

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
Oct 30, 2015, 10:11 am  
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 SUPPLEMENTAL BRIEF

---

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

 ORIGINAL

FILED AS  
ATTACHMENT TO EMAIL

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

I. INTRODUCTION..... 1

II. ASSIGNMENTS OF ERROR ..... 1

III. PROCEDURAL HISTORY ..... 1

IV. STATEMENT OF THE CASE..... 2

    A. Registered sex offender Clark’s BSD student file . . .2

    B. BSD failed to monitor or supervise  
    Clark, and failed to protect N.L. from  
    registered sex offender Clark .....5

    C. Registered sex offender student Clark’s  
    Grooming, luring, deception, ruse  
    and rape of N.L. .... 8

    D. N.L.’s expert, Judith Billings .....10

V. ARGUMENT ..... 11

    A. The Court of Appeals’ decision was correct:  
    the Trial Court erred in granting summary  
    judgment .....11

    B. Duty and breach .....12

    C. General Field of Danger: Clark’s sexual  
    assault was reasonably foreseeable ..... 15

    D. Proximate cause .....17

VI. CONCLUSION .....20

## TABLE OF AUTHORITIES

### Washington Cases

<i>Briscoe v. Sch. Dist. 123</i> , 32 Wn.2d 353, 362 (1949) .....	12, 13
<i>Carraba v. Anacortes School Dist. No. 103</i> 72 Wn.2d 939, 956 (1967) .....	13
<i>Christen v. Lee</i> , 113 Wn.2d 479, 492 (1989) .....	14
<i>Durland v. San Juan County</i> , 182 Wn.2d 55, 69 (2014) .....	11
<i>Hartley v. State</i> , 103 Wn.2d 768, 777 (1985) .....	18
<i>Hertog v. City of Seattle</i> ,, 138 Wn.2d 265, 275 .....	13, 18
<i>J.N. v. Bellingham Sch. Dist. No. 501</i> , 74 Wn. App. 49, 56-57 (1994) .....	12, 13, 15, 16, 17
<i>Johnson v. State</i> , 77 Wn.App. 934 (1995) .....	19
<i>Joyce v. Department of Corrections</i> , 155 Wn.2d 306, 322 (2005) .....	18
<i>Kenneth v. Yates</i> , 41 Wn.2d 558, 565 (1952) .....	19
<i>Martini v. Post</i> , 178 Wn.App. 153, 479 (2013) .....	18
<i>McLeod v. Grant County School District No. 128</i> , 32 Wn.2d 316, 319-20 (1953) .....	12, 13, 14, 15, 16, 17, 18

<i>Mostrom v. Pettibon</i> , 25 Wn.App. 158, 162 (1980) .....	11
<i>N.K. v. Corp. of Presiding Bishop</i> , 175 Wn.App. 517, 525 (2013) <i>rev. denied</i> , 179 Wn.2d 1005 (2013) ..	13
<i>N.L. v. Bethel School District</i> , 187 Wn.App. 460 (2015) .....	1, 2, 13, 15, 16, 17, 19
<i>Owen v. Burlington N. Santa Fe. RR Co.</i> , 153 Wn.2d 780, 788 (2005) .....	18
<i>Ruff v. King County</i> , 125 Wn.2d 697, 703 (1995) .....	18
<i>Schooley v. Pinch's Deli Market, Inc.</i> , 80 Wn.App. 862, 874 (1996), <i>aff'd</i> , 134 Wn.2d. 468 (1998) .....	11, 12, 17, 18
<i>Scott v. Blanchet High School</i> , 50 Wn. App. 37, 44, 474 P.2d 1124 (1987) <i>review denied</i> , 110 Wn.2d 1016 (1998) .....	14, 15
<i>Shah v. Allstate</i> , 130 Wn.App. 74 (2005) .....	18
<i>Sheriff's Ass'n v. Chelan County</i> , 109 Wn.2d 282, 294-95 (1987) .....	11
<i>Smith v. Acme Paving Co.</i> , 16 Wn.App. 389, 393 (1976) .....	11
<i>Taggart v. State</i> , 118 Wn.2d 195, 226 (1992) .....	17
<i>Travis v. Bohannon</i> , 128 Wn.App. 231, 239 (2005) .....	13, 18

**Statutes**

RCW 9A.44.079 ..... 9

RCW 9A.44.060 ..... 9

RCW 9A.44.050 ..... 9

## I. INTRODUCTION

Plaintiff N.L. files this Supplemental Brief and asks this Court to affirm the Court of Appeals' decision in *N.L. v. Bethel School District* and remand this case back for trial on the merits.<sup>1</sup>

## II. ASSIGNMENTS OF ERROR

### **Assignment of Error No. 1**

The trial court erred when it granted summary judgement in favor of BSD.

