S188982

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

When a school district's employees hire, retain or supervise a school guidance counselor they know or have reason to know has a history of child molestation, can the school district be *vicariously* liable for that negligent hiring, retention or supervision under Government Code section 820 if that counselor molests a student entrusted to her, or is the molested student unable to sue the school district because there is no separate statute imposing *direct* liability on the District for that conduct, as the Court of Appeal Majority held in its published opinion in this case?

INTRODUCTION

As incredible as it sounds, 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. As explained, that is not the law.

Schools and their employees are in a special relationship with the students entrusted to their care and therefore owe a duty to protect those students from foreseeable harm caused by third parties – whether that third party is a school yard bully or a school guidance counselor with a history of child abuse. Here, the District's employees breached this duty owed to plaintiff by having him personally counseled by an individual they either knew or had reason to know was a child molester. Those employees therefore could be individually liable for their individual negligence and, in turn, the school could be vicariously liable for that negligence.

Accordingly, this Court should reverse the Court of Appeal's Majority opinion, and reaffirm that under California law, schools are not insulated from liability if they hire/retain/supervise individuals whom they either know or have reason to know are child molesters to work closely with the students whose safety is entrusted to them.

In this case, it is alleged that employees of the William S. Hart Union High School District ("School District") negligently hired, retained or supervised Roselyn Hubbell to be a head high school guidance counselor even though these employees knew or had reason to know that Ms. Hubbell had a history of child molestation. While working as counselor, Ms. Hubbell started a relationship with one of the 15-year-old students in her charge (plaintiff C.A.) and sexually molested him, engaging in sexual acts with him at the school. In its published majority

opinion, the Court of Appeal held that plaintiff could not pursue any of his claims against the School District.

The Majority held there could be no vicarious liability for the acts of the molester because such acts will be deemed outside the course and scope of employment. The Majority then went further and held that there could be no liability for the hiring, retention or supervision of the molester because, according to the Majority, there is no statute imposing *direct* liability on the School District itself for such conduct.

In reaching its conclusion, the Majority analyzed plaintiff's claim seeking to hold the School District liable for Ms. Hubbell's conduct in molesting plaintiff as being vicarious in nature, but the claims seeking to impose liability for the hiring, retention or supervision of Ms. Hubbell as being direct in nature only. Viewed in this way the Majority concluded that the School District could not be liable for the hiring, retention or supervision of Ms. Hubbell because, in order for there to be direct liability there must first be a statute imposing liability for the conduct in question, which was absent here.

As Justice Mallano quickly recognized in his vigorous dissenting opinion, the flaw in the Majority's analysis was its failure to recognize that when a plaintiff claims (such as here) that certain employees of a governmental entity negligently hire, retain or supervise another employee who in turn directly injures the plaintiff, then the negligent hiring and retention claim is *vicarious* in nature. The plaintiff is

seeking to impose liability on the entity based upon the negligent conduct of the employees who were responsible for the hiring, retention or supervision of the unfit employee who directly injured the plaintiff. "Here, the school district's liability is based on the wrongful conduct – negligence – of employees *other than* the guidance counselor." (Slip Opinion, Dissent p. 11.)

The reason why this characterization is so important is that under the Government Code "a public employee is liable for injury caused by his act or omission to the same extent as a private person" (Gov. Code, § 820 , subd. (a)) *and* "[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . have given rise to a cause of action against that employee,' unless 'the employee is immune from liability." (Gov. Code, § 815.2, subds. (a), (b).) Thus, so long as the basis for plaintiff's claim is the negligence of an employee of a governmental entity and that claim would have been recognized if it had been brought against a private defendant, then section 815.2 provides a statutory basis to hold that governmental entity vicariously liable for its employee's tortious conduct.

The Court of Appeal Majority is therefore unquestionably wrong. In its answer to the petition for review, the District attempted to justify the Majority's conclusion by arguing that there could be no vicarious liability under Government Code section 820, subdivision (a). According to the District, a school employee

cannot be individually liable when a student is foreseeably molested by a guidance counselor even though (1) that employee knows or has reason to know that the guidance counselor has molested students in the past, and yet decides to hire her anyway or (2) 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.

