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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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C.A., A MINOR, ETC., ET AL.,

Plaintiff and Appellant,

vs.

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

Defendants and Respondents.

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

According to the majority opinion of the Court of Appeal in this case, a school district is not liable when a school administrator hires an applicant known to have a history of molesting students, or where after hiring an applicant, the administrator becomes aware of the employee's sexual misconduct with a student and does not properly supervise, train or discharge the employee, and the molester predicably sexually abuses a student. The Majority reasoned that there can be no liability for the hiring, retention or supervision of the molester because there is no statute imposing *direct* liability on the School District itself for such conduct. As explained in the opening brief, the Majority's analysis is flawed as it failed to recognize that the claims were *vicarious* in nature.

Echoing the flawed reasoning of the Court of Appeal, the District argues in its answer brief that the majority is correct because according to the District there can *never* be individual employee liability for the selection or supervision of school district employees. The District argues that the school employees responsible for hiring and/or supervising teachers and other school employees owe no duty to protect the students from foreseeable harm. The District is simply wrong.

First, the District's analysis requires the Court to ignore the special relationship existing between school personnel and students, the compulsory nature of education, as well as the State's foremost public interest in protecting children from sexual abuse. In its Answer Brief, the District argues that the context is not determinative of the issue of duty and that plaintiff's discussion of the special relationship between school personnel and students is misplaced. However, in determining whether one owes a duty to another the context of the relationship is of paramount importance. The District cannot ignore the circumstances in this case.

Second, the District's position that there can never be individual liability for the failure to exercise reasonable care in selecting or supervising an employee is without merit. Not one of the cases the District cites supports this remarkable proposition.

Lastly, to the extent the District argues that "imposing liability would have a counterproductive effect of discouraging the personal attention that students often need" and would "put a chill" on the hiring of qualified school district employees (Answer p. 26), the District is mistaken. There is no justification to immunize school district employees from liability. The paramount public policy of protecting school children trumps any alleged harm suffered by the District.

ARGUMENT

I. School Administrators and Employees Owe a Duty to Exercise Ordinary Care in Protecting Students From Foreseeable Harm.

Despite superfluous rhetoric that Plaintiffs are seeking "a radical remaking of the statutory law" (Answer p. 9), the District admits in its Answer that "[t]he sole question, thus, is whether individual school district employees have personal liability for which the school district may be vicariously liable." (Answer p. 11 (italics omitted).) To determine whether an individual school district employee may be personally liable to one of his or her students, an analysis of whether or not the employee owes a *duty* to the student is required. Thus the critical issue is duty – and it is here where the District and plaintiff differs.

The District contends that its administrators and employees owed no duty to protect students from hiring, retaining and supervising known child molesters on its campus, even where those molesters are placed in positions of authority over students because according to the District, in the private employment context such claims are "direct" in nature and can only be alleged against an employer. (Answer pp. 14-18.) To reach this disturbing conclusion, the District ignores the context of the circumstances in this case

– the existence of the special relationship between the district employees and students, the compulsory nature of education, and the policy of protecting society's most vulnerable members from abuse – and argues "[a]lthough the opening brief discusses the school context at length, the issue framed does not depend on that context." (Answer, p. 9.) However, the District's attempt to divorce the facts in the case from the issue of duty is entirely misplaced.

"It 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 (italics added); see also *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747.) This Court has repeatedly emphasized that a school district may be vicariously liable for the failure of its employees to use reasonable care in ensuring the safety and welfare of the children entrusted to its custody and control. (See *Dailey, supra,* 2 Cal.3d 741, *Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438; *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066.)

In *Daily,* this Court considered the duties owed by school district employees when a student was harmed by another student. In that case, Michael Dailey, a high school student, was killed by another student while they were "slap boxing" during lunch period, unsupervised by school personnel. Michael's parents brought a wrongful death action against the school district and two teachers for failing to provide adequate supervision. The trial court granted a directed verdict for defendants. The Supreme Court reversed.

This Court explained that pursuant to Government Code section 815.2, a school district is vicariously liable for the negligence of its employees and thus if the district employees owed a duty to supervise the students and breached this duty, the school district would be vicariously liable.

