SUPREME COURT NO. 91775-2
COURT OF APPEALS CASE NO. 45832-2-ii

IN THE SUPREME COURT OF

THE STATE OF WASHINGTON

N.L.,

Respondent,

v.

BETHEL SCHOOL DISTRICT,

Petitioner.

N.L.'S ANSWER TO AMICUS BRIEF

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TABLE OF AUTHORITIES

Washington Cases

I. IDENTITY OF THE PARTY FILING ANSWER

This Answer to the Amicus brief is filed by the Plaintiff, N.L.

II. RELIEF REQUESTED

Bethel's Petition for Review should be denied by the Court. Amici's brief in support of Bethel's Petition for Review is predicated upon an erroneous set of facts; relies upon inapposite case authority; and its policy arguments are speculative. *N.L. v. Bethel School District* was decided by the Court of Appeals on well established principals of tort liability, and upon years of precedent regarding the duty of a school to its students.[1] This Court should deny the Petition for Review.

III. STATEMENT OF THE CASE

N.L. incorporates by reference the Statement of the Case found in her Answer to the Petition for Review.

In brief, Bethel School District did nothing to notify, monitor, supervise or protect students from a dangerous registered sex offender student -- Nicholas Clark -- enrolled at Bethel High School.[2] Clark had a voluminous history of committing sexual offenses and engaging in sexualized and assaultive behaviors both on and off campus.[3] The

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[1] *N.L. v. Bethel School District*, 348 P.3d 1237 (2015).

[2] *Id.*, at 1240-42.

[3] *Id.* at 1240, and see also, Statement of Facts from N.L.'s response to the Petition for Review.

District failed to supervise Clark, failed to notify faculty and coaches, and failed to protect other students from Clark's dangerous propensities.[4] These failures resulted in the predictable sexual assault by Clark of a female student, N.L. Given Clark's disturbing history it was reasonably foreseeable that he would sexually assault other female students.[5]

Because the District failed to take any action to monitor or supervise or notify faculty of Clark's dangerous propensities, Clark was able to lure N.L. off campus under a ruse.[6] N.L. and Clark both should have been at track practice.[7] But instead Clark lured N.L. off campus, raped her, and then returned her to campus in time to take the school bus home.[8] Had the District done its job of supervising Clark, notifying faculty of Clark's dangerous propensities, and protecting students from Clark, N.L. would not have been raped by Clark.

IV. ARGUMENT

A. Amici do not understand the record on appeal.

The Amici adopt an untenable position: School Districts do not have a duty protect their students from registered sex offender students who have a lengthy history of committing sexual offenses on and off

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[4] *N.L.*, supra at 1243.

[5] *Id.*

[6] *Id.* at 1240-1243.

[7] *Id.*

[8] *Id.* at 1240.

campus. The Amici argument is also based upon fundamental misunderstanding of key facts in the record.

The Amici do not have a familiarity with the issues before the Court in the Petition for Review. For instance, the Amici motion erroneously states that the rape of N.L. occurred "after-hours."[9] But this is not so. The rape occurred when N.L. and Clark should have been at a school sanctioned after school sport: track practice.[10] After raping N.L., Clark dropped N.L. off at school in time for her to catch the school bus home.[11] The entire premise of the Amici brief is predicated on an "after hours" argument which reflects an erroneous understanding of the facts in this case.[12] Amici's argument must be rejected.

