47612-6-II

No. 46784-4-II

**IN THE COURT OF APPEALS, DIVISION II,**
**OF THE STATE OF WASHINGTON**



ANGELA EVANS

Appellant,

v.

TACOMA SCHOOL DISTRICT, NO. 10.;

Respondents.

# APPELLANT'S OPENING BRIEF

**THADDEUS P. MARTIN, ATTORNEY AT LAW**
Thaddeus P. Martin, WSBA # 28175
Attorney for Petitioner
thad@thadlaw.com
4928 109th St SW
Lakewood, WA 98499
(253) 682-3420

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**RCW**

## I. INTRODUCTION

This is a case, despite viable legal theories and all substantial evidence supporting such theories, the trial court disposed of under CR 12(b)(6) and summary judgment standards. As shown herein, the Appellant has established that the Tacoma School District (TSD, hereafter), either knew or should have known that one of their employees, a security guard named Jesse Brent, on school grounds and during school hours, engaged in a abusing grooming/romantic relationship with Appellant's minor 17-year-old female daughter Jasmine McFadden. The location of the abuse was at TSD's Science and Math Institute (SAMI).

The evidence presented below established, among other things that during the course of school hours security guard Brent would exhibit inappropriate romantic interests with the 17-year-old Jasmine by literally coming into one of her classes every day and spending the entire class period in the back of the classroom flirting with her and carrying on an inappropriate relationship.

The evidence established that not only should Mr. Brent have never been hired, due to disqualifying criminal history and the absence of a valid driver's license, but despite his carrying on with Appellant's then

minor daughter, no one at the TSD took any action to either report or curtail such abusive grooming behaviors.

As a proximate result of the inactions and inattentions of TSD with respect to the misconduct of one of its employees, Appellant's relationship with her daughter, who was a minor at the initiation of Mr. Brent's amorous attentions, has been forever and hopelessly compromised and destroyed.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing plaintiff's claims for common law and statutory claims for alienation of affections under CR 12(b)(6) standards.

2. The trial court erred in determining under CR 12(b)(6) standards that the Tacoma School District cannot be vicariously liable for the actions of its employee Mr. Brent which served to alienate the affections between the plaintiff and her daughter.

3. The trial court erred in dismissing plaintiff's negligent supervision, hiring and retention claim.

4. The trial court erred in dismissing on summary judgment grounds plaintiff's claim pursuant to RCW 26.44.030 for failure to report child abuse when under the terms of the implied remedy applicable to the relevant statutory scheme a parent has an independent cause of action for a failure to report.

5. The trial court misapplied CR 12(b)(6) and summary judgment standards in this case.

## III. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the trial court commit reversible error by dismissing plaintiff's statutory and/or common law alienation of affections claims against the Tacoma School District under CR 12(b)(6) standards when, hypothetically, under the vicarious liability principles the school district can be held liable for the misconduct of its employee Mr. Brent?

2. Assuming arguendo that Mr. Brent was not operating within the "scope of his employment" for the application of respondeat superior principles, did the Trial Court nevertheless commit reversible error by dismissing plaintiff's claim that the school district's independent negligence in the hiring, retention and supervision of Mr. Brent caused her injury?

3. Did the trial court err in dismissing on summary judgment grounds plaintiff's failure to report claim brought pursuant to the implied remedy attached to RCW 26.44.030?

## IV. STATEMENT OF FACTS

### A. Factual Background

The Tacoma School District had in place a policy called "MAINTAINING PROFESSIONAL STAFF/STUDENT BOUNDARIES. CP. 231. The purpose of this policy is stated to increase staff's awareness

"of their role in protecting children from inappropriate conduct by adults" and defines "a boundary invasion as an act, omission or pattern of behavior by a school employee that violates professional staff/student boundaries, does not have an educational purpose, and has the potential to abuse the staff/student relationship." Id. This policy defines "Unacceptable Conduct" to include (CP 231-233):

- Any type of physical contact or communication with a student that violates the Board's policies on employee Conduct on Harassment, Sexual Harassment or WLAD constitutes misconduct[.];
- Singling out a particular student for personal attention and friendship beyond the professional staff/student relationship;
- For non-guidance/counseling staff, encouraging students to confide their personal or family problems and/or relationships.
- Sending or taking students on personal errands unrelated to any educational purpose;
- Banter, allusions, jokes or innuendos of a sexual nature with students;
- Disclosing personal, sexual, family employment concerns or other private matters to one or more students;
- Addressing students or permitting students to address staff members with personalized terms of endearment, pet names or otherwise in an overly familiar manner;

- Maintaining personal contact with a student outside of school by electronic means such as instant messenger or internet chat rooms or social networking Web sites;
- Sending phone, email, text messages or other forms of written or electronic communications to students when the communication is unrelated to school work or other legitimate school business;
- Socializing or spending time with students[.]

TSD's policy mandates that "staff members who become aware of conduct by a staff member that may constitute a boundary invasion are required to promptly notify the building principal or the supervisor of the employee suspected of engaging in inappropriate conduct." CP 231-233. "All school personnel who have reasonable cause to believe that a student has experienced sexual abuse by a staff member working in a school are required to make a report to Child Protective Services or law enforcement pursuant to . . . RCW 26.44." CP 231-233.

