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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

JAN 14 2011

Frederick K. Ohlrich Clerk

Deputy

C.A., A MINOR, ETC., ET AL.,
Plaintiff(s) and Appellant(s),

vs.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT AND GOLDEN VALLEY HIGH SCHOOL,
Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 1, CASE NO. B217982
LOS ANGELES SUPERIOR COURT CASE NO. PC 044428

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

In the petition for review, plaintiff explained that under the published majority opinion of the Court of Appeal in this case, a school district who hires, retains or supervises a child molester to personally counsel high school students is not subject to any liability if that counselor predictably molests one of the students entrusted to her – even though the school district's employees were previously aware or had reason to be aware of the counselor's molestation history and did nothing about it.

In its answer to the petition the defendant School District affirmatively embraces this holding, arguing that not only could there be no direct liability under these circumstances (as the Court of Appeal majority ruled) but also that there could be no vicarious liability under Government Code section 820, subdivision (a), because, according to defendant, a school employee could *never* be personally liable for the conduct alleged here. Defendant fatally ignores the fact that school administrators are in a special relationship with the minors entrusted to them.

Defendant takes the position that where a school employee knows or has reason to know that a guidance counselor has molested students in the past, and yet decides to hire her anyway, and where after the counselor has been hired, the school employee knows or has reason to know that the counselor is continuing to molest students and yet fails to supervise, train or discharge the counselor and instead continues to facilitate the sexual

abuse by turning a blind eye to such misconduct, and a young student is foreseeably molested, that school employee cannot be held personally liable.

Needless to say, parents who send their young children to public schools every weekday morning would be shocked to learn that a school that hires known child molesters to have direct, one-on-one interactions with their children, face absolutely no civil liability if their child is molested. But, according to defendant, that is precisely how the law is and how it should be.

Defendant brazenly argues that if there is to be liability under the circumstances alleged here, then it is up to the Legislature to step in. But intervention by the Legislature is not necessary, because it has already created a liability mechanism through the current statutory scheme. As explained below, the law does not dictate the outrageous result defendant advocates. Further, the very fact that defendant advocates such a position and the fact that the Court of Appeal, albeit on different grounds, held that there could be no potential liability under the facts plead in this case, illustrates why review by this Court is so justified. Clarification by this Court is needed to ensure that students who are molested under the circumstances alleged here have civil recourse against those whose negligence placed them in a position to be so traumatically harmed.

ARGUMENT

A school district employee is not shielded from liability for his or her negligent participation in the selection, retention or supervision of a known child molester.

The crux of defendant's answer is the argument that school employees cannot be personally liable for the manner in which they selected or supervised other school employees whom they knew or had reason to know had tendencies to molest the young children with whom they were charged. However, not one of the cases defendant cites supports this remarkable proposition. Further, defendant ignores the fact that this case involves the duties owed by school administrators who are in a special relationship with minor children entrusted to them.

Negligence involves a legal duty to use reasonable care, breach of that duty, and proximate cause between the breach and the plaintiff's injury. (See *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal.App.4th 746, 751.) While as a general rule one owes no duty to control the conduct of another, nor to warn those endangered by such conduct, it is well accepted that a special relationship is formed between a school personnel and students resulting in the imposition of an affirmative duty on the school personnel to take all reasonable steps to protect the students. (See *M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517; *Leger v. Stockton Unified School Dist.*

(1988) 202 Cal.App.3d 1448, 1458-1459.) As explained in *M. W.*, "[t]his affirmative duty arises, in part, based on the compulsory nature of education. (*Rodriguez v. Inglewood Unified School Dist.* (1986) 186 Cal. App. 3d 707, 714-715 [230 Cal. Rptr. 823]; see also Cal. Const., art. I, §§ 28, subd. (c) [students have inalienable right to attend safe, secure and peaceful campuses]; Ed. Code, § 48200 [children between ages 6 and 18 years subject to compulsory full-time education].) '[T]he right of all students to a school environment fit for learning cannot be questioned. Attendance is mandatory and the aim of all schools is to teach. Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming.' (*In re William G.* (1985) 40 Cal.3d 550, 563 [221 Cal. Rptr. 118, 709 P.2d 1287].)" (*M. W., supra.* at p. 517.)

As explained by Justice Mallano in his dissent, this Court has long recognized a school district's vicarious liability for its employees' negligent failure to protect students pursuant to this special relationship. (Slip Opinion, Dissent pp. 2-13; citing *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741; *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438 and *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066.) "Under the *Dailey-Hoyem-Randi W.* trilogy, a school employee may be held personally liable for his or her negligence in failing to supervise students adequately, and the school district may be vicariously liable for the employee's negligence." (Slip Opinion Dissent p. 10.)

"[I]f individual District employees respoonsible for hiring and/or supervising teachers knew or should have known of [the teacher's] prior sexual misconduct towards students, and thus, that [the teacher] posed a reasonably foreseeable risk of harm to students under [the teacher's] supervision, [...] the employees owed a duty to protect the students from such harm." (*Virginia G. V. ABC Unified School District,* (1993) 15 Cal.App.4th 1848, 1855.)

Thus, it is axiomatic that pursuant to the special relationship existing between school personnel and students, where an employee of the school *knows or should know* that a guidance counselor has a propensity to molest or abuse children and yet the employee facilitates the relationship between the student and known child molester by hiring the molester, permitting the molester to have contact with the student, or simply turning a blind eye to the abuse in violation of his or her mandatory duties, the employee can be held personally liable.

