

S236765

**IN THE
SUPREME COURT OF CALIFORNIA**

LIBERTY SURPLUS INSURANCE CORPORATION, et al.,

Plaintiffs and Appellants,

vs.

**LEDESMA AND MEYER CONSTRUCTION
COMPANY, INC., et al.,**

Defendants and Appellants.

After Order Certifying Question by the
U.S. Court of Appeals for the Ninth Circuit 9th Cir. No. 14-56120

**APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF
AND BRIEF OF AMICUS CURIAE THE LOS ANGELES
UNIFIED SCHOOL DISTRICT IN SUPPORT OF DEFENDANTS-
APPELLANTS**

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al.,**

Plaintiffs and Appellants,

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**LEDESMA AND MEYER CONSTRUCTION
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Defendants and Appellants.

**APPLICATION FOR LEAVE TO FILE AMICUS
CURIAE BRIEF IN SUPPORT OF DEFENDANTS-
APPELLANTS**

Pursuant to rule 8.520(f) of the California Rules of Court, Amicus Curiae the Los Angeles Unified School District (“LAUSD”) respectfully requests leave to file the attached amicus curiae brief in support of Defendants-Appellants Ledesma and Meyer Construction Company, Inc.; Joseph Ledesma; and Chris Meyer on the issue certified by the Ninth Circuit Court of Appeals to this Court: “Whether there is an ‘occurrence’ [defined as an accident] under an employer’s commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.”

LAUSD is the largest public school district in California and employs over 25,000 teachers in more than 900 schools with more than 555,000 students. Since the high-profile arrests in 2012 of two teachers at Miramonte Elementary School, a teacher at Telfair Elementary School, and a teacher at De La Torre Elementary School, LAUSD has spent approximately \$300,000,000 to resolve claims by hundreds of students alleging abuse by those teachers.

The claims against LAUSD are all based on the theory of liability—articulated by this Court through *John R. v. Oakland Unified School District* (1989) 48 Cal.3d 438 (*John R.*), and *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861 (*C.A.*)—that, although a school district cannot be vicariously liable for an employee’s sexual abuse (*intentional injury*) of a student, a school district may be vicariously liable for the *negligence* of administrators or supervisors in hiring, supervising and retaining such an employee who sexually harasses and abuses a student. This distinction, and the creation and scope of a school district’s vicarious liability in this context, has been based in material part on the availability of insurance. Specifically, this Court has imposed such negligence-based liability against a school district based in material part on the premise that the school district can spread the risk of such liability via insurance. In contrast, this Court has declined to impose liability against a school district based on, or for, employees’ intentional acts of abuse because such liability would not fall within the normal range of risks for which costs can be spread via insurance. (See *John R.*, *supra*, 48 Cal.3d at pp. 450-451.)

Having been forced to spend approximately \$300,000,000 of its own funds to resolve hundreds of negligent hiring, retention, and supervision claims filed against it without any assistance from its insurance carriers, LAUSD is now prosecuting massive (and costly) insurance recovery

litigation against its insurance carriers seeking to recover those funds. Although the insurance policies at issue in those cases differ from the policy at issue here, LAUSD anticipates that the carriers will argue that this Court's answer to the certified question may preclude LAUSD from recovering the funds it has expended.

The attached LAUSD amicus curiae brief does not repeat arguments already presented to this Court through Defendants-Appellants' briefs or other amici briefing. Instead, this brief focuses on a narrow issue concerning public entity liability for negligent hiring, supervision, and retention and insurance coverage for those claims, which has not been previously addressed and is of extreme importance to LAUSD and other public entities. LAUSD believes that its discussion of this issue will assist the Court in answering the certified question.

No party or counsel for a party in the pending appeal authored any part of the proposed amicus curiae brief or made any monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the Amicus or its counsel in the pending appeal has made any monetary contribution intended to fund the preparation or submission of the proposed amicus curiae brief.