Jasmine McFadden was born on December 24, 1994 and turned 18 on December 24, 2012. CP 236. When plaintiff Angela Evans, mother of Jasmine McFadden, learned of the inappropriate relationship in 2013, she researched her phone records and "had Jasmine McFadden's phone bill printed up and noticed hundreds of texts and phone calls from Phone Number 253-353-0915. CP 235-240; CP 295. Most of these started in the

beginning of October of 2012, when Jasmine was a minor." CP 235-240. Ms. Evans provided the Tacoma Police Department with a copy of the list of texts with the phone number highlighted from October 2012-December 2012. CP 235-240.The Tacoma Police were able to quickly determine that Mr. Brent had an extensive arrest history including several assaults for DV-Burglary, Assault, vandalism, DV-No Contact order violation, Driving with License Suspended and several DV-Court Order Violation Reports. CP 235-240.

In another police report, Jasmine admitted that she started speaking with Mr. Brent daily by phone in October of 2012, before school, after school and late at night. CP 245. Mr. Brent started working as a Campus Security Officer for TSD on September 24, 2009, and started as the only SAMI security guard in early 2011. CP 250. SAMI Assistant Director Kristen Tinder orally counseled Mr. Brent during the 2012-2013 school year for disrupting classes at SAMI by socializing with students. CP 251. According to Jasmine, she began spending time with Mr. Brent in August of 2012 by attending church with him. CP 254. The TSD investigation found that there were over 10,000 text messages between Jasmine and Mr. Brent between December 16, 2012 and May 12, 2013. CP 257. Jesse Brent's number was 253-353-0915, CP 276. Ms. Evans provided Jasmine's cell phone to the TSD investigator, where the investigation

found nude images of Jasmine sent to Mr. Brent, along with various messages that were sexual in nature. CP 278.

In the employment application and disclosure statements to the TSD, Mr. Brent submitted under oath that he had no criminal history. CP 259; CP 282, CP 284-286, CP 288-289, CP 291-292. This was a lie; Mr. Brent was convicted in September of 2010 by the Pierce County District Court of Malicious Mischief, Assault in the Fourth Degree, one count of interfering with the Reporting of Domestic Violence and one Count of Violation of No Contact Order. CP 260. Mr. Brent was also on "formal" court ordered probation from September of 2010 through September 2012 and was still on criminal probation when he was hired and worked at SAMI. CP 260. On April 5, 2012, when Mr. Brent applied to be a full time Campus Security Officer at SAMI (he was previously part-time), Mr. Brent lied and answered "No" to the question of "Have you ever been convicted of a crime?" CP 261. Mr. Brent also told a fabrication to TSD and answered "No" to the question of "Have there ever been findings against you in a civil adjudication involving domestic violence?

After the fact, the TSD learned that Mr. Brent had a suspended invalid driver's license from September 3, 2012 through May 6, 2013-the majority of the school year. CP 261. After the fact, it was also learned that Mr. Brent had previously been placed on administrative leave in his

previous job with DOC, but lied again on his TSD application stating that he had no previous administrative leaves. CP 264. TSD did not request Mr. Brent's Driving Record history until December of 2013, after TSD placed him on administrative leave and after Jasmine was graduated. CP 294.

Mr. Brent was not put on administrative leave for boundary invasion until September 3, 2013, after Jasmine was already graduated. CP 274. In a Planned Parenthood medical appointment on April 8, 2013, Jasmine reported that she obtained a new sexual partner in the last year, but not in the last 60 days, a man that she was having a monogamous relationship with, including vaginal, anal and oral sex. CP 280.

**OBSERVATION OF INAPPROPRIATE RELATIONSHIP WITH MINOR**

Jasmine's teacher, Ms. Carol Brouillette, acknowledges that she witnessed security guard Jesse Brent in her classroom "carrying on" with students and she knew it was inappropriate, yet she let this behavior continue while she was actively attempting to teach her class "because it wasn't her job to tell Mr. Brent to do his job" and patrol the campus. Ms. Brouillette was so upset about Mr. Brent's inappropriate behavior that she talked to various staff and vented her frustration, but Ms. Brouillette never informed administration of her serious concerns. Specifically, Ms.

Brouillette testified that she previously taught 11th and 12th grade English.. CP 300. Ms. Brouillette recalled Jasmine. *Id.*, CP 300. Teacher Brouillette testified:

Q. Do you recall Jessie Brent spending time in your classroom?

A. He was in the back of my classroom pretty often.

Q. Do you remember what year?

A. It would have been during that-I think you said 2011/2012 school year because that was the year I was teaching in portable 4.

Q. What would he (Brent) be doing in your classroom?

A. Just hanging out in the back talking to students and being in the way.

Q. Did that appear to you to be concerning?

A. Just annoying, but he was in the back of teachers' classrooms and so I wished he would go somewhere else, but it didn't concern me.

CP 301.

Q. Why didn't you tell Jessie Brent to get out of your classroom?

A. That's a very good question. I don't know. I think it was just- it was a common thing. He was in the back of everyone's classrooms. And I guess for a while it seemed like a part of his job to just come in and check on everyone. And I guess his check-ins just started lasting, but it was a pretty common complaint among the teachers. It's just like Jessie is here.

Q. You understood it wasn't part of his job to stay in the back of the classroom and socialize while you were conducting class?

A. It also wasn't a part of my job to tell him how to do his.

Q. Did you ever complain to anyone in your administration?

A. I don't recall complaining officially about it, no.

Q. Who did you informally make comments to?

A. Probably it would have been to other members of the humanities department and just other co-workers. This was a complaint we all had in common.

Q. When he started to linger in your classroom, how long would he typically be there?

A. I don't remember how long he would be there.

Q. Would it be several minutes to like up to half an hour?

A. It was enough to get annoying, yes.

Q. But it was enough that it stuck out in your head and you were annoyed by it?

A. Yes.

CP 301.

Q. If this is your class and your students, and you are trying to teach and you have someone back there that doesn't belong there interrupting your class, why didn't you say something.

