CASE NO. DF-113319

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JANE DOE, A MINOR BY AND THROUGH HER PARENTS AND NEXT FRIENDS, JOHN DOE AND MARY DOE, AND JOHN DOE AND MARY DOE, INDIVIDUALLY,

PLAINTIFFS/APPELLEES

VS.

KIRK OF THE HILLS

DEFENDANT/APPELLANT

BRIEF OF AMICUS CURIAE NATIONAL CENTER FOR THE VICTIMS OF CRIME

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA,
CASE NO. CJ-2010-7356,
THE HONORABLE LINDA MORRISSEY PRESIDING

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August 21, 2015

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INTRODUCTION

COMES NOW The National Center for Victims of Crime, as Amicus Curiae ("Amicus Curaie"), and hereby submits the following brief in support of the Plaintiffs/Appellees and in opposition to the Appellant's Petition for Writ of Certiorari.

Meredith Howard ("Howard") is a full grown adult who is significantly developmentally disabled with a limited comprehension of evil. Kirk of the Hills gave a job to Howard as a daycare worker in 2008. While so employed, Howard broke a six-month-old boy's leg, while she was alone with him, the incident of which Kirk of the Hills became promptly aware.

In 2010, Howard left Kirk of Hills. Later in that year, she applied for a job at John Knox Presbyterian Church ("John Knox") in Tulsa. As part of the application process, John Knox requested a reference from Kirk of the Hills, which they received. However, in responding to the reference request, Kirk of the Hills failed to include any reference to the broken leg incident which would have almost certainly ensured that John Knox would have denied employment to Howard. Relying on the reference from Kirk of the Hills, John Knox hired Howard and within six (6) months, Howard sexually abused nineteen-month-old baby girl, Jane Doe, by digital penetration of Jane Doe's vagina, resulting in serious physical injury and even more serious emotional injury.

Based on the foregoing, Jane Doe sued John Knox, Howard, and Kirk of the Hills. Jane Doe settled with John Knox and Howard. The case proceeded to trial against Kirk of the Hills and, upon jury verdict, the trial court entered judgment for Minor-Plaintiff Jane Doe for $1.5 Million against Kirk of the Hills and $250,000 for each of Doe's parents, John and Mary Doe, against Kirk of the Hills. The Court of Civil Appeals affirmed and this Petition for review on certiorari followed.

SUMMARY OF THE RECORD

Appellant has asserted several matters as "facts" that are, in fact, merely disputed testimony. It is elementary that appellate courts will resolve disputed facts in a light most favorable to the prevailing party below, especially where, as here, the appeal is not based on a claim of the jury verdict being against the weight of the evidence. "[A] jury verdict is conclusive as to all disputed facts and all conflicting statements . . . where there is any competent evidence reasonably tending to support the jury verdict . . . ." *Nealis v. Baird*, 1999 OK 98, ¶47, 996 P2d.439. With that principle in mind, the following are the facts of this case:

In 2008, apparently in a fit of anger and while employed as a daycare worker by Kirk of the Hills, Howard abused six-month-old L.G. while acting as L.G.'s caretaker, resulting in a spiral fracture to L.G.'s leg. Tr. Vol. IV, pg. 81-82, 107. Kirk of the Hills was fully aware of the actions of Howard. Tr. Vol. IV, pg. 81-82, 107. The child's family did not wish to prosecute and no criminal charges were filed at that time. Tr. Vol. II, pg. 84, 102, 109, 126-127. In 2009, Howard applied for a job as a daycare worker at John Knox. In September of 2009, John Knox called Kirk of the Hills for a reference, which Kirk of the Hills provided, but Kirk of the Hills did not include in its reference any mention of the fact that Howard had previously assaulted an infant in her care while employed at Kirk of the Hills, or that the assault resulted in a spiral fracture of the infant's leg. As a result of these omissions, John Knox hired Howard in October of 2009. Tr. Vol. II, pg. 147, 165-67; Tr. Vol. IV, pg. 95; Tr. Vol. IV, pg. 94-95. On November 4, 2009, Howard sexually abused Jane Doe, causing a serious injury to Jane Doe's vagina and incalculable mental distress to both Jane Doe and her parents. Tr. Vol. IV, pg. 12. Howard was thereafter convicted and imprisoned for both incidents of abuse. *Id.*, R. 733 (Pl. Ex. 27).

ARGUMENT AND AUTHORITIES

Amicus Curiae acknowledges that Oklahoma law requires a plaintiff to establish breach of duty, proximately causing damages to prevail in a tort claim. This *amicus curiae* brief is concentrated on element of duty.

