JARDINE LOGAN & O'BRIEN P.L.L.P.
ATTORNEYS AT LAW

651.290.6500

8519 Eagle Point Boulevard, Suite 100
Lake Elmo, Minnesota 55042
info@jlolaw.com

JLO Newsletter March 2016

Teenagers, Sex and Schools

By Lawrence M. Rocheford

In Doe 175 ex Re. Doe 175 v. Columbia Heights School District, 873 N.W.2d 352 (MN. Ct. App. 2016), the Court of Appeals of Minnesota ruled as follows:

> The school district was statutorily immune from vicarious liability for sexual abuse as such was *outside the coach's scope of employment*, and, on direct claims of negligence and negligent supervision, the *sexual abuse was not foreseeable* as there were insufficient facts giving an "objectively reasonable indication" of a specific danger of potential or ongoing sexual abuse. Id at 361.

Accordingly, the Court of Appeals of Minnesota affirmed the trial court's dismissal of the direct negligence claims asserted against the school district and the derivative vicarious liability claim asserted against the district, based on its male coach's sexual abuse of a ninth grade female student. 873 N.W.2d at 362.

FACTS

Defendant Christopher Warnke had been hired by the school district in 2008 to work as a football coach and weight room supervisor. Nothing in the school district's interview process of Warnke, his references or criminal background check disclosed to the school district that Warnke posed a risk to students. When hired, Warnke received the school district's employee handbook. The handbook described how school district employees should interact with students and referenced the policy manual which was available on the internet. The internet school district manual included a policy that stated "sexual relationships between school district and students, without regard to the age of the student, are strictly forbidden and may subject the employee to criminal liability;" prohibited employees from dating students, having sexual interactions with students and inducing students to commit immoral or illegal acts. The policies stated that all employees should "employ safeguards against improper relationships with students and/or claims of such improper relationships." Warnke testified under oath that he knew in the fall of 2009 that the school district policy prohibited its employees from dating or having sexual interactions with students.

The Plaintiff had friends who were football players coached by Warnke in the eighth grade. The Plaintiff would stop by and say hello to her friends at football games and, concomitantly, met Warnke. When the Plaintiff was in the ninth grade and fourteen years old, she continued to visit with her friends on the ninth grade football team coached by Warnke and the Plaintiff and Warnke got to know each other better. After a 2009 football game, the Plaintiff borrowed Warnke's cell phone to call her parents for a ride home. When the Plaintiff got home, she used her parents' caller identification feature on their home telephone number to acquire Warnke's cell phone number. With that number, the Plaintiff proceeded to initiate correspondence with Warnke under a false identity pretending to be an adult woman interested in having a sexual relationship with Warnke. After a week of exchanging text messages with Warnke, the Plaintiff admitted to Warnke that she was the person sending the text messages. Initially, Warnke was angry with the Plaintiff, but he soon resumed texting with the Plaintiff though he knew she was a

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Congratulations!

JLO congratulates Larry Rocheford on his January 16, 2016 election to membership in the American Board of Trial Advocates (ABOTA) and the Minnesota Chapter of ABOTA.

ABOTA believes that our traditional jury system is the one system of jurisprudence which guarantees the necessary safeguards for the protection of the rights of person and property, and that this system should be preserved in its essence. Membership in ABOTA is limited to those jury trial lawyers who are nominated and have the requisite jury trial experience and professional qualities justifying election.

The Nature of a Trespass Must be Identified to Ascertain Permissible Damages

By Patrick S. Collins

The Minnesota Court of Appeals recently issued an important decision pertaining to real property damage. The decision highlights the important distinction between a permanent and temporary trespass, along with the distinct damages that flow from each.

In re Minnwest Bank Litigation Concerning Real Property, 873 N.W.2d 135 (Minn. App. 2015) involved two pieces of property in Otsego, Minnesota – Outlot L and Outlot M. In the fall of 2005, construction of Building B (a two story office building) began on Outlot L. During its construction, no one was aware that Building B was encroaching upon Outlot M by more than 18 feet. In 2009, the owner of Outlot L and Building B encountered financial troubles and defaulted on a loan with Minnwest Bank ("Minnwest"). During the foreclosure proceedings, Minnwest discovered the encroachment upon Outlot M. Minnwest commenced an action to determine, among others, the damages owed to the owner of Outlot M for the encroachment. The parties agreed that Building B's encroachment upon Outlot M constituted a trespass. However, the district court failed to make a finding on the nature of the trespass. As a result, the district court entered judgment for the owner of Outlot M awarding, in part, diminution-in-value damages and lost rent. Both parties appealed.

