *Hertog v. City of Seattle*, 138 Wn.2d 265, 275 (1999). Questions of proximate cause are generally questions for the jury. *Schooley v. Pinch's Deli,* 80 Wn.App. 862 (1996). Evidence of breach of duty is not necessarily evidence of proximate cause; such evidence may be admissible on the issue of proximate cause as well as breach of duty. See *Taggart v. State*, 118 Wn.2d 195, 226 (1992) (the question of legal causation is so intertwined with the question of duty that the former may be answered by addressing the latter).

Proximate cause has two elements: cause in fact and legal causation." *Hartley v. State*, 103 Wn.2d 768, 777 (1985). Cause in fact (also called "but for" causation) refers to the "physical connection between an act and an injury." *Hartley*, surpa at 778. The Appellant is required to establish that "the harm suffered would not have occurred but for an act or omission of the defendant." *Martini v. Post*, 178 Wn.App. 153, 479 (2013), citing *Joyce v. Department of Corrections*, 155 Wn.2d 306, 322 (2005). Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment. *Martini*, supra at 479, citing *Owen v. Burlington N. Santa Fe. RR Co.,* 153 Wn.2d 780, 788

(2005), (quoting *Ruff v. King County*, 125 Wn.2d 697, 703 (1995) ("issues of negligence and proximate cause are generally not susceptible to summary judgment.") *Hertog*, 138 Wn.2d at 275. "Establishing cause in fact involves a determination of what actually occurred and is generally left to the jury." *Schooley v. Pinch's Deli*, 134 Wn.2d 468, 478 (1996).

Here, the Appellant presented evidence that "but for" the failures of BSD -- to adopt model policies on sex offender students; to develop a safety plan for Clark; to supervise and monitor the safety plan for the safety of Clark as well as young female students; to alert faculty, coaches, notify and alert the junior high of Clark's status and his dangerous history at school; to prohibit Clark from interacting with junior high students (his victim pool); to prohibit Clark from participating in a joint junior-senior high sport (track) due to the presence of young girls -- Clark would not have made contact with the Appellant at the track, and groomed the naive 14 year old for sexual assault, and led her off campus to be raped. These were the facts presented to the trial court. It is clear that the trial court failed to consider all of the reasonable inferences from evidence produced by the Appellant. When viewed in such a light, it is clear that Appellant more than met her burden to show that "but for" BSDs failures, the Appellant would not have been raped.

The trial court also erred in finding that the element of legal causation was not present based upon the facts presented in the light most favorable to the Appellant.

As this Court knows, legal causation requires that the Appellant must show that the relationship between her injury and the Defendant's conduct is "proximate" enough to justify imposition of responsibility on the Defendant. The existence of legal causation between two events is determined "on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." *Shah v. Allstate*, 130 Wn.App. 74 (2005).

Washington courts have held that there can be more than one proximate cause of an injury, and that the Appellant should not be forced to prove that the defendant's negligence was the sole cause of the injury. *Fosbre v. State*, 70 Wn.2d 578, 584 (1967). Courts have held that the standard for whether an intervening act will be considered a superceding cause, sufficient to relieve a defendant of liability, depends on whether the intervening act can reasonably be foreseen by the defendant. *Anderson v. Dries and Krump Manuf.*, 48 Wn.App. 432, 443 (1987). The foreseeability of an intervening act is ordinarily a determination reserved for the finder of fact. *Kennett v. Yates*, 41 Wn.2d 558, 565 (1952). The question becomes whether the intervening act will supercede defendant's

negligence only when it is so highly extraordinary or unexpected that it can be said to fall outside the realm of reasonable foreseeability as a matter of law. *Johnson v. State*, 77 Wn.App. 934 (1995).

> A criminal act by a third party is not an intervening cause if it was reasonably foreseeable. A criminal act may be foreseeable if the actual harm fell within the general field of danger which should have been anticipated.

Johnson v. State, 77 Wn.App. 934, 942 (1995).

Whether the general field of danger should have been anticipated by the defendant is normally a question for the jury to decide, and it can be decided as a matter of law only where reasonable minds cannot differ. *Christen*, 113 Wn.2d at 492; *Rikstad*, supra at 270. The fact that the harm was caused by an intervening intentional criminal act does not "of itself exonerate a defendant from negligence." *McLeod*, 42 Wn.2d at 320. Instead, this is a "fact to be considered in determining whether such act was reasonably foreseeable." Id. at 321. "Intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon." McLeod, at 321.