> Before we can decide whether or not the foregoing evidence is sufficient to support a verdict in plaintiffs' favor, we must determine what, if any, duty is owed by those in defendants' position to students on school grounds. While school districts and their employees have never been considered insurers of the physical safety or students, California law has long imposed on school authorities a duty 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.)" (*Taylor v. Oakland Scavenger Co.* (1941) 17 Cal.2d 594, 600, 110 P.2d 1044, 1048; Education Code, section 13557. . . . The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care "which a person of ordinary prudence, charged with (comparable) duties, would exercise under the same circumstances." (*Pirkle v. Oakdale Union etc. School Dist.* (1953) 40 Cal.2d 207, 210, 253 P.2d 1, 2; *Bellman v. San Francisco H.S. Dist.* (1938) 11 Cal.2d 576, 582, 81 P.2d 894.) Either a total lack of supervision ([citation]) or ineffective supervision ([citation]) may constitute a lack of ordinary care on the part of those responsible for student supervision. *Under section 815.2, subdivision (a) of the Government Code, a school district is vicariously liable for injuries proximately caused by such negligence.*

(*Dailey, supra,* 2 Cal.3d at p. 747 (italics added).)

This Court then concluded that school employees may be personally liable for student injuries cased by the failure to provide adequate supervision. (*Id.* at pp. 748-750.) Considering the evidence before it, the Court noted that Mr. Maggard, the responsible department head, failed to develop a comprehensive schedule for teacher supervision of students, and failed to instruct subordinate teachers as to what was expected of them while they were supervising students. Further, the individual teacher, Mr. Daligney who was "ostensibly on duty at the time of the accident," remained inside an office during the entire lunch period and did not "devote his full attention to supervision but ate lunch, talked on the phone, and prepared future class assignments." (*Id.* at pp. 749-750.) The Court concluded, "[f]rom this evidence a jury could reasonably conclude that those employees of the defendant school district who were charged with the responsibility of providing supervision failed to exercise due care in the performance of this duty and that their negligence was the proximate cause of the tragedy which took Michael's life." (*Id.*)

Accordingly, the school district could be vicariously liable for its employees' negligence pursuant to Government Code section 815.2. As highlighted by Justice Mallano in his dissent in this case, "*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 pp. 4-5; 117 Cal.Rptr.3d at p. 295.)

Some courts have relied upon the special relationship formed between school personnel and students as warranting 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.) "This 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.)

In *M.W.*, a student who had been sexually assaulted by another student on campus but before the school day began, filed an action against the school district for negligent failure to supervise and careless failure to guard, maintain, inspect and manage the school premises. The appellate court affirmed the jury's verdict against the District, finding that the District employees had a duty to protect the minor student from sexual assault.

The court explained that whether or not a duty was owed concerned whether the particular harm to the student is *reasonably foreseeable* and "[f]oreseeability is determined in light of all the circumstances." (*M.W.*, 110 Cal.App.4th at pp. 518-519, citing *Leger, supra,* 202 Cal.App.3d at p. 1459.) Given the duty owed by school authorities to supervise students, the foreseeability of harm to special education students, the relatively minimal burden on school districts to ensure adequate supervision and "the paramount policy concern of providing our children with safe learning environments," the court affirmed the jury's verdict against the school district. (*M.W.*, at pp. 518-519.)

Thus, *M.W., Dailey* and several other decisions detailed in the opening brief demonstrate that school employees may be personally liable

for student injuries caused by the failure to provide adequate supervision and the school district, in turn, may be vicariously liable for the employees' negligence. (Opening Brief pp. 13-17.)

While in its Answer Brief the District acknowledges that a school district employee "may" have a common law duty to protect students from foreseeable harm at the hands of other students and even third parties (despite the fact that in the private context the duty may not arise), the District nonetheless argues that the duty would not extend to the selection, retention or even supervision of individuals employed by the school district. (See Answer Brief pp. 22-30.) However, there is simply no rationale basis for imposing liability on a school where an employee's failure to supervise students leads to injury, but withholding accountability where the negligence involves the selection and supervision of teachers.

In fact, three courts, including this Court have said that negligent supervision is a viable theory where a teacher has behaved abominably outside the scope of his or her job functions. (See *John R. v. Oakland Unified School Dist.*, *supra*, 48 Cal.3d 438, *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, and *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1045 ["The district ... could not be held vicariously liable for a sexual assault committed by its

teacher. [Citation.] It could be held liable only for its own negligence, i.e., negligent hiring or negligent supervision."].)

In *John R.*, this Court concluded that a school district could not be held liable under respondeat superior for its employees' sexual offenses, noting: "Although it is unquestionably important to encourage both the careful selection of these employees and the close monitoring of their conduct, such concerns are, we think, better addressed by holding school districts to the exercise of due care in such matters and subjecting them to liability only for their own direct negligence in that regard." (*John R.*, 48 Cal.3d at 451.) Accordingly, the Court remanded with directions to enter judgment on plaintiffs' claim for respondeat superior, "leaving plaintiffs free to pursue only their claims against the district premised on its own direct negligence in hiring and supervising the teacher." (*Id.* at p. 453.)

