

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)	

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

**APPELLANTS-PLAINTIFFS
REPLY BRIEF**

Sarah Graziano
HENSLEY LEGAL GROUP
426 E New York Street
Indianapolis, IN 46202
T: 317-472-3333
F: 317-472-3340

Attorney for Appellants-Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF UNDISPUTED FACTS.....1

ARGUMENT 2

 A. HSE had actual knowledge or was deliberately indifferent as
 required for liability to attach under Title IX 2

 B. The District Court lost jurisdiction of the Plaintiffs’ state law
 claims after the Federal Title IX Claims were dismissed3

 D. The Plaintiffs designated material issues of fact precluding
 Summary Judgment on their state law claims4

CONCLUSION7

CERTIFICATE OF SERVICE8

CERTIFICATE OF COMPLIANCE9

TABLE OF AUTHORITIES

FEDERAL CASES

Buethe v. Britt Airlines, Inc.,
749 F.2d 1235, 1240 (7th Cir. 1984)4

Delgado v. Stegall,
367 F.3d 668, 671 (7th Cir. 2004)2, 3

Groce v. Eli Lilly & Co.,
193 F.3d 496, 501 (7th Cir. 1999)4

Williams Electronics Games, Inc. v. Garrity,
479 F.3d 904 (7th Cir. 2007).....3, 4

FEDERAL STATUTES AND RULES

Title IX of The Education Amendments Act of 1972,
20 U.S.C. §§ 1681-1688*passim*

28 U.S.C. § 1367 (c)(3).....4

28 U.S.C. § 1367(d).....3

STATE CASES

Beckett v. Clinton Prairie School Corp.
504 N.E.2d 552, 554 (Ind. 1987).....5

Interim Healthcare of Fort Wayne Inc. v. Moyer,
746 N.E.2d 429 (Ind. Ct. App. 2001)7

Klobuchar v. Purdue University,
553 N.E.2d 169 (Ind. Ct. App. 1990).....6

Mangold ex rel. Mangold v. Indiana Dept. of Natural Resources,
756 N.E.2d 970 (Ind. 2001).....5

Miller v. Griesel
308 N.E.2d 701 (Ind. 1974)5

Stropes v. Heritage House Children’s Center of Shelbyville, Inc.,
547 N.E.2d 244 (Ind. 1989), *reh’g denied*5, 6, 7

Wickey v. Sparks,
642 N.E.2d 262 (Ind. Ct. App. 1994).....5

STATE STATUTES

Indiana Code §20-33-8-86

I. STATEMENT OF UNDISPUTED FACTS

Based upon the information provided by HSE in its response brief below are the facts that are before this Court and are undisputed.

First and foremost HSE's attempt to bring in C.H.'s history and characterize her as trouble is irrelevant and clearly disrespectful of the issues that are before this Court. Contrary to HSE's indication that C.H. and Alano only had an alleged relationship the facts in this case conclusively prove an improper and non-consensual interaction between C.H. and Alano. (App. at 44-46). Alano admitted the following when he pled guilty to sexual battery against C.H.:

THE COURT: ...In order for you to be guilty of this offense, Mr. Alano, there has to be at least one occasion in the period of time at issue which is September of 2000 to June of 2002 during which you forced yourself upon [C.H.] in such a way that it involved the touching of a person with an intent to arouse her or your sexual desires and that she perceived that it was forcing. Do you understand those facts?

DEFENDANT: I do.

THE COURT: Do you admit that that occurred on at least one occasion?

DEFENDANT: I do.

(App. 46, *modified*). At the time of the interaction between C.H. and Alano, C.H. was younger than sixteen. (App. 61).

HSE did not ask Alano if he had been involved sexually or otherwise with a student, current or former. (Brief of Appellee, p. 11). The inference must be drawn that Niemic whom knew Alano "personally" and "socially" had knowledge that Alano's now

wife was a former student and did not disclose this fact to other HSE officials at HSE during Alano's hiring process with HSE. (Brief of Appellee, p. 13). Niemic's reference was "very important" to HSE and Hogue. (Id.). Hogue cannot recall what he asked Alano during the interview process therefore his statement alluded to by HSE that he asked a question that "specifically addressed inappropriate contact with students and that Mr. Alano answered appropriately" is at best self serving and lacks credibility. (Brief of Appellee, p. 14).

