NO. 45832-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

N.L.,

Appellant,

v.

BETHEL SCHOOL DISTRICT,

Respondent.

APPELLANT'S REPLY BRIEF

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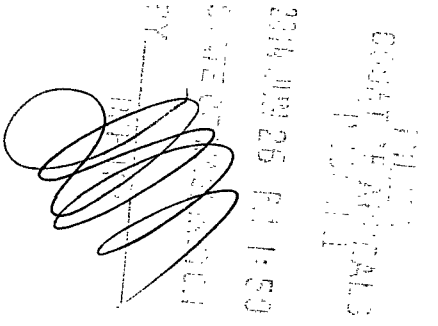

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A. INTRODUCTION

Appellant N.L. respectfully submits this Reply Brief to respond to issues raised in Bethel School District's Response Brief. Appellant continues to press all factual statements and legal arguments raised in her opening brief which are fully incorporated herein.

This case is simple. Bethel School District (BSD) failed to take any efforts whatsoever to monitor, curtail, supervise, or restrict a registered sex-offender student's activities, and as a result, a fourteen-year-old female student (the Appellant) was seduced on campus and lured off campus to be forcibly raped.

The trial court erred in granting summary judgment as the Appellant provided the court with evidence sufficient to raise a material issue of fact as required under 56(c). 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.

B. ARGUMENT

I. BETHEL SCHOOL DISTRICT OWED AN ACTIONABLE DUTY TO PROTECT N.L. FROM REGISTERED SEX-OFFENDER, NICHOLAS CLARK

1. Bethel School District owed a duty to N.L.

Even though the trial court's ruling clearly stipulates that Bethel School District owed a duty of care to N.L. to protect her from Clark under the facts presented, the Respondent still attempts to argue that no actionable duty existed. Relevant case law, however, undisputedly indicates that schools owe a duty of protection to students who are out of their parent's control and who are instead under the protection of the school district and the faculty members of the educational institution in which they attend. *McLeod v. Grant Cy. Sch. Dist. No. 128*, 42 Wn.2d 316, 319, 320, 255 P.2d 360 (1953).

When a student attends a public 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. *Id.*; *Briscoe v. School Dist. No. 123*, 32 Wn.2d 353, 362, 201 P.2d 697 (1949). As a result, a duty is imposed by law on the school district to take certain precautions to protect the students in its custody from dangers reasonably to be anticipated. *McLeod* at 320; *Briscoe* at 362; *Scott v. Blanchet High School*, 50 Wn. App. 37, 44, 747 P.2d 1124 (1987) *review denied*, 110 Wn.2d 1016 (1998). This duty is one of reasonable care, which is to say that the district, as it supervises the students within its custody, is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances. *Briscoe* at 362. The basic idea is that a

school district has the power to control the conduct of its students while they are in school or engaged in school activities, and with that power goes the responsibility of reasonable supervision. *Peck v. Siau*, 65 Wn. App. 285, 292, 827 P.2d 1108, *review denied*, 120 Wn.2d 1005 (1992).

While Bethel School District does not deny the existence of a protective duty when the student is on campus or participating in a school sponsored event, the Respondent does erroneously argue that the special relationship between school and student garnering protection dissipates in circumstances or situations where the harm occurs off campus, outside of a school regulated activity. The Respondent cites to numerous authorities as support for this unsubstantiated claim, but none of the binding authorities referenced specifically limit the reach of the duty to harm occurring on school grounds. *See, e.g, McLeod v. Grant Cy. Sch. Dist. No. 128*, 42 Wn.2d 316; *Peck* at 293; *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 532, 307 P.3d 730 (2013) *review denied*, 179 Wn.2d 1005, 315 P.3d 530 (2013). The location of where the harm took place is merely a non dispositive factor that the court uses to evaluate foreseeability. *See, e.g, Scott v. Blanchet High School*, 50 Wn. App. 37, 44, 474 P.2d 1124 (1987) *review denied*, 110 Wn.2d 1016 (1998) ("The liability of a school is not limited to situations involving school hours, property, or curricular activities").

Since no blanket statement has ever been made reverting protection back to the parents once a student leaves campus, the courts have instead relied on a variety of different factors in its analysis of where a duty lies. The courts in *Scott v. Blanchet High School* and *Coates v. Tacoma School District,* for example, chose to focus on factors such as the location of the breach and the time of day in which the harm occurred. *Scott,* 50 Wn. App. at 45 ("By placing the breach on school property during school hours, the Scotts clearly locate the tort within the scope of Blanchet [School District]'s authority"); *Coates*, 55 Wn.2d 392, 396, 347 P.2d 1093 (196) ("In the McLeod case they occurred during a noon-recess period; here, they occurred at 2:00 a. m. on a Sunday morning").

