Supreme Court Case No. S188982
2d Civil No. B217982

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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

C.A., A MINOR, ETC.

Plaintiff and Appellant,

vs.

WILLIAM S. HART UNION HIGH SCHOOL DISTRICT, et al.

Defendants and Respondents.

ANSWER BRIEF ON THE MERITS

After A Decision By The Court of Appeal
Second Appellate District, Division 1, Case No. B217985
(189 Cal.App.4th 1166, 117 Cal.Rptr.3d 283)
Los Angeles Superior Court Case No. PC 044428

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

TABLE OF AUTHORITIES
(Continued)

ISSUE PRESENTED

Government Code sections 815.2 and 820 limit a public entity's vicarious liability to liability that would otherwise attach to *individual* private-party employees for the same conduct. In view of that statutory scheme, can a public entity be vicariously liable for unidentified school employees' supposed negligent hiring, retention, and oversight of other employees when individual private persons would not be personally so liable?

RELEVANT STATUTES

Government Code:

§ 815. *Liability for injuries generally; immunity of public entity; defenses*

Except as otherwise provided by statute:

(a) *A public entity is not liable for an injury*, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

(Italics added.)

§ 815.2. *Injuries by employee within scope of employment; immunity of employee*

(a) 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, apart from this section, have given rise to a cause of action *against that employee* or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability. (Italics added.)

§ 820. *Liability for injuries generally; defenses*

(a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission *to the same extent as a private person.*

(b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person. (Italics added.)

INTRODUCTION

The liability of public entities is purely statutory. The starting point is that public entities are *not* liable except where made so by statute. In particular, public entities are not liable *qua* entities. Statutorily, there is no *direct* public entity liability. A significant exception, of course, is that a public entity may be vicariously liable for its employees' *individual* liability. But if no employee is personally liable, then the public entity cannot be liable. And, a public employee's liability can be no greater than that of a private person in the same stead. Thus, the issue presented here is whether individual school employees can be *personally* liable for alleged negligent hiring or supervision of their fellow employees.

Plaintiff does not dispute that the counselor and the counselor alone is directly liable for her ultra vires sexual misconduct. Nor does he claim any direct entity liability. Rather, in order to avoid the clearly ultra vires nature of the counselor's acts, he claims that other, unspecified school district employees must somehow be personally liable for negligent hiring and supervision and on that basis the school district must be doubly vicariously liable for the counselor's misconduct (i.e., that the school district is vicariously liable for the individual employee's personal vicarious liability for the counselor's ultra vires misconduct). But individuals are not personally liable for entities' hiring and other employment decisions. They are not personally liable in the private setting and they are not personally liable in the public setting.

Plaintiff complains that this will leave only the counselor liable for her extra-scope-of-employment misconduct. Perhaps so, but that is where the responsibility – including criminal liability – truly lies. It certainly would not be the first instance where there is no public entity liability because there is no individual liability. That is a reasonable public policy choice that the Legislature made.

The judgment should be affirmed.

STATEMENT OF THE CASE

Plaintiff alleges as follows.[1] He was a student at Golden Valley High School in defendant William S. Hart School District. (CT 8, ¶ 12; 117 Cal.Rptr.3d at p. 286; Opn. 2.) The head adult counselor at Golden Valley was Roselyn Hubbell. (CT 8, ¶ 13; 117 Cal.Rptr.3d at p. 286; Opn. 2.) Ms. Hubbell sexually harassed, molested and abused him. (CT 8, ¶ 14; 117 Cal.Rptr.3d at pp. 286-287; Opn. 2.)

Plaintiff sued Ms. Hubbell, the school district and various otherwise unidentified Doe defendants. (CT 4; 117 Cal.Rptr.3d at p. 286; Opn. 2.) Besides Ms. Hubbell, no individual is a named defendant, either by name or by position or capacity. (CT 4; 117 Cal.Rptr.3d at p. 286; Opn. 2.)

Plaintiff alleges that unspecified school district employees knew or should have known that Ms. Hubbell was a potential child molester. (CT 9-10, ¶ 17, 19; 117 Cal.Rptr.3d at p. 287; Opn. 2.) Plaintiff alleged claims against all defendants for generic negligence, negligent supervision, hiring, training and retention of the counselor, failure to warn, constructive fraud, intentional infliction of emotional distress, assault, sexual battery, sexual harassment, and unfair business practices, among others. (CT 19-44; 117 Cal.Rptr.3d at p. 287; Opn. 2-3.)