DATED: May 10, 2017

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DATED: May 10, 2017

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**BRIEF OF AMICUS CURIAE THE LOS ANGELES UNIFIED
SCHOOL DISTRICT IN SUPPORT OF DEFENDANTS-
APPELLANTS**

I. INTRODUCTION

“The principal justification for the application of the doctrine of *respondeat superior* in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.’ [Citation.]” (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 450 (*John R.*))

This risk-spreading justification and the availability or unavailability of insurance has informed and formed a powerful foundational premise underlying California law on school district vicarious liability for abuse-related claims. A school district may be vicariously liable for negligence “in hiring, supervising and retaining” a teacher who abuses a student in material part because the risk of that negligence-based liability can be readily spread through insurance; but the same cannot be said if vicarious liability were imposed against a school district for the intentional abuse by the teacher. As a result, this Court has imposed vicarious liability on school districts only for negligence-based liability, including liability for the negligence of administrators or supervisors in hiring, supervising and retaining an employee who sexually harasses and abuses. It has declined to impose vicarious liability on school districts for intentional abuse by employees on the ground that: “[t]he imposition of vicarious liability on school districts for the sexual torts of their employees would tend to make insurance, already a scarce resource, even harder to obtain, and could lead to the diversion of needed funds from the classroom to cover claims.” (*John R., supra*, 48 Cal.3d at p. 451.)

The Ninth Circuit Court of Appeals has asked this Court: “Whether there is an ‘occurrence’ [defined as an accident] under an employer’s

commercial general liability policy when an injured third party brings claims against the employer for the negligent hiring, retention, and supervision of the employee who intentionally injured the third party.”

In light of the risk-spreading justification for holding school districts vicariously liable for negligent hiring, retention, and supervision of an abusive teacher, this Court should answer the certified question in the affirmative.

II. LEGAL DISCUSSION

A. The Existence and Scope of Public Entity Liability Is Informed by Insurance and Budgetary Considerations

Pursuant to Government Code section 815, tort liability of a public entity—such as LAUSD—is “exclusively statutory.” (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 868 (*C.A.*)) There is no statutory authority imposing direct tort liability against a school district for abuse by a teacher or the negligent hiring, supervision, or retention of that teacher. Instead, victims of teacher sexual abuse sue school districts based on vicarious liability theories under Government Code section 815.2, which provides, in part, 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, apart from this section, have given rise to a cause of action against that employee or his personal representative.” (Gov. Code, § 815.2, subd. (a).)

In determining the existence and scope of a duty that may result in tort liability, courts consider “the availability, cost, and prevalence of insurance for the risk involved. [Citations.]” (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 750 (*Thompson*), quoting *Rowland v. Christian* (1968) 69 Cal.2d 108, 113.) “When public agencies [such as LAUSD] are involved, additional elements include ‘the extent of [the

agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget; ...'. [Citations.]” (*Thompson, supra*, 27 Cal.3d at p. 750.)

B. The Inability to Spread Risk Through Insurance Precludes School District Vicarious Liability for Employee Sexual Abuse Torts

In *John R.*, the Court addressed the question of “whether an employer (specifically, a school district) can be held liable for a sexual assault committed by an employee (here, a teacher) on another person (particularly, on a student committed to that teacher’s supervision).” (*John R., supra*, 48 Cal.3d at p. 447.) The Court explained that “[t]he principal justification for the application of the doctrine of *respondeat superior* in any case is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.’ [Citation.]” (*Id.* at p. 450.) In deciding that school districts may not be held vicariously liable for sexual abuse by teachers, this Court based its decision largely on the fact that if it were to do so, insurance would not be readily available to spread the risk of that liability:

The imposition of vicarious liability on school districts for the sexual torts of their employees would tend to make insurance, already a scarce resource, even harder to obtain, and could lead to the diversion of needed funds from the classroom to cover claims.

(*Id.* at p. 451.) Accordingly, the plaintiffs could not hold the Oakland School District vicariously liable for the teacher’s sexual assault.

