Supreme Court No. 91775-2
Court of Appeals Case No No. 45832-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

N.L.,

Respondent,

vs.

BETHEL SCHOOL DISTRICT,

Petitioner.

AMICI CURIAE BRIEF OF THE WASHINGTON STATE SCHOOL DIRECTORS ASSOCIATION; THE ASSOCIATION OF WASHINGTON SCHOOL PRINCIPALS; AND THE WASHINGTON ASSOCIATION OF SCHOOL ADMINISTRATORS IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY AND INTEREST OF AMICI

Amici adopt and incorporate the statement of interest contained in their motion for leave to file an *Amici Curiae* brief.

II. STATEMENT OF THE CASE

Amici accept and adopt Bethel School District's statement of the case set forth in its Petition for Review. The Court of Appeals ruling significantly expands school district liability to now include student's misconduct (including criminal acts) that occurs off-campus and after school hours, while the student is no longer under the care, control or supervision of the district. This expansion of liability will have enormous financial and operational impact on the schools in this state. This Court should review the ruling of the Court of Appeals and make its own determination on whether school district tort liability should be so significantly increased.

III. ARGUMENT

A. BETHEL'S PETITION FOR REVIEW INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND CONFLICTS WITH EXISTING CASE LAW.

The operation of school districts has an enormous impact on the public. Schools are often the center of community interest. Washington

schools educate over one million students each year. School districts have a combined annual budget of over six billion dollars and employ over 100,000 people. A court ruling that would significantly increase the potential tort liability of school districts throughout the state is a matter of significant public interest. Moreover, an expansion of tort liability to a student's off-campus and after-hours criminal conduct would create a substantial financial and operational risk that would certainly affect the public coffers. Building principals and other school administrators would be saddled with the impossible task of determining how to supervise students while off-campus and after-hours. Accordingly, the issues involved in this case are of "substantial public interest' under RAP 13.4(b)(4).

Furthermore, the previous opinions of this Court and the Court of Appeals have limited a school district's liability for student misconduct to situations where the students were (or should have been) under the care, custody and supervision of the District. In addition, this Court has in other analogous situations rejected this liability concept such as claims against the State where children placed in foster care have criminally assaulted others. *Sheikh v. Choe* 156 Wash.2d 441, 128 P.3d 574, 576 (2006) In *Sheikh,* the victim of an assault by four dependent wards of the State sued the State to recover for his injuries arguing that the State owed to him a

common law duty to control the conduct of the dependent wards. This Court recognized that "our common law imposes no duty to prevent a third person from causing physical injury to another." *Id at 448.* This Court noted that the "take charge" liability for the criminal misconduct of others is limited to governmental supervision of parolees and probationers because in that situation the government has the authority to significantly regulate the parolees conduct. *Id. at 449* (citing *Taggart v. State,* 118 Wash.2d 195, 218–21, 822 P.2d 243 (1992) The *Sheikh* court recognized limitations to the "take charge" duty, including Division One's decision declining to impose a duty where DSHS had undertaken supervision of two children who later sexually assaulted a neighbor child. *Terrell C. v. Dep't of Soc. & Health Servs.,* 120 Wash.App. 20, 29, 84 P.3d 899, *review denied,*152 Wash.2d 1018, 101 P.3d 109 (2004). Based on common law duties and public policy *Sheikh* concluded that the State owed no duty to the assault victim. *Id. at 454.* The Court of Appeals ruling at bar is directly contrary to *Sheikh* and imposes a "take charge" duty on the school district for the off-campus after-hours criminal misconduct of one of its students. This opinion is in direct conflict with existing case law. RAP 13.4(b)(1)- (2).

B. HISTORICALLY, SCHOOLS HAVE ONLY FACED POTENTIAL TORT LIABILITY FOR INJURIES TO

STUDENTS THAT ARE UNDER ITS CARE, CUSTODY OR SUPERVISION.