The trial court sustained defendant school district's demurrer without leave to amend reasoning that the counselor's conduct was outside the

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[1] At this stage, these are allegations only. Given the procedural posture on appeal, however, they must for present purposes be assumed to be true. The defendant school district reserves the right to deny and dispute any of these allegations.

scope of her employment. (RT 1-2; CT 143-144; 117 Cal.Rptr.3d at p. 287; Opn. 3.)

The Court of Appeal, in a 2-1 decision, affirmed. The majority recapped the established law that a public entity has no direct liability and is only liable to the extent that a public entity employee would be personally liable for an act or omission within the scope of her employment. (117 Cal.Rptr.3d 283, 288; Opn. 4-5.) The majority noted that the counselor's personal sexual misconduct, as a matter of law, was outside the scope of employment and therefore occasioned no school district vicarious liability. (*Ibid.*) Plaintiff does not appear to dispute that holding.

The majority then addressed the negligent hiring and supervision claims. First, it noted that no statute imposes direct liability on a school district for hiring and supervision claims. (*Id.* at p. 289; Opn. 6-8.) Plaintiff pointed to no such statute. (*Ibid.*) Following *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, the majority explained that no nonstatutory direct liability exists against a public entity for negligent hiring or supervision. (117 Cal.Rptr.3d at p. 290; Opn. 7-8.) The majority then held, again following *de Villers*, that there is no basis for individual public entity employee liability for negligent hiring or supervision of other employees. (*Ibid.*) The majority further explained, again following *de Villers*, that dicta in some of this Court's precedents did not suggest otherwise. (*Ibid.*)

The dissent argued that individual district employees could be liable for negligent hiring and supervision of the counselor. The dissent cited

cases addressing the overall duty of a school to look after its students. It cited no case, however, in which an *individual* has been held liable for negligent hiring or supervision of a co-employee.

This Court granted review.

ARGUMENT

THE ESTABLISHED STATUTORY SCHEME PRECLUDES PUBLIC ENTITY VICARIOUS LIABILITY FOR NEGLIGENT EMPLOYEE HIRING, RETENTION OR OVERSIGHT

The opening brief presents a single issue: whether a public entity can be vicariously liable for the supposed negligent hiring, retention or oversight of other employees, in this case a high school guidance counselor.[2] Although the opening brief discusses the school context at length, the issue framed does not depend on that context. As framed, the issue is limited to a public entity's vicarious liability for its employees' actions in hiring, retaining, or overseeing other employees. The established law is that there is and can be no such individual employee personal liability and without such individual employee liability, there can be no vicarious liability.

What the opening brief seeks is simply a radical remaking of the statutory law.

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[2] This issue relates at most to the complaint's first four causes of action (for negligence, negligent supervision, negligent hiring, and negligent failure to train). The petition raised no issue as to the complaint's remaining causes of action, the dismissal of which the Court of Appeal's opinion also affirmed. Those remaining claims must now be deemed finally dismissed.

A. Public Entity Liability Is Strictly Limited To Vicarious Liability Where Employees Are *Personally* Liable.

The Opening Brief seeks to ignore or remake settled law. Absent a direct statutory mandate, a public entity is not liable as an entity. (Gov. Code, § 815.) The Opening Brief (OB) makes no reference to or argument about such a statutory mandate. It identifies no statutory basis for either school district liability or any individual employee liability, other than the statutory scheme making public entities vicariously liable if, and only if, the entity's employee is personally liable. (Gov. Code, §§ 815.2, 820; see OB at iii.)[3] Rather, a public entity's liability is vicarious of the liability of individual employees. (Gov. Code, §§ 820, 815.2 [public entity liable only if individual public entity employee would also be liable].) Public entity employees are liable only to "the same extent as a private person." (Gov. Code, § 820, subd. (a).)