The District attempts to discount *John R.* on the grounds that such remarks were in a portion of the opinion "signed by just two justices." (Answer Brief p. 28.) However, as noted by Justice Mallano in his dissent, "each of the justices in *John R.* concluded that the school district could be liable for the student's molestation under one theory or another. (Cf. *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 211 & fn. 2, 285 Cal.Rprt. 99, 814 P.2d 1341 [discussing various opinions in *John R.*].)" (Slip

Opinion, Dissent p.8; 117 Cal.Rptr.3d at p. 298.)

In *Virginia G., supra,* the court furthered such reasoning and concluded that "claims against school districts premised on their own direct negligence in hiring and supervising teachers may be pursued." (*Virginia G.*, 15 Cal.App.4th at p. 1855.) "[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.*" (*Ibid.* (italics added).)

The District cannot distinguish *Virginia G.* Instead, the District argues that *Virginia G.* was "wrongly decided" to the extent it concluded that there was a special relationship giving rise to a duty between a student and a district employee responsible for selecting, retaining or supervising another employee. (Answer Brief pp. 27-29.) The District's analysis is again flawed as even in the absence of a special relationship, this Court has concluded that an individual school district employee may owe a duty to protect a child from foreseeable harm. (See *Randi W. v. Muroc Joint Unified School Dist.* (1997) 14 Cal.4th 1066.)

In *Randi W.*, this Court considered whether individual school employees owe a duty to protect students *at another school* from an administrator previously charged with sexual improprieties. Noting that there was *no special relationship* between the injured student and the individual defendants because the plaintiff was not a student in the district of the individual defendants, this Court nonetheless held that the individual defendant employees owed plaintiff a duty not to misrepresent the school administrator's qualifications or character in their letters of recommendation. (*Randi W.*, at pp. 1076-1081.) In its analysis, the Court considered such factors as the foreseeability that the positive recommendation letters (which omitted information concerning prior sexual misconduct) could cause harm to plaintiff, the moral blameworthiness of such conduct and public policy concerns for preventing future harm. (*Ibid.*)

The District superficially distinguishes *Randi W.* by stating that in that case the individual employees "actively created the danger by affirmatively misrepresenting an administrator's qualifications and good character." (Answer Brief p. 25.) The District ignores this Court's analysis of duty and its finding that even a school employee of another district, who is not in a special relationship with the injured student, may nonetheless owe that student a duty of care. According to the District, although under

Randi W. a school employee who submits a positive letter of recommendation of a known or suspected child molester can be individually liable to a student of a different school district, the school employee who actually selects and hires a known or suspected child molester to work with students in his or her district cannot be individually liable for the forseeable consequence of molestation of a student. As noted in Justice Mallano's dissent, "*Randi W.* would make little sense if a truthful recommendation – one disclosing an applicant's past sexual misconduct – could be ignored by its recipient, namely, the employee making the hiring decision at the other school." (Slip Opinion, Dissent p. 9; 117 Cal.Rptr.3d at pp. 298-299.)

Furthermore, as noted in *Randi W.,* individual school employees have a duty to report suspected or known child abuse. (Penal Code §§ 11165.7, 11166.) The Legislature's enactment of Penal Code section 11166, imposing a duty on teachers and school employees to report suspected or known child abuse, affirms the State's compelling interest in protecting children. The District's repeated argument in its Answer Brief that to impose a duty on school district employees in this case would "create public entity liability in an array of cases far beyond anything that the Legislature ever contemplated," (Answer Brief p. 21), is thus disingenuous. The Legislature has expressly contemplated the individual duty of a teacher

or school district employee to affirmatively act when child abuse is suspected or known.

The District's attempts to have this Court consider the issue of duty in a vacuum - isolated from the context of the special relationship formed between a school personnel and students, the compulsory nature of education, a student's inalienable right to attend safe, secure and peaceful campuses (Cal. Const., art. I, §§ 28, subd. (c)), and the right of all students to a school environment fit for learning (*In re William G.* (1985) 40 Cal.3d 550, 563) – is therefore in error. It is precisely because of these facts that school administrators and employees must exercise ordinary care in the selection, retention and supervision of those working with students.

II. The District's Position That an Individual Can Never Be Liable for Negligent Selection, Retention and Supervision, and Thus an Employer Can Never Be Liable for Such Claims, Is Misplaced.

The District argues that where a school employee who knows or has reason to know that a guidance counselor has molested students in the past, and yet decides to hire her anyway, and where after the counselor has been hired, the school employee knows or has reason to know that the counselor

is continuing to molest students and yet fails to supervise, train or discharge the counselor and instead continues to facilitate the sexual abuse by turning a blind eye to such misconduct, and a young student is foreseeably molested, that school employee cannot be held personally liable. According to the District, because such claims are allegedly "direct" in nature against the employer in the private context, they cannot serve to impose liability against the employee or in turn vicarious liability against the employer. There are several flaws with the District's position.