### **Issues Pertaining to Assignment of Error No. 1**

Should this Court affirm the Court of Appeals' decision in *N.L.*, which held (1) that N.L. presented sufficient evidence that BSD owed a duty of reasonable care to protect her and monitor Clark, and (2) that genuine issues of material fact existed as to whether BSD's breach was a proximate cause of injury to N.L.?

## III. PROCEDURAL HISTORY

In August 2012, N.L. filed a lawsuit in Pierce County Superior Court against Defendant BSD.<sup>2</sup> In January 2014, the trial court granted summary judgment in favor of BSD. In January 2014, N.L. timely

---

<sup>1</sup> Plaintiff N.L. will be referred to as N.L. throughout this pleading. Defendant Bethel School District will be referred to as BSD.

<sup>2</sup> CP 1-9.

appealed.<sup>3</sup> In a published opinion, *N.L. v. Bethel School District*, 187 Wn.App. 460 (2015), the Court of Appeals reversed the trial court and remanded the matter for trial on the merits. On September 30, 2015, this Court granted BSD's petition for review.

#### IV. STATEMENT OF THE CASE

##### A. Registered sex offender Clark's BSD student file.

Nicholas Clark (Clark) attended BSD from kindergarten through 12th grade.<sup>4</sup> His BSD discipline file is replete with instances of physically assaulting students, sexually assaulting female students, highly sexualized talk and behaviors, bullying, and general disobedience at school.<sup>5</sup> Clark was reprimanded, disciplined, or written up for the aforementioned behaviors more than 78 different times.<sup>6</sup> He was suspended from school approximately 19 different times.<sup>7</sup> A brief summary of Clark's disturbing history in the Bethel School District from 1st through 8th grade includes, but is not limited to, the following: physical assault of a teacher (2nd grade)<sup>8</sup>; assault on a student (4th, 5th, and 7th grades); impulsive

---

<sup>3</sup> CP 502-505.

<sup>4</sup> CP 119-268; CP 119-137 (Clark's Kindergarten through 6th Grade records); CP 138-201 (Clark's 7th-9th grade records); CP 202-268 (Clark's 10<sup>th</sup>-12<sup>th</sup> grade records).

<sup>5</sup> *Id.*

<sup>6</sup> CP 119-268.

<sup>7</sup> *Id.*

<sup>8</sup> For efficiency, the grade in which the conduct occurred will be indicated as follows: (2<sup>nd</sup>) for 2<sup>nd</sup> grade, and so on.

behaviors (6th grade); use of racial epithets, sexual language, sexual gestures, bringing pornography to school (all 7th grade); and repeated use of sexualized language, drawing sexual pictures, use of homophobic slurs, grabbing a female student's crotch, and engaging in "sexual harassment" (all 8th grade).<sup>9</sup>

During Clark's 9th grade year, he: engaged in a fist-fight off campus;<sup>10</sup> physically assaulted a female student; punched a male student in the groin; had inappropriate pictures on his binder; approached a female student and engaged in a "humping motion" on her rear end; was disruptive on the school bus; and sexually assaulted a younger female student.<sup>11</sup> Clark's sexual assault of the female student entailed forcibly grabbing her, kissing her mouth, breast, and neck. He also grabbed her buttocks and pushed his penis into her groin.<sup>12</sup> The female student was two years younger than Clark.<sup>13</sup> Consequently, Clark was convicted of

---

<sup>9</sup> See, CP 119-201.

<sup>10</sup> CP 179, Discipline log for Clark indicates "10/27 left campus to fight." CP 182, Discipline Report for this event states, "Nick left campus to fight another student during the school day. Suspension effective 10/28/2003-10/30/2003." BSD's argument at summary judgment and in its petition for review included that it had no duty to N.L once she was lured off campus by the sex offender, and raped. However, the fact that BSD has suspended Clark for going off campus to fight another student shows the disingenuous nature of this argument.