A. Again, it wasn't my job to tell him how to do his job. . . . And occasionally I would ask him to stop talking, but it wasn't my job to tell him to go and patrol the school or whatever he was supposed to do.

Q. When Mr. Brent was back there socializing and talking to students, was there any legitimate security reason you saw for him to do that?

A. I didn't perceive that there was one.

Q. For instance, you didn't ask Mr. Brent to stay in your classroom?

A. I did not.

Q. And there was no security threat in your classroom such as a disruptive student, or a student that might have been high on drugs, or anything like that that you recall required him to be there?

A. I never invited him in for any of those reasons.

CP 301-302.

Q. So the behavior you observed was Officer Brent-how would you describe it? Was it like laughing? Talking? Socializing?

A. Yeah. He was just back there talking to the kids.

Q. Were you concerned that the kids he was talking to should have been engaged in your lessons and your tasks?

A. Yes.

CP 302.

Q. But this bothered you?

A. Yes.

Q. Did you ever have the impression that Mr. Brent was getting too personal with the students?

A. I did feel like he was too informal with them, yes.

CP 302.

Ms. Brouillette testified that Mr. Brent saw the students at SAMI as his peers, like he was another student. CP 302. Teacher Brouillette also testified that Mr. Brent's "relationship with the kids' struck me as informal and unprofessional[,]" and that it continued for a significant or long period of time, to the point she became annoyed and voiced her concerns informally to other teaching staff. CP 302, CP 303. Ms. Brouillette agreed that it would have been inappropriate for Mr. Brent to text students with numerous text messages, especially text messages after school hours. CP 302. Ms. Brouillette testified that Jasmine may have been one her "bridge helpers" (teacher assistants) and that bridge helpers are free to roam the classroom, but did not remember Jasmine. CP 303.

Kristen Tinder was the Assistant Principal at SAMI and was familiar with Jasmine. CP 307. Assistant Principal Tinder testified that another teacher named Mary Mann came to her in the Fall of 2011 with concerns that Mr. Brent was "spending a little too much time in her art class" and another "special ed teacher (Sandy Farewell) that shared concerns about him spending a little too much time in a study skills class." CP 308. Ms. Tinder admits that this would have been in Jasmine's junior year in the Fall of 2011. CP 308. Ms. Tinder knew that in the Fall of 2011, a teacher was "just concerned that he was spending a little bit too much time in that class, and was kind of hanging out with Stan in a way

that wasn't quite appropriate as far as just kind if sitting down next to him . . . and he was chatting with him, so that was the concern." CP 308. Ms. Tinder admitted that Mr. Brent had no legitimate reason as a security guard to be socializing with students in their classroom while they were class. CP 308-309. Ms. Tinder was also aware that Mr. Brent's brother in law, a security guard at Stadium named Donald Lipscomb where Brent also worked, was investigated and later convicted of having sex with under-aged students. CP 309. Ms. Tinder agrees that she should report to CPS or law enforcement as a mandatory reporter when a staff member has violated inappropriate boundary issues with staff and students. CP 309.

Ms. Tinder agrees that there is no reason that a security guard should be sending thousands of text messages to a student or texting students at all. CP 309; CP 312. In fact, staff members at SAMI should not have student numbers at all, it is a boundary invasion issue. *Id.*, at CP 309. It is also a boundary invasion issue for a staff member to single out a particular student, according to Tinder. *Id.*, at CP 309. Tinder agrees that it is unacceptable conduct for a security guard to be in the classroom during class talking to a female student daily during class or text messaging a student after hours. CP 309. Ms. Tinder interviewed and approved Brent for hire at SAMI but did not check his criminal history; she agrees that with his criminal history, he was not appropriate for hire

with his history of assaults, malicious mischief and violation of protective orders. *Id.*, at CP 310-311. Tinder testified:

> Q. And based on Mr. Brent's criminal history, you would agree that he never should have been employed at SAMI at all?
>
> A. Correct.
>
> CP 310.

Tinder testified that Brent's failure to have a valid driver's license would have prevented him from having employment at SAMI as a guard. CP 310. Tinder never checked Brent's credentials after he was hired and never asked HR to follow up, she just trusted TSD Human Resources. CP 311. Teacher Brouillette never told Tinder of her concerns with Brent. CP 311. After the fact, Ms. Tinder stated that Mr. Brent was acting like "one of the kids." CP 312.

Paul McGrath was the former guidance counselor for SAMI. CP 317:321. Mr. McGrath testified that it would have been inappropriate for staff the text students, show students special attention, or anything that violated TSD's boundary issues policy. CP 319. The concern, of course, is staff members engaging in "grooming" conduct. CP 319. Mr. McGrath testified that staff that becomes aware of any "boundary" issue are required to report the issues to the principal, CPS or law enforcement. CP 320. McGrath testified that any staff that knew of unacceptable boundary

violations were required to report such issues as mandatory reporters. CP 320. McGrath testified that there was no legitimate reason for Brent to send numerous text messages to Jasmine. CP 320. McGrath testified that there was no legitimate reason for Brent to spend time socializing with students in their classroom during class and that this would have been inappropriate and should have been reported to CPS or law enforcement. CP 320, CP 321.

Gayle Elijah is the Director of Labor and Employee Relations at the Tacoma School District and was during the relevant time periods. CP 326, 327. Ms. Elijah testified that had she known of Mr. Brent's criminal history at the time that she hired him, she "would not have hired him." CP 328. Ms. Elijah does not know how Mr. Brent "fell through the cracks." CP 328. Ms. Elijah testified that Mr. Brent did falsify his criminal history background in his application. CP 328. Ms. Elijah agrees that the most primary goal of TSD is to ensure the safety and welfare of the students in the district. CP 329. Ms. Elijah testified:

> Q. As a human resource professional for the Tacoma School District, had you known of Mr. Brent's criminal history as stated on pages 10-12 of this March 7, 2014 letter, you would agree that you would have never hired Mr. Brent to be a security guard at SAMI?
>
> A. I would agree.

