

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 14, 2016, 2:31 pm
BY RONALD R. CARPENTER
CLERK

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

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

N.L.,

Respondent,

v.

BETHEL SCHOOL DISTRICT,

Petitioner.

N.L.'S ANSWER TO AMICUS CURIAE OF THE WASHINGTON
STATE SCHOOL DIRECTORS ASSOCIATION, THE ASSOCIATION
OF WASHINGTON SCHOOL PRINCIPALS AND THE
WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS IN
SUPPORT OF PETITIONER

Julie A. Kays, WSBA #30385
Connelly Law Offices, PLLC
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100
jkays@connelly-law.com
Attorneys for Respondent N. L.

 ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. IDENTITY OF THE PARTY FILING ANSWER 1

II. RELIEF REQUESTED 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 3

 A. WSSDA misstates the factual record
 on appeal 3

 B. WSSDA’s arguments regarding the impact of
 N.L. are speculative, outside the record,
 and must be rejected by the court. 4

 C. *N.L.* was decided on well settled principles of law. ... 6

V. CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Banks v. New York City Dep't of Educ.,
70 A.D.3d 988 (2010) 8

Bertrand v. Bd. Educ. Of City of New York,
707 N.Y.S.2d 218 (2000)10

Briscoe v. Sch. Dist. 123,
32 Wn.2d 353 (1949) 7

Fredrick v. Vermillion Parish Sch. Brd.,
772 So.2d 208 (2000)10

Huey v. Caldwell Parish School Board
109 So.2d 924 (2013)8

Hayes v. Sheraton Operating Corp.,
156 So.3d 1193 (2014)7, 8

J.N. v. Bellingham Sch. Dist. No. 501,
74 Wn. App. 49, 60 (1994)7

Kazanjian v. School Bd. Of Palm Beach County,
967 So.2d 259 (2007) 9, 10

McLeod v. Grant County School District No. 128,
42 Wn.2d 316, 320 (1953)7, 12

N.L. v. Bethel Sch. Dist.,
348 P.3d 1237 (2015) 1, 2, 3, 4, 5, 6, 7, 12, 13

Parella v. Ulmer,
518 N.Y.S.2d 91 (1987)11

Rife v. Long,
908 P.2d 143 (1995)11

Scott v. Blanchet High School,
50 Wn. App. 37 (1987) 7

Sheikh v. Choe et al,
156 Wn.2d 441 (2006) 12

Stoddart v. Pocatello School Dist. No. 25,
149 Idaho 679 (2010) 9

Terrell v. State of Washington,
120 Wn.App. 20 (2004) 12

I. IDENTITY OF THE PARTY FILING ANSWER

This Answer to the State School directors, principals, and administrator's Amicus brief is filed by the Plaintiff, N.L.¹

II. RELIEF REQUESTED

N.L. asks this Court to affirm the Court of Appeals' decision, and reject the arguments lodged by WSSDA in their Amicus brief. WSSDA's arguments are: predicated upon an erroneous understanding of the facts, rely upon inapposite case authority and present speculative policy arguments that go outside of the record before the Court. *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.² This Court should affirm the Court of Appeals decision in *N.L.*

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

¹ In order to save space, the Amicus brief filed by the various school associations will be referred to generally as "WSSDA" throughout this Answer. The WSSDA was the first association named in the caption, and no disrespect is meant to the other associations that are part of the Amicus brief.

² *N.L. v. Bethel School District*, 348 P.3d 1237 (2015).

student -- Nicholas Clark -- enrolled at Bethel High School.³ Clark had a voluminous history of committing sexual offenses and engaging in sexualized and assaultive behaviors both on and off campus.⁴ The District failed to supervise Clark, failed to notify faculty and coaches, and failed to protect other students from Clark's dangerous propensities.⁵ 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.⁶

Because the District failed to take any action to monitor or supervise or notify faculty of Clark's dangerous propensities, Clark was able to deceive and lure N.L. off campus under a ruse.⁷ N.L. and Clark both should have been at track practice.⁸ But instead Clark lured N.L. off campus, raped her, and then returned her to campus in time for her to take the school bus home.⁹ Had the District done its job of supervising Clark, notifying faculty of Clark's dangerous propensities, and protecting female students from Clark, N.L. would not have been raped by Clark.

