

No. 08-1205  
UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

SONDRA J. HANSEN	)	Appeal from the United States
AND WILLIAM R. HANSEN,	)	District Court for the Southern
Individually and on behalf of C.H.	)	District of Indiana,
	)	Indianapolis Division
	)	
Appellants	)	Lower Case No.:
	)	1:05-cv-0670-LJM-WTL
v.	)	
	)	
BOARD OF TRUSTEES OF HAMILTON	)	The Honorable Larry J. McKinney
SOUTHEASTERN SCHOOL CORP. AND	)	
DIMITRI B. ALANO	)	
	)	
Appellees	)	

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Appeal from the United States District Court  
For the Southern District of Indiana, Indianapolis Division  
Case No. 1:05-cv-0670-LJM-WTL  
The Honorable Judge Larry J. McKinney

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**BRIEF OF APPELLANTS-PLAINTIFFS**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-1205

Short Caption: Hansen v. Board of Trustees of Hamilton Southeastern School Corporation

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Sondra J. Hansen, William R. Hansen, C.H. (a minor at the time of filing underlying action)

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## I. STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Indiana, Indianapolis Division had jurisdiction of the federal claims in this cause pursuant to 28 U.S.C. §1331 as the case was brought in part pursuant to Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 et seq, 42 U.S.C. § 1983 and 42 U.S.C. § 1988. The United States District Court for the Southern District of Indiana, Indianapolis, Division, had jurisdiction of the Appellants' state law claims, Negligence, Negligent Hiring, Retention, Supervision and the Common Law regarding Agency, pursuant to 28 U.S.C. § 1367(a) when the Appellants' federal claims were active; however the District Court lost their jurisdiction upon the dismissal of the Appellants' federal claims brought pursuant to the federal statutes detailed therein.<sup>1</sup>

The District Court issued summary judgment to the Defendant, Board of Trustees of Hamilton Southeastern School Corporation (“HSE”) on October 19, 2007 on all claims pending between the Plaintiffs and HSE. In this Entry the District Court dismissed **all** of the Plaintiffs' claims against the Defendant, HSE. After said order was issued the only claims remaining with the district court were Plaintiff's, C.H., claims against Dmitri Alano pursuant to 42 U.S.C. § 1983. Subsequent to this summary judgment order the Plaintiffs requested the district court issue final judgment to HSE under the authority provided by Fed. R. Civ. P. 54(b) as all of the Plaintiffs' claims pending against HSE had been dismissed and the issues to be appealed were directly intertwined with the remaining claims between the Plaintiff, C.H., and Dmitri Alano. In other words it was Plaintiffs' position the claims against Dmitri Alano could not be resolved without final

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<sup>1</sup> The Appellants are appealing whether the district court retained jurisdiction on the state law claims once all the federal claims were dismissed and this issue with discussion is provided in detail below.

resolution of the claims the Plaintiffs brought against HSE. The district court issued final judgment in favor on HSE on all claims pending between HSE and the Plaintiffs on December 28, 2007. The Plaintiffs, with the consent of all parties, filed a Motion to Stay all remaining proceedings pending the outcome of the appeal at the district court level which was granted by the district court on January 2, 2008.

Thereafter, the Plaintiffs filed a timely Notice of Appeal on January 24, 2008. Because the District Court's Entry on HSE's Motion for Summary Judgment was deemed a final order this Court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

## **II. STATEMENT OF THE ISSUES**

1. Whether the District Court improperly granted summary judgment to the Defendant, Board of Trustees for Hamilton Southeastern School Corporation ("HSE")?
2. Whether the District Court lost jurisdiction of the Plaintiffs', Sondra J. Hansen, William Hansen and C.H., ("Plaintiffs") state claims after the dismissal of all federal claims brought pursuant to Title IX by the Plaintiffs against HSE?
3. Whether the District Court improperly granted summary judgment to HSE on Plaintiffs' State Law Claims?

## **III. STATEMENT OF THE CASE**

This case was brought by the Plaintiffs, Sondra J. Hansen and William R. Hansen, individually and on behalf of C.H, (collectively "the Plaintiffs") against the Board of Trustees for Hamilton Southeastern School Corporation ("HSE") on May 12, 2005.<sup>2</sup> The Plaintiffs' Complaint against HSE, in part, alleged violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), 42 U.S.C. §§ 1983,

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<sup>2</sup> The Plaintiffs also brought claims against Dmitri B. Alano; however only those claims dismissed against HSE are before this Court and the subject matter of this appeal.