CP 329, CP 250-272.

Former Student Kuammesha Moore testified that Mr. Brent was being inappropriate and violating the TSD boundary policy while Jasmine was a minor:

> I am a former student of SAMI from the years of 2009 through 2013. I graduated from SAMI in June of 2013. I am currently a student at Pacific Lutheran University in Parkland, Washington. I have known Jasmine McFadden since sixth grade. We both went to middle (Hunt Middle School) and high school SAMI) together. I considered Jasmine a friend and school acquaintance. During our entire Junior year at Sami, from September of 2011 to June of 2012, it was obvious that Jesse Brent had some sort of inappropriate romantic/flirtatious relationship with Jasmine McFadden. Mr. Brent would always be around Jasmine in classes and on the campus. For example, in my English class, was a teacher assistant in the class and Carol Brouillette was the teacher. In that English class during the entire junior year, Mr. Brent would come into the class and stand or sit in the back of the class and talk to and flirt with Jasmine the entire period, even to the point where Ms. Brouillette had to tell Mr. Brent to stop talking in the class. There was no reason for Mr. Brent to have come to this class on a daily basis, he was supposed to be patrolling the campus. Ms. Brouillette most definitely observed and acknowledged the presence of Mr. Brent and Jasmine and it was obvious to all the students that the relationship and attention that Mr. Brent was showing Jasmine was inappropriate, flirtatious and appeared romantic. Students made comments in the class in front of Ms. Brouillette about the inappropriate relationship where she would hear such as "Why don't you do your job? Why so much attention for Jasmine?" The statements to Jesse were serious; it may have sounded as if the students were joking, but they weren't. There was a teacher in the portable during these encounters. The teacher would not send Jesse out. The teacher was able to see or notice this because she was in the portable with us, but she didn't say anything. She allowed Jesse to sit in there

> and fawn over Jasmine during the entire junior year, from September 2011 to June 2012.
>
> Mr. Brent engaged in the same conduct all over the campus with Jasmine. For example, Mr. Brent would meet Jasmine at her car and walk with her through the front gate and generally on the campus. I know that several administrators saw Mr. Brent walking and exclusively talking and flirting with Jasmine, including Mr. Ketler (Head Director), Ms. Tinder, various teachers like Ms. Amy Hawthorne, Johnny Divine, Mr. Higgins and Bethany Schmidt. I observed all these teachers and administrators stare at Mr. Brent and Jasmine together. This was an everyday occurrence. At lunch time, a group of male students would state Jesse, "Man, don't you have a wife?" or "that's a little girl you are flirting with."

Declaration of Moore, CP 335-336.

The Trial Court previously dismissed plaintiff's claims of negligent hiring, retention and supervision of Jesse Brent by way of CR 12(b)(6), despite strong, conclusive evidence that TSD hired Mr. Brent and retained him when he was unqualified from the inception of his hire due to disqualifying criminal history and failure to have a valid driver's license. Further, no one from administration or any of the teacher mandatory reporters took action to supervise Mr. Brent to inform him that it was inappropriate to spend most of the class period socializing with students or showing inappropriate attention to children.

**B. Procedural History**

This case was filed on June 13, 2014. (CP 1). Within the complaint, plaintiff brought a variety of claims including a claim of

negligent hiring, retention, supervision and/or retention; negligent failure to report suspected abuse pursuant to RCW 26.44.030 in an action by a parent for seduction of a child pursuant to RCW 4.24.020. (CP 5-6).

As opposed to answering, the TSD moved to dismiss pursuant to CR 12(b)(6) all of plaintiff's claims. (CP 11-32). Plaintiff provided a detailed opposition to this motion. (CP 34-54).

On August 22, 2014 the Honorable Elizabeth Martin heard defendant's CR 12(b)(6) motion and granted the motion with respect to all of plaintiff's claims except her claim for a "negligent failure to report child abuse pursuant to RCW 26.44.030. "

On September 2, 2014 plaintiff filed a timely motion for reconsideration of the trial court's dismissal of her alienation of affections/RCW 4.24.020 claims. The trial court denied reconsideration by way of an order dated September 19, 2014.

After substantial discovery had been completed on April 17, 2015 the school district moved for summary judgment on plaintiff's remaining claim failing to report child abuse which is brought under the implied remedy available under RCW 26.44.030.

On May 4, 2015 plaintiff provided a detailed response and also requested that the trial court revise its earlier order pursuant to CR 54(B). Pursuant to CR 54(B), plaintiff sought revision of the Trial Court's order

which it dismissed the negligent hiring, supervision and retention its supervision claims which had earlier been dismissed. (CP 68-70).

Despite what plaintiff viewed to be substantial factual issues with respect to whether or not school district personnel, despite knowledge of Mr. Brent's abuse, failed to report it. The trial court nevertheless dismissed plaintiff's claim pursuant to RCW 26.44.030 and denied plaintiff's motion for revision.

A notice of appeal was timely filed.