Defendant attempts to side step this fact by asserting that individual employees cannot be liable for negligent hiring and retention because such claims are "direct" in nature against the employer and therefore cannot serve to impose liability against the employee. There are several flaws with defendant's position.

First, while as explained below defendant's position that the negligent hiring and retention cannot be asserted against an individual employee is mistaken, even assuming *arguendo* defendant's position is accurate, defendant ignores the allegations in this case

concerning vicarious liability based on negligent supervision. As noted above, it is well established that a school district can be held vicariously liable for its employee's negligent supervision. (See *Dailey*, *supra*, 2 Cal.3d at p. 747; *Hoyem*, *supra*, 22 Cal.3d at p. 513; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1460-1462; *M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 518.)

Defendant coyly describes plaintiff's negligent supervision claims as negligent "oversight" in an apparent attempt to avoid the numerous cases that have directly held that school employees could be liable for negligent supervision. (See Answer, pp. 1,2, 4-9.) However, no matter how defendant phrases the claim, the allegations concern the school employee's failure to supervise and protect the students from a known child molester, whose job it was to personally interact with young children. Further, it should not and does not matter whether the cases finding personal liability for negligent supervision concern claims that the school employee failed to properly supervise a student who injured another student, as opposed to the failure to supervise a guidance counselor who injured a student, such as here. In both cases the obligation to supervise exists to *protect the students* for whom the school employee was responsible. In both cases the school employee was in a position to control the third party that injured the student (whether that third party was another student or a guidance counselor). And in both cases the negligence of the school employee resulted in a student being injured.

Thus, as defendant has not and cannot meaningfully dispute that an individual school employee's negligent supervision may give rise to personal liability, and under Section 815.2, the school district may be vicariously liable for the negligent supervision, the Court of Appeal's holding in this case finding otherwise is unquestionably in error.

Second, defendant's position that negligent hiring and retention are always direct claims of negligence against the employer, not vicarious liability, is misplaced. (Answer p. 6.) The cases cited by defendant distinguishing vicarious liability from "direct" liability claims of negligent hiring and retention, concern the vicarious liability for the underlying wrongful conduct that is outside the scope of employment (the sexual molestation by the counselor in this case). (See Answer pp. 6-7, citing *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1136-1137 [shooting and killing of customer by former employee]; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1559, 1565 [allegations of criminal sex abuse; no claim of respondeat superior]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 813-814 [cyber-threats made outside scope of employment]; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 831, 840, fn. 2 (1992) [allegations of criminal acts of molestation; court specifically noting that respondeat superior did not apply to those tortious acts].) These cases do not distinguish direct liability from vicarious liability of the employee charged with negligently hiring, retaining or supervising of the underlying tortfeasor employee. Rather, as explained in these cases, where the underlying tortfeasor

employee's conduct is outside the scope of employment, the employer will not be found vicariously liable for that misconduct, but may be found directly liable for the injuries caused by the underlying tortfeasor under a theory of negligent hiring or retention. (*Ibid.*)

Here, the vicarious liability alleged is not the molestation by the guidance counselor, but the negligence of the employees who participated in the hiring, retention or supervision of the molester and who therefore placed that molester in the position to perpetrate her despicable acts on a student with whom the employees unquestionably had a special relationship giving rise to a duty to protect. There is simply no justification for shielding these employees from personal liability.

Finally, defendant's position, that if individual liability were recognized under these circumstances then "public entities will face an onslaught of negligent hiring, retention and oversight claims," is bizarre. (Answer p. 9.) Such claims can legitimately be made against public entities such as defendant if these entities (1) owe a special relationship to protect a class of individuals such as the plaintiff-victim; (2) employees of these entities hire, retain or supervise individuals, whom they know or should know will foreseeably harm members of that class, such as the plaintiff; and (3) the plaintiff is foreseeably harmed as a result of this negligence.

If, under these circumstances, there is an "onslaught" of claims, then such would justify the reasoning behind the jurisprudence allowing liability for negligent supervision by school officials. Any wide-spread deficiency in the manner in which school

employees are carrying out their duties of supervision, placing at risk the most vulnerable members of our society whose safety they are charged to protect–young students who are legally required to leave the safety of their homes each day and attend school–should be properly addressable through the courts. Thus, any potential "onslaught" is a reason why review by this Court is justified–to recognize that there Schools are potentially liable under these circumstances. It is certainly not a reason to avoid recognition of such claims.

CONCLUSION

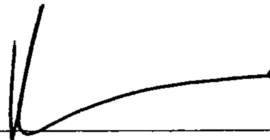
Simply put, nothing defendant argues in its answer justifies the Court of Appeal's majority opinion or negates the reasons why review of this decision is necessary.

Dated: January 13, 2011

Respectfully submitted,

MANLY & STEWART

ESNER, CHANG & BOYER

By: 

Holly N. Boyer

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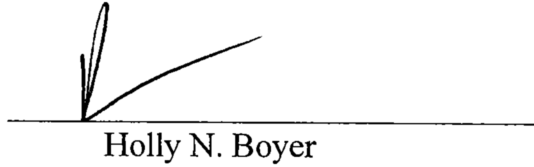

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