This argument ignores the mandatory nature of education, requiring parents to entrust the safety of their children to school personnel. In turn, those school personnel are in a special relationship with the students entrusted to their care to guard against foreseeable risks of harm. Accordingly, when school employees hire, retain or supervise a guidance counsel whom they either know or have reason to know is a child molester, they could be individually liable if a student is molested by that counselor and the school could be vicariously liable for that negligence.

Simply put, parents are required to send their young child to public schools on weekday mornings. They are entitled to know that there will be recourse against that school if its employees hire/retain/supervise known child molesters to have direct, one-on-one interactions with their child, and their child is foreseeably molested. This Court should therefore reverse the opinion of the Court of Appeal and remand this matter for a trial on its merits.

STATEMENT OF FACTS[1]

C.A. was a 15-year-old student at a public high school operated by the William S. Hart Union High School District (School District). (AA 5.) Roselyn Hubbell, was the head guidance counselor and advisor at the high school (an employee of the School District) who was assigned to "counsel, advise and mentor" C.A. (AA 8.) The District and the School "specifically represented to Plaintiff and Plaintiff's family that [Ms. Hubbell] was a highly qualified senior guidance counselor and advisor who could and would assist Plaintiff with working through personal and academic issues he faced." (AA 7.)

The complaint alleged that the guidance counselor sexually harassed, abused and molested C.A. on a number of occasions from January 2007 to September 14, 2007. The guidance counselor drove C.A. home from school and spent long hours with C.A. on and off the high school premises. The guidance counselor performed a variety of sexual acts on C.A. and required him to perform a number of sexual acts on her, some occurring at the school. C.A. suffered "extensive physical, psychological and emotional damages" as a result. (AA 14.)

The School District "knew that [the guidance counselor] had engaged in

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[1] The facts are derived from the operative complaint (AA 1-42) as is appropriate in an appeal reviewing an order sustaining a demurrer without leave to amend such as this. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

unlawful sexually-related conduct with minors in the past, and/or was continuing to engage in such conduct" (AA 9), but failed to take reasonable steps to prevent further unlawful sexual conduct by the guidance counselor whom it had reason to know had sexually abused plaintiff. (AA 10.)

The complaint stated causes of action against the School District, the high school, and the guidance counselor for negligence; negligent supervision; negligent hiring and/or retention; negligent failure to warn, train or educate; constructive fraud; intentional infliction of emotional distress; sexual battery; assault; sexual harassment; gender violence; and unfair business practices. (AA 4.)

In its published majority opinion, the Court of Appeal held, among other things, that plaintiff could not pursue his claim for negligent hiring, retention or supervision because, according to the majority, there was no statutory basis for such a claim. In reaching this conclusion, the majority treated the negligent hiring, retention or supervision claim as being premised on direct liability against the School District only. (Slip Opinion Majority, pp. 6-8.) In his thorough dissent, Justice Mallano reasoned that when employees of the School District hired and retained a person they knew or had reason to know was a child molester or failed to properly supervise someone they had reason to know was molesting a child, they acted negligently and were potentially liable under Government Code section 820, subdivision (a). Accordingly, the School District would be subject to

vicarious liability for the supervisory employee's negligence under Government Code section 815.2, subdivision (a) and (b). (Slip Opinion Dissent, pp. 1-27.)

ARGUMENT

I. Standard of review.

This Court applies "a de novo standard of review because this case was resolved on demurrer. . . ." (*Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089.) "On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 [119 Cal. Rptr. 2d 709, 45 P.3d 1171].) Further, we treat the demurrer as admitting all material facts properly pleaded, but do not assume the truth of contentions, deductions or conclusions of law. (*Ibid.*; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967 [9 Cal. Rptr. 2d 92, 831 P.2d 317] (*Aubry*).) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. (*Zelig*, *supra*, 27 Cal.4th at p. 1126.) And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court

has abused its discretion and we reverse. (*Ibid.*)" (*City of Dinuba v. County of Tulare* (2007) 41 Cal. 4th 859, 865; see *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal. 4th 32, 42.)