<sup>11</sup> CP 138-201, 190-194; 269-283. See also, CP 179-180, which is the discipline log created by BSD faculty for Clark's 9<sup>th</sup> grade year.

<sup>12</sup> CP 269-283.

<sup>13</sup> *Id.*; the female student was 13 years old.

the crime of Attempted Indecent Liberties, was required to register as a sex offender, and was placed on probation for a year.<sup>14</sup>

During Clark's 10th grade year, in December 2004, Bethel High School (BHS) was notified that Clark was a registered sex offender.<sup>15</sup> During that school year, he physically assaulted a student, and was truant and disruptive.<sup>16</sup> In January 2005, while Clark was on probation, he sexually assaulted a female student on a BSD bus.<sup>17</sup> This matter was "investigated" by Assistant Principal Mishra, but only scant notes appear in Clark's discipline file: "puts hands on front of bra," "puts hands down front of pants," and "takes out penis, asked her to touch it."<sup>18</sup> Clark was subjected to an emergency expulsion because "his presence would be a danger to himself or other people."<sup>19</sup>

During his 11th and 12th grade years, Clark's assaultive and sexually-charged behaviors continued unabated.<sup>20</sup> In 11th grade, Clark: physically and verbally harassed a younger student on a BSD bus; violated

---

<sup>14</sup> *Id.*; during the probationary period, he was prohibited from being around children who are two or more years younger than him without supervision.

<sup>15</sup> CP 206-207.

<sup>16</sup> *See* CP 202-268.

<sup>17</sup> *Id.*, CP 211-216.

<sup>18</sup> CP 357-391 (Deposition excerpts of Mishra); CP 359 (lines 18-25); CP 360 (lines 1-5); 25-53; CP 216; CP 363-391.

<sup>19</sup> CP 202-268; CP 388 (lines 14-25) CP 389 (lines 1-17), CP 376-387. It is not clear that this matter was ever reported to law enforcement.

<sup>20</sup> *See*, CP 202-268.

bus conduct rules; skipped class; and physically assaulted a student.<sup>21</sup> In the 12th grade Clark: was written-up three separate times for bus misconduct; was found inside the girls' bathroom at school; yelled out "Fuck" and "My dick hurts" during class; was observed engaging in "hanky panky" in the hallway with a female student; left class and never returned; was truant; was disruptive in class; and assaulted two different students.<sup>22</sup> During his 12th grade year, Clark raped N.L.

**B. BSD failed to monitor or supervise Clark, and failed to protect N.L. from registered sex offender Clark.**

In December 2004, BHS School Principal Wanda Riley-Hordyk (hereinafter Riley) received notification that Clark, a 10th grader, was a registered sex offender.<sup>23</sup> Upon receipt of the notification Riley did not inform Clark's teachers of his sex offender status.<sup>24</sup> Riley violated the BSD policy on sex offender notification when she failed to inform Clark's individual teachers of his sex offender status.<sup>25</sup> According to BSD Assistant Superintendent Brophy (Brophy), there "really wasn't a policy relative to monitoring" sex offender students enrolled in the district.<sup>26</sup>

---

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*, see also, CP 236, 237, 241.

<sup>23</sup> CP 206-207; Dep. Riley at p. 115.

<sup>24</sup> CP 332-333, Dep. Riley.

<sup>25</sup> CP 335, District Policy #3143 reads in pertinent part: "District Notification of Juvenile Offenders: A court will notify the common school in which a student is enrolled if the student has been convicted...for any of the following offenses: a sex offense.... The principal must inform any teacher of the student and any other personnel who should be aware of the information."

<sup>26</sup> CP 398 (lines 2-25), 399 (lines 1-22).