## V. ARGUMENT

### A. Standards of Review

The grant of both CR 12(b)(6) and summary judgment motions are reviewed *de novo*. *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998). Under Washington law dismissal under CR 12(b)(6) is appropriate only if it appears beyond a reasonable doubt that no facts exist that would justify recovery. *Id.* 136 Wn.2d at 200-01, citing to, *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 1216 (1994). Additionally, the court must accept as true the allegations in plaintiff's complaint and any reasonable inferences therefrom. *Id.* citing to *Chambers-Castanes v. King County*, 100 Wn.2d 275, 278, 669 P.2d 451 (1983). Further, under 12(b)(6) standards the Court must use hypothetical facts, not part of the record, in arriving at its determination whether any

set of facts could exist that could justify recovery. See *Kenney v. Cook*, 130 Wn. App. 36, 123, P 3d. 508 (2005). CR 12 (b)(6) motion should be granted "sparingly and with care", and only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint there is some insuperable bar to relief. *Id.* The dismissal of a claim on a motion to dismiss for failure to state a claim only should occur if the Court concludes, beyond a reasonable doubt, that the plaintiff cannot prove any set of facts that would justify recovery. *Id.* As a result of these rules, the courts must take all the facts alleged in the complaint, as well as hypothetical facts, and view them in a light most favorable to the nonmoving party. *M.H. v. Corporation of Catholic Archdioceses of Seattle*, 162 Wn. App. 183, 188, 252 P. 3d 914 (2011).

Further, contrary to what the defense is apparently suggesting, CR 12(b)(6) motions should be construed in a manner consistent with our system "notice pleading" which requires only a "short and plain statement of the claim" and a demand for relief in order to file a lawsuit. See *Waples v. Yi*, 169 Wn. 2d 152, 159-60, 234 P. 3d 187 (2010). As discussed in *Waples* under notice pleading standards, plaintiffs use the discovery process to uncover the evidence necessary to pursue their claims. A plaintiff may bring separate or alternative claims seeking compensation for the same damages or amounts provided there is different

evidence available to prove each of the claims. See *Jacobs Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P. 3d 1153 (2007). Given the liberal standards applicable to notice pleadings, it is simply no longer necessary for a plaintiff to plead facts "constituting a cause of action". *Hofto v. Bloumer* 74 Wn. 2d 321, 444 P. 2d 657 (1968). It has long been recognized that the purpose of the complaint is to provide fair notice of the facts on which the cause of action is predicated upon, but there is no requirement that the complaint states the legal effect or legal conclusion which can be inferred from such facts. See *Carroll v. Cane*, 27 Wn. 402 677 P. 993 (1902).

The rules applicable to motion for summary judgment were long ago catalogued by our Supreme Court in the case of *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963). Standards are exceptionally well known, they should not be repeated herein.

**B. The Trial Court Erred In Dismissing Appellant's Common Law and Statutory Alienation of Affection Claims Against The Tacoma School District.**

Under Washington law there is both a common law claim for alienation of a child's affection, as well as a statutory claim relating to the seduction of a child. Contrary to the school districts assertions, in Washington there is both a common law claim for alienation of a child's

affections, as well as a statutory claim relating to the seduction of a child. Such claims exist in Washington regardless of what other states may or may not be doing.

RCW 4.24.020 provides:

> "A father or mother, may maintain an action as a plaintiff for the seduction of a child, and the guardian for the seduction of a ward, though the child or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards, and there is no loss of service."

This statute was last revised in 1973 and has not been repealed by the legislature. No case has ever held that the statute is invalid or otherwise unconstitutional. The only reported Washington case addressing the statute is *D.L.S. v. Maybin*, 103 Wn. App. 94, 121 P.3d 1210 (2005). Curiously, in the *D.L.S.* case while clearly the facts stated therein supporting claims of negligent hiring, retention and supervision, such claims are not addressed, but rather the case was resolved in the employer's favor based on a lack of "apparent authority". Nevertheless, nowhere in the *D.L.S.* case is there any suggestion that a claim cannot be brought pursuant to RCW 4.24.020, or that such a statutory cause of action was in any way infirm.

Similarly, the Washington Court of Appeals has recognized a common law claim for the alienation of a child's affections. *See Strode v.*

*Gleason*, 9 Wn. App. 13, 510 P.2d 250 (1973). In the *Strode* opinion, which was also issued in 1973, the Court of Appeals clearly found that such a claim existed despite the fact that it had been rejected in a number of other states. Such a claim as discussed in 16 WAPRAC § 14:12 (4th ed. 2013), has the following elements:

(1) An existing family relationship;

(2) A malicious interference with the relationship by a third person;

(3) An intention on the part of the third person that such malicious interference results in a loss of affection or family association;

(4) A causal connection between the third party's conduct and the loss of affection; and

(5) Resulting damages.

As discussed in *Strode* at Page 20, "malicious" for the purpose of this tort action is simply an unjustified interference with the relationship between the parent and the child. As the alienation of affection of one family member to another is a "gradual process" the claim accrues when the parent becomes aware that such alienation or loss of affection has occurred. *See also, Tyner v. DSHS*, 141 Wn.2d 68, 1 P.3d 1148 (2000) (wherein the Supreme Court permitted a parent to sue the state for damages to the parent/child relationship).

Here, Appellant has pled that as a result of the seduction/alienation of her minor child's affection that she no longer has a relationship with that child. Such allegations, standing alone should have been sufficient to defeat TSD's motion to dismiss under the appropriate application of CR 12(b)(6) standards. Under the circumstances of this claim, Appellant has both a statutory and common law claim.