II. When employees of a school district hire, retain or supervise a guidance counselor whom they know or have reason to know has a history of child molestation, the school district could be *vicariously* liable for that negligent hiring, retention or supervision under Government Code sections 820 and 815.2 and, contrary to the majority opinion, the plaintiff need not cite to yet an additional statute authorizing a *direct* liability claim against the school district.

As described above, plaintiff alleged that the School District was vicariously liable for the negligent hiring, retention or supervision of Roselyn Hubbell as a high school guidance counselor because at least one of its employees knew or had reason to know that Ms. Hubbell had a history of child molestation. (*Ante* at pp. 5-6.) Yet, the majority opinion treated plaintiff's claim as one imposing only "direct" in contrast to "vicarious" liability and held that there was no statute that specifically permitted a direct liability claim against a governmental entity. (Slip Opinion Majority, pp. 6-8.)

In so ruling, the majority crafted a blanket rule characterizing negligent hiring/retention/supervision claims as necessarily seeking to impose "direct" liability only. The majority was mistaken. Before explaining why, it is first important to explain that there is a statutory basis for imposing vicarious liability on a governmental entity due to the tortious conduct of an employee – something the majority ignores due to its "direct" liability analysis.

A. Governmental entities are vicariously liable for the negligence of their employees.

"Under the provisions of the California Tort Claims Act, 'a public employee is liable for injury caused by his act or omission to the same extent as a private person,' except as otherwise specifically provided by statute. (Gov. Code, § 820 , subd. (a), italics added.) In addition, the Tort Claims Act further provides that '[a] public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would . . . have given rise to a cause of action against that employee,' unless 'the employee is immune from liability.' (Gov. Code, § 815.2, subds. (a), (b), italics added.)" (*Lugtu v. California Highway Patrol* (2001) 26 Cal. 4th 703, 715-718.)

"Through these statutes, 'the Legislature incorporated "general standards of

tort liability as the primary basis for respondeat superior liability of public entities. . . ." [Citation.]' (*Mary M. v. City of Los Angeles*, *supra*, 54 Cal. 3d at pp. 209-210.) Under them, 'a school district is vicariously liable for injuries proximately caused by [the] negligence' of school personnel 'responsible for student supervision.' (*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal. 3d 741, 747 [87 Cal. Rptr. 376, 470 P.2d 360] (*Dailey*); see also *Castro v. Los Angeles Bd. of Education* (1976) 54 Cal. App. 3d 232, 235 [126 Cal. Rptr. 537] [under §§ 815.2, 'school districts are liable for the negligence of their employees'].)" (*Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal. 4th 925, 932-933; *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128 ["Vicarious liability is a primary basis for liability on the part of a public entity, and flows from the responsibility of such an entity for the acts of its employees under the principle of respondeat superior."])

Thus, so long as a plaintiff alleges that an employee of a governmental entity engaged in tortious conduct within the course and scope of his or her employment for which that employee could be personally liable, then there is a statutory basis to find that the employer-governmental-entity could be vicariously liable for that tortious conduct.

When, as here, a plaintiff alleges that a supervisory employee of a public entity negligently hired, retained or supervised another employee who in turn injured the plaintiff, then that plaintiff is seeking to impose vicarious liability on the public entity for negligent hiring, retention or supervision. Liability is being

sought not because the entity itself was negligent, but instead because it is vicariously liable for the negligence of an employee (the employee who hired or retained the unfit employee). "'Vicarious liability "means that the act or omission of one person . . . is imputed by operation of law to another,"' without regard to fault. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal. Rptr. 2d 672], italics added.) For example, vicarious liability for torts is imposed by operation of law upon employers for acts of their employees within the course and scope of employment, or upon principals for the acts of their agents. . . . ." (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1375; see *Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1305 ["Vicarious liability is based on the concept that one person's wrongful act will be imputed to another despite the fact the latter is free from fault. It is an exception to the general rule that persons are only responsible for their own wrongful acts. (See Prosser & Keeton, Torts (5th ed. 1984) §§ 69, pp. 499-500.)"])

B. School supervisory employees could be liable for their negligent hiring, retention or supervision of known child molesters.

In the answer to the Petition for Review, the District argued that individual school employees could not be individually liable for their hiring, retention or supervision of a school counselor known to be a child molester. The District is

mistaken.