Appellant has mistakenly tried to label this case as a routine employment law case, when, in fact, it is a child sexual abuse case. The employment law spin is disingenuous in that the statute relied upon by the appellants, 40 O.S. 2011, §61, only provides immunity to employers for what *is actually disclosed* to potential future employers. "The current or former employer shall be immune from civil liability *for the disclosure or any consequences of such disclosures* . . . ." 40 O.S. 2011, §61(A)(emphasis added). The statute, in actuality, supports appellees' position in this case as it encourages open and complete disclosure. Section 61 most assuredly ***does not*** support or sanction concealment of material information. Indeed, the stated policy of Oklahoma is that all persons have ***a duty to not conceal material information***. 76 O.S. 2011, §§2-3. However, Kirk of the Hills is attempting to distort the plain language of 40 O.S. 2011, §61, by claiming immunity for what it failed to disclose. This is not the plain meaning of the statute, nor is this interpretation supported by any other Oklahoma statute. Neither is any such intent revealed within Section 61, and the public policy of Oklahoma requires disclosure of material information to future employers and to prohibit the concealment of material information. *See* 76 O.S. 2011, §3 (defining deceit as, *inter alia*, "[t]he suppression of a fact by one who is bound to disclose it . . . ."); *see also* 76 O.S. 2011, §2.

"Oklahoma has a strong public policy to protect children" from child abuse. *Myers v. Lashley*, 2002 OK 14, ¶8, 44 P.3d 553, and Oklahoma public policy mandates the disclosure of possible child abuse. *Id.; see also Ellison v. Ellison*, 1996 OK 64, 919 P.2d 1, 2. This case involves

nothing more than an acknowledgment of that policy, implementation of same, and the corresponding duty that flows from that policy. *Myers,* 44 P.3d at ¶8 ("Toward [the goal of protecting children], Oklahoma statutes require the reporting and investigation of suspected child abuse.").

This Court should adopt the following as a rule of law, in keeping with Oklahoma's strong public policies against child abuse and in mandating disclosure, i.e., that a competent person or business entity with particularized knowledge of a substantial risk of serious physical harm to a child of tender years, has a duty to warn the appropriate responsible parties of that risk. While duty is indeed a question for the Court, the jury is responsible for determining whether the stated duty has been breached. "If a duty exists, the trier of fact then determines whether a violation of that duty has occurred." *Leak-Gilbert v. Fahle* 2002 OK 66, ¶11, 55 P.3d 1054.

Although the Appellant complains that Plaintiffs/Appellees have cited no cases that support this proposition for liability for failure to warn the unwary of a substantial risk of serious physical harm, not apparent to the public but known to the Defendant, this concept is not novel. The landmark case in this field of law is *J.S. v. R.T.H.*, 155 N.J. 330, 714 A.2d 924 (1998). In that case, the Supreme Court of New Jersey held that a wife was liable to two (2) neighborhood girls for the damages her husband caused the girls by sexually abusing them, where the wife had knowledge of her husband's pedophilia. *Id.* at 929-30. The Court in *J.S. v. R.T.H.* fully and excellently addressed all arguments on both sides of the issue and resoundingly delivered a unanimous decision establishing the duty to disclose such information and the liability for breach of that duty. *See generally id.* Among the numerous excellent points in *J.S. v. R.T.H* are that:

1. "Determination of duty is a question of fairness and public policy";

2. When the Defendant's actions are relatively easily corrected and the harm sought to be prevented is serious, it is fair to impose a duty;

3. There is a strong public policy against child sex abuse; and

4. Foreseeability can be established where there have been previous offenses committed against children of similar age, same sex, at the same location, with people who were known to the abuser, and the failure of any previous intervention, treatment or arrest.

Id. at 928-929.

Other cases are in accord and support the existence of a duty in this case. *See Doe v. Batson* 338 S.C. 291, 525 S.E.2d 909 (1999), *aff'd in part, vacated in part on other grounds*, wherein the Court of Appeals of South Carolina held that a trial court improperly granted summary judgment to a mother of an adult male minister, where several minor children sued the mother for failing to warn them of the son's known propensity for child sex abuse. In that case, the Court held that the mother could be liable to the children if the mother knew of the children's presence with the son, and knew of the threat his being with them posed, yet failed to effectively warn the children's parents. *Id.* At 914; *see also Pamela L. v. Farmer*, 112 Cal. App. 3d 206, 169 Cal. Rptr. 282 (Ct. App. 1980), wherein the trial court dismissed a complaint by two (two) minor children against a woman who knew of her husband's history of child sex abuse, but failed to effectively warn the families of the children of such history, was reversed, *citing* Restatement (Second) of Torts §302 B as follows:

> "An act ***or omission*** may be negligent if he actor realizes or should realize that it involves unreasonable risk of harm to another through the conduct of the other or a third person, which is intended to cause harm, even though such conduct is criminal." *Id.* at 209-10 (emphasis added).