First, as explained above, the District's emphasis on the private employment context is misplaced. For a variety of reasons, an employee at a school district may owe a student a duty of care not found in the private employment context. As explained, courts have repeatedly held that a school district can be held vicariously liable for its employee's negligent supervision. (See *Dailey*, *supra*, 2 Cal.3d at p. 747; *Hoyem*, *supra*, 22 Cal.3d at p. 513; *Leger, supra,* 202 Cal.App.3d at pp. 1460-1462; *M. W., supra,* 110 Cal.App.4th at p. 518.) While the District tries to draw a distinction between negligent supervision of students and negligent "oversight" of District employees (Answer Brief pp. 1, 17, 20), 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, the District has not and cannot meaningfully dispute that an individual school employee's negligent supervision may give rise to personal liability, and that under Section 815.2, the school district may be vicariously liable for the negligent supervision. On this basis alone, reversal is warranted.

Second, the District's position that there can never be a claim for negligent hiring, retention or supervision against an employee is inaccurate. The District fails to cite any case standing for the proposition that a plaintiff is legally barred from asserting a claim for negligent hiring, retention or

supervision against an individual employee. Rather. the District capitalizes on language in select cases referring to such claims as being against the "employer" or "enterprise." (See Answer Brief pp. 14-18.) However, nowhere in these cases do the courts state that a claim cannot legally be asserted against an individual employee.

Moreover, upon closer examination of 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 Brief pp. 14-18, citing *Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1136-1137 [shooting and killing of customer by former employee]; *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal.App.4th 1556, 1559, 1565 [allegations of criminal sex abuse; no claim of respondeat superior]; *Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 813-814 [cyber-threats made outside scope of employment]; *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 831, 840, fn. 2 (1992) [allegations of criminal acts of molestation; court specifically noting that respondeat superior did not apply to those tortious acts].) These cases do not distinguish direct liability from vicarious liability of the employee

charged with negligently hiring, retaining or supervising of the underlying tortfeasor employee. Rather, as explained in these cases, where the underlying tortfeasor employee's conduct is outside the scope of employment, the employer will not be found vicariously liable for that misconduct, but may be found directly liable for the injuries caused by the underlying tortfeasor under a theory of negligent hiring or retention. (*Ibid.*)

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

Citing this Court's decision in *Eastburn v. Reg'l Fire Prot. Auth.* (2003) 31 Cal.4th 1175, the District argues that just as in that case, here there is no personal liability for which vicarious liability could predicated upon. (Answer Brief pp. 11-12.) *Eastburn* however does not support the District's position. In *Eastburn*, the plaintiffs sued the public entities that provided 911 emergency dispatch services alleging claims of direct and vicarious liability for the negligence concerning the manner in which the

operators responded to the call. As to the claims of vicarious liability, the Court explained that the qualified immunity under Health and Safety Code section 1799.107 applied to the individual 911 dispatchers. (*Id.* at 1184-1185.) There is no similar immunity statute applicable to the District employees here.

Furthermore, the District's reliance on *Eastburn* is in error as this Court also noted that paramedics and 911 operators owe no personal duty to come to the aid of another "absent a special relationship" and "assuming the person by his conduct has neither created nor increased the peril." (*Eastburn v. Reg'l Fire Prot. Auth.* (2003) 31 Cal.4th 1175, 1185 citing *Zepeda v. City of Los Angeles* (1990) 223 Cal.App.3d 232, 235-236, *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128-1129 and *Williams v. State of California* (1983) 34 Cal.3d 18, 25.) Here, not only is there a special relationship between District employees and students, but by hiring a known child molester to counsel students, and then in fact becoming aware of sexual abuse between the counselor and a student and failing to do anything to stop such misconduct, the employees created and facilitated the conditions for the abuse to occur.

CONCLUSION

Therefore, for the foregoing reason, plaintiff respectfully urges this Court to reverse the conclusion of the Court of Appeal Majority. Pursuant to the special relationship existing between school personnel and students as well as the compulsory nature of education and the public policy protecting minors from abuse, where an employee of a school district knows or should know that a guidance counselor has a propensity to molest or abuse children and yet the employee facilitates the relationship between the student and known child molester by hiring the molester, permitting the molester to have contact with the student, or simply turning a blind eye to the abuse in violation of his or her mandatory duties, the employee can be held personally liable and the district vicariously liable.

Dated: July 13, 2011

Respectfully submitted,

MANLY & STEWART

ESNER, CHANG & BOYER

By: _____

Holly N. Boyer

CERTIFICATE OF WORD COUNT

This Reply Brief on the Merits contains 4,408 words per a computer generated word count.

Holly N. Boyer

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