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; *J.H. v. Los Angeles Unified School Dist.* (2010) 183 Cal.App.4th 123, 141-145.)

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.)

"[I]f individual District employees responsible 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, italics added.)

Thus, it is axiomatic that pursuant to the special relationship existing between school personnel and students, where an employee of the school *knows or has reason to 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.

Justice Mallano recognized as much in his dissenting opinion, explaining that school employees can be subjected to individual liability for the decision to hire or retain unfit employees. "[*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741] recognized (1) school employees may be personally liable for student injuries caused by the failure to provide adequate supervision, and (2) the school district, in turn, may be vicariously liable for the employees' failure to provide

adequate supervision. *Dailey* makes clear that in school district cases, the Government Claims Act did not abolish precedent making school districts liable for negligent supervision, and, accordingly, it is not necessary to identify a statutory basis for the school district's liability other than section 815.2 itself." (Slip Opinion Dissent, p. 4.)

Justice Mallano then analyzed this Court's opinion in *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 and reasoned that "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.)

Other cases are in accord. For example, in *Virginia G. v. ABC Unified School Dist.*, *supra*, 15 Cal.App.4th at pp. 1853-1855, the Court held that "while Ferguson's conduct in molesting Virginia G. will not be imputed to the School District, if individual District employees responsible for hiring and/or supervising teachers knew or should have known of Ferguson's prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, including *Virginia G.*, the employees owed a duty to protect the students from such harm. (*John R. v. Oakland Unified School Dist.*, *supra*, 48 Cal.3d at p. 453; *Leger v. Stockton Unified School Dist.*, *supra*, 202

Cal.App.3d at pp. 1458- 1459.)"

Further, in *M. W. v. Panama Buena Vista Union School Dist.* (2003) 110 Cal.App.4th 508, 517-520, the Court detailed the "principles pertaining to a school district's duty to supervise students" explaining that "'[i]t is the duty of the school authorities to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. [Citations.] The school district is liable for injuries which result from a failure of its officers and employees to use ordinary care in this respect.' (*Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 600 [110 P.2d 1044]; see also *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747 [87 Cal. Rptr. 376, 470 P.2d 360]; Ed. Code, § 44807; Cal. Code Regs., tit. 5, § 5552 [where playground supervision is not otherwise provided, principal of school must provide for supervision by certificated employees of pupils on the school grounds during recess and other intermissions and before and after school].)" *Id.* at p. 517.)

The *M.W.* Court then detailed that "California courts have long recognized that a student may recover for injuries proximately caused by a breach of this duty to supervise. (See, e.g., *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 523 [150 Cal. Rptr. 1, 585 P.2d 851] [student stated claim against school district based on failure to exercise due care in supervision on school premises]; *Dailey v. Los Angeles Unified Sch. Dist.*, *supra*, 2 Cal.3d at pp. 747-751 [sufficient evidence to support verdict against school district for negligent

supervision even where another student's misconduct was immediate, precipitating cause of injury]; *Lucas v. Fresno Unified School Dist.* (1993) 14 Cal.App.4th 866, 871-873 [18 Cal. Rptr. 2d 79][school district had legal duty to supervise students to prevent them from throwing dirt clods at each other during recess]; *Charonnat v. S.F. Unified Sch. Dist.* (1943) 56 Cal. App. 2d 840, 845-846 [133 P.2d 643] [school district liable for negligence or willful misconduct of pupil resulting in injuries to another pupil while both were playing during recess hour]; *Forgnone v. Salvador U.E. School Dist.*, supra, 41 Cal. App. 2d at p. 426 [wrongful absence of supervisor may constitute negligence creating liability on part of school district for student's injuries].)" (*Id.* at p. 518.)

C. Claims based on a school district's employee's negligent hiring, retention or supervision of a known child molester are not necessarily "direct" negligence claims against the District.

The District attempts to side step the duty owed by its employees not to negligently hire, retain or supervise a known child molester, 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 the District'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 v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal. 3d 741, 747; *Hoyem, supra*, 22 Cal.3d at p. 513; *Leger v. Stockton Unified School Dist., supra,* 202 Cal.App.3d at pp. 1460-1462; *M. W. v. Panama Buena Vista Union School Dist., supra,* 110 Cal.App.4th at p. 518.)