In support of its claim, Appellant cites *Richland Sch. Dist. v. Mabton Sch. Dist.*, 111 Wash. App. 377, 45 P.3d 580 (2002), a Washington state case wherein a school district was found, at trial,

not to be liable for failing to report a job applicant's criminal history to another school district. However, in a case with facts almost identical to the case at hand, the Washington Court of Appeals in fact recognized the existence of the same duty at issue here and found for the Plaintiff. *See J.N. ex rel. Hager v. Bellingham Sch. Dist. No. 501*, 74 Wash. App. 49, 871 P.2d 1106, 1111 (1994). In *J.N. ex rel. Hager*, the Court of Appeals held that failure to warn under such circumstances resulted in a breach of duty to warn. *Id.*, at 1111-1112, *citing Peck v. Siau*, 65 Wash.App. 285, 292, 827 P.2d 1108 (1992). In *Funkhouser v. Wilson*, 89 Wash. App. 644, 950 P.2d 501 (1998), the Washington Court of Appeals found that a church member who knew that another church member had molested the pastor's daughter, while babysitting the child, ***could be liable*** for failing to warn the pastor of the possibility of abuse of his daughters. The Court held that it was the first church member's special knowledge that created the "special relationship" and/or duty. *Id.* at 508-510. The Washington Supreme Court thereafter upheld the Court of Appeals's special relationship duty/theory, and on remand, the case was allowed to proceed to trial. *See generally C.J.C. v. Corp. of Catholic Bishop of Yakima,* 138 Wash. 2d 699, 985 P.2d 262 (1999).[1] Moreover, courts in similar cases have recognized that a school district or other authoritative, custodial body or business, has a duty to warn children after gaining knowledge that an employee had sexually abused a child and can subsequently be liable to subsequent children for failure to do so when subsequent children are abused by that same individual. *See, e.g., Yates v. Mansfield Bd. of Edn.*, 102 Ohio St. 3d 205, 2004-Ohio-2491, 808 N.E.2d 861 (school district could be liable to a student abused by a coach, where school had prior knowledge of allegation that coach had abused another student but failed to report same); *M.S. v. Harvey*, 2014-Ohio-4236, 2014 WL 4748568 (holding where extended family members,

[1] The foregoing case was a consolidated Supreme Court case of 3 cases, including *Funkhouser*.

specifically an ex-great aunt and ex-great uncle, had particular knowledge of an offender's propensity for child abuse not known to the general public, those persons were liable to a subsequently abused minor for failing to report the known tendencies of the offender to the minor's parents); *N.K. v. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints,* 175 Wash. App. 517, 531-32, 307 P.3d 730, 737-38 (2013),*review denied sub nom. N.K. v. Church of Jesus Christ of Latter-Day Saints*, 179 Wash. 2d 1005, 315 P.3d 530 (2013)(holding that a church which sponsored local Boy Scout troop both owed a duty to protect former scout from adult volunteer, especially when the church affirmatively showed its support for the volunteer and his trustworthiness with children).

CONCLUSION

A nineteen-month-old child has no ability to protect herself from sexual predators. Oklahoma and most other states have strong public policies to protect helpless minors from the ravages of physical and sexual abuse. Where an employer or any entity has specialized knowledge of significant risk of abuse of children, by a specific offender or an other specific person, that entity must warn those persons responsible for minor children of such risk. This inherent duty has been recognized throughout this State and the nation's courts, and Appellants have cited no statutory or case law to suggest otherwise. "The risk of a child's death substantially outweighs the burden of making a phone call." *Wyke v. Polk Cnty. Sch. Bd.*, 129 F.3d 560, 574 (11th Cir. 1997). The recognition of a duty and the imposition of liability, based on the failure to adhere to that duty, is consistent with the law and constitutes a moral and legal imperative harmonious with Oklahoma law and public policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st of August, 2015, a copy of the foregoing document was mailed, U.S. postage first-class prepaid, to:

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