1988.<sup>3</sup> Specifically the Plaintiffs alleged that C.H. was discriminated against on the basis of her sex, female, and subjected to sexual harassment while a minor and student at HSE, at the hands of HSE's assistant band director, Dmitri B. Alano ("Alano"). In addition to the federal claims the Plaintiffs brought state law claims under the theories of negligence and respondent superior for the hiring, retention and supervision of Alano.

HSE filed their Motion for Summary Judgment on June 15, 2007, which was granted on October 19, 2007. Pursuant to the Plaintiffs' request the District Court deemed the summary judgment entered in favor of HSE on the Title IX claims and state law claims a final order on December 28, 2007. The Plaintiffs then filed their timely Notice of Appeal on January 24, 2008.

#### **IV. STATEMENT OF THE FACTS**

The Plaintiffs, Sondra J. Hansen and William R. Hansen, individually and on behalf of C.H. (hereinafter "The Plaintiffs" collectively, and "C.H." individually) brought an action against both the Board of Trustees of Hamilton Southeastern School Corporation ("HSE") and Dmitri B. Alano ("Alano"). Their Complaint sought damages in part pursuant to Title IX of The Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX") and the Indiana State Law claims including Negligence, Agency, Negligent Hiring, Negligent Retention, Negligent Supervision and Respondeat Superior. (Dk. 1). The District Court had jurisdiction over the Title IX claims as it was an obvious federal question. The District Court therefore had supplemental jurisdiction over the

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<sup>3</sup> The only order appealed by the Plaintiffs' that was certified for appeal was the district court's decision on the Title IX claim and Plaintiffs' state law claims. Therefore the claims pursuant to 42 U.S.C. §§1983 1988 will not be addressed.

State Law claims brought by the Plaintiffs while the Title IX claims were pending before the District Court pursuant to 28 U.S.C. §1367(a).

Alano was employed by Waldron High School (“Waldron”) prior to his position with HSE. While a teacher with Waldron he had relationships with two students, Alicia Rhodes (“Rhodes”) and Julie Harker (“Harker”). (Dk. 114 at Ex. P, App. at 19-23; Dk. 108 at Att. 6 p. 17-18, App. at 24-25). Alano initiated a relationship with Rhoades in 1998 while she was student at Waldron, which lead to sexual intercourse shortly after Rhoades graduation. *Id.* Alano and Rhodes had a physical relationship during Rhoades senior year at Waldron in 1998. (Dk. 114 at Ex. P, p. 6 App. at 20-21). Alano had a physical relationship with Harker when she was a student of Alano’s at Waldron. *Id.*

Alano applied and interviewed with HSE for the Assistant Band Director position in 1998. (Dk. 108 at Att. 3 p. 2, App. at 26). The position Alano applied for and was awarded was a “very high profile job.” (Dk. 108 at Att. 15 p. 2, App. at 27). As part of the application process the completion of an employment form was required. (Dk. 108 at Att. 10, App. at 32-33). The employment form did not inquire as to romantic or sexual relationships with students, former or otherwise. *Id.* Alano was interviewed by Dr. Richard Hogue (“Hogue”), the Assistant Superintendent of HSE. (Dk. 108 at Att. 3, App. at 26). During the application and/or interviewing process, Michael Niemic (“Niemic”), HSE’s band director provided a reference for Alano. (Dk. 108 at Att. 15 p.2, App. at 27). Hogue gave great weight to Niemic’s reference. *Id.* At this same time Harker applied for a teaching position with HSE. (Dk. 108 at Att. 11 p. 2, App. at 35). Harker advised HSE during the interviewing process that she was engaged to Alano. *Id.* Alano and Harker were hired for teaching positions with HSE shortly after their wedding. *Id.*

Niemic attended the Alano/Harker wedding. (Dk. 108 at Att. 16 p.2, App. at 39). After their respective teaching positions began it was common knowledge at HSE that Harker and Alano were married and she was his former student. (Dk. 108 at Att. 11 p. 3, App. at 36).