The District coyly described 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 the District 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 the District 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, the District'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 the District 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 [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, the District'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 the District 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, 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 reversal 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.

There is no rationale which would justify imposing liability on a school where its failure to supervise students on a school yard leads to injury, but withholding accountability where the negligence involves supervision of teachers. Indeed, as explained above, a number of cases, including opinion by this Court treat a school district's liability for the failure to supervise teachers in the same

way as its liability for the failure to supervise other students. If anything, liability should extend further with respect to the failure to supervise school employees such as teachers who are entrusted with the safety of young children. And this is even more true as to guidance counselors – such as Ms. Hubbell.

Again, as Justice Mallano aptly explained:

> "'A school counselor often wears many hats and may work in elementary, middle, or high schools. ... [A] professional school counselor must ultimately communicate with the students under her charge. Specifically, the professional counselor takes on a dual role with respect to student interaction: she is both an advisor on personal issues and an ... academic consultant. Consequently, a school counselor can be one of the most important persons students will encounter during their educational development. [¶] ... [¶]
>
> 'In many instances, the counselor is the person to whom students speak regarding personal problems that have affected, or may eventually affect, academic performance. In such instances, the counselor may make suggestions tailored to the individual student, such as having the student speak one-on-one with the instructor at issue; speaking with the instructor herself; or convening a conference with the counselor, student, instructor, and, sometimes, the parent. ... [A] student may come to a counselor seeking her opinion, anticipating that the counselor will take all the factors involved under consideration." (Note, Iowa School Counselors Had Better Get It Right! (2004) 89 Iowa L.Rev. 1093, 1096-1097, fns. omitted.)
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> "'A guidance counselor plays a crucial role in the development of a high school student's future. ... [¶] The interactions between student and counselor and their resultant decisions can have a long-lasting impact on the life of the student. ... [¶] The relationship between a guidance counselor and student is premised upon trust. The student relies on the counselor to give accurate and informed advice." (Note, Torts--Negligent Misrepresentation--High School Guidance Counselors Can Be Held Liable When Their Erroneous Advice Prevents A Student-Athlete From Obtaining An Athletic Scholarship--Sain v. Cedar Rapids Community School District, 626 N.W.2d 115 (Iowa 2001) (2002) 12 Seton Hall J. Sport L. 311, 311-312, fn. omitted.) In short, guidance counselors have the 'importan[t] [task] of advising students on personal, social, academic and vocational matters.'

(*Luhm v. Board of Hot Springs County School Dist.* (Wyo. 2009) 206 P.3d 1290, 1297.)"

"Yet, in this case, the school district hired a known child molester to be a guidance counselor--a position that, by definition, often brings the counselor and a student into confidential one-on-one contact about the student's personal concerns."

(Slip Opinion, Dissent p. 23.)

In the course of his dissent Justice Mallano further highlighted a number of cases from other jurisdictions recognizing that a school district could be liable when its employees negligently allow the hiring, the retention or the supervision of a child molester. (See *Doe Parents No. 1 v. State, Dept. of Education* (2002) 100 Hawaii 34 [58 P.3d 545]; *Dia CC. v. Ithaca City School Dist.* (2003) 304 A.D.2d 955 [758 N.Y.S.2d 197, 199-200]; *Doe v. Durtschi* (1986) 110 Idaho 466 [716 P.2d 1238, 1243-1244]; *School Bd. of Orange County v. Coffey* (Fla.Dist.Ct.App. 1988) 524 So.2d 1052, 1053; *Hertzel v. Palmyra School Dist.* (2007) 15 Neb.App. 538 [733 N.W.2d 578, 584-586]; *Durham Bd. of Education v. National Union* (1993) 109 N.C.App. 152 [426 S.E.2d 451]; *Watkins Glen Central v. National Union Fire* (2001) 286 A.D.2d 48 [732 N.Y.S.2d 70].)