³ *N.L.*, supra, at 1240-42.

⁴ *Id.* at 1240, and *See also*, Statement of Facts from N.L.'s response to the Petition for Review.

⁵ *N.L.*, supra at 1243.

⁶ *Id.*

⁷ *Id.* at 1240-1243.

⁸ *Id.*

⁹ *Id.* at 1240.

IV. ARGUMENT

A. WSSDA misstates the factual record on appeal.

The arguments lodged by WSSDA in their Amicus brief are based upon a fundamental misunderstanding of key facts in the record.

WSSDA consistently misstates critical facts in the record. WSSDA repeatedly, and erroneously, states that the rape of N.L. occurred “after-hours.”¹⁰ 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.¹¹ After raping N.L., Clark dropped N.L. off at school in time for her to catch the school bus home.¹² The entire premise of the WSSDA argument is predicated on an “after hours” argument which reflects an erroneous understanding of the facts in this case.¹³ For this reason alone, WSSDA’s arguments must be rejected.

WSSDA further illustrates their lack of understanding of the facts before this Court when WSSDA fails to both concede and recognize that the breach of the duty owed to N.L. occurred on campus. Then eighteen-year-old Clark deceived fourteen-year-old N.L. while on campus and used

¹⁰ WSSDA Amicus Brief at p. 2, 3, 4, 5, 8, 9, 11, and 17.

¹¹ Dep. N.L., CP 452-456.; *N.L.*, supra at 1240

¹² *Id.*

¹³ WSSDA Amicus Brief at p. 2, 3, 4, 5, 8, 9, 11, and 17.

a ruse to lure her off campus where he raped her.¹⁴ Clark then returned N.L. to campus where she caught the school bus home.¹⁵ The breach of the duty owed to N.L. occurred on campus. Because WSSDA ignores this critical fact, WSSDA's arguments are not supported by the factual record on appeal must be rejected by the Court.

B. WSSDA's arguments regarding the impact of N.L. are speculative, outside the record, and must be rejected by the Court.

WSSDA argues that N.L. will result in a "monumental increase" in tort liability for school districts, and insinuates that insurance coverage will be impossible to obtain.¹⁶ WSSDA's "facts" in support of this argument amount to nothing more than *ipsi dixit*. Because WSSDA can cite to no facts in the record below to support its argument regarding insurance coverage, the argument is speculative, outside the record, and should be rejected by this Court.¹⁷

Furthermore, WSSDA failed to acknowledge key -- undisputed facts -- in the record on appeal. The record contains undisputed testimony from the former Superintendent of Public Instruction, Judith Billings.¹⁸ Ms. Billings opined that the Office of the Superintendent of Public

¹⁴ *N.L.*, supra at 1240; Dep. N.L. at CP 452-456.

¹⁵ *N.L.*, at 1240.

¹⁶ WSSDA brief at p. 7

¹⁷ Accord, WSAJ Amicus brief, p.20, Footnote 14.

¹⁸ CP 297-305,301-302. See also *N.L.*, supra at 1244-45.

Instruction (OSPI) had made available model policies for Districts to adopt that govern the supervision of registered sex offender students.¹⁹

WSSDA pretends that the OSPI model policies for schools to monitor and supervise registered sex offender students does not exist because the existence of these policies undermines WSSDA's "the sky is falling" arguments. If it were such an onerous burden that expanded liability of schools such that insurance would be impossible to obtain, the OSPI's model policy requiring the supervision and monitoring of registered sex offenders would not exist. WSSDA's arguments fail.

WSSDA erroneously asserts that that *N.L.* requires that students be notified of a registered sex offender's status.²⁰ That has never been asserted by *N.L.*, and is found nowhere in the Court of Appeals decision below. WSSDA is obviously unaware that Bethel School District's own policies required the principal to notify faculty of a registered sex offender student.²¹ That policy was not followed by Bethel.²² WSSDA's argument must be rejected.