In the case at hand, both of those factors are favorable to the Appellant. Bethel School District breached its duty when: BSD failed to notify teachers and coaches of Clark's sex-offender status; BSD granted Clark unbridled access to N.L. on school grounds by failing to monitor and supervise Clark; and BSD failed to implement model policies designed to ensure the safety of students from registered sex-offenders; among other failures. CP 297-305. In addition to the breach occurring on the school's campus, the event causing the injuries was not so distant in time and place as to absolve the school from its duty. *Coates*, 55 Wn.2d at 399.

Here, Clark groomed N.L. for sexual contact during track practice. The following day shortly after 2:00 p.m. Clark lured N.L. (a junior high student) from a school regulated sport, took her off campus and forcibly raped her. After being raped, N.L. returned to school in time to catch the school bus home. The rape occurred during a time period that the District stood *in loco parentis* with N.L., and it failed to act in accordance with that standard, by failing to protect her from the predatory actions of Clark.

Bethel School District's own actions have already demonstrated the hollowness of their claim that duty should not extend off school property. In October 2003, the district suspended Clark for a fight occurring *off campus*. CP 179. If Bethel School District actually believed that the duty of protection transfers back to the parent any time a student leaves school, then why did it find it necessary to punish Clark for a fight occurring off school grounds?

In this case, when considering the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party, it is evident that Bethel School District owed a duty of protection to N.L. as she was a young student participating in an on campus extra-curricular activity. Since she was still under the control of the school when she was approached and seduced by the registered sex-offender, the school's duty to protect her is clear. The ultimate harm (the

forcible rape) did not occur on campus, but the breach of the duty that subsequently allowed the harm to occur shortly thereafter did originate on property that was under the custodial protection of the Respondent. Therefore, N.L. was still under the scope of Bethel School District's protective authority even after she was seduced off of the campus. The trial court's earlier ruling finding a duty supports this conclusion.

2. N.L. was a foreseeable victim.

According to former Superintendent of Public Instruction for the State of Washington and Appellant expert Judith Billings, "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." CP 301. In this regard, Bethel School District argues that no duty was owed because it was unforeseeable and could not have been anticipated that N.L. would be persuaded into missing an extracurricular activity, lured into Clark's vehicle, leave campus with him, and then be subject to an act of rape at Clark's house. But that is not the pertinent point of inquiry.

The "pertinent inquiry is not whether the actual harm was of the particular kind which was expectable. Rather, the question is whether the actual harm fell within the general field of danger which should have been

anticipated." *Rickstad v. Holmberg*, 76 Wn.2d 265, 269, 456 P.2d 355 (1969). In this case, it was certainly foreseeable that Clark, a registered sex-offender, would assault another young female if provided the opportunity. See CP 1-297. In this way, N.L., or any other child at Bethel High School or Bethel Junior High, was a potential victim of the precise type of harm that "should have been anticipated" by Bethel School District. *Id.* With regard to foreseeability, it is the "danger" that should be anticipated by the Respondent, not the "particular" sequence of events.

> The sequence of events need not be foreseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpectable, 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...

Id. at 269; *see also N.K. v. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints*, 175 Wn. App. 517, 307 P.3d 730 (2013). "A sexual assault is not legally unforeseeable 'as long as the possibility of sexual assaults...was within the general field of danger which should have been anticipated.'" *Id.* at 530.

Bethel School District erroneously argues that the anticipated "danger" in this case should be treated differently from that of *McLeod,* 42 Wn.2d 316, and *J.N. v. Bellingham School District*, 74 Wn. App. 49, 871 P.2d 1106 (1994), because of the lack of special relationship. As held

in the trial court's ruling, as well as is illustrated in the previous section, Bethel School District's duty to protect N.L. did not transfer back to her parents upon leaving campus. With this being the case, there is no argument for why the question of foreseeability in *McLeod* and *J.N.* should be treated any differently. In *McLeod*, the court concluded that it was reasonably foreseeable that an unsupervised dark room might be used for acts of indecency. *McLeod* at 324. The room had no history of being used for inappropriate acts; it was simply an unsupervised dark area. Still, however, the court believed "that these well-pleaded facts, together with the reasonable inferences therefrom, leave room for a reasonable difference of opinion as to whether the school district should reasonably have anticipated that the darkened room might be used for acts of indecency." *Id.* As a result, the question of foreseeability was left "for the jury to decide." *Id.* The question of foreseeability was similarly analyzed in *J.N. v. Bellingham School District.* In *J.N.,* a seven-year-old boy was repeatedly sexually assaulted by a nine-year-old boy in the restroom during recess. *J.N.* at 51. Relying on evidence that the school district had notice of the perpetrator's "assaultive propensity," the Court concluded that "harm to a pupil caused by another pupil" was "within the general ambit of hazards which should have been anticipated by the District"

flowing from the arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised rest rooms. *Id.* at 59-60.