Hogue was concerned by improper sexual relationships between teachers and students. (Dk. 108 at Att. 15 p. 2, App. at 27). Hogue however did not ask Alano or Harker about relationships with students, former or otherwise. (Dk. 108 at Att. 15 p. 3, App. at 28; Dk. 108 at Att. 11 p. 2, App. at 35). Despite the “common knowledge” about Alano’s improper relationship with Harker HSE did not inquire about the same. *Id.* Hogue conceded that teacher student relations were of concern in the education industry and to him as there were, or had been, improper teacher student relationships at HSE. (Dk. 108 at Att. 15, App. at 28-31). HSE should have inquired about Alano’s past relationships with students, former or otherwise, including with Harker. (Dk. 108 at Att. 14 pp. 9-10, App. at 40-43). Alano conceded that had Hogue asked about relations with students he would have been truthful and disclosed the relations with Rhoades and Harker. (Dk. 108 at Att. 3 p. 5, App. at 26).

As part of their, Alano and Harker, employment HSE charged them with responsibility of taking precautions to protect the students of HSE from harm. (Dk. 108 at Att. 11 p. 2, App. at 35).

There is no dispute that Alano initiated and continued an improper non-consensual sexual relationship with C.H. when she was his band student during her freshman and sophomore years at HSE, 2000-2002. (Dk. 108 at Att. 2 pp. 14-16, App. at 44-46). During 2000-2002 C.H. was 14 and 15 years old. *Id.* The sexual acts with the

exception of one occurred at HSE in Alano's band department, including but not limited to the band director, Niemic's, office and private band practice rooms, which were isolated small and soundproof. (Dk. 96 at Ex. A p. 19, App. at 51). In exchange for sexual contact C.H. was given passing grades without completing the required assignments. (Dk. 96 at Exhibit A, App. at 52). The sexual relationship initiated and continued by Alano with C.H. was disclosed by C.H. during a counseling session at Fairbanks Hospital ("Fairbanks") on January 20, 2004. (Dk. 114 at Ex. C, D, and E, App. at 48, 55-58). After this disclosure, the Fairbanks counselor notified Child Protective Services for Hamilton County ("CPS"). *Id.* In turn the police were notified and criminal charges against Alano were brought including a total of seven counts of "Sexual Misconduct with a Minor." (Dk. 108 at Att. 8 &9, App. at 59-61). During the investigation, the police discovered electronic communications between Alano and C.H. on Alano's school issued account, "dalano@hse.k12.in.us." (Dk. 114 at Ex. K, App. at 62-66). One of the emails referenced a note in C.H.'s yearbook that stated "I'm still waiting for more gifts in my stocking like I got your freshman year." *Id.* This reference was to a practical joke where C.H. had placed a condom in his stocking at HSE. *Id.* Ultimately Alano plead guilty to sexual battery, a Class D Felony, against C.H. on September 26, 2004. (Dk. 108 at Att. 2, App. at 44-46). The commission of this crime is sexual harassment under HSE policy of sexual harassment. (Dk. 108 at Att. 15, App. at 27-31).

HSE is statutorily required to supervise its students. In addition HSE considers student safety as a top and major priority along with education. (Dk. 108 at Att. 15 p. 2, App. at 27). This includes safety from improper sexual contact between student and

teacher. *Id.* Hogue, during the interviewing process of band directors, asked judgment related questions such as how a teacher is to deal with a student who develops a crush; however did not take the interview the necessary step further and inquire about teacher student relationships, improper or otherwise. (Dk. 108 at Att. 15, App. at 37-31). Hogue also agreed that HSE should play a proactive role in preventing inappropriate relationships between teachers and students. *Id.* As part of the safety of the students at HSE there should be video surveillance cameras in the band rooms designed for one on one instruction. (Dk. 108 at Att. 14 p. 9, App. at 40-43)

## V. SUMMARY OF THE ARGUMENT

The District Court improperly granted summary judgment on Plaintiffs' federal claims and erred in dismissing Plaintiffs' state law claims. The facts before the District Court demonstrate a very strong dispute of material facts that HSE had actual knowledge and/or was deliberately indifferent to the improper sexual relationship Alano initiated and continued with a HSE minor student, C.H. Moreover, the District Court should not have dismissed or ruled otherwise on Plaintiffs' state law claims upon granting summary judgment on the Title IX action because the District Court lost jurisdiction over these claims when it granted HSE summary judgment on all federal claims between the Plaintiffs and HSE. Therefore, this Court should reverse the District Court's decision and remand for further proceedings.