¹⁹ *CP 302*, Ms. Billings opines: "Washington model policy and procedure regarding release of information concerning sexual offenders, available in December 2006...outlined in detail the need for a safety plan, who should be involved in its development, what should be included, how it should be monitored and who should have access to it. None of this was done in the case of Nicholas Clark."

²⁰ WSSDA Amicus brief at p. 19-21.

²¹ *CP 335*, the Bethel School District policy reads in pertinent part: "The principal **must** inform any teacher of the [registered sex offender] student and any other personnel who should be aware of the information." (**emphasis added**).

Time and again, WSSDA illustrates that it does not have a command of the facts in the record: the District had knowledge and notice of Clark's dangerous sexual behaviors, and yet permitted him to remain unsupervised and unmonitored on campus. The District failed to notify faculty and coaches of Clark's dangerous history of sexual assaults against fellow students, and consequently he was allowed unfettered access to a fourteen-year-old junior high student, whom he deceived and lured away from a school sanctioned activity (track practice), raped her, and returned her to campus to catch the bus home. The District failed to follow its own policies regarding registered sex offender students, and failed to adopt model policies from OSPI.²³ But for the District's abject failure to notify faculty of Clark's dangerousness, and supervise Clark on campus, he would never have been able to lure and deceive a junior high student away from campus to rape her.

C. N.L. was decided on well settled principles of law.

Contrary to the assertions of WSSDA, the *N.L.* decision did not break new ground. *N.L.* was predicated on well established precedent with

²² *N.L.*, 348 P.3d at 1240-1242.

²³ CP 335, CP 302, and *See* also Footnote 21, *supra*.

respect to schools and their duty to protect students from reasonably foreseeable harms.²⁴

WSSDA's arguments rely heavily upon a misunderstanding of the facts of the record and upon out of state cases. Those cases are easily distinguished.

WSSDA cites *Hayes v. Sheraton Operating Corp.*, 156 So.3d 1193 (2014) as authority for its untenable position. Hayes involved the rape of a student, at a private party held in a hotel, after the school year had ended. The court held that the school had "no prior notice" of the rape and the rape "happened without warning." *Id.* at 1198. Here, the District had ample "prior notice" and "warning" that Clark would sexually assault another female student by virtue of his lengthy discipline history for similar behaviors. Furthermore, the rape occurred while both Clark and N.L. should have been at track practice. If the District had properly notified faculty and coaches of Clark's dangerous propensities, and

²⁴ 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 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).

properly supervised him, N.L. would not have been lured off campus by Clark to be raped. *Hayes* does not apply.

WSSDA relies on *Huey v. Caldwell Parish School Board*, 109 So.3d 924 (2013). In *Huey*, a sixteen-year-old girl lied and forged a note in order to be let off the bus early to meet up with a twenty-eight-year-old man (not a student) who had intercourse with her. The school had no knowledge of the plaintiff's history of engaging in similar behavior at another school, nor did the school have a duty to supervise or monitor a non-student. *Huey* is distinguishable. The school district knew nothing of the twenty-eight-year-old man, he was not a student at the school, with a well documented history of committing sexual offenses, and a convicted sex offender. In contrast Clark was all of those things, and the District had knowledge of all of his past assaultive behavior and had a duty to protect other students from him. The *Huey* court held that "there is no evidence or analysis in the record that anyone at the school would have been able to foresee this type of injury" to the plaintiff. *Id.* at 929. In contrast, in the facts before this case there is ample "evidence" and "analysis in the record" that the District "would have been able to foresee this type of injury" to N.L. *Huey* does not control.

WSSDA next relies upon *Banks v. New York City Dept. Ed.*, 70 A.D.3d 988 (2010). But *Banks* too is distinguishable. *Banks* held that the

plaintiff failed to present “any triable issues of fact.” The scant facts in the opinion reflect that -- unlike in the facts before this Court -- there was no evidence presented by Banks that it was foreseeable that a child would be injured by a firecracker on the bus. Here, N.L. has presented ample evidence of foreseeability.