II. ARGUMENT

A. HSE had actual knowledge or was deliberately indifferent as required for liability to attach under Title IX.

While HSE would like to suggest C.H. is contradictory in discussing the standards of liability under Title IX, quite the opposite is true. As discussed in C.H.'s opening brief, under *Delgado v. Stegall*, 367 F.3d 668, 671 (7th Cir. 2004) the Court found that liability will attach under Title IX 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. (*emphasis added*). In putting forth her argument C.H. relied heavily on *Delgado* as the rationale in this case appears to be more appropriate to the factual situation at hand in this case. Furthermore, *Delgado* specifically implies that a school will not be able to hide behind "actual knowledge" alone to avoid liability, but rather the knowledge will be inferred if the same is obvious and/or ignored by the institution. *Id.* at 672.

Alano's history with a former student, now wife, the emails between C.H. and Alano of an extremely inappropriate tone and dialogue were within reach of HSE and certainly create an issue of fact as to whether liability would exist under Title IX. Couple

these facts with Niemic's, whom appears to be the biggest reason Alano was hired, personal and social relationship with Alano for over ten years, at the very least the jury should be the one deciding if HSE simply turned a blind eye to the warning signs in front of them. It is clear that the rationale of *Delgado* was attempting to avoid this exact same scenario, that is, allowing an institution to avoid liability by keeping an ignorant eye. Therefore, following the *Delgado* holding that deliberate indifference is enough to satisfy the liability requirement under Title IX summary judgment in favor of HSE on this ground should be reversed.

B. The District Court lost jurisdiction of the Plaintiffs' state law claim against HSE after all federal claims against HSE were dismissed.

Contrary to HSE's assertion C.H. properly cited to particular authority that the District Court lost jurisdiction over all state claims between the Plaintiffs and HSE when all federal claims against HSE, which formed the basis of the District Court's original jurisdiction, were dismissed.

Citing to HSE's own authority, *Williams Electronics Games, Inc. v. Garrity*, 479 F.3d 904, 907 (7th Cir. 2007) the relief requested by the Plaintiffs in their opening brief, i.e. reversal of the District Court's grant of summary judgment on Plaintiffs' state law claims should be granted. The *Williams'* Court found that exercising supplemental jurisdiction is favored in the following situations: (1) Where the statute of limitations would bar the re-filing of the state claims; (2) Where substantial federal judicial resources have already been expended on the resolution of the supplemental claims; and (3) Where it is obvious how the claims should be decided. *Id.* at 907. None of these situations are present here as (1) 28 U.S.C. § 1367(d) allows for thirty days after relinquishing such jurisdiction to file the claims in state court; (2) substantial federal judicial resources have

not been expended on the state law claims as this matter was essentially decided on Title IX grounds which the District Court used, albeit improperly, to dismiss the state law claims against HSE; (3) There is no obvious answer to the questions involved in the state law claims as the parties have very different versions of what applicable law should be applied in this instance. The *Williams*' Court most importantly went onto say that "[t]he fact that the federal claims are all gone is a further reason for relinquishment, §1367 (c) (3)..." In this case when summary judgment was entered by the District Court on the federal claims, "the federal claims are all gone," and relinquishment of the state law claims should have been the next step by the District Court.

The state issues before the District Court were based upon the state law claims of Negligence, Negligent Hiring, Negligent Retention, Negligent Supervision and Respondent Superior. A review of the law cited by the Plaintiffs and that cited by HSE clearly establishes these claims as applied to the unique circumstances of this case cause great debate amongst the parties and therefore relinquishment for resolution by the Indiana State Courts would be favored in this scenario. *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999); *Bueth v. Britt Airlines, Inc.*, 749 N.E.2d 1235, 1240 (7th Cir. 1984). Based upon the foregoing, coupled with the arguments in Plaintiff's opening brief, the District Court's decision to dismiss the state law claims via HSE's Motion for Summary Judgment should be vacated.

C. **The Plaintiffs designated material issues of fact preclude summary judgment on their state law claims.**

Again contrary to HSE inaccurate characterization C.H. has provided this Court with ample authority that the District Court applied the incorrect "knowledge" standard in its ruling on Plaintiffs' state law claims sounding in negligence and respondent superior.

Since this is Plaintiffs' reply brief the Plaintiffs in lieu of re-hashing their entire argument would direct the Court back to their argument and designated materials provided in Plaintiffs' opening brief on these specific issues with the exception of responding to HSE's argument on the applicability of the non-delegable duty in the school context which is addressed below.

The authority cited by HSE does not stand for the proposition they assert, i.e. that Indiana Courts "have clearly and unequivocally rejected the application of a non-delegable duty in the school context." It is helpful to begin with the cases cited by HSE to dispose of their argument.