C. Public Entity Negligent Hiring, Retention, and Supervision Liability Is Premised on the Availability of Insurance to Spread the Risk

In *C.A.*, the Court considered whether a school district may be vicariously liable for its supervisory or administrative employee’s negligent hiring, retention, and supervision of an abusive counselor:

[T]he question presented is whether the district may be found vicariously liable for the acts of its employees (Gov. Code, § 815.2)—not for the acts of the counselor, which were outside the scope of her employment (see *John R.* [, *supra*, 48 Cal.3d at] 441, 451-452), but for the negligence of supervisory or administrative personnel who allegedly knew, or should have known, of the counselor’s propensities and nevertheless hired, retained and inadequately supervised her.

(*C.A.*, *supra*, 53 Cal.4th at p. 865, fn. omitted.) In finding that the school district could be vicariously liable for its supervisory or administrative employee’s negligent hiring, supervision, and retention of the abusive counselor, this Court explained that the *Rowland* factors, specifically including “ ‘the availability, cost, and prevalence of insurance for the risk involved,’” were used in determining the scope of the school district’s liability. (*Id.* at p. 877, fn. 8, quoting *Rowland v. Christian*, *supra*, 69 Cal.2d at p. 113.)

Similarly, in *John R.*, while the unavailability of insurance prevented the plaintiffs from holding the Oakland School District vicariously liable for the teacher’s sexual assault, they were “free to pursue ... their claims against the district premised on its own direct negligence in hiring and supervising the teacher[.]” which were more readily insurable. (*John R.*, *supra*, 48 Cal.3d at p. 453.)

D. Answering the Certified Question in the Negative Would Undermine the Rationale Established in this Court’s Prior Decisions for Imposing Vicarious Liability on Public Entities

If this Court were to answer the certified issue in the negative, LAUSD’s insurers will almost certainly use that decision to attempt to bar coverage for the more than \$300,000,000 loss already paid by LAUSD in the sexual-abuse related claims brought against it. That loss is grounded


exclusively on the decisions articulated in *C.A.* and *John R.* creating negligence-based vicarious liability against school districts. Yet with an answer in the negative here, a critical basis for the very creation of such liability—the ability of school districts like LAUSD to spread the risk of such liability “through insurance”—will be undermined, leaving school districts (and other public entities) with the threat of potentially having no insurance protection for overwhelming liability, which is premised on the very existence of that insurance. In the words of the *John R.* Court, these consequences “could lead to the diversion of needed funds from the classroom to cover claims.” (*John R.*, *supra*, 48 Cal.3d at p. 451.) That result cannot be what the Court anticipated or desired in *C.A.* or *John R.* To the contrary, it would be in direct contravention of what this Court was expecting to accomplish through its rulings in both cases.

III. CONCLUSION

For the forgoing reasons, and those stated in Defendants-Appellants’ briefs, the Court should answer the certified issue in the affirmative.

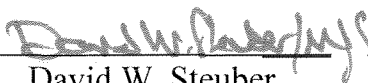
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CERTIFICATE OF COMPLIANCE WITH
CALIFORNIA RULE OF COURT, RULE 8.204(c)(1)

Counsel of Record hereby certifies, pursuant to rule 8.204(c)(1) of the California Rules of Court, that this brief was produced using 13-point type and contains approximately 2,302 words. This certification is made on reliance on the word count of the computer program used to prepare this brief.

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CA Supreme Court No. S236765
Ninth Circuit No. 14-56120
USDC Central District No. 2:12-cv-00900-RGK-SP

PROOF OF SERVICE

I, Margaret Landsborough, declare:

I am a citizen of the United States and I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is: 555 California Street, 26th Floor, San Francisco, California 94104. On **May 10, 2017**, I served the foregoing document described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE THE LOS ANGELES UNIFIED SCHOOL DISTRICT IN SUPPORT OF DEFENDANTS-APPELLANTS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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By Mail. I placed the above-documents in sealed envelope(s), with postage thereon fully prepaid, for collection and mailing at San Francisco, California, following ordinary business practices. I am readily familiar with the firm's practices for processing of correspondence, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for processing.

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

Executed this 10th day of May, 2017, in San Francisco, California.



Margaret Landsborough