The facts in *Stoddart v. Pocatello School District*, 149 Idaho 679 (2010), are also distinguishable. That case held that the “location of the negligence rather than the location of the injury” was the relevant question. It found that the school’s information concerning the shooters from 2.5 years earlier was insufficient to establish that the subsequent shooting, off campus, of a girl inside her home was foreseeable. *Id.* 687. Here the location of the negligence was on campus when Clark was given unfettered access to young N.L. to deceive and lure away from campus to rape her. The negligence occurred on campus and Clark’s actions were foreseeable. *Stoddart* does not control.

WSSDA next cites *Kazanjian v. School Board of Palm Beach*, 967 So.2d 259 (2007), but this case is also distinguishable. The case involves students who left campus without permission, and were killed in an auto accident. Their death was not foreseeable. In the facts before this court, Clark’s discipline file was replete with numerous sexual offenses; he was a registered sex offender who was permitted by BSD to have unfettered

access to N.L., which allowed him to lure her from campus on a ruse and rape her. BSD knew of Clark's dangerous history and that made the rape of N.L. foreseeable. *Kazanjian* does not control.

WSSDA relies upon *Bertrand v. Bd. Educ. Of City of New York*, 707 N.Y.S.2d 218 (2000), where the Court predicated its grant of summary judgment in favor of the district on the fact that the record was "devoid of any admissible evidence" that supported plaintiff's contention that the assault was foreseeable. The same cannot be said to be true in the facts before this Court, as the record is replete with "admissible evidence" that the District had knowledge and notice of Clark's dangerous propensities. *Bertrand* too does not control.

Fredrick v. Vermillion Parish Sch. Brd., 772 So.2d 208 (2000), is also distinguishable because the plaintiff failed to present evidence of foreseeability. In *Fredrick*, no evidence was presented to the court that the four male students had "criminal history concerning these boys or any reason to fear them or that her parents would have objected to the ride." *Id.* 213. In contrast, here the District had a voluminous recorded history of assaultive and sexually assaultive behaviors by Clark, including the fact that he was a registered sex offender. *Fredrick* does not control, as N.L. has presented ample evidence of foreseeability.

Rife v. Long, 908 P.2d 143 (1995) is also not controlling. *Rife* involved a young student walking home from school who tripped on a curb and fell into a tractor and was significantly injured. Rife alleged the district was required to supervise the young boy on his walk home. The appellate court held that the district did not have a duty to supervise the young boy after school and on his walk home. In the facts before this Court the District failed to supervise Clark while he was in school, during school hours, and during a school sanctioned track practice. The District failed to protect N.L. from Clark during school hours, which enabled the dangerous Clark to deceive N.L. and lure her from campus and rape her. *Rife* is inapposite.

WSSDA also relies upon *Palella v. Ulmer*, 518 N.Y.S.2d 91 (1987), but that case too is distinguishable. *Palella* involved a group of students who left school, stole a car, engaged in joy riding and a high speed chase with law enforcement that left one student injured. The *Palella* court held that the district owed no duty to the injured student. But here, the breach of the duty owed to N.L. occurred on campus, when the District failed to supervise and monitor the dangerous Clark. The lack of supervision enabled him to deceive and lure N.L. Off campus, rape her, and return her to campus to catch the bus. *Palella* is not controlling.

In addition, WSSDA also 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.²⁵ 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.²⁶

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

²⁵ WSSDA Amicus Brief at p.10,18.

²⁶ *N.L.*, at 1242, citing *McLeod*, 42 Wn.2d at 320.

V. CONCLUSION

WSSDA's arguments rest on an inaccurate recitation of the facts. WSSDA also encourages this Court to go outside the record and buy into WSSDA's *ipsi dixit* arguments regarding liability insurance. The Court should reject this effort. The critical point lost on WSSDA throughout its Amicus brief is this: Bethel School District stands *in loco parentis* with the children in its care. Reasonable prudence, and common sense, dictate that the District should have informed faculty and coaches of the dangers presented by a registered sex offender student with Clark's dangerous history, so that Clark could be supervised and children could be protected from him. Given Clark's lengthy disciplinary history it was reasonably foreseeable that he would sexually offend again and he did. The District's abject failure to protect N.L. from Clark resulted in Clark approaching N.L. on campus, deceiving her, and luring her off campus to rape her. 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 affirm the Court of Appeals decision and remand the matter back to the trial court to give N.L. her day in court.