It should therefore be beyond question that when school employees whose responsibilities include the hiring, retention or supervision of guidance counselors, negligently perform that job and hires, retains or supervised someone whom they knew or had reason to know had a history of child molestation to perform that highly sensitive job, the school employees could be liable for that tortious conduct

under Government Code section 820, if that counselor predictably molests one of the students entrusted to her. This is particularly true where, as here, these school employees should have known the counselor was molesting one of her students because she spent long hours with him on and off the high school premises, and yet they took no steps to protect that student from this conduct. (AA 14.) In turn, the school district for whom that negligent employee worked could be vicariously liable under Government Code section 815.2, subdivisions (a) and (b).

D. The Majority's analysis does not support its result.

Nothing in the Majority opinion justifies its conclusion. As referenced above, the beginning and end of the Majority's analysis of this question was its characterization of plaintiff's negligent hiring/retention/supervision claim as being based entirely upon "direct" versus "vicarious" liability. Following this conclusion the Majority then proceeded to try and explain why neither *John R.*, *supra*, 48 Cal.3d 438 nor *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, justified imposition of "direct" liability on a governmental entity due to the negligent hiring, retention or supervision of an employee, relying on *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238. (Slip Opinion Majority p. 6.)

The Majority reasoned:

As the Fourth District explained [in *de Villers v. County of San Diego*

(2007) 156 Cal.App.4th 238], in both *John R.* and *Grudt*, the question was whether direct liability claims were timely, and the court did not reach the issue of the viability of a claim against a public entity for direct liability for negligent supervision. (*de Villers*, *supra*, 156 Cal.App.4th at p. 253.) The statements relied upon by C.A. are thus dicta. Further, as a concurring opinion in the California Supreme Court explained, '[T]he policy discussion in John R., supra, 48 Cal.3d 438, was in an opinion signed by only two justices of this court. (There were four separate opinions.) Even the other three justices who agreed there should be no vicarious liability declined to sign the portion of the lead opinion dealing with that issue. Instead, they chose to make clear that they concurred only 'in the majority's holding' of no vicarious liability. (*Id.*, at p. 455 (conc. and dis. opn. of Eagleson, J.), italics added.) Except to its precise holding of no liability, the lead opinion stated a minority view and provides no authority for any proposition in a subsequent case. [Citations.] This is hornbook law. 'No opinion has any value as a precedent on points as to which there is no agreement of a majority of the court.' [Citation.]" (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 233-234 [285 Cal. Rptr. 99, 814 P.2d 1341].)

We agree with the Fourth District's reasoning distinguishing those cases. (See *de Villers*, *supra*, 156 Cal.App.4th at pp. 252-255.) We also agree with its conclusion: "[A] direct claim against a governmental entity asserting negligent hiring and supervision, when not grounded in the breach of a statutorily imposed duty owed by the entity to the injured party, may not be maintained." (*Id.* at pp. 255-256.) "As a public entity, ... liability must be based on statutory not common law." (*Munoz v. City of Palmdale* (1999) 75 Cal.App.4th 367, 369 [89 Cal. Rptr. 2d 229].)

(Slip Opinion Majority, pp. 7-8.)

However, *de Villers* supports rather than undermines plaintiff's claim here. There, an employee of the County of San Diego Medical Examiner office absconded with drugs from the Examiner's office and used those drugs to murder her husband. The husband's family brought an action against the County claiming that it negligently hired or retained the wife-murderer. *The plaintiffs couched their claim both in terms of vicarious and direct liability.* As to vicarious liability, the

plaintiffs alleged that certain county employees failed to discover that the wife was unfit for her job. In rejecting this claim, the Court of Appeal concluded that there could be no vicarious liability because "Rossum's [the wife's] coworkers would not have been liable for de Villers's death because they had no duty to prevent Rossum from murdering de Villers, and therefore plaintiffs' claim of vicarious liability against County is not viable." (*Id* at p. 249.)

Unlike the lab workers in *de Villers*, however, who had no duty to guard against unknown criminal tendencies of a co worker to protect a third party with whom they had no relation, here as explained above, employees of the school district had a well recognized duty to protect the students in their charge by not hiring or retaining a guidance counselor they knew or had reason to know was a child molester. Thus, the reason why the *de Villers* court concluded that there could not be vicarious liability in that case is inapplicable here.