These statutory rules are clear, as this Court has recognized. "The Government Claims Act (§ 810 et seq.) establishes the limits of common law liability for public entities, stating: 'Except as otherwise provided by statute: [¶] (a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.' (§ 815, subd. (a), italics added.) . . . 'This section *abolishes all common law or judicially declared forms of liability*

[3] Conceivably, there might be a specific statutory basis for a mandatory duty creating either direct entity liability or individual personal liability. But none is argued in this case. Rather, the sole assertion in the Opening Brief is that individual school district employees owe some sort of common law liability for which the school district is vicariously liable.

for public entities, except for such liability as may be required by the state or federal constitution, e.g., inverse condemnation. . . .' [Citation.] Moreover, our own decisions confirm that section 815 abolishes common law tort liability for public entities." (*Miklosy v. Regents of University of California* (2008) 44 Cal.4th 876, 899, italics added in *Miklosy*.)

These are the rules that the Legislature has imposed. They are not open to controversy. But the Opening Brief asks this Court to remake the rules. Why? Because, it asserts, this case presents sympathetic circumstances. But that is no reason to usurp the Legislature's choices. The Opening Brief does not dispute that no statute makes a public entity directly liable to third persons for employee hiring, retention or oversight decisions. Certainly it does not identify any such statute (its only statutory references are to the above-cited Government Code sections). Rather, it premises the sole issue as supposed vicarious liability for individual public employees' *personal* liability. The sole question, thus, is whether *individual* school district employees have *personal* liability for which the school district may be vicariously liable.

Indeed, that was the whole point of this Court's decision in *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, reiterating the distinction between direct and vicarious liability (*id.* at pp. 1183-1185; see *de Villers v. County of San Diego*, *supra*, 156 Cal.App.4th at pp. 252-253; *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1113) – a distinction that the Opening Brief glosses over. *Eastburn* arose out of public entities' alleged negligence in the manner in which 911 dispatchers

were trained and handled emergency calls. This Court concluded – after a lengthy discussion about the distinction between direct and vicarious liability – that plaintiffs failed to identify an independent statutory basis for imposing liability on defendants. (*Eastburn*, *supra*, at pp. 1183-1185.) It held that no public entity liability could exist because individual public entity employees were not personally liable for how they trained or oversaw dispatchers.

The same is true here. Despite the Opening Brief's attempt to blur the line between direct and vicarious liability, it has failed to address, let alone identify authority to impose, direct liability *on individuals* on the basis of negligent hiring or supervision for which the public entity school district might be vicariously liable.

B. Neither Private Nor, Accordingly, Public Employees Are Personally Liable For Negligent Hiring And Supervision of Co-Workers.

Thus, the critical question is whether an individual private-person manager or supervisor can be personally liable for negligent hiring, retention, or supervision of a co-employee.

1. The complaint identifies no supposedly liable individual.

Under section 820, if a co-employee, manager or supervisor as a private individual cannot be personally liable for negligent hiring, firing, or supervision then a public employee cannot be individually liable either. (Gov. Code, § 820, subd. (a).) The public entity vicarious liability "doctrine clearly contemplates that the negligent employee whose conduct is sought to be attributed to the employer at least be specifically identified." (*Munoz v. City of Union City*, *supra*, 120 Cal.App.4th at p. 1113.)

The complaint does not identify any particular public entity employee who made any employment hiring, retention, or oversight decision. Rather, it merely alleges that the public entity and unidentified Doe employees somehow negligently hired, retained, and oversaw the malfeasant counselor. It alleges that unspecified persons knew or should have known of the counselor's proclivities, but it does not allege why any specific individual owed a personal duty to plaintiff or otherwise would be personally liable. There is no allegation as to what any individual employee (upon whom vicarious liability must be premised) did wrong. There is no identification of any individual by name, title, or even function. There must be an allegation that some particular individual, no matter how identified, both owed a duty *and* was personally at fault. There is none here.

2. Only entities, not individuals, are liable for negligent hiring, supervision, and firing of *entities'* employees.

Individual employees are not *personally* liable for entities' negligent hiring or supervision. Case law is uniform in imposing liability only on an *employer* for negligent hiring and supervision, not on other employees. (See, e.g., *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1564-1565 ["[a]n *employer* may be liable to a third person for the employer's negligence in hiring or retaining an employee," italics added].) Thus, private enterprises are directly liable *as entities*. But, absent specific statutory mandate not asserted here, public entities cannot be directly liable *as entities*. They can only be vicariously liable based on their employees' personal liability. Liability for negligent hiring or supervision of an employee cannot be based on vicarious liability because it is a tort of "direct liability for negligence." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815, citing 2 Dobbs, The Law of Torts (2001) § 333, p. 906.)