## VI. ARGUMENT

### A. Standard of Review

Summary judgment is warranted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, the district court must construe all facts and inferences in the light most favorable to the non-moving party, drawing all reasonable and justifiable inferences in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue of fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* A court should not grant summary judgment, in a discrimination case or otherwise, when there are contestable issues of material fact. *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997).

In determining if there exists material issues of fact, credibility determinations or the weighing of the evidence are prohibited, as they are jury functions and not those of the trial judge. *Paz v. Wauconda Healthcare and Rehabilitation Centre, LLC*, 464 F.3d 659, 664-65 (7th Cir. 2006); *Payne v. Pauley*, 337 F.3d 767, 770-71 (7th Cir. 2003).

**B. HSE had Actual Knowledge or Was Deliberately Indifferent as Required for Liability to Attach under Title IX**

Title IX prohibits sex discrimination in education programs or activities supported by Federal grants. *Delgado v. Stegall*, 367 F.3d 668, 671 (7<sup>th</sup> Cir. 2004). In *Delgado*, this Court defined the requirements for liability to attach to an educational institution pursuant to Title IX. In defining these requirements, the Court looked to *Gebster v. Lago Vista Independent School District*, 524 U.S. 274, 277 118 S. Ct. 1989 (1998), which held that when a suit by a person is for the misconduct of a teacher, the plaintiff must prove actual notice of, and deliberate indifference by the appropriate institution's officials to the teachers' misconduct to hold the institution liable under Title IX. In furthering its

explanation this Court held “[d]eliberate indifference means shutting one’s eyes to a risk one knows about but would prefer to ignore.” *Delgado*, 367 F.3d at 671. It will be enough for liability under Title IX to attach when the “risk” is either known **or** obvious and a failure to take steps against such conduct is reckless and would almost certainly materialize if nothing is done with this knowledge. *Id.* at 672. In other words to allow consequences to occur though they could have readily been prevent from occurring will impose liability to the school for successful claims under Title IX.” *Id.* The clear message sent by the *Delgado* Court is that actual knowledge of the misconduct between the plaintiff and the teacher is not required for claims under Title IX. Rather evidence that would suggest the institution had information that would establish a risk of harassment to its students is enough proof to claim a violation of Title IX.

The facts in this case that apply to the Plaintiffs’ federal and state claims are consistent and therefore will not be incestuously repeated throughout. As noted above the information that can be credited to the appropriate HSE officials (Hogue and Niemic) include the relationship between Alano and Harker, which began when they were teacher-student at Waldron. It is an important fact to mention that Niemic, Alano’s direct superior, and ultimately the reason Alano was hired at HSE attended their wedding!<sup>4</sup> Coupled with these facts HSE interviewed Alano and Harker during the same time, and Harker testified it was “common knowledge” they were married and their relationship began while she was a student at Waldron. Let’s not forget that Alano used his school issued email account to send emails to C.H. The emails certainly suggest that an inappropriate teacher student relationship had ensued and continued. The emails include

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<sup>4</sup> Niemic, as the HSE band director, and Hogue who in part placed Alano on suspension, certainly could have taken corrective actions against Alano, and therefore they would meet the “appropriate official prong.”

Alano telling C.H. “Ill miss you lots,” his home address, and C.H. repeatedly signing off “xoxoxo” which is known to mean “hugs and kisses.” C.H. also tells Alano “I’ll come back to your daily routine my senior year.”

Prior to C.H., Alano had two inappropriate relationships with former students, Rhoades and Harker. While HSE may not have had “actual knowledge” of the relationships, the information was right before them concerning Harker, which should have been enough to elicit some concern over their students’ safety and ask the difficult and necessary questions to Alano about any inappropriate relations with students, including those with Rhoades and Harker. Alano would have disclosed the same, and C.H. may not have been a victim of molestation and sexual harassment by Alano and HSE.

When these facts are applied to the holdings and reasoning of *Delgado* the conclusion that must be drawn is HSE was deliberately indifferent to the evidence of the potential risk of Alano’s inappropriate conduct with HSE’s students and therefore liability under Title IX may exist. These are the types of factual disputes and possible, albeit not certain, conclusions that according to *Delgado* and the rules of law applicable in this Circuit prohibit summary judgment as they should be decided not as a matter of law, but rather by a jury. As such, the District Court’s order granting summary judgment to HSE should be reversed and remanded for further proceedings.