Further, there is nothing within Washington law which conclusively establishes that such claims can only be brought against the "seducer" and not the seducer's employer under respondeat superior principles. It was inappropriate for the trial court to dismiss under CR 12(b)(6) standards plaintiff's claims against TSD on the grounds that it cannot be held vicariously liable for the actions of Mr. Brent. The question whether or not an employer can be vicariously liable for the action of its employees is typically a question of fact. See *Rahman v. State* 170 Wn. 2d 810, 816, 246 P. 3d 182 (2011), (superseded by statute as applied to the state of Washington). The *doctrine of respondeat superior* holds that an employer is liable for acts of its employees that are "within the scope of their employment." *Id.*, citing to *Dickinson v. Edwards* 105 Wn. 2d 457, 466, 716 P. 2d 814 (1986). Employer can be liable for the misconduct of its employee even if such misconduct violates the employer's workplace rules, orders or instructions. *Id.*

Contrary to the suggestions of the defense, there is no per se rule that indicates that intentional acts and/or criminal misconduct necessarily falls outside of the "scope of employment". *Robel v. Roundup Corp.* 148 Wn. 2d 35, 53-54, 59 P. 3d 611 (2013). This is because an employee's conduct will only be deemed "outside the scope of employment" if it is "different in kind from that authorized, far beyond the authorized time and space limits, or too little actuated by a purpose to serve the master." *Id* citing to Restatement (2d) of Agency ss 228(2) (1958). As a matter of fact, it was shown through discovery that Mr. Brent groomed the Appellant's daughter while attending to his regular "security guard" job duties within his Tacoma School District. Much of the activity alleged in the complaint occurred on school grounds, while in part, Mr. Brent was engaging in the job responsibilities he was hired to perform. It goes without saying that if Mr. Brent was not employed by the school district, he probably would have never met or had contact with Appellant's daughter. It's likely, that Mr. Brent's conduct was a mixture of actions performed both within and without the scope of his employment. However, merely because some of the conduct was performed outside of the scope of Mr. Brent's employment does not necessarily take the school district "off the hook".

Even if we assume *arguendo* that Mr. Brent's conduct fell outside of the "scope of his employment" nevertheless the school district has an independent duty to be non-negligent in the hiring, retention and/or supervision of its employees. See *Nice v. Elm View Group Home,* 131 Wn. 2d 39, 929 P. 2d 420 (1997). Employers are liable for negligent hiring, retention and supervision if the employer knew, or in the exercise of reasonable care, should have known that the employee presented a risk of danger to others. See *S.H.C. v. Lu* 113 Wn. App. 511, 517, 54 P. 3d 174 (2012). Such a limited duty is imposed upon an employer and owed by the employer to foreseeable victims "to prevent the task, premises, or instrumentalities entrusted to an employee from endangering others." See *Bety Y. v. Al-Hellou,* 98 Wn. App. 146, 149, 988 P. 2d 1031 (1999). Liability in this regard has been imposed in a wide variety of circumstances, including, for example, when a dangerous employee has been hired in a position of responsibility without an appropriate background check. See *Carlsen v. Wackenhut* 73 Wn. App. 247, 252, 868 P. 2d 882, review denied, 124 Wn. 2d 1022, 81 P. 2d 255 (1994); see also *Rucshner v. ADT, Security Systems, Inc.* 149 Wn. App. 655, 204 P. 3d 271 (2009). See also *La Lone v. Smith* 39 Wn. 2d 167, 172, 234 P. 2d 893 (1951) (an employer is liable for the criminal assault on third person when

the employer had a reason to believe that there was an undue risk of harm because of the employment).

Here Appellant specifically alleged at Paragraph 4.9 that school district personnel had knowledge, and were aware, (or should have been aware), of the relationship between J.M. and Mr. Brent. Thus, even on the face of the complaint the allegations set forth therein separate this case from those cases relied on by the defense. For example in *Peck v. Siau*, supra, the school district was not liable for the teacher's off-campus sexual assault of a student where it did not know, nor reasonably should have known, of the risk posed by the teacher). In the case of *Bratton v. Caulkin* 73 Wn. App. 492, 870 P. 2d 981 (1984), the Appellate Court did not address negligent supervision retention and/or hiring within its opinion. Similar to *Peck,* in *Thomson v. Everett Clinic* although the appellate court addressed negligent supervision as an independent cause of action, the Court found that the victim had failed to establish that the employer knew or should have known of the potential dangerous tendencies of the employee. See 71 Wn. App. 548, 555, 86 P. 2d 1054 (1993).

Here, the above stated facts sets forth specific allegations regarding such knowledge therefore these cases should be found to be unpersuasive particularly under CR 12(b)(6) standards.

Indeed, given the allegations set forth at Paragraph 4.9 of the Complaint, the Court should be mindful, as discussed below, that not only were school district personnel aware of such a relationship, (or should have been), but also of the fact that they are mandatory reporters of such misconduct under the terms of RCW 26.44. et. seq., which in part is designed not only to protect the child victims of abuse, but also places parents within the protected sphere.

Whether under *respondeat superior* or negligence hiring, retention and/or supervision principles, liability can be imposed against the school district either for the actions of Mr. Brent under the legal theories discussed below or the inactions on the part of school staff personnel who failure to act and report the illicit relationship between J.M. and Mr. Brent.

**C. Plaintiff Has a Valid Claim for the Alienation of Her Child's Affections.**

Contrary to the school districts assertions, in Washington there is both a common law claim for alienation of a child's affections, as well as a statutory claim relating to the seduction of a child. Such claims exist in Washington regardless of what other states may or may not be doing.

RCW 4.24.020 provides:

> "A father or mother, may maintain an action as a plaintiff for the seduction of a child, and the guardian for the seduction of a ward, though the child or ward be not living with or in the service of

> the plaintiff at the time of the seduction or afterwards, and there is no loss of service."