California courts have adopted the Restatement formulation of the tort imposing liability on *the employing principal* only: "'A *principal* who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by *the principal's negligence* in selecting, training, retaining, supervising, or otherwise controlling the agent.'" (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1140, italics added, quoting Rest.3d

Agency, § 7.05(1) [companion to Rest.2d Agency, § 213]; see *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 836 [following Rest.2d Agency, § 213].) The Restatement says nothing about the propriety of imposing liability directly on individual employees, nor do the published cases. Rather, the tort is framed only in relation to the duty *the enterprise* or *its principal* owes. (Rest.2d Agency, § 213, coms. a & f, pp. 458-461.)

The reasoning for imposing a duty only on employers is based on the recognition that the *enterprise itself* should bear the loss caused by the wrongdoings of its employees when the *enterprise* hires individuals with characteristics which might pose a danger to customers or other employees. (*Phillips*, *supra*, 172 Cal.App.4th at p. 1139; accord *Roman Catholic Bishop v. Superior Court*, *supra*, 42 Cal.App.4th at pp. 1564-1565 ["An *employer* may be liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit," italics added]; *Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339 ["Liability for negligent hiring and supervision is based upon the reasoning that if *an enterprise* hires individuals with characteristics which might pose a danger to customers or other employees, *the enterprise* should bear the loss caused by the wrongdoing of its incompetent or unfit employees," italics added].) Direct liability does not attach to other employees or agents of the employer. As a matter of law, liability only attaches to the entity.

As this Court has repeatedly recognized, no individual liability attaches where the function at issue is an *entity* function. Where the duty

imposed arises out of the relationship between the plaintiff and *the entity*, there is no individual, personal liability in tort for harm arising out of that relationship. (E.g., *Miklosy*, *supra*, 44 Cal.4th 876 [no supervisor personal liability for wrongful termination of employment in violation of public policy]; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503 [agent not individually liable for interfering with principal's contract]; *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39 [attorney and expert witness not personally liable for principal's insurance bad faith]; *Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566 [same re insurance claims adjuster].)

That makes sense. The employment relationship – and the right and duty to control behavior through that relationship by hiring, firing, retaining, and disciplining employees – exists between the *employer* (the principal) and the employee (the agent). Individual co-workers, whether peers or supervisors, have no personal legal relationship with other employees. For that reason, individual managers, supervisors and co-employees are *not* personally liable to third-parties in some managerial capacity in how they hire, fire, retain, or discipline co-workers. For example, individual private party managers and supervisors are *not* personally liable for wrongful termination of employment in violation of public policy. Accordingly, neither individual public employee managers and supervisors nor, therefore, their employing public entities can be liable for such termination in violation of public policy. (*Miklosy*, *supra*, 44 Cal.4th at p. 900.)

Analogously, neither are individual managers or supervisors personally liable for public policy violative discriminatory or retaliatory hiring, firing and oversight decisions. (E.g., *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173; *Reno v. Baird* (1998) 18 Cal.4th 640.) Given that lack of statutory liability, there is even less support for the proposition that, as private persons, individual co-employees, managers or supervisors can be personally liable for employee hiring, retention and oversight decisions. Certainly, the Opening Brief cites no case holding an individual employee – public or private – personally liable for negligent hiring, retention, or oversight of another employee. But under Government Code section 820, that is what is required for public-entity vicarious liability. (See *de Villers v. County of San Diego*, *supra*, 156 Cal.App.4th 238 [where private party employees would not have been personally liable for co-worker's theft of poisons to murder spouse, no public entity liability].)

We are not aware of any published California case that authorizes, or even recognizes, a claim of negligent hiring or supervision against an individual employee for the wrongdoings of a co-employee, nor has the Opening Brief cited any such authority. But other courts have expressly disavowed such claims. (See, e.g., *Lutz v. Chitwood* (Bankr. S.D.Ohio 2005) 337 B.R. 160, 170 [Ohio law recognizes a claim for an *employer's* negligent supervision of an employee, but it does not support an imposition of liability on an employee].) This makes perfect sense since the "duty to hire employees who are competent and not dangerous is, by its very nature,

a duty of a master or employer, and this duty is nondelegable." (*Magnum Foods, Inc. v. Continental Casualty Company* (10th Cir. 1994) 36 F.3d 1491, 1500, citing Rest.2d Agency, §§ 492, 505.)