C. **The District Court Lost Jurisdiction of the Plaintiffs’ State Law Claims after the Federal Title IX Claims were Dismissed**

The District Court should have dismissed *without* prejudice the state supplemental claims alleged by the Plaintiffs in their Complaint for Damages. If jurisdiction on supplemental state claims is retained by a district court then this Circuit at the very least

requires the court to supply the basis for retaining jurisdiction over the state law claims where original jurisdiction has been destroyed. Because the District Court failed to comply with the practices generally preferred by the 7th Circuit, their decision to dismiss the state law claims on summary judgment should be vacated.

The District Court in this case maintained jurisdiction over the federal claims pursuant to 28 U.S.C. §1331 as a federal question existed. As such and in accordance with 28 U.S.C. § 1367(a), then was provided with supplemental jurisdiction over the Plaintiffs' state law claims that are part of the "same case or controversy" as the federal claims over which they had original jurisdiction.

Under 28 U.S.C. 1367(c)(3), a district court need not exercise jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction." Indeed, "it is the well-established law of the [7<sup>th</sup> Circuit] that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial." *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999); *Buethe v. Britt Airlines, Inc.*, 749 F.2d 1235, 1240 (7th Cir. 1984).

Disposal of all federal claims on a motion for summary judgment "strongly suggests that the district court should have declined to retain [supplemental] jurisdiction over the state law claim[s]." *Buethe*, 749 F.2d at 1240. This general rule reflects "the [district] court's duty of comity toward Indiana courts in developing Indiana law." *Martin v. Indiana State Police*, 2008 WL 268822 (S.D. Ind.).

In this case, the District Court dismissed *with* prejudice the state supplemental claims alleged by Plaintiffs in their Complaint for Damages **after** the dismissal of all the Plaintiffs' federal claims against HSE, including the Title IX claim. In doing so, the

District Court did not follow the preferred and requested practice of the 7th Circuit regarding supplemental jurisdiction of state law claims. While it is true that federal comity is not served by sending “doomed litigation” back to state court “that will only be dismissed once it gets there,” the facts of this case as described herein clearly suggest that the Plaintiffs’ state law claims are viable and by no means ‘doomed’ and should be given full consideration by the trier of fact in a state court of competent jurisdiction. *Groce*, 193 F.3d at 501. Therefore, the District Court’s decision to dismiss the state law claims via HSE’s Motion for Summary Judgment should be vacated.<sup>5</sup>

**D. The Plaintiffs Designated Material Issues of Fact Precluding Summary Judgment on their State Law Claims.**

**1. Summary Judgment Standard**

Summary Judgment is rarely appropriate in cases involving negligence. *McKinney v. Public Service Co.* 597 N.E.2d 1002 (Ind. Ct. App. 1992). Any doubt about the existence of a fact or the reasonable inference to be drawn from it must be resolved in favor of the non-moving party. *Frye v. American Painting Co.* 642 N.E.2d 995 (Ind. Ct. App. 1994). In fact on appeal, it is the appellate court’s responsibility to carefully scrutinize the trial court's determination to assure that the non-prevailing party is not improperly prevented from having his day in court. *Indiana Department of Revenue v. Caylor-Nickel Clinic*, 587 N.E.2d 1311, 1313 (Ind. 1992). If during this scrutiny summary judgment is viewed to have hinged about the credibility of a witness, an individual’s state of mind or the weight to be given such testimony, summary judgment is inappropriate. *Richter v. Klink Trucking Inc.* 599 N.E.2d 223 (Ind. Ct. App. 1992).

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<sup>5</sup> If this Court is inclined to affirm the District Court’s decision regarding the Plaintiffs’ Title IX claim, i.e. affirm summary judgment, the relief sought by the Plaintiffs would be for the Court to remand this case back to the District Court with instructions to remand to a state court of competent jurisdiction.

Finally, summary judgment cannot be justified simply because there may appear to be an improbability at trial. *Id.*

**2. Negligence, Negligent Hiring, Negligent Retention, Negligent Supervision**

A plaintiff to be successful in an action pursuant to the theories of Negligent Hiring, Retention or Supervision must show that the employer knew or should have known that the employee was in the habit of mis-conducting himself. *Frye v. American Painting Company*, 642 N.E.2d 995 (Ind. Ct. App. 1994). Indiana has adopted the *Restatement (Second) of Torts § 317*, applicable in such cases which provides in pertinent part as follows:

“A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master(i) knows or has reason to know that he has the ability to control his servant, and(ii) knows or should know of the necessity and opportunity for exercising such control.”