First in the matter of *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974), which on its face cannot reject the "non-delegable duty" application in the school context as it was decided after the case defining such duty and relied upon by the Plaintiffs, *Stropes v. Heritage House Children's Center of Shelbyville, Inc.*, 547 N.E.2d 244 (Ind. 1989). Notwithstanding this crucial fact, a substantive distinction is easily made to void HSE's reliance on this case. The *Miller* court was faced with addressing the school's liability in terms of responsibility for the conduct of other students that were not being properly supervised by their teachers or other superiors. Which is significantly the opposite of the factual scenario in this case as the conduct at issue here is that of affirmative actions taken against a student, C.H. by their employee, Alano. Therefore, *Miller* certainly cannot be found to reject the applicability of the non-delegable duty in this case.

The line of other cases cited by HSE, *Beckett v. Clinton Prairie School Corp.*, 504 N.E.2d 552, 554 (Ind. 1987); *Mangold ex rel. Mangold v. Indiana Dept. of Natural Resources*, 756 N.E.2d 970, 974 (Ind. 2001); *Wickey v. Sparks*, 642 N.E.2d 262, 267

(Ind. Ct. App. 1994); *Klobuchar v. Purdue University*, 553 N.E.2d 169, 172 (Ind. Ct. App. 1990) also fall short of providing support for HSE's proposition that the Indiana Courts have rejected the application of the non-delegable duty in the school context. First and for most none of the cases addresses the issue, let alone reject the application of the same. However, and most importantly all these cases were centered around the school's liability in the context of either a student's conduct or third party's conduct, but not the molestation of a student by their own teacher. Therefore it is a far cry to argue this line of cases can support the rejection of the application of a non-delegable duty.¹

Like the employee in *Stropes*, Alano sexually battered an individual under the entity's care. The factual circumstances of *Stropes* are more congruent with the case at hand than any case cited by HSE that is precedent in Indiana.

In defining non-delegable duty the *Stropes* Court provided that when one has "assumed the duty to protect another...the protection cannot be delegated even though the protective tasks themselves are." "Second, where an employer has assumed a non-delegable duty...and his employee inflicts injury...the doctrine of respondent superior will not interdict the imposition of liability." *Stropes*, 547 N.E.2d at 250-251. Since HSE is cloaked with the duty to ensure the supervision of its students by statute, (Indiana Code §20-33-8-8) and Hogue found safety of its students his top priority, HSE by the nature of its existence have assumed both statutory and procedurally a non-delegable duty to their students including, C.H. As such the application of non-delegable duty should be applied in the school context as HSE conduct and existence meet the definitions and

¹ It is important to point out at this time that this unique issue of law is yet another reason the District Court should have relinquished jurisdiction of the Plaintiffs' state law claims sounding in negligence and specifically the claims of respondent superior.

guidelines set out in *Stropes*.² Since the breach of a duty is a question of fact for the jury, the District Court's grant of summary judgment on Plaintiffs' state law claims should be reversed and remanded for further proceedings.³ *Interim Healthcare of Fort Wayne Inc. v. Moyer*, 746 N.E.2d 429 (Ind. Ct. App. 2001).

III. CONCLUSION

Based upon the foregoing, and the Plaintiffs' opening Appellants' Brief, the District Court's grant of Summary Judgment in favor of HSE on the claims before this Court should be reversed and the matters remanded for further proceedings.

Respectfully Submitted,

Sarah Graziano, 21650-49
John D. Hensley, 20600-49
Attorneys for Appellants

Hensley Legal Group, P.C.
426 East New York Street
Indianapolis, IN 46202
317-472-3333
317-472-3340 (Facsimile)
sgraziano@hensleylegal.com
jhensley@hensleylegal.com

² Plaintiffs in furtherance of this argument would again direct the Court back to their opening brief which addresses the application of non-delegable duty in great detail.

³ If this Court is inclined to affirm the District Court grant of summary judgment on the Title IX issue, the Plaintiffs would ask this Court to remand the state law claims to the District Court with instructions to dismiss the same for re-filing in a state court of competent jurisdiction.

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 6th day of June, 2008.

Thomas E. Wheeler, II
Locke Reynolds, LLP
201 North Illinois Street, Suite 1000
Indianapolis, IN 46244

Sarah Graziano

Hensley Legal Group, P.C.
426 East New York Street
Indianapolis, IN 46202
317-472-3333
317-472-3340 (Facsimile)
sgraziano@hensleylegal.com
jhensley@hensleylegal.com

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 Reply 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 2171 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 COMPLIANCE WITH CIRCUIT RULE 30 (d)

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

Dated: _____

Sarah Graziano, 21650-49
Attorney for Appellants

CIRCUIT RULE 31 (e) STATEMENT

A digital version of the Reply Brief for Appellants is available in electronic PDF and is being provided to the Court on CD-Rom.

Dated: _____

Sarah Graziano, 21650-49
Attorney for Appellants