This statute was last revised in 1973 and has not been repealed by the legislature. No case has ever held that the statute is invalid or otherwise unconstitutional. The only reported Washington case addressing the statute is *D.L.S. v. Maybin*, 103 Wn. App. 94, 121 P.3d 1210 (2005). Curiously, in the *D.L.S.* case while clearly the facts stated therein supporting claims of negligent hiring, retention and supervision, such claims are not addressed, but rather the case was resolved in the employer's favor based on a lack of "apparent authority". Nevertheless, nowhere in the *D.L.S.* case is there any suggestion that a claim cannot be brought pursuant to RCW 4.24.020, or that such a statutory cause of action was in any way infirm.

Similarly, the Washington Court of Appeals has recognized a common law claim for the alienation of a child's affections. *See Strode v. Gleason*, 9 Wn. App. 13, 510 P.2d 250 (1973). In the *Strode* opinion, which was also issued in 1973, the Court of Appeals clearly found that such a claim existed despite the fact that it had been rejected in a number of other states. Such a claim as discussed in 16 WAPRAC § 14:12 (4th ed. 2013), has the following elements:

(1) An existing family relationship;

(2) A malicious interference with the relationship by a third person;

As the *Robel* case indicates there is simply no "per se" rule that an employee's intentional misconduct necessarily falls outside the "scope" of his or her employment. Given the absence of such a per se rule it was highly inappropriate for the Trial Court to have dismissed such claims under CR 12(b)(6) standards.

**D. The Trial Court Erred in Dismissing Plaintiff's Negligent Hiring, Training, Supervision and Retention Claims.**

It is acknowledged that typically negligent supervision type claims are not available when a claim otherwise could be brought under respondeat superior principles. See *LaPlant v. Snohomish County*, 162 Wash. App. 476 271 P.3d 254 (2011). Thus, even if it is assumed it can be established under CR 12(b)(6) standards that Mr. Brent's conduct was too far removed from the "scope of his employment", the trial court nevertheless committed error by dismissing plaintiff's negligent hiring, training, supervision and retention claims. Even if we assume *arguendo* that Mr. Brent's conduct fell outside of the "scope of his employment" nevertheless the school district has an independent duty to be non-negligent in the hiring, retention and/or supervision of its employees. See *Nice v. Elm View Group Home*, 131 Wn. 2d 39, 929 P. 2d 420 (1997).

Employers are liable for negligent hiring, retention and supervision if the employer knew, or in the exercise of reasonable care, should have known that the employee presented a risk of danger to others. See *S.H.C. v. Lu* 113 Wn. App. 511, 517, 54 P. 3d 174 (2012). Such a limited duty is imposed upon an employer and owed by the employer to foreseeable victims "to prevent the task, premises, or instrumentalities entrusted to an employee from endangering others." See *Bety Y. v. Al-Hellou*, 98 Wn. App. 146, 149, 988 P. 2d 1031 (1999). Liability in this regard has been imposed in a wide variety of circumstances, including, for example, when a dangerous employee has been hired in a position of responsibility without an appropriate background check. See *Carlsen v. Wackenhut* 73 Wn. App. 247, 252, 868 P. 2d 882, review denied, 124 Wn. 2d 1022, 81 P. 2d 255 (1994); see also *Rucshner v. ADT, Security Systems, Inc.* 149 Wn. App. 655, 204 P. 3d 271 (2009). See also *La Lone v. Smith* 39 Wn. 2d 167, 172, 234 P. 2d 893 (1951) (an employer is liable for the criminal assault on third person when the employer had a reason to believe that there was an undue risk of harm because of the employment).

Here Appellant's complaint specifically alleges at Paragraph 4.9 that school district personnel had knowledge, and were aware, (or should have been aware), of the relationship between J.M. and Mr. Brent. Thus, even on the face of the complaint the allegations set forth therein separate

this case from those cases relied on by the defense. For example in *Peck v. Siau*, supra, the school district was not liable for the teacher's off-campus sexual assault of a student where it did not know, nor reasonably should have known, of the risk posed by the teacher). In the case of *Bratton v. Caulkin* 73 Wn. App. 492, 870 P. 2d 981 (1984) the appellate court did not address negligent supervision retention and/or hiring within its opinion. Similar to *Peck,* in *Thomson v. Everett Clinic* although the appellate court addressed negligent supervision as an independent cause of action, the Court found that the victim had failed to establish that the employer knew or should have known of the potential dangerous tendencies of the employee. See 71 Wn. App. 548, 555, 86 P. 2d 1054 (1993).

Here, the complaint sets forth specific allegations regarding such knowledge therefore these cases should be found to be unpersuasive particularly under CR 12(b)(6) standards.

**E. A Parent Has a Cause of Action Pursuant to RCW 26.44.030 When a School District Fails to Report the Abuse of Their Child.**

RCW 26.44.030 requires professional school personnel with "reasonable cause to believe that a child suffers abuse or neglect" to report the suspected abuse to DSHS or the proper law enforcement agency. In *Beggs v. DSHS*, 171 Wn.2d 69, 77, 247 P.3d 421 (2011) our Supreme

Court recognized there was an implied cause of action against a mandatory reporter who fails to report suspected abuse. RCW 26.44.030(1)(a) defines "abuse or neglect" in relevant part, as "sexual abuse, sexual exploitation, or injury of a child by a person under circumstances which causes harm to the child's health, welfare, or safety."

In *Beggs* the Supreme Court recognized that there is an implied tort cause of action based on the language set forth within RCW 26.44.030. In reaching such a conclusion the Supreme Court relied on its previous decision in the case of *Tyner v. DSHS, supra* wherein, based on a different part of the same statutory scheme, the Court found that the legislature intended a remedy for parent victims of negligent child abuse investigations, and provided such parents with a cause of action.