It is important at the outset to look to the District Court’s October 19, 2007, opinion on these state law claims. The District Court specifically found that for the Plaintiffs to survive on the claims of negligent hiring, retention and supervision they must demonstrate HSE “knew that Alano had a habit of misconduct.” However this holding is wholly incongruent with Indiana State Law. In other words, and simply put, the District Court applied the incorrect standard applicable to these claims and therefore its granting of summary judgment on these grounds was clearly in error and should be reversed on these grounds alone.

If the Court is inclined to address the viability of the Plaintiffs' claims applying the "knew or should of known" standard the same conclusion needs to be drawn, summary judgment was inappropriate on these claims.

The Indiana Court of Appeals found in the case of *Interim Healthcare of Fort Wayne Inc. v. Moyer*, 746 N.E.2d 429 (Ind. Ct. App. 2001) that whether the employer has breached the duty applicable to negligent hiring, retention, or supervision claims is a question for the jury. The duty described by *Interim* includes a duty to inquire about a perspective employee's past employment history, references, and other important background information. *Id.* The jury would then decide "whether the person charged with the duty had knowledge or means of knowledge which he did not avail himself, so that knowledge must be implied." *Id.*

Despite this knowledge surrounding HSE as described in detail herein and the ability to inquire, not once, but twice from Alano and Harker about Alano's relations with former students, HSE never asked the simple questions of Alano and/or Harker: Did you or have you, had a sexual or physical relationship with a former student; Did you have a sexual or physical relationship with your teacher. There is nothing inappropriate about this question, nothing illegal; however it is necessary to insure the student's safety according to the expert opinion of Joseph Sabatella. It is a stretch of the rules of law applicable here to believe that when the honorable courts in articulating the claims of negligent hiring envisioned that employers would - despite the information readily available - be allowed to escape liability as they did not have "actual" information about an employee's prior sexual relations with students. The bottom line is HSE knew or could have known the existence of these relations, but chose to ignore the red flags, and

therefore it should not be a matter of law that HSE is not responsible for the negligent hiring, retention or supervision of Alano, but for a jury to decide if their ignorance of the information was a breach of the duty admittedly owed to their students.

When reviewing the negligent retention/supervision claims again the same conclusion must be drawn. Joseph Sabatella makes a good point that the secluded instruction rooms used by Alano and others at HSE for band instruction could easily have been equipped with security technology, such as a camera. The failure to provide the same is another factual dispute that should be allowed to be considered and resolved by the jury in deciding the liability of HSE for negligent supervision of its employees, including Alano. The sexual molestation of C.H. by Alano occurred on HSE's grounds, in HSE's secluded rooms, during regular school hours and on multiple multiple occasions. Based upon the foregoing there are more than enough factual disputes that would preclude summary judgment on these claims that arise under the general theory of negligence. Therefore, the District Court's grant of summary judgment in favor of HSE on these grounds should be reversed.

### **3. Respondeat Superior and Non Delegable Duty**

In addition to the aforementioned state law claims, the Plaintiffs brought claims under the doctrine of respondeat superior. Whether an employer, like HSE is responsible for the acts of the employees, here Alano, under the doctrine of respondeat superior is contingent upon whether Alano was acting with the course and scope of his employment with HSE. Whether the employee's conduct is within or outside the scope of their respective employment is an issue to be resolved by the jury. *City of Fort Wayne v. Moore*, 706 N.E.2d 604, 607, (Ind. Ct. App. 1999).

In the Indiana Supreme Court case of *Stropes v. Heritage House Children's Center of Shelbyville, Inc.* 547 N.E.2d 244 (Ind. 1989), *reh'g denied* the plaintiff, a resident of the defendant, was allowed to proceed to trial thereby vacating the entry of summary judgment on both the theory of respondeat superior and the breach of a non-delegable duty. Therefore, the Plaintiffs in this action should also be allowed to proceed to trial on both theories and therefore each will be addressed in turn.