DATED this 14th of January, 2016.

CONNELLY LAW OFFICES, PLLC

By: s/ Julie Kays
Julie A. Kays, WSBA No. 30385
Attorney for N.L.

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 email:

Francis Stanley Floyd
John Armen Safarli
Floyd, Pflueger & Ringer, P.S.
200 West Thomas Street, Suite 500
Seattle, WA 98119-4296
ffloyd@floyd-ringer.com
jsafarli@floyd-ringer.com
Attorneys for Petitioner (Bethel School District)

Jerry J. Moberg
Jerry Moberg & Associates, P.S.
PO Box 130
124 3rd Avenue S.W.
Ephrata, WA 98823
jmoberg@jmlawps.com

George M. Ahrend
Ahrend Law Firm
16 Basin Street SW
Ephrata, WA 98823
gahrend@ahrendlaw.com

DATED this 14th day of January, 2016.

s/Marla H. Folsom

Marla H. Folsom, Paralegal to Julie A. Kays

OFFICE RECEPTIONIST, CLERK

To: Marla Folsom
Cc: Julie Kays; Jack Connelly; "Francis Floyd"; "John Safarli"; "Jerry Moberg"; "James Baker"; "Bryan P. Harnetiaux"; "Shari Canet"; "George M. Ahrend"; "Valerie McOmie"
Subject: RE: N.L. v. Bethel School District (S.C. #91775-2)

Received on 01-14-2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Marla Folsom [mailto:mfolsom@connelly-law.com]
Sent: Thursday, January 14, 2016 2:22 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Julie Kays <jkays@connelly-law.com>; Jack Connelly <jconnelly@connelly-law.com>; "Francis Floyd" <ffloyd@floyd-ringer.com>; "John Safarli" <jsafarli@floyd-ringer.com>; "Jerry Moberg" <jmoberg@jmlawps.com>; "James Baker" <jbaker@jmlawps.com>; "Bryan P. Harnetiaux" <amicuswsajf@wsajf.org>; "Shari Canet" <scanet@ahrendlaw.com>; "George M. Ahrend" <gahrend@ahrendlaw.com>; "Valerie McOmie" <valeriemcomie@gmail.com>
Subject: RE: N.L. v. Bethel School District (S.C. #91775-2)

Good afternoon,

Attached for filing is Respondent N.L.'s Answer to Brief of Amicus Curiae of the Washington State School Directors Association, The Association of Washington School Principals and the Washington Association of School Administrators in Support of Petitioner.

A copy of the same is being served simultaneously on all parties.

Thank you.

Respectfully submitted,

--



Marla Folsom
Paralegal | Connelly Law Offices, PLLC
(p) 253.593.5100 | (f) 253.593.0380
www.connelly-law.com

Reply to
Tacoma Office:
2301 North 30th Street
Tacoma, WA 98403
(p) 253.593.5100
(f) 253.593.0380

Seattle Office:
Smith Tower
506 2nd Ave, 33rd Floor
Seattle, WA 98104
(p) 206.816.3002

CONFIDENTIALITY NOTICE: THIS MESSAGE AND/OR THE DOCUMENT(S) ACCOMPANYING THIS ELECTRONIC TRANSMISSION MAY CONTAIN PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF YOU ARE NOT THE INTENDED RECIPIENT, BE AWARE THAT ANY DISCLOSURE, COPYING, DISTRIBUTION OR USE OF THE CONTENTS OF THIS TRANSMISSION IS PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY US BY TELEPHONE, MAIL OR ELECTRONIC MAIL, AND DESTROY THIS COMMUNICATION.



GO SEAHAWKS!