There is simply no support for the proposition that individual employees can be held liable under a negligent hiring or supervision theory for their co-workers' wrongful acts. The same holds true whether the employer is a private entity or a public entity.

3. Schools' hiring, supervision, and firing responsibilities create no individual school employee duty or liability.

The lack of a basis to impose personal liability on individual employee co-workers or superiors is, if anything, even greater in the public school context. That is because the individual co-worker's or superior's ability to hire, fire, retain or even discipline other employees is statutorily constrained. The hiring of certificated school employees (such as counselors, see Educ. Code, § 44065, subd. (a)(2)), is entrusted to the governing board of the school district. (Educ. Code, § 44830.) Likewise, a certificated employee may only be terminated on statutorily specified grounds. (E.g., Educ. Code, §§ 44932, 44933.) Again, the school district's governing board, *not* an individual superior, is responsible for the termination or suspension process, a process that is statutorily defined and regulated. (Educ. Code, § 44934, et seq.)

Personal legal liability should be matched with the power to control the conduct at issue. That is not the case for individual school supervisors, managers, even principals and administrators. Yet, here the claim is that any duty arises not out of any direct relationship between plaintiff and any individual (other than, of course, the counselor), but by virtue of the plaintiff's relationship with the entity – the school – and the fact that some, unnamed and unidentified individuals necessarily have a role in running the school.

Of course all entities – public or private – can only act through their individual employees. But just because a plaintiff alleges that an employee was responsible for negligently hiring and supervising a fellow employee on behalf of an entity, "that does not convert a claim for direct negligence into one based on vicarious liability." (*Munoz v. City of Union City*, *supra*, 120 Cal.App.4th at p. 1113 [city's liability for officer's excessive force purely vicarious.) The alleged negligence in hiring or supervision "is the employer's own, and not the imputed negligence of the employee." (Note, *The Responsibility of Employers for the Actions of Their Employees: The Negligent Hiring Theory of Liability* (1977) 53 Chi.-Kent L.Rev. 717, 719.) Accepting plaintiff's argument to the contrary would render the distinction between direct and vicarious liability, "completely illusory in all cases except where the employer is an individual." (*Munoz*, *supra*, at p. 1113, citing *Eastburn*, *supra*, 31 Cal.4th 1175.)[4]

[4] Where the employer is an individual rather than an entity, nothing would prevent a plaintiff from bringing a negligent hiring or supervision (continued...)

4. Plaintiff's cases are not to the contrary.

The Opening Brief cites a litany of cases where public entities have been held vicariously liable for their employees' direct negligence in supervising or protecting the injured party. But the conduct of the relevant employee – the counselor – vis à vis the plaintiff, as a matter of law, was outside the scope of employment and something for which the public entity undeniably is not vicariously liable. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438.) What is left is negligent hiring and oversight of the offending employee. In other words, is any school district employee, other than the counselor herself, *personally* vicariously liable for the counselor's wrongdoing? No case holds an individual public entity employee liable for such supposed negligence. And without individual public entity employee liability there can be no vicarious public entity liability. Likewise, the various dicta that the Opening Brief cites (some of it not even from opinions garnering majority support) cannot obviate the direct statutory mandate that public entity vicarious liability must be premised on individual public entity employees' personal liability no greater than that which would be imposed on private persons. None of the cited cases considered the impact of Government Code sections 815.2 and 820. None of the cited cases considered whether an individual public entity employee could be personally liable for negligent hiring or supervision of a

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[4] (...continued)
claim directly against that individual, but such is not the case here where the employer is not an individual, but rather an entity.

co-worker. Cases do not stand for propositions not considered. (E.g., *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.)

We recognize that nearly 70 years ago in *Fernelius v. Pierce* (1943) 22 Cal.2d 226, this Court held that individuals – there a City manager and a police chief – could be held personally liable, as public officials, for hiring, supervision, and retention of subordinates (there, violent police officers). But *Fernelius* was decided as a matter of common law of public official liability. (See *id.* at pp. 236-238.) Two decades later, in Government Code sections 815 and 820, the Legislature *abolished* any such common law theories of personal liability by public officials. Rather, now public employee liability is regulated by the same law as applies to private employees. (*Miklosy*, *supra*, 44 Cal.4th at pp. 899-900.)