> The sequence of events, of course, need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly expectable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability.....

McLeod, at 322. The question of whether the danger should have been reasonably anticipated by the District is a question for the jury to decide. *J.N.*, supra at 59.

Our courts have given guidance on what constitutes a "general field of danger." Our state Supreme Court held that a "general field of danger" has been found in "the darkened room under the bleachers" that "might be utilized during periods of unsupervised play for acts of indecency between school boys and girls." *McLeod*, at 322. In McLeod, a female student was raped by two male students in a darkened room in the gym. There was no evidence before the court of the male student's "vicious propensities." The court held that the general field of danger flowed from the "existence of an accessible darkened room coupled with a lack of supervision." The court further held that the existence of the darkened room combined with a lack of supervision put the school on notice of a risk of indecent acts, and that rape fell within that risk. Safeguarding students from the general danger -- the darkened room and lack of supervision -- would have protected the rape victim from the particular harm. *Id.* at 322.

In *J.N.*, the court found the District had "overwhelming notice" of the offending student's propensity to assault other students over the course of a single year, including: assaultive and disruptive behavior, lack of self

control, hair pulling, throwing pencils, poking a student in the back with his foot, shoving a student off a chair, physically aggressive with other students in gym class, kicking, hitting, body butting and pushing. *J.N.*, supra at 51-54 (emphasis added). During this same year, the offending student sexually assaulted a young male student in the school restroom on multiple occasions. *Id.* at 51. On these facts, the Court of Appeals held that 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 rest rooms." Id. at 59-60. On appeal the district argued that it was not foreseeable that the offending student would commit a sexual offense. The court held that it was "irrelevant" at the summary judgment stage whether the particular injury that in fact occurred was an assault or a sexual assault. *Id.* "All that was required is evidence that the District knew, or in the exercise of reasonable care should have known of the risk that resulted in the harm's occurrence." *J.N.*, citing *Peck*, at 293.

Here, given the dangerous sexual offense history of Clark while attending school in the district, it was reasonably foreseeable that Clark would commit yet another sexual offense against yet another younger female student. It was neither highly extraordinary nor unexpected for Clark to act in such a manner: sexually offending against female students.

Clark's discipline file is replete with such dangerous sexual offenses and actions, and he committed the underlying crime which formed the basis for his sex offender status against a younger female student. It was reasonably foreseeable that Clark would target a younger female student, and groom her for sexual assault, and lead her off campus and rape her. The District should never have let Clark have unfettered access to junior high females. Appellant's expert testimony supports such a conclusion. Therefore it cannot be held as a matter of law that his actions fell outside the realm of reasonable foreseeability. *Johnson*, supra.

When the facts are viewed in the light most favorable the Appellant, and reasonable inferences are drawn in her favor, it is clear that Appellant has presented evidence such that the trial court erred in granting summary judgment on causation. Appellant has presented evidence that "but for" BSDs breaches and failures, Clark would never have had the opportunity to target the Appellant, groom her for sexual contact, and lead her off campus to rape her. Appellant has also presented ample evidence that the District owed a duty of care to protect Appellant from the dangerous propensities of Clark, and that the zone of danger represented by Clark included targeting a younger student, and sexually offending against her. The "harm suffered" by Appellant "falls within the general danger area" represented by Clark's disturbing history. *McLeod*, at 322.

The question of whether the danger should have been reasonably anticipated by the District is a question for the jury to decide. *J.N.*, supra at 59. This Court should reverse the trial court's ruling and let the matter proceed to a jury.

F. CONCLUSION

The trial court erred in granting summary judgment. The Appellant has presented evidence that when viewed in the light most favorable to her, defeats a motion for summary judgment. Based upon the record of evidence, and the arguments and authority cited herein, Appellant respectfully asks that this court reverse the grant of summary judgment and remand this matter for trial on the merits.

DATED this 28th day of April, 2014.

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NO. 45832-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

N.L.,

Appellant,

v.

BETHEL SCHOOL DISTRICT,

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- Appellant's Opening Brief

in the manner indicated to the parties listed below:

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DATED this 28th day of April, 2014.

s/Marla H. Folsom
Marla H. Folsom, Paralegal to Julie A. Kays