#### *Respondeat Superior*

Respondeat Superior imposes liability on an employer for the wrongful acts of its employees which are committed within the scope of their employment. *Stropes*, 547 N.E.2d at 247. The *Stropes'* Court provides a detailed description of what analysis is to be applied in determining liability of the employer on this theory and reiterated that the questions of course and scope shall be decided by the jury. In *Stropes*, as here, the acts of the employee were in part criminal acts therefore the issue was whether the employer could be held responsible for the criminal acts of its employees. *Stropes* answers this question in the affirmative. *Stropes* concludes that criminal acts may be considered as being within the scope of employment if the criminal acts originated in activities so closely associated within the employment relationship as to fall within its scope. *Id.*; *Bushong v. Williamson* 790 N.E.2d 467, 473 (Ind. 2003).

Indiana Courts in defining the acts to be covered under the theory of respondeat superior look to the connection between the authorized acts and unauthorized acts. Like the course and scope argument, the question of whether the unauthorized acts were within the scope of employment is left up to the jury. *Stropes*, 547 N.E.2d at 249; *Konkle v. Henson*, 672 N.E.2d 450, 457 (Ind. Ct. App. 1996). Of course it goes without saying that

battering a student or having non-consensual sex with a student is an unauthorized act. However Alano, like the employee in *Stropes*, initiated the act with C.H. during his authorized activity, band instruction in the secluded but permitted access band practice rooms, and provided a more than passing grade to C.H. It cannot be said that based upon the facts here there is no issue of fact for the jury to decide that Alano's battery and molestation of C.H. was so divorced in time from his authorized acts to escape liability under the respondeat superior theory.

In *Bushong*, the Indiana Supreme Court held that a teacher's battery of student was within the scope of the teacher's employment thereby attaching liability to the employer, and the school, for the conduct pursuant to the theory of respondeat superior. The student in *Bushong*, during a scheduled class activity, was physically struck by the teacher instructing and responsible for the class. Like the student in *Bushong*, C.H. was molested and battered by her teacher, Alano, during a scheduled class activity, band class, where Alano was to provide instruction to C.H. for a grade. C.H. received passing grades for the class headed by Alano. The similarity of the facts in this case and *Bushong* therefore would preclude summary judgment as a similar conclusion, i.e. Alano was within the course and scope of his employment, could be drawn. As such, the District Court's decision holding Alano was not in the course and scope when the molestation occurred should be vacated and the summary judgment on the same should be reversed.

#### *Non Delegable Duty*

In *Stropes* the Court held that the defendant assumed a non-delegable duty which was owed to the plaintiff, a resident of the defendant. The Court defined a non-delegable duty in this fashion:

First, once one has, by contract or otherwise, assumed the duty to protect another, the nature of that duty may be such that the responsibility for providing the protection cannot be delegated even though the protective tasks themselves are. Second, where an employer has assumed a non-delegable duty to protect a person and his employee inflicts injury on that person, the doctrine of respondeat superior will not interdict the imposition of liability on the employer even if the wrongful act was outside the scope of employment.

*Stropes*, 547 N.E.2d at 250-251. The Court went on to describe the common carrier exception to the doctrine of respondeat superior and held the following after a review of Indiana Law on the subject:

Indiana's common law has long recognized the extraordinary standard of care imposed on common carriers: One of the prime duties resting upon a [common carrier] is to protect its passengers from assaults and injuries by its servants, nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment. Unlike South Carolina, however, Indiana has identified the principles underlying its adoption of the exception, and, in fact, has extended it to reach enterprises other than common carriers.

*Id.* (citing *Indianapolis Union Ry. Co. v. Cooper* 33 N.E. 219, 220. (Ind. Ct. App. 1893)).

In furtherance of this discussion the Court looked to *Dickson v. Waldron* 34 N.E. 506 (Ind. 1893), *reh'g denied*. The defendant, a theater manager, was found to be liable to a patron for injuries sustained from a beating inflicted by an employee. The *Dickson* Court analogized the theater's responsibilities toward the patron to those of a common carrier toward its passenger and found “The treatment due from a carrier to his passenger, from an innkeeper [sic] to his guest, and from a theatrical manager to his patron, while perhaps differing in degree, is similar in kind.” *Id.* at 509, 510. It is important to look at the following verbatim discussion in *Dickson* as it gives a indication on how far back the rule of law regarding liability of the employer for acts of its employees extends.