In both *Tyner* and *Beggs,* the Court looked to the test for implied statutory remedies set for within *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990), in order to determine whether or not an implied cause of action should be provided from a statute which did not provide for an express tort remedy. Under the *Bennett* test the following questions must be asked:

> "First whether the plaintiff is within the class who especial benefit the statute was enacted; second, whether legislative intent, explicitly or implicitly supports creating or denying a remedy; and third,

> whether implying a remedy is consistent with the underlying purpose of the legislation."

In *Tyner* the court looked to RCW 26.44.010 in order to aid in the determination as to whom was intended to be "especially" benefited by the statute. RCW 26.44.010 provides in part "The State of Washington legislature finds and declares; the bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian or guardian ...".

Based on such language the court in *Tyner* found that a parent was amongst the class of individuals intended to be benefited by the procedural safeguards set forth within RCW 26.44.050 and had an available cause of action for negligent investigation.

In *Beggs,* the Court similarly looked to *Bennett.* As *Beggs* is based on the duty to report set forth within RCW 46.44.030, part of the same statutory scheme at issue in *Tyner,* it would make no sense and would be absurd not to look to RCW 26.44.010 also for a determination as to whether or not a parent was amongst the class of individuals intended to be benefited by the implied statutory remedy recognized in *Beggs. See also Ducote v. DSHS*, 167 Wn.2d 697, 222 P.3d 785 (2009) (only a parent and not stepparents, fall within the class of individuals protected with an

implied cause of action for negligent investigation under RCW 26.44.050). As recognized in *Tyner* at Page 80 "... The legislature's emphasized interest of a child and parent are closely linked. RCW 26.44.010. Thus, by recognizing the deep importance of the parent/child relationship, the legislature intended a remedy for both the parent and child if that interest is invaded."

Additionally by permitting a claim pursuant to RCW 26.44.030 by a parent whose child is a victim of unreported abuse would be consistent with the underlying purpose of the statutory scheme and the requirements of RCW 26.44.030. As in *Tyner,* "The existence of some tort liability will encourage [mandatory reporters] to avoid negligence conduct and leave open the possibility that those injured by [mandatory reporters'] negligence can recover." *Id.* at 81 citing to *Babcock v. State*, 116 Wn.2d 596, 622, 809 P.2d 143 (1991). "Accountability through tort liability ... may be the only way of assuring a certain standard performance by governmental entities." *Bender v. City of Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983).

There's nothing within the formulation of this cause of action within either the *Beggs* or *Tyner* opinions which indicates that such an applied cause of action only applies to individuals who failure to report as opposed to their employing entities and/or agencies. Indeed both the

*Beggs* and *Tyner* case involve claims directly brought against the employing agency, in those instances, DSHS. Further, under the above discussed respondeat superior/scope of employment principles discussed above, there is simply no reason why vicarious liability would not apply to the *negligent failure to report perpetrated by an entity's employees. A negligent failure to report is far from intentional conduct which otherwise could (but not necessarily would) support a finding that such actions occurred outside of scope of employment.*

Thus, the school district's position in that regard as posited below is simply erroneous. The fact that the various members of the Tacoma School District knew of the inappropriate relationship occurring between Brent and Jasmine McFadden, does not absolve the Tacoma School District from liability, but rather is indicative that it also violated the terms of Subsection .030 just like teacher Brouillette. Given the amount of contact between Mr. Brent and Jasmine in Ms. Brouillette's classroom, or on the campus in general when Jasmine was a minor, if anything, is indicative of a failure to "report" the abuse and grooming despite the fact they clearly had a statutory duty to do so. This is especially true when the Tacoma School District's own teacher regularly observed Mr. Brent in her class when he had no legitimate reason to be there along with former

student Ms. Moore's testimony that he spent the entire class period every day flirting with Jasmine while she was a minor.

As it is, there is simply little doubt that there is at least a question of fact that the Tacoma School District through its employees had enough information, to be held liable under the terms of RCW 26.44.050 for failing to report Mr. Brent, and it should be left to the jury to make a determination as to whether or not had the District acted responsible, Mr. Brent's actions could have been prevented.

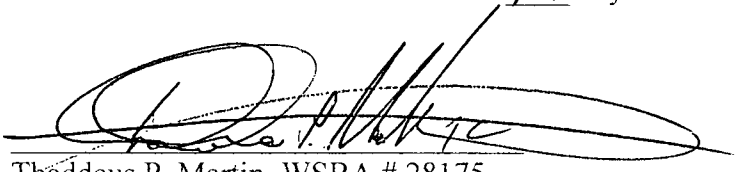
## CONCLUSION

For the reasons stated above, it is respectfully prayed that the Appellate Court reverse the trial court's decision to dismiss plaintiff's alienation of affections claims and negligent hiring, retention and supervision claims.

It is further requested that the court reverse the trial court's grant of summary judgment on plaintiff's RCW 26.44.030 failure to report claim. Clearly there are factual issues with respect to such claim which undoubtedly vests a cause of action with a parent.

This matter should be reversed and remanded for a trial on the merits.

RESPECTFULLY SUBMITTED this 12 day of October, 2015.



Thaddeus P. Martin, WSBA # 28175
Attorney for Appellant

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE OF THE FOREGOING DOCUMENT ON THE FOLLOWING PARTIES IN THE FOLLOWING MANNER(S):

Charles P. Leitch
Patterson Buchanan Fobes & Leitch
2112 3rd Avenue, Ste 500
Seattle, WA 98121

[XXX] by causing a full, true, and correct copy thereof to be E-MAILED to the party at their last known email address, per prior agreement of the parties, on the date set forth below followed by regular mail.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Lakewood, Washington on the 12th day of October, 2015.

Kara Denny

Kara Denny, Legal Assistant