B. Amici's arguments regarding the impact of *N.L.* are speculative; *N.L.* was decided upon well settled law.

Amici argue that only their input can inform the Court adequately upon the issue of sex offender students because they have members who "are primarily responsible for development of policies and practices regarding the supervision of students in public schools."[13] Again, the Amici prove they are not familiar with the issues before this Court. The

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[9] Amici Motion at p. 3, 4.
[10] Dep. N.L., CP 452-456.; *N.L.*, supra at 1240
[11] *Id.*
[12] *See* Amici Brief at p. 1, 2, 3, 5, 6, 7, and 8 for repeated reference to "after school hours" and "after-hours."
[13] Brief of Amici at p. 3.

record, that the Amici clearly have not reviewed, contains undisputed testimony from the former Superintendent of Public Instruction, Judith Billings.[14] Ms. Billings opined that the Office of the Superintendent of Public Instruction had long ago made available model policies for Districts to adopt that govern the supervision of registered sex offender students.[15] Thus, Amici cannot state that supervision of registered sex offender students is a novel issue that would result in a parade of terribles. If that were the case, the outcry would have been heard – and addressed -- at the time our State's governing body for public instruction developed model policies regarding sex offenders in the schools.

Next the Amici argue to the Court that the *N.L.* decision would result in an "expansion" of tort liability and place an "impossible burden" on Districts such that a District's ability to obtain liability insurance would be jeopardized.[16] This is not so. The *N.L.* decision did not break new ground. *N.L.* was predicated on well established precedent with respect to schools and their duty to protect students from reasonably foreseeably harms.[17] Thus, any expansion of tort liability and impossible burdens

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[14] CP 297-305.301-302. See also *N.L.* supra at 1244-45.

[15] *Id.*

[16] Amici motion at p. 2, Amici Brief at p. 5. The Amici's *ipse dixit* argument regarding liability insurance should be rejected by this Court as the Amici have not produced a shred of evidence to support that argument.

[17] *See* generally, *N.L.*, supra, citing, *McLeod v. Grant County School District No. 128*, 42 Wn.2d 316, 320 (1953). A school district's duty "is to anticipate dangers which may be reasonably anticipated and to then take precautions to protect the pupils in its custody

would have occurred some 20+ years ago. The Petition for Review must be denied.

C. Cases cited by Amici are not on point.

Amici presents this Court with citations to authority that are akin to comparing apples to oranges. Amici cites cases involving DSHS supervision -- *Sheikh v. Choe et al.* 156 Wn.2d 441 (2006), and *Terrell v. State of Washington.* 120 Wn.App. 20 (2004) -- as authority for the proposition that *N.L.* was decided wrongly.[18] But those cases are inapposite, and do not mirror the facts in *N.L.*

Both N.L. and the sex offender student were in the mandatory custody of Bethel. Accordingly, Bethel

> 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.[19]

Neither *Sheikh* nor *Terrell* involve the school district's duty owed to the students who are mandated to its custody. Neither *Sheikh* nor *Terrell* involve a school district's duty of reasonable care to a student to protect

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from such dangers."; *Scott v. Blanchet High School*, 50 Wn.App. 37 (1987); *J.N. v. Bellingham Sch. Dist. No. 501*, 74 Wn.App. 49, 60 (1994) "[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."; and *Briscoe v. Sch. Dist. 123*, 32 Wn.2d 353 (1949).

[18] Amici Brief at p.1-3.

[19] *N.L.*, at 1242, citing *McLeod*, 42 Wn.2d at 320.

her from reasonably foreseeable harm and to monitor another student who has a well document history of sexually assaulting female students. Accordingly, Amici's reliance on these cases is not well founded and its argument fails.

V. CONCLUSION

For each of the foregoing reasons, the Amici's arguments in support of the Petition for Review fail. The Amici's argument rests on inaccurate facts, and they do not understand the record on appeal. Moreover, the Amici have not presented evidence to support its "because I said so" assertions, and those arguments must be rejected by the Court. Most critically, the *N.L.* decision was based upon long standing precedent, and does not chart new territory. For each of these reasons, the Court should deny the Petition for Review.

DATED this 21st of August, 2015.

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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:

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

DATED this 20th day of August, 2015.

s/Marla H. Folsom
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Greetings,

I have attached N.L.'s Answer to Amicus Brief. The original will be hand delivered tomorrow to the Supreme Court.

Thank you.

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