No rule is better established than that a principal is responsible for the acts of his agent performed within the line of his duty, whether the particular act was or was not directly authorized, and whether it was or was not lawful. But common carriers, inn-keepers, merchants, managers of theaters, and others, who invite the

public to become their patrons and guests, and thus submit personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury while present on such invitation and particularly that they shall not suffer wrong from the agents and servants of those who have invited them.

*Id.*

The question then becomes is or can the principal known as the “common carrier exception” be applicable in a school setting thereby imposing a non-delegable duty on a school for its students? A review of recent case law does not suggest that this question has been answered; however since this exception and duty is placed upon innkeepers, hospitals, homes for individuals with special needs, and the like, it is at least arguably proper to allocate the common carrier exception and impose the non-delegable duty on a school for the safe keeping of its students.

The imposition of this exception to the doctrine of respondeat superior is premised on the control and autonomy surrendered by the individual harmed to the entity/employer, and the range of the employee activities deemed to be under the employer's dominion is irrelevant. *Stropes*, 574 N.E.2d at 252.

HSE by statute is cloaked with the duty to ensure the supervision of its students. Indiana Code §20-33-8-8. Hogue, the assistant superintendent of Hamilton Southeastern Schools accepts this responsibility as provided by the statute. In fact during his testimony, Hogue was asked the question: “ So safety is one of the top priorities along with education?” Hogue responds “absolutely.” Like the entity in *Stropes*, HSE by the nature of its existence, an educational institution for minor children trusted to care for the children, its students, have assumed both statutory and procedurally a non-delegable duty

to their students including, C.H. As such, HSE would fall into the common carrier exception to the doctrine of respondeat superior.

What is important about the nature of this duty is the discussion and analysis of whether Alano was within the course and scope of his employment is without relevance to this claim. When HSE accepted C.H. as a student, whom was a minor child, dependent upon the authority of her teachers to guide her through not only her education but pre-adult life, they assumed this non-delegable duty to her. Like the other state law claims, and similar to *Stropes*, a breach of this duty is for the jury to decide and the facts applicable to this claim are so material and in dispute summary judgment would be inappropriate on this issue.

When Hogue and other HSE officials failed to inquire into Alano's past relationships with students, either generally or specifically, a material issue of fact exists as to whether this was a breach of their non-delegable duty to their students including C.H. Students, as well as their parents, at HSE have the right to be kept safe from potential sexual assault and harassment by teachers or even students. HSE's failure to either ask Alano or even Harker during the interviewing process, or his tenure with HSE is troublesome. HSE's failure to act on the information before them is also troublesome. There was information at the tip of HSE's fingertips that revealed the risk that its teacher, Alano, had and would initiate and continue an improper sexual relationship with a student. HSE did nothing with this information and therefore it is for a jury, not the judge, to decide whether this conduct and HSE's ignorance is a breach of the applicable non-delegable duty defined herein.

## VII. CONCLUSION

Based upon the foregoing the District Court's grant of Summary Judgment in favor of HSE on the claims discussed herein should be reversed and the matter be remanded for further proceedings.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that two (2) copies of the foregoing has been sent by U.S. Mail, First Class, postage pre-paid to the following individuals this 21<sup>st</sup> day of May, 2008.

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Sarah Graziano

**CERTIFICATE OF COMPLIANCE WITH RULE 32 (a)**

The undersigned counsel of record for the Appellants in compliance Fed. R. App. P. 32 (a)(7)(B) hereby certifies that the Brief of the Appellants complies with the type volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(iii) and consists of 6394 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32 (A)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in font size 12, Times New Roman.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Sarah Graziano, 21650-49  
Attorney for Appellants

**CERTIFICATION OF COMPLAINT WITH CIRCUIT RULE 30 (d)**

The undersigned counsel of record for the Appellants in compliance with Circuit Rule 30 (d) hereby certifies that the Appendix for the Appellants' Brief contains all materials required by Circuit Rule 30 (a) and Circuit Rule 30 (b).

Dated: \_\_\_\_\_

\_\_\_\_\_  
Sarah Graziano, 21650-49  
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**CIRCUIT RULE 31 (e) STATEMENT**

A digital version of the Brief for Appellants is available in electronic PDF and is being provided to the Court on CD-Rom. A digital version of the Appellants' Appendix was not available and therefore was previously provided in hard copy only.

Dated: \_\_\_\_\_

\_\_\_\_\_  
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