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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

A.O., a Minor, etc., Plaintiff and Appellant, v. RIALTO UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	E077017 (Super.Ct.No. CIVDS1925986) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Geragos & Geragos, Ben Meiselas, Noah Geldberg, Justice Turner and Dev Das for Plaintiff and Appellant.

McCune & Harber, Dana John McCune and Joseph W. Cheung for Defendant and Respondent.

Through her guardian ad litem, plaintiff and appellant A.O., a minor, sued defendant and respondent Rialto Unified School District (the District); and Bryan Servin (Servin). Two of the causes of action against the District were negligent supervision and sexual harassment (Civ. Code, § 51.9, subd. (a)(1)(E)). The trial court granted the District's motion for summary judgment. (Code Civ. Proc., § 437c.) A.O. contends the trial court erred because there are triable issues of material fact as to the negligent supervision and sexual harassment causes of action. We affirm.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

The facts in this section are taken from A.O.'s complaint. Servin was A.O.'s seventh grade social studies teacher. The middle school where Servin taught and that A.O. attended (the School) is located in the District. Servin was the academic supervisor for an anime club at the school. A.O. was a member of the anime club.

When A.O. was in the seventh and eighth grades, Servin contacted A.O. via Snapchat. Servin sent A.O. photos of Servin in which he was shirtless. Servin sent messages to A.O. pressuring her to send him topless photos of herself. In February 2019, Servin summoned A.O. out of her class and into his classroom. "Servin then proceeded to hug and grope her. He leaned in and said, 'I don't want you to be nervous,' and then kissed her on the lips. [A.O.] left . . . Servin's classroom immediately and returned to her class." A.O. told a classmate (Classmate) about the incident. "[C]lassmate then told a parent, and the parent then informed the school."

In the negligent supervision cause of action, A.O. made the following allegations concerning what the District knew about Servin's abusive conduct: (1) the District "knew of, but either intentionally or unreasonably ignored warnings and complaints regarding . . . Servin's sexual misconduct toward A.O."; and (2) the District "knew, or in the exercise of reasonable diligence, should have known, that . . . Servin posed an undue risk to persons such as [A.O.]"

In the sexual harassment cause of action, A.O. alleged, "[The District] failed to discharge . . . Servin although it was aware of his sexual misconduct and [the District] failed to investigate or respond to charges that . . . Servin committed sexual assault, battery, and harassment."

B. SUMMARY JUDGMENT

In moving for summary judgment, the District contended that Servin was hired in August 2016; he passed a criminal background check; and prior to March 2019, there had been no complaints against Servin. The District asserted, "On March 5, 2019, [Classmate] came forward and reported to Dorothy Ennis, Assistant Principal at [the] Middle School, that Servin kissed and sent flirtatious texts to [A.O.] [Citation.] Servin was removed from campus and placed on administrative leave by the District on or about March 6, 2019, and [A.O.] has not had any contacts with him since. . . . [¶] . . . Prior to [Classmate] reporting . . . Servin's misconduct, the District never received any complaint alleging Servin sexually harass[ed] or caus[ed] harm to any adult or student."

In regard to the negligent supervision cause of action, the District asserted that it did not have a duty to protect A.O. from Servin's abuse because such abuse was not

foreseeable. The District contended there was not evidence that the "employees responsible for hiring and/or supervising [Servin] **knew or should have known**" of the risk Servin posed. As to the sexual harassment cause of action, the District asserted the cause of action failed because the District did not ratify Servin's sexual misconduct because "the District knew of no prior sexually harassing acts."

C. OPPOSITION

1. *NEGLIGENT SUPERVISION*

In the separate statement of undisputed material facts, the District wrote, "Prior to [Classmate's] reporting of Servin's misconduct, the District never received any complaint alleging Servin sexually harass[ed] or caus[ed] harm to any adult or student." In A.O.'s opposition, she disputed that fact. A.O. wrote, "Teachers were aware of the conduct and Principal Dominguez along with [the] District should have known."

J.C., a student at the School, declared that "Servin was generally creepy towards most female students . . . . Servin would creepily ogle many of the female students, and it was obvious that his behavior was inappropriate." J.C. further declared, "I was not surprised when I saw our Middle School English Teacher Ms. Decesare question students about Mr. Servin's inappropriate behavior. [¶] Ms. Decesare taught in the classroom next door to Mr. Servin. One time, I overheard Ms. Decesare talking about Mr. Servin's inappropriate behavior with her Teacher's Assistant."

A.A., a student at the School declared, "[T]he entire class agreed that [Servin's] behavior was wildly inappropriate and creepy." Further, A.A. declared, "It was my impression that other teachers were aware of Mr. Servin's behavior. It was also my

impression that students from Mr. Servin's class told the English teacher who taught next door, Ms. Decesare, about Mr. Servin's creepy behavior towards his female students. After Ms. Decesare was informed of the situation, it was my impression that she did not take further action to stop or report Mr. Servin's actions."

K.T.C., a student at the School, declared, "I, along with other students at [the school], was aware of Mr. Servin's creepy behavior." K.T.C. further declared, "School administrators were aware of Mr. Servin's inappropriate behavior."

In A.O.'s declaration, she asserted that she was frequently late to her eighth-grade English class due to meeting with Servin, but she was never questioned about being tardy. A.O. further declared that the teacher in the classroom across the hall from Servin's classroom saw A.O. enter Servin's classroom alone two to five times, but that teacher never questioned A.O.

A.O. declared, "Initially, Mr. Servin privately brought me to his closet once a month where he would touch me. After the first semester ended and I returned from Christmas Break, Mr. Servin brought me into his closet more frequently and touched me in his classroom once almost every other day. [¶] Over time, the hugs got more frequent and more intimate. Mr. Servin would hug me in his closet while also rubbing my back, playing with my hair, or touching my face." In her opposition, as to the negligent supervision cause of action, A.O. contended the District should have known about Servin's sexual misconduct.

2. *SEXUAL HARASSMENT*

Four facts that A.O. did not dispute from the District's separate statement of material facts include: (A) "On March 5, 2019, [Classmate] came forward and reported to Dorothy Ennis, Assistant Principal at [the school], that Servin kissed and sent flirtatious texts to [A.O.]; (B) on March 6, 2019, Servin was placed on administrative leave and removed from campus; (C) A.O. has not had contact with Servin since March 6, 2019; and (D) Servin has not taught at any school in the District since March 6, 2019.

A.O. submitted the partial deposition transcript of Roxanne Dominguez, who was the principal at the School. Dominguez learned of the sexual misconduct allegations against Servin on March 5, 2019. On March 6, 2019, Servin was given a letter notifying him that he had been placed on administrative leave. Rhea McIver Gibbs, "a lead agent employed by the [District]," told Dominguez "[t]hat personnel and law enforcement would investigate."[1]

A.O. also provided a partial deposition transcript of Police Officer Floyd Blue who investigated the allegations against Servin. Blue did not execute a search warrant at the school