One of Minnwest's arguments on appeal was that the district court erred by awarding both diminution-in-value and lost rental damages. The Minnesota Court of Appeals agreed. In doing so, the Minnesota Court of Appeals emphasized the difference between the measure of damages for a *"continuing trespass"* versus a *"permanent trespass."* The proper measure of damages for a continuing trespass is the reasonable rental value of that land during the period of trespass. On the other hand, the proper award for permanent trespass is measured by diminution in market value. Accordingly, a determination must be made whether a trespass is temporary or permanent before suitable damages can be awarded.

A permanent trespass is one of such a character and existing under such circumstances that it will be presumed to continue indefinitely. While a temporary trespass is one that may be abated or discontinued at any time, either by the wrongdoer or by the injured party. The Minnesota Court of Appeals held that Building B's encroachment on Outlot M constituted a permanent trespass because it was not a reoccurring intrusion and could not be freely abated at any time. Thus, the Minnesota Court of Appeals reversed the award for lost rent holding that diminution-in-value was the proper measure of damages. The Court concluded both diminution-in-value and rental value damages constituted a double recovery.

When handling a trespass claim, the ***Minnwest*** case reiterates the importance of initially identifying the nature of any alleged trespass, because specific damages and different statutes of limitations apply, depending on whether the trespass was permanent or temporary. ●

Firm News

The Firm welcomes Courtney Kurkowski as the new Firm Administrator.

Courtney comes to our firm with over 6 years of experience as a law firm administrator. She began her law firm experience as the accountant at a small firm and was accelerated into the administrator role. Prior to her legal experience, she worked at a local accounting firm where she worked with small businesses and taxes. She graduated from the University of St. Thomas with a bachelor's degree in Accounting.

Referrals & Inquiries

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mere ninth grader. Warnke and the Plaintiff exchanged hundreds of text messages, many of which contained graphic sexual conduct. Warnke also e-mailed the Plaintiff two photographs of his penis.

By this time, Warnke and the Plaintiff saw each other in the weight room that Warnke supervised. The Plaintiff testified that her weight room visits with Warnke were limited to conversation though the subject matter was at times sexually explicit. Though others would be using the weight room, no other school district employees were present when the Plaintiff visited Warnke in the weight room. Warnke was with the Plaintiff alone in the weight room on two occasions. On one of those occasions, Warnke placed the Plaintiff's hand on his penis or coerced her to touch his penis. After that sexual conduct, Warnke and the Plaintiff continued to exchange sexual text messages.

RELATIONSHIP BECOMES PUBLIC

On November 17, 2009, another student's mother contacted Plaintiff's mother and told her that Warnke and Doe had been exchanging sexually explicit text messages. The next day that student told a school official about Warnke's inappropriate relationship. That same day, the school district called the police, reported Warnke's sexual abuse; Warnke was arrested and terminated thereafter. Two years later, Warnke pled guilty to one count of fourth degree criminal sexual conduct and two counts of solicitation of a minor to engage in sexual conduct. All parties agreed that the first time any employee of the school district knew about the Plaintiff and Warnke's relationship was November 18, 2009, when the student told a school official about Warnke's inappropriate abuse of Plaintiff.

CIVIL LAWSUIT

The Plaintiff filed a Complaint in 2011 against Warnke and the school district alleging sexual battery by Warnke, vicarious liability for the school district for the sexual battery by Warnke, independent negligence against the school district and negligent supervision by the school district of Warnke. Very briefly, the school district successfully moved for summary judgment on the negligence and negligent supervision claims but lost its vicarious liability summary judgment motion and, then, after the order on the summary judgment motion hearing arguments, claimed statutory immunity for the vicarious liability claim. The hodgepodge case went up to the Court of Appeals, with these and other issues; the Court of Appeals dismissed the appeal on procedural grounds. *Doe 175 by Doe 175 vs. Columbia Heights School District* 842 N.W.2d 38, 40-41, 49 (Minn. Ct. App. 2014). Subsequently, the matter went back to the Court of Appeals on the issues of negligence, negligent supervision, and statutory immunity for vicarious liability.

STATUTORY INTERPRETATION

The Court of Appeals had considerable discussion about Minnesota's municipal tort claims act and Minnesota state tort claims act. That whole discussion of statutory interpretation came to a common sense conclusion. A school district employee who sexually abuses a student is not acting within the scope of his employment. The Court cited Minn. Stat. §466.03 subd. 15 and Minn. Stat. §3.736. The Court of Appeals held that the school district had immunity from vicarious liability for Warnke's sexual battery of the Plaintiff under Minn. Stat. §466.03, subd. 15.