Until the ruling of the Court of Appeals in this case, it has been widely and commonly recognized that school districts in this state are only liable for injuries caused by the misconduct of a student when that student is in or should be in the care and custody of the district either at school or in extracurricular activities sponsored by the school. *Briscoe v. School Dist. No. 123, Grays Harbor County*, 32 Wn.2d 353, 363, 201 P.2d 697, 702 (1949)(Failure to supervise a "keep away" game played during school on playground); *McLeod v. Grant County School District No. 128*, 1953, 42 Wn.2d 316, 255 P.2d 360 (1953)(Premises liability for student misconduct on unsupervised school grounds); *Travis v. Bohannon*,128 Wn. .App. 231, 238, 115 P.3d 342 (2005)(School sponsored activity that should have been supervised by District). Districts have not been held responsible for the personal off-campus misconduct of its students. *Coates v. Tacoma School Dist. No. 10* , 55 Wn.2d 392, 394, 347 P.2d 1093 (1960).

This is a rule of common sense recognizing that the district can effectively control its students only while they are in the care and control of the district. The district generally owes the same duty to its students while in its care and control that a parent owes to his or her children. The

in loci parentis doctrine recognizes that the district assumes the role of the parent whilst the children are in its care, control and custody.[1]

Expanding the schools' traditional liability to off-campus after-school student criminal misconduct would result in a monumental increase in potential tort liability for all districts in the State. In addition, because the nature of such liability would be virtually impossible to predict or control, it is very likely that traditional school district risk pools and insurance carriers would not be able to underwrite the potential exposure thereby exposing the Districts' and State budgets to unwarranted expense. The Court of Appeals unprecedented ruling making the district liable for the off-campus after-hours criminal misconduct of a student creates an unmanageable risk that will have significant implications on the cost of education.

This newly created duty of supervision would require school administrators and boards to develop new policies and procedures for supervision that would likely conflict with a parent's duty to supervise children when they are not in school. Would school staff be required to stay with some children after-school at their private homes? School

[1]Interestingly, the Court of Appeals opinion imposes a greater liability on the district for the malicious misconduct of children than currently exists for their parents. RCW 4.24.190 limits a parent's liability for the willful or malicious misconduct of children living with them to $5,000. *Schwartz v. Elerding*, 166 Wash.App. 608, 612, 270 P.3d 630, 633 (2012)

administrators would be faced with the "Hobson's" choice of warning other students of behavioral issues of peers, thereby violating the student's right of privacy and confidentiality under various privacy laws that currently protect students, or honoring those privacy laws and not warning students of the dangerous proclivity of fellow students. The administration of this newly created liability will be nearly impossible.

C. MERE KNOWLEDGE OF A STUDENT'S DANGEROUSNESS SHOULD NOT BE A BASIS OF DISTRICT TORT LIABILITY.

The Court of Appeals held that "knowledge of one of its student's dangerousness may give rise to a jury question of foreseeability." *N.L. v. Bethel School Dist.*, 348 P.3d 1237, 1242 (2015) To date, no Washington court has held that knowledge of dangerousness can result in district tort liability for off-campus after-hours student criminal misconduct. Adoption of this theory of liability would expose schools to potential tort liability not only for the acts of registered sex offenders but also the out-of-school acts of thousands of students identified with emotional and behavioral disorders (EBD).[2]

[2] Estimates are that nearly 2% of the student population is EBD students. Based on DSM-IV criteria it is estimated that 15-20% of the entire student population is said to have a clinically significant emotional and or behavioral disorder.
http://www.k12.wa.us/SpecialEd/Families/pubdocs/bestpractices.pdf

Schools in Washington are required to educate all students, including students with aggressive behavioral issues and sexual predators. To make the district liable for their out-of-school conduct merely because they attend school and the district is aware of their behavioral issues would create an unprecedented and unworkable responsibility on every district in the state.