But, as important as why this case is distinguishable from *de Villers,* is the fact that the *de Villers* Court recognized that negligent hiring and retention claims could be both direct and vicarious in nature. Such a claim is vicarious to the extent it seeks to impose liability on an employer because an employee failed to properly detect that another employee was unfit for the job.

It was only after the court analyzed and concluded that due to the particular circumstances of that case there could not be vicarious liability, that the *de Villers* court proceeded to examine whether there could be direct liability. It is that

portion of the opinion on which the Majority in this case exclusively focuses. The *de Villers* court concluded that there was no statutory basis to hold a governmental entity directly liable for the negligent hiring or retention of an employee and that the case law on which the plaintiffs relied did not say otherwise. (*Id.* at pp. 252-254.)

But nothing in this discussion altered the fact that the (1) the *de Villers* court recognized that in theory there could be vicarious liability for the negligent hiring, retention or supervision of an employee and that (2) if the County's employees had breached a duty owed to the plaintiff by the manner in which they hired or retained another employee who harmed the plaintiff then the County would have been vicariously liable for this conduct. Thus, *de Villers* fully supports Justice Mallano's dissent and undermines the majority opinion treating plaintiff's negligent hiring, retention or supervision claim as necessarily one that was direct and not vicarious in nature.

Further, the Majority in this case seeks to discount the passages in *John R.* and *Grudt* which clearly recognize that there could be claims against school district's due to the negligent hiring, retention or supervision of child molesters to come into direct contact with the students entrusted to those schools. (See *John R., supra*, 48 Cal.3d at p. 445, fn. 5 [even if vicarious liability does not apply, "the employer may be independently liable for its own conduct"]; *id.* at p. 450, fn. 9 [discussing type of foreseeability relevant to whether "the district itself acted

negligently ..."]; *id.* at p. 451 [careful selection of employees and close monitoring of their conduct are relevant to school district's "own direct negligence"]; *id.* at p. 451, fn. 10 [discussing evidence concerning whether school district was liable for its own negligence].) And as Justice Mallano observed: "Indeed, the *court's* disposition in *John R.* directed the affirmance of the trial court's order sustaining the demurrer to the vicarious liability claim, "thus leaving plaintiffs free to pursue only their claims against the [school] district premised on its own direct negligence *in hiring and supervising* the teacher." (*Id.* at p. 453, italics added.)" (Slip Opinion, Dissent p.7; see also *Grudt*, *supra*, 2 Cal.3d at pp. 583-585 [complaint could be amended (after the running of the statute of limitations) in a case involving a shooting death by an officer, to add a claim asserting direct liability against the public entity for retaining officers it knew to be dangerous.])

However, the manner in which the Majority seeks to deal with these opinions only serves to highlight why this Court should now reaffirm that it meant what its said in its earlier decisions. When parents send their children to school as they are legally required to do, they should and do expect that the school and its employees will take steps to guard against the retention of child molesters as teachers and counselors who have access to and power over their children. When the school and its employees carry out this obligation so negligently that a person they know or have reason to know is a child molester is hired, retained or supervised as a guidance counselor and a student is foreseeably molested by her,

then the school should face liability for the negligence of its employees every bit as much as if a school employee negligently supervised activities in the school yard.

In sum, this Court should reaffirm that the passages from *John R.* and *Grudt*, (which the Court of Appeal Majority in this case seeks to discount) accurately reflects California law. School Districts such as the defendant in this case whose employees hire, retain or supervise individuals known to be child molesters face vicarious liability for their conduct.

CONCLUSION

For the foregoing reasons, plaintiff respectfully urges this Court to reverse the conclusion of the Court of Appeal Majority.

Dated: March 13, 2011

Respectfully submitted,

MANLY & STEWART

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By: _____
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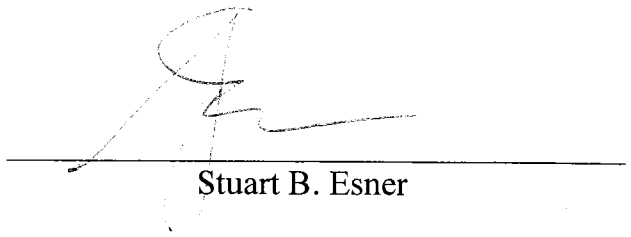

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