LACK OF FORESEEABILITY

The remainder of the decision discussed the Plaintiff's appeal of the dismissal of her claims for negligence and negligent supervision. The Plaintiff claimed there were a number of "red flags" which made Warnke's abuse foreseeable. In every negligence case, the burden is on the Plaintiff to bring forth enough evidence to the trial court for the trial court to recognize the existence of a legal duty. The Court of Appeals noted that "there is no general duty to protect another from harm, but a duty to protect arises if there is a special relationship between the parties and the risk is foreseeable."

In these cases, the legal question (i.e. duty) must be decided by the trial court, before the case is submitted to a jury. The trial court must initially decide "whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility… Sexual abuse will rarely be deemed foreseeable in the absence of prior similar incidents." Nearly two decades ago, the Minnesota Supreme Court noted and held "that the sexual abuse of a student by a teacher did not impose a liability on the school district because the teacher and student concealed their relationship, such that "closer vigilance would not have uncovered their relationship" ". *P.L. v. Aubert*, 545 N.W.2d 666, 668 (Minn. 1996).

In this case, the Plaintiff cited some red flags, as follows:

1. On one or two occasions, the Plaintiff yelled to Warnke during football practice "Chris, I love you." In response, another football coach told Warnke: "That's trouble". Warnke did not respond to the Plaintiff and the other football coach asked the Plaintiff to leave practice.

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2. The Plaintiff and Warnke talked in the school parking lot after a football practice. Several other students and coaches were in the parking lot talking at the same time. Contrary to Plaintiff's argument, the Plaintiff and Warnke were not alone and it was not uncommon for coaches, male and female, to be talking to male and female students after practice.

3. The Plaintiff apparently was seen using a computer in the weight room office while Warnke supervised students in the weight room. In response, the Court of Appeals noted that Warnke was not in the weight room office and, when a fellow coach told Warnke "[The Plaintiff] needs to leave," Warnke responded, "She's not my problem." The same coach testified he did not recall seeing the Plaintiff interacting with Warnke in the weight room. The Plaintiff herself admitted that anyone could go in the weight room office and use the computer and that she only used it a couple of times.

4. Another weight room supervisor saw Warnke alone in the weight room with a young girl on a Saturday morning and did not report this observation to school officials until after there was an internal investigation of Warnke's sexual abuse. It turns out that Warnke sometimes had his daughter accompanying him to the weight room on Saturdays when his wife was working.

In essence, the Court of Appeals noted that the red flags or incidents the plaintiff alleged gave no "objectively reasonable" indication of a specific danger of potential or ongoing sexual abuse. Last, the Plaintiff alleged inadequate training by the school district. However, the court of appeals noted that the Plaintiff failed to identify what additional training would have caused the school district employees to make this discernment.

BETTER PRACTICES

Sadly, sexual abuse of children happens. It also occurs between adults. Though the course through the trial court, twice through the Court of Appeals and the extensive motion practice, was time consuming and disjointed, here, the school district got the correct result.

LESSONS LEARNED

There are a number of lessons learned from this case, as follows:

1. Before hiring someone, interview them, check their references and conduct a criminal background check. During the hiring process, try to discover whether the prospective school employee (or any employee for that matter) would pose a risk of sexual abuse.

2. Have a detailed employee handbook, give it to the new employee, and make certain that handbook contains clear policies on how the employee should interact with students.

3. Have handbook policies and other policies publicly available on the internet forbidding sexual relationships between school district employees and students. Let the world know that the employer has no tolerance for sexual abuse.

4. Make it clear that sexual relationships between school district employees and students may subject the school district employee to criminal liability.

5. Prohibit school district employees from dating students, having sexual interactions with students and coercing or inducing students to commit immoral, illegal or sexual acts.

6. Direct that employees must employ safeguards against improper relationships with students or claims of such improper relationships.

7. Make certain the school district employee knows that the school district prohibits dating or having sexual interactions with students.

8. Make certain the school district employees understand they have a reporting obligation to immediately advise the district and law enforcement of any sexual relationship between school district employees and students.

9. When notified of a sexual relationship between a school district employee and a student, get law enforcement involved. Follow district policy, which may include a union contract, to get that school district employee on leave and, if appropriate, terminated.

Last, this *Columbia Heights School District* case went through too many motion arguments, certified questions to the Court of Appeals, dismissals from the Court of Appeals on procedural grounds, arguments written but not heard because they were not properly considered by the trial court, all because this unique area of the law involves governmental immunity and the simple, time honored argument that the trial court determines whether another owes a legal duty. Make certain your counsel is experienced in these areas of the law. ●

About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

About the Authors

Lawrence M. Rocheford
Partner
LRocheford@jlolaw.com
651.290.6516

Patrick S. Collins
Senior Associate
PCollins@jlolaw.com
651.290.6527

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