BSD did not have a policy or practice for monitoring sex offender students or developing a safety plan for the student.<sup>27</sup> Brophy testified that not only was it District policy to inform a sex offender student's six teachers of his status, but that it was also "absolutely" the best practice to do so.<sup>28</sup>

Riley had an "unwritten" process in place for the monitoring of sex offenders, which included having a special meeting with the registered sex offender's counselor, and having assistant principals involved in the monitoring of the sex offender.<sup>29</sup> However, Riley's testimony on this point is subject to doubt, as Brophy, BSD Athletic Director (and BSD Director of Campus Safety) Dan Heltsley, Clark's BHS counselor, and Riley's assistant principals refute Riley's testimony.<sup>30</sup> Brophy, Mr. Heltsley, the counselor, and the assistant principals at BHS were not familiar with Riley's "unwritten" process for monitoring sex offenders like Clark, nor did the aforementioned BSD faculty ever recall being involved in such a process.<sup>31</sup> In fact, neither Clark's BHS counselor, nor

---

<sup>27</sup> *Id.*, CP 297-305; *See* Billings' expert report re: Washington State model policies.

<sup>28</sup> CP 394 (lines 1-11)

<sup>29</sup> CP 319 (lines 23-25); 320-330 (lines 1-17).

<sup>30</sup> Dep. Alayna Septon, BHS Counselor CP 338 (lines 12-25); 339-341 (lines 1-9); Dep. Hay, BHS Assistant Principal CP 344-349 (lines 1-7); Dep Mishra BHS Assistant Principal CP 361 (lines 5-25), 362 ( lines 1-6); 364-367 (lines 1-20), 387-389 and 363-391 generally; Dep. Brophy, Assistant Superintendent CP 398 (lines 2-25), 399 (lines 1-22); Dep Heltsley, Athletic Director and Director of Campus safety CP 418-419; 420 (lines 7-25); 421 (lines 1-13); 422 (lines 3-25); 423-426 (lines 1-9); 427-429; 430-438.

<sup>31</sup> *Id.*

the Campus Safety Director, nor the Assistant Principals were ever made aware that Clark was a registered sex offender.<sup>32</sup>

It is undisputed that Riley failed to inform the next door Bethel Junior High administrators that Clark was a registered sex offender.<sup>33</sup> It is undisputed that the District did not have a policy requiring that the coach of a registered sex offender student must be informed if that sport involves the sex offender intermingling with younger students.<sup>34</sup> According to Brophy it would be best practice to notify coaches in the circumstances presented in this case.<sup>35</sup> Riley did not inform the track coaches of the fact that Clark was a registered sex offender, nor was the coach given a safety plan for Clark, nor asked to look out for high-risk behaviors of a sexual nature exhibited by Clark, nor asked to protect young female students from Clark.<sup>36</sup>

///

///

---

<sup>32</sup> Dep. Alayna Septon, BHS Counselor, CP 338-341; Dep. Hay, BHS Assistant Principal, CP 344-349; Dep. Mishra, BHS Assistant Principal, CP 361-362; 364-367; 387-389; and 357-391 generally. *See also*, Dep. Hay, CP 344-349; 351-356, wherein Assistant Principal Hay describes the one time she can recall ever having a monitoring plan in place for a student (not Clark) who engaged in “sexually aggressive” conduct at school. Accordingly, it was possible for BHS to monitor a student such as Clark, but BHS simply chose not to.

<sup>33</sup> Dep. Hay, BHS Assistant Principal, CP 350-351; Dep. Riley, 317-318; Dep. Mishra, 390-391.

<sup>34</sup> Dep. Brophy, Assistant Superintendent BSD, CP 395-397.

<sup>35</sup> *Id.*

<sup>36</sup> Dep. BHS Head Track Coach Patrick Mullen (2006-2007), CP 402- 405; 406-408; 414-415.

**C. Registered sex offender student Clark's grooming, luring, deception, ruse and rape of N.L.**

Bethel High School is located a short distance away from the Bethel Junior High School campus; the track/football field links the two campuses together.<sup>37</sup> In April 2007, during Clark's 12th grade year at BHS, 14-year-old N.L. was in the 8th grade at Bethel Junior High.<sup>38</sup> N.L. was a good student and athlete, and signed up for track during her 8th grade year.<sup>39</sup> The Bethel Junior High track team and the BHS track team used the same track and field for practice.<sup>40</sup> N.L. was on the junior high track team, and the registered sex offender student, Clark, was on the senior high track team.<sup>41</sup>

Clark was introduced to N.L. on the track field during a joint track practice.<sup>42</sup> After the introduction on the track field, Clark began grooming N.L. for sexual contact. He started texting N.L.<sup>43</sup> The text messages from Clark to N.L. were "dirty" texts, and contained sexual connotations.<sup>44</sup> Young N.L. naively thought that Clark's texts were a request to go to

---

<sup>37</sup> CP 312-314.