To make public entity employees personally liable, and thereby public entities vicariously liable, for the hiring or supervision of subordinates or co-workers who, in turn, may have committed a willful or even negligent wrong would create public entity liability in an array of cases far beyond anything that the Legislature ever contemplated.

* * *

The bottom line is that individual school district employees are not personally liable for negligent hiring or supervision of subordinates or co-workers. Accordingly, there is no basis for school district vicarious liability.

C. The School Setting Creates No Endless Chain Of *Personal* Liability.

Plaintiff claims that a different rule for individual personal liability for negligent hiring or supervision of co-workers or subordinates should apply because of the special relationship between the school and students.[5] The argument doesn't withstand scrutiny.

1. School employees owe no personal duties to students who are not under their direct control and supervision.

We do not question that, in general, a *school* may owe a duty to supervise students. (But see *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684, 698-700 [for 42 U.S.C. § 1983 purposes, schools generally do *not* have a "special relationship" with students to prevent misconduct by third parties; public library to which student expected to go to complete school assignments owed no duty to prevent access to sexually explicit Internet sites even where library alleged to have known that minors were being exposed to pornography on library computers].) But that is not the question here. A teacher (or counselor) may owe a duty to students under his or her direct control. But, plaintiff is attempting to impose liability on unidentified individuals who were *not* in charge of supervising

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[5] The complaint alleges both on-campus and off-campus misconduct by the counselor. (117 Cal.Rptr.3d at p. 287; Opn. 2; CT 14.) Off-campus, non-school hour misconduct for the most part cannot be a basis for liability. (See Educ. Code, § 44808.)

plaintiff or any particular student. Plaintiff, thus, seeks to impose liability for failing to supervise *other school employees*. In essence, plaintiff is asking that every school employee owes a duty at all times to every student regardless whether they are supervising that student or not. And, the duty of course is not limited to the particular harm here, but would extend to preventing any harm of whatever nature. The creation of such a universal duty without a special relationship between a particular school employee and a specific student-plaintiff would, in effect, be to hold that school districts, unlike other public entities, have *entity* liability for injury to students. No authority supports such a broad proposition. In enacting Government Code sections 815 and 815.2 the Legislature decided to the contrary. The fact that the school district as an entity might owe a general duty toward students does not create *personal* liability on the part of all or any particular individual school employee.

This Court recognized this very point in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112. There, plaintiffs' mother was shot and killed by her former husband in a County courthouse. Plaintiffs sued the County for failing to adequately protect her. As this Court recognized "[t]he essence of . . . plaintiffs' claims [there was] that the *county*, rather than any individual employee standing in a special relationship with [plaintiff's mother], owed a duty to *all* persons using the courthouse to protect them against reasonably foreseeable criminal activity by persons using the courthouse." (*Id.* at p. 1130, original italics.) The complaint in *Zelig* further alleged that the county and unnamed individual county

employees knew of the assailant's dangerous propensities and threats. (See *id.* at pp. 1119-1120.) This Court held that was not enough. The County's general duty did not translate into a special relationship between each or any particular individual employee and the plaintiffs' mother upon which individual personal liability could be premised. (*Id.* at pp. 1129-1131.) As the employees owed no *personal* duty, what they "knew or should have known" was irrelevant to their individual liability. Without such individual liability, there could be no vicarious public entity liability.

So where is the line drawn between individual personal school employee liability and lack of personal liability. The answer is first and foremost where negligence or fault and duty coalesce in the same individual. The individual must be both personally at fault and must personally owe a duty. (See *Munoz v. City of Union City*, *supra*, 120 Cal.App.4th at p. 1113 [elements of individual employee's liability must be proven].) That an individual may be at fault, may have "known or should have known" of the counselor's secret propensities, does not matter if that individual did not *also* owe an *individual* duty of care. (See *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1119-1120, 1129-1131.) Duty only exists where *the individual employee* has a special relationship with the student. (See *ibid.*)

Such a special relationship might exist where the individual employee is in direct charge of and supervising the student. That individual employee, here, was the counselor. Thus, for example, a teacher directly supervising students on the playground may be personally liable (triggering

vicarious liability). (*Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741.) But the principal, school superintendent, or other administrator who oversees the overall functioning of the entity as a whole (let alone a co-worker) is not. They have no special relationship with any particular student. Their relationship is with the entity. Importantly, the complaint here does not identify *any* particular school district employee (whether by name, title, or even function) other than the counselor who was alleged to have a special, duty-inducing relationship with the plaintiff. Even more so, the complaint nowhere alleges that any individual who had a personal special relationship with the student-plaintiff (of course, other than the counselor) was *personally* negligent or at fault.