If it is reasonably foreseeable that indecent acts could occur in a dark unsupervised room or that a child with a history of assault could harm another student, then it *must* be foreseeable that an unsupervised sex-offender with a history of sexually assaulting and offending against female students would try and seduce and sexually assault another female student if given the opportunity. (emphasis added). The "general field of danger" that should have been anticipated by the defendant is typically a question of fact, *Christen v. Lee*, 113 Wn.2d 479, 497, 780 P.2d 1307 (1989), and since duty has been established, it should be treated in the same manner as it was in both *McLeod* and *J.N.* and be presented to a jury.

Based on the preceding analysis, it becomes evident that Bethel School District owed an actionable duty to protect N.L from the registered sex-offender, Nicholas Clark. When the facts are viewed in the light most favorable to the Appellant, as required by law, it is clear that Bethel School District did not exercise reasonable care in this case. The trial court erred in granting summary judgment.

II. PROXIMATE CAUSE

The trial court erred when it granted summary judgment to Bethel School District on the grounds that "causation" could not be established as

a matter of law. The Appellant not only presented sufficient evidence to establish causation in the trial court, but also reiterated that strong argument in its opening brief which the Respondent fails to address. The trial court's ruling must be reversed for a trial on the merits.

In support of its assertion that the sequence of events leading up to N.L.'s rape were all independent acts that interrupted the causal chain, Bethel School District simply relies on its earlier argument that those events were not within the general field of danger that the District could or should have reasonably anticipated. Since this argument is refuted above, there is no need to reiterate.

The District argues that requiring schools to monitor and supervise registered sex offender students, like Clark, in order to preclude a sex offender student from grooming a victim on campus for sexual contact would result in the imposition of an extraordinary burden on school districts. This argument fails for many reasons. First, it defies the "in loco parentis" status that schools hold with their students. And begs the question, what reasonable person would permit a child to be in the company of an unsupervised and unmonitored registered sex offender? The answer is no reasonable person would consent to put a child in such danger. Second, the Appellant presented testimony from the former Superintendent of Public Instruction for the State of Washington stating

that model policies were available for the district to implement to prevent the very circumstances that occurred in this case. CP 297-305. The District's argument that a reversal in this case would over burden districts flies in the face of the existence of said model policies, and also flies in the face of the obligation of the district to adhere to the "in loco parentis" standard.

The hollow policy arguments proffered by the District seek to obfuscate the issue before this Court: But for the District's failure to supervise and monitor Clark, a registered sex offender with a disturbing history of committing sexual offenses against female students, N.L. would not have been seduced and groomed for sexual contact by Clark, and lured off campus by him only to be raped. What Bethel School District also fails to address in their response, however, is that in general, "an affidavit containing admissible expert opinion on an ultimate issue of fact is sufficient to create a genuine issue as to that fact, precluding summary judgment." *J.N.,* 74 Wn. App. at 60. The Appellant has presented expert testimony stating that "but for" the indifference and inaction of Bethel School District, the rape, more probably than not, would not have occurred. Given this testimony, case law specifically indicates that a genuine issue of fact exists. Therefore, the trial court's ruling of summary

judgment for the Defendant should be reversed and this matter remanded for trial on the merits.

C. CONCLUSION

Based upon the record of evidence, authority cited, and reasons set forth above, the trial court's summary dismissal of N.L.'s claims must be reversed and remanded for trial.

DATED this 26th day of June, 2014.

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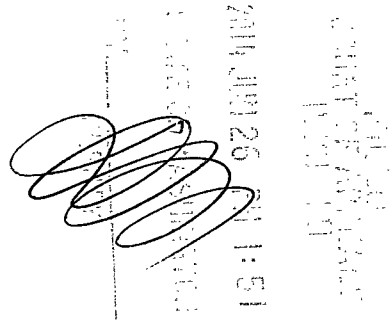
CERTIFICATE OF SERVICE



ORIGINAL

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 Reply Brief

in the manner indicated to the parties listed below:

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