<sup>38</sup> Dep. N.L. CP 451-452.

<sup>39</sup> *Id.* CP 441-443.

<sup>40</sup> Dep. Heltsley, Athletic Director, CP 424-426.

<sup>41</sup> Dep. Mullen, BHS Head track coach, CP 409-413; Dep. N.L., CP 446-447.

<sup>42</sup> Dep. N.L., CP 446-448

<sup>43</sup> Dep. N.L., CP 448-450.

<sup>44</sup> *Id.*

lunch with her.<sup>45</sup> Clark lied to N.L. about his true age (18), and told her he was only 16 years old.<sup>46</sup> The District did not inform junior or senior high track coaches that they had a sex offender on their team, and as a consequence, coaches did not monitor the conduct of the sex offender or keep him away from N.L.<sup>47</sup>

Clark used a ruse and urged N.L. to skip track practice in order to go to Burger King for lunch.<sup>48</sup> During scheduled afterschool track practice, Clark picked up N.L. in his car and told N.L. he had forgotten something and needed to go back to his home.<sup>49</sup> N.L. went inside Clark's home, and once inside his bedroom, Clark forcibly raped N.L.<sup>50</sup> N.L. expressed her lack of consent through words ("no") and conduct (resistance, no matter how slight).<sup>51</sup> It is undisputed that N.L. was raped by Clark, after which he dropped her off at track practice where she caught the bus to go home.<sup>52</sup> It is undisputed that N.L. was a virgin at the time of

---

<sup>45</sup> *Id.*

<sup>46</sup> Dep. N.L., CP 451-452

<sup>47</sup> Dep. BHS Head track coach Patrick Mullen (2006-2007), CP 402-408; 414; See also, Dep. Heltsley, Athletic Director, and Director of Campus Safety, CP 418-438.

<sup>48</sup> Dep. N.L., CP 452-456.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, See rape as defined in: RCW 9A.44.079; RCW 9A.44.060; and RCW 9A.44.050.

<sup>52</sup> *Id.*

the rape.<sup>53</sup> The matter was reported to the police, and Clark was prosecuted and convicted.<sup>54</sup>

**D. N.L.'s expert, Judith Billings.**

The trial court was presented with the expert report of Judith Billings, the former Superintendent of Public Instruction for the State of Washington.<sup>55</sup> The expert testimony of Ms. Billings was unrefuted by BSD. Billings opined that the applicable standard of care for BSD was to have: created a safety plan for Clark that monitored his whereabouts and behavior; set expectations of his behavior; protected younger female students from Clark; notified coaches, faculty, teachers and the neighboring junior high of his status and dangerous propensities, to name but a few protective measures. Billings concluded, based upon her review of the record, that BSD's failure to notify faculty, coaches, and the junior high of Clark's status and history, as well as failing to develop a safety plan to monitor Clark, as "deliberate indifference to the safety of students, particularly younger female students."<sup>56</sup> Ms. Billings opined: "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,

---

<sup>53</sup> Dep. N.L., CP 445

<sup>54</sup> CP 285-296, Certification for Determination of Probable Cause, and judgment and sentence. Dep. N.L., CP 444.

<sup>55</sup> CP 297-305.

<sup>56</sup> *Id.* at CP 301.

raped and suffered, the documented, extensive consequences of that event.”<sup>57</sup>

## V. ARGUMENT

### A. **The Court of Appeals decision was correct: the Trial Court Erred in Granting Summary Judgment.**

Summary judgment orders are reviewed de novo, and the appellate court performs the same inquiry as the trial court. *Durland v. San Juan County*, 182 Wn.2d 55, 69 (2014). At the summary judgment stage, the trial court “must consider the facts submitted and all reasonable inferences therefrom in the light most favorable to the nonmoving party.” *Sheriff’s Ass’n. v. Chelan County*, 109 Wn.2d 282, 294-95 (1987); CR 56(c). Summary judgment “must be denied if a right of recovery is indicated under any provable set of facts.” *Smith v. Acme Paving Co.*, 16 Wn.App. 389, 393 (1976). Summary judgment must be denied “if the record shows any reasonable hypothesis which may entitle the non-moving party to relief.” *Mostrom v. Pettibon*, 25 Wn.App. 158, 162 (1980). Questions of proximate cause are also generally questions for the jury. *Schooley v. Pinch’s Deli Market, Inc.*, 80 Wn.App. 862, 874 (1996), aff’d, 134 Wn.2d 468 (1998).

---

<sup>57</sup> *Id.*, at CP 303.

Here, the trial court granted summary judgment in favor of BSD and ruled as follows:

I do not believe that the schools are the guarantors of safety; and certainly a teacher, an administrator, a coach is not in the role of a CCO, community corrections officer. To me, the issue is not so much the duty as the causation element, and on that basis I'm going to dismiss the case and grant summary judgment for the defense.<sup>58</sup> VRP 18.

**B. Duty and Breach.**

The trial court ruled that schools are not “guarantors” of the safety of its students. *Id.* This is not so. It is well established that when “a pupil attends a school, he or she is subject to the rules and discipline of the school, and the protective custody of the teachers is substituted for that of the parent.” *J.N. v. Bellingham School District*, 74 Wn.App. 49, 56-57 (1994), citing *McLeod v. Grant County School District No. 128*, 32 Wn.2d 316, 319-20 (1953). The duty imposed is one of reasonable care, “as it supervises the pupils within its custody, the district is required to exercise such care as a reasonably prudent person would exercise under the same or similar circumstances.” *J.N.*, supra at 57; citing *Briscoe v. School District 123*, 32 Wn.2d 353, 362 (1949), and *McLeod*, supra, at 319-20. The school district “holds mandatory custody of a child” and therefore:

---

<sup>58</sup> VRP refers to verbatim report of proceedings and the pages are: 1-19. N.L. incorporates by reference all arguments made in her pleadings to the Court of Appeals, as well as in the response to the Petition for Review and in opposition to the Amicus brief.

it 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.

*N.L.*, at 469.<sup>59</sup> The supervisory duty of a school extends to off campus and extracurricular activities under the supervision of district employees, such as coaches, band directors and the like. *Travis v. Bohannon*, 128 Wn.App. 231, 239 (2005), citing *Carraba v. Anacortes School Dist. No. 103*, 72 Wn.2d 939 956 (1967). The duty of the district is to “anticipate dangers which may reasonably be anticipated, and then take precautions to protect the pupils in its custody from such dangers.” *McLeod*, at 320.

The existence of a legal duty is a question of law that is reviewed de novo. *N.K. v. Corp. of Presiding Bishop*, 175 Wn.App. 517, 525 (2013) *rev. denied*, 179 Wn.2d 1005 (2013). The question of whether a defendant breached its duty is generally a question of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265. 275 (1999).

In determining whether BSD owed a legal duty to *N.L.*, courts look at the relationship between the parties, and the general nature of the risk. *McLeod*. at 319. A school district's duty to exercise reasonable care extends only to foreseeable risks of harm. *J.N.*, *supra* at 57. A school district's duty is to “anticipate dangers which may be reasonably

---

<sup>59</sup> Citing *McLeod*, at 320, Internal citations omitted.

anticipated, and to then take precautions to protect..." students in its custody from "such dangers." *McLeod*, at 320.

Whether the general field of danger should have been anticipated by the defendant is normally a question for the jury to decide, and it can be decided as a matter of law only where reasonable minds cannot differ. *Christen v. Lee*, 113 Wn.2d 479, 492 (1989). The fact that the harm was caused by an intervening intentional criminal act does not "of itself exonerate a defendant from negligence." *McLeod*, 42 Wn.2d at 320. Instead, this is a "fact to be considered in determining whether such act was reasonably foreseeable." *Id.* at 321. "Intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon." *McLeod*, at 321.

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

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

BSD owed a duty of reasonable care to N.L. to protect her from Clark, and BSD had a duty to monitor and supervise Clark because of his dangerous history of sexual assault. *N.L.*, supra at 474. BSD took no reasonable steps to protect N.L. or to supervise Clark, and the result was a highly foreseeable sexual assault. *Id.*<sup>60</sup>

**C. General Field of Danger: Clark’s sexual assault was reasonably foreseeable.**

BSD failed to protect N.L. from the general field of danger represented by Clark’s dangerous history of sexual assaults. This Court has held that a “general field of danger” has been found in “the darkened room under the bleachers” that “might be utilized during periods of unsupervised play for acts of indecency between school boys and girls.” *McLeod*, at 322. In *McLeod*, a female student was raped by two male students in a darkened room in the gym; there was no evidence of the male student’s “vicious propensities.” The general field of danger flowed from the “existence of an accessible darkened room coupled with a lack of

---

<sup>60</sup> Expert opinion testimony on the ultimate issue of fact is sufficient to create an issue to that fact, and therefore preclude the entry of summary judgment. *J.N.* supra at 60-61. Billings unrefuted testimony defeats summary judgment, and thus the trial court erred.

supervision.” Safeguarding students from the general danger -- the darkened room and lack of supervision -- would have protected the rape victim from the particular harm. *Id.* at 322.

In *J.N.*, the court found the District had “overwhelming notice” of the offending student’s propensity to assault other students over the course of a single year. *J.N.*, at 51-54. During this year, the offending student sexually assaulted a young male student in the school restroom on multiple occasions. *Id.* at 51. The *J.N.* Court held that the “general field of danger -- harm to a pupil caused by another pupil -- flowed from the arguably inadequate recess supervision and the presence of nearby, accessible, and generally unsupervised rest rooms.” *Id.* at 59-60. It was “irrelevant” at the summary judgment stage whether the particular injury that in fact occurred was an assault or a sexual assault. *Id.* “All that was required is evidence that the District knew, or in the exercise of reasonable care should have known of the risk that resulted in the harm’s occurrence.” *J.N.*, citing *Peck*, at 293.

Here, the Court of Appeals concluded that “a school district’s knowledge of one of its student’s dangerousness may give rise to a jury question of foreseeability.” *N.L.*, at 470. The *N.L.* court relied upon *J.N.*, *supra*, and held that:

Like the school district in *J.N.*, BSD owed N.L. a duty of reasonable care to protect her from reasonably foreseeable harm....The evidence suggests that BSD was on notice of the possibility for the specific harm to N.L., and BSD could have and should have reasonably anticipated that Clark would reoffend. Thus it had a duty to reasonably protect N.L. from Clark's reasonably foreseeable acts.

*Id.* at 471. Long standing precedent – *McLeod, J.N.* –holds that the general field of danger for N.L., flowed from BSD's complete failure to supervise a dangerous student, Clark. *J.N.*, at 59-60; *McLeod* at 322.

N.L. presented ample evidence that BSD did NOTHING to protect students like N.L. from the general field of danger Clark represented. *Id.* The trial court erred.

#### **D. Proximate cause**

The trial court erred when it granted summary judgment to BSD on the grounds that "causation" could not be established as a matter of law. N.L. presented evidence that BSD's breach was a proximate cause of her injury, and the Court of Appeals should be affirmed. *N.L.*, supra at 473.

"Questions of proximate cause are generally questions for the jury. *Schooley v. Pinch's Deli*, 80 Wn.App. 862 (1996). Evidence of breach of duty is not necessarily evidence of proximate cause; such evidence may be admissible on the issue of proximate cause as well as breach of duty.<sup>61</sup>

---

<sup>61</sup> See *Taggart v. State*, 118 Wn.2d 195, 226 (1992) (the question of legal causation is so intertwined with the question of duty that the former may be answered by addressing the latter).

Proximate cause has two elements: cause in fact and legal causation.” *Hartley v. State*, 103 Wn.2d 768, 777 (1985). Cause in fact requires the plaintiff to show “the harm suffered would not have occurred but for an act or omission of the defendant.”<sup>62</sup> Cause in fact is usually a question for the trier of fact and is generally not susceptible to summary judgment. *Martini*, supra at 479.<sup>63</sup>

Legal causation requires that N.L. must show that the relationship between her injury and BSD’s conduct is “proximate” enough to justify imposition of responsibility on BSD. The existence of legal causation between two events is determined “on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.” *Shah v. Allstate*, 130 Wn.App. 74 (2005). There can be more than one proximate cause of an injury, and it is for a jury to determine whether a third party’s act is a superseding or concurring cause. *Travis*, 128 Wn.App at 242. “Intervening criminal acts may be found to be foreseeable, and if so found, actionable negligence may be predicated thereon.” *McLeod*, at 321. The question becomes whether the intervening act will supersede

---

<sup>62</sup> *Martini v. Post*, 178 Wn.App. 153, 479 (2013), citing *Joyce v. Department of Corrections*, 155 Wn.2d 306, 322 (2005). See also *Hartley*, supra at 778.

<sup>63</sup> Citing *Owen v. Burlington N. Santa Fe. RR Co.*, 153 Wn.2d 780, 788 (2005), (quoting *Ruff v. King County*, 125 Wn.2d 697, 703 (1995) (“issues of negligence and proximate cause are generally not susceptible to summary judgment.”) *Hertog*, 138 Wn.2d at 275; *Accord, Schooley v. Pinch’s Deli*, 134 Wn.2d 468, 478 (1996).

defendant's negligence only when it is so highly extraordinary or unexpected that it can be said to fall outside the realm of reasonable foreseeability as a matter of law. *Johnson v. State*, 77 Wn.App. 934 (1995).<sup>64</sup>

Here, N.L. presented evidence that “but for” the myriad of failures of BSD Clark would not have made contact with N.L. at the track, and groomed the naive 14 year old for sexual assault, and used deception to lure her off campus to be raped. When the evidence is viewed in the light most favorable to N.L., “but for” causation is satisfied.

As to legal causation, the harm to N.L. was not “so highly extraordinary or improbable” that no reasonable person could be expected to anticipate it. *N.L.*, at 474. In fact, Clark's chronic and lengthy history made it highly foreseeable that he would reoffend. BSD's failures to protect N.L., and supervise Clark, resulted in the highly foreseeable harm that occurred here: N.L.'s rape. In the absence of supervision, Clark was able to lure, deceive, and create a ruse to lure a 14 year old girl, off

---

<sup>64</sup> A criminal act by a third party is not an intervening cause if it was reasonably foreseeable. A criminal act may be foreseeable if the actual harm fell within the general field of danger which should have been anticipated. *Johnson v. State*, 77 Wn.App. 934, 942 (1995). The foreseeability of an intervening act is ordinarily a determination reserved for the finder of fact. *Kennett v. Yates*, 41 Wn.2d 558, 565 (1952).



**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:

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](mailto:ffloyd@floyd-ringer.com)  
[jsafarli@floyd-ringer.com](mailto:jsafarli@floyd-ringer.com)  
Attorneys for Petitioner (Bethel School District)

I served same upon the following counsel of record via email and regular U.S. Mail:

Jerry J. Moberg  
Jerry Moberg & Associates, P.S.  
PO Box 130  
124 3<sup>rd</sup> Avenue S.W.  
Ephrata, WA 98823  
[jmoberg@jmlawps.com](mailto:jmoberg@jmlawps.com)

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

DATED this 30th day of October, 2015.

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

## OFFICE RECEPTIONIST, CLERK

---

**To:** Marla Folsom  
**Cc:** ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; Julie Kays; 'mmoberg@jmlawps.com'; jmoberg@jmlawps.com  
**Subject:** RE: N. L. v. Bethel School District, Supreme Court No. 91775-2, Court of Appeals No. 45832-2-II

Received on 10-30-2015

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:** Friday, October 30, 2015 10:10 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** ffloyd@floyd-ringer.com; jsafarli@floyd-ringer.com; Julie Kays <jkays@connelly-law.com>; 'mmoberg@jmlawps.com' <mmoberg@jmlawps.com>; jmoberg@jmlawps.com  
**Subject:** RE: N. L. v. Bethel School District, Supreme Court No. 91775-2, Court of Appeals No. 45832-2-II

Greetings,

I have attached Respondent's Supplemental Brief. The original will be hand-delivered this afternoon to the Supreme Court.

Copies of the attached are also being hand delivered to the attorneys for Bethel School District and the Court of Appeals, Division II, this afternoon. The attorneys for amici will be served by U.S. Mail.

Thank you.

*Marla H. Folsom*  
Connelly Law Offices  
2301 North 30<sup>th</sup> Street  
Tacoma, WA 98403  
(253)593-5100  
(253)593-0380 (fax)  
[mfolsom@connelly-law.com](mailto:mfolsom@connelly-law.com)