This is not a case like *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066, where specific individuals actively created the danger by affirmatively misrepresenting an administrator's qualifications and good character. Rather, plaintiff seeks to create a duty of unknown and potentially unbounded scope for nonfeasance in failing to interfere as regards to students with whom the employee does not have direct contact. That is, and should be, too attenuated a duty. No doubt, as this Court has often recognized, in retrospect almost anything is foreseeable and almost any act can ultimately be traced to any result. (See *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668 ["there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury"].) But that does not suffice for duty.

(*Ibid.*) What is required is a "special relationship" between an individual employee and the plaintiff.

Even in *John R.*, the lead opinion[6] noted that "the connection between the authority conferred on teachers [or, here, counselors] to carry out their instructional duties and the abuse of that authority to indulge in personal, sexual misconduct is simply too attenuated to deem a sexual assault as falling within the range of risks allocable to a teacher's employer." (*John R. v. Oakland Unified School Dist.*, *supra*, 48 Cal.3d at p. 452.) *John R.* also noted that imposing liability would have the counterproductive effect of discouraging the personal attention that students often need. (*Ibid.*) That is especially true of counselors who, by definition, need to address students' personal concerns and issues. If other individual employees are to be *personally* liable for a counselor's ultra vires, despicable misconduct, then the simple solution will be to forbid counselors from having the very direct, personal interactions with students that are the most important aspect of their job functions.

There are further problems with creating individual personal liability for negligent supervision of other employees who, in turn, engage in sexual misconduct. Individual public entity managers, supervisors and co-workers will be named as defendants, putting a chill on public entities' ability to hire qualified managers and supervisors and on the effective management of

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[6] *John R.* fractured 2-2-3, with two justices finding no respondeat superior liability, but late-claim relief; two justices finding (although in separate opinions and on separate bases) respondeat superior liability and late-claim relief; and three justices finding no respondeat superior liability and no late-claim relief.

crucial public entity functions. Nor is insurance an answer. Additional liability will only make insurance *less* available, as recognized by the two-justice lead opinion in *John R.* (*Id.* at p. 451.) In any event, "[i]ncreasingly, insurance policies include a sexual molestation/abuse exclusion, which provides that the insurer is not obligated to defend or indemnify the insured for claims or damages that arise out of the sexual molestation." (Mathias, et al., Insurance Coverage Disputes (2006) § 16.03[3], p. 16-18.) Such exclusions apply regardless whether the insured is the perpetrator or merely alleged to have been negligent in supervising the perpetrator. (*Ibid.*)

2. The cases plaintiff relies on do not support imposing personal liability on school employees not directly supervising the plaintiff.

The only case that comes close to supporting plaintiff's position is *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848. But *Virginia G.* recognized that there is no statutory basis to impose liability on either a school district or individual employees to supervise students' relationships with their own teachers (or, here, counselors). (*Id.* at p. 1855, fn. 1 [noting, for example, that Education Code section 44807 governs supervision of *student* conduct, not that of teachers].) *Virginia G.* does state that "if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [a teacher's] prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, including

[plaintiff], the employees owed a duty to protect the students from such harm." (*Id.* at p. 1855.) But it provides no analysis. It nowhere discusses why or how it is that a public entity employee is to be personally liable for the negligent hiring and supervision of co-workers or subordinates when private employees have no such liability.

Certainly neither of the cases that *Virginia G.* cites as authority supports that proposition. One case is *John R.* But *John R.* never addressed individual liability for negligent hiring and supervision. That simply was not an issue on appeal in that case. The only remarks in *John R.* about such potential liability appear in an opinion signed by just two justices. The other case that *Virginia G.* cites is *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448. But *Leger* has nothing to do with the hiring, retention or supervision of other school district employees. The claim there was that an individual teacher (a wrestling coach) failed to supervise a student in his direct charge. Devoid of rationale, *Virginia G.* cannot bear the weight of ipse dixit conclusions.