D. THE JN V. BELLINGHAM SCH. DIST. ANALYSIS DOES NOT APPLY TO OFF-CAMPUS AFTER-SCHOOL MISCONDUCT.

The Court of Appeals applied the analysis of *J.N. v Bellingham Sch. Dist.,* 74 Wn. App. 49, 871 P.2d 1106(1994) to this case. *JN* involved an injury occurring on campus while JN was under the direct supervision of the District. Application of the *J.N.* supervision standards to off-campus after-school student activity will be impracticable if not impossible. The District has no way to effectively control the out-of-school conduct of students with a known disturbed or aggressive propensity.

E. MONITORING AND NOTIFICATION OF A REGISTERED SEX-OFFENDER IS THE RESPONSIBILITY OF LAW ENFORCEMENT NOT SCHOOLS.

The Court of Appeals suggests that the District has a legal duty to monitor a registered sex-offender's conduct after-school hours. The

District has no legal authority to impose its supervision authority on students after school is out and they leave campus. The authority to warn the public about sexual predators rests primarily with law enforcement and not with school districts. RCW 4.24.550 The district does not have "take charge" responsibility for the actions of its students. (See brief, supra) The decision in this case would transfer that monitoring requirement to schools at an untold cost.

F. **PUBLIC POLICY WOULD DICTATE AGAINST IMPOSING TORT LIABILITY ON SCHOOL DISTRICTS FOR AFTER-HOURS OFF-CAMPUS MISCONDUCT OF STUDENTS**.

With over one million students attending public schools in Washington, creating a duty on districts for misconduct of students while away from the campus and after school hours in non-school sponsored activities is, simply, a dangerous public policy. The potential costs to districts for this implausible tort liability would be significant and have an adverse impact on the educational process in Washington. This Court has recognized the public policy implications of saddling a government institution with potential liability for the criminal conduct of its wards in *Sheikh,* supra. The public policy concerns are even greater the institution is a school district.

G. PRIVACY LAWS WOULD PROHIBIT THE DISTRICT FROM WARNING OTHER STUDENTS OF THE BEHAVIORAL DISORDERS OF STUDENTS.

The Court of Appeals opinion implies that the District should have warned or notified N.L. and other students of the dangerous propensities of Clark. However, this type of information is generally protected by privacy laws that prohibit such disclosures. See for example, *Family Educational Rights and Privacy Act* (20 U.S.C. § 1232g; 34 CFR Part 99) and *Protection of Pupils Rights Act*, 20 U.S.C. § 1232h (2000 & Supp. IV 2004) (also known as the Hatch Amendment after its 1978 sponsor). The holding in this case may also implicate behaviorally disabled students. There are privacy laws that protect the information related to these students as well.

IV. CONCLUSION

The opinion subject to this petition greatly expands the traditional liability of school district for actions of its students. It moves the circle of supervision from the confines of the school grounds to the entire community. A major change in school district supervision requirements like this one is best left to the determination of the legislature and not the courts. Legislatures are better able to study the impacts on public education that will result from this expansion of liability. This court

should review the decision to determine if, under existing case law, such an extension of liability is warranted. Bethel's Petition for Review should be granted. The Amici Curiae are uniquely situated to address the financial and operation impacts that an expansion of liability of this magnitude may have on education in Washington and they look forward to addressing these important issues should the Court grant review.

RESPECTFULLY SUBMITTED July 27, 2015.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 27 day of July, 2015, I caused a true and correct copy of this Amici Curiae Brief of The Washington State School Directors Association; The Association of Washington School Principals; and the Washington Association of School Administrators in Support of Petition for Review to be delivered in the manner indicated below to the following counsel of record:

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DATED this 27 day of July, 2015, at Ephrata, WA.

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OFFICE RECEPTIONIST, CLERK

To: Mary Moberg
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Greetings,

Attached please find the following documents in Supreme Court No. 91775-2; N.L. v Bethel School District:

- Motion For Leave to File Brief *Amici Curiae* of the Washington State School Directors Association; The Association of Washington School Principals; and The Washington Association of School Administrators

- Amici Curiae Brief of The Washington State School Directors Association; The Association of Washington School Principals; and the Washington Association of School Administrators in Support of Petition for Review

Please don't hesitate to contact our office with any questions or concerns.

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