Neither does *J.H. v. Los Angeles Unified School Dist.* (2010) 183 Cal.App.4th 123, support indirect personal liability. *J.H.* is a case of liability for a teacher's *direct* playground supervision. To the extent that it, *Virginia G.* or *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, suggest that school personnel generically have personal liability for failing to supervise individuals who, in turn, have direct responsibility to supervise a student, they are wrongly decided. *Zelig v. Superior Court, supra*, 29 Cal.4th 1112, holds to the contrary: Individual employees do *not*

have the necessary duty-creating personal special relationship with a plaintiff just because the entity as a whole undertakes or owes a duty to protect that plaintiff.

Schools, of course, are not the only institutions – public *and* private – that have a special relationship with potential plaintiffs. Hospitals and nursing homes have such a relationship with patients; courthouses with litigants; childcare facilities and youth sports leagues with children; common carriers with passengers; the list goes on. In each of these settings is everyone in the chain of hierarchy to face *personal* liability for the malfeasance of a subordinate on the ground that they could have or should have ferreted out wrongdoing sooner? No precedent suggests that. *Zelig*, for one, is to the contrary.

Nor do the tentacles of supposed personal liability necessarily stop with superiors. Under plaintiff's theory, co-workers, too, could be personally liable for negligently failing to recognize or take measures to intervene to stop another employee's misconduct. Again, neither precedent, logic, nor a reasonable allocation of responsibility supports such a result. (See *Armato v. Baden* (1999) 71 Cal.App.4th 885 [doctors working for medical group not liable for co-worker physician assistant's malpractice where doctors did not directly participate in wrongdoing].) Under plaintiff's view individual employees – public and private – will be potentially *personally* liable for virtually everything they do or fail to do at work on behalf of their employer. The law has never so extended liability.

The chain of attenuated duty is just too long to justify liability. The responsibility for the counselor's egregious misconduct far outside any conceivable scope of her employment lies squarely with her, just as it would if she robbed or beat a student. Individual supervisors and co-workers, whether in a public entity or private setting, are not personally responsible for her misdeeds absent some personal, special relationship (not alleged here) with the victim.

Plaintiff complains that this means that no liability – individual or entity – will attach for negligent hiring or supervision by a public entity. Perhaps so. But that is no different than the result that this Court recognized in *Miklosy, supra*, 44 Cal.4th 876, holding that no liability – individual or entity – exists for a public entity's wrongful termination of employment in violation of public policy or in *Zelig v. Superior Court, supra*, 29 Cal.4th 1112, holding that no liability – individual or entity – exists for a public entity's failure to protect a plaintiff from a courthouse shooting. And, unlike *Miklosy* (but like *Zelig*), here there is liability somewhere – with the truly responsible party, the perpetrator.[7]

As in *Miklosy* and *Zelig*, there exist sound policy reasons behind the Legislature's choice. Unlike private entity actors, public entities face constraints on their behavior beyond liability. They are subject to *public* control. If they perform their functions poorly, there are public

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[7] In most molestation cases, as here, the majority of damages are going to be noneconomic, e.g., emotional distress, impact on future relationships, etc. The perpetrator inevitably and inherently will bear the lion's share of responsibility. Under Proposition 51, the vast majority of such noneconomic damages would be the perpetrator's sole responsibility.

repercussions, reforms, and remedial measures. Liability is thus unnecessary to create an incentive for a safe environment. That is already provided by public control and accountability.

CONCLUSION

The Court of Appeal majority got it correct. The result in this case is dictated by the statutory scheme that the Legislature created. That scheme places public employee personal liability on the same footing as private employee personal liability. If that result is not satisfactory, the recourse is to the Legislature.

The judgment of the Court of Appeal (and of the trial court) should be affirmed.

DATED: May 25, 2011 Respectfully submitted,

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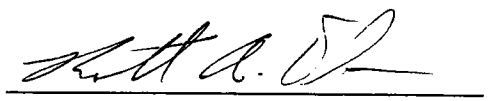
CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, that the **ANSWER BRIEF ON THE MERITS** contains **6,726** words, not including the tables of contents and authorities, the caption page, signature blocks, the proposed order, or this Certification page.

Dated: May 25, 2011



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

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Executed on May 25, 2011, at Los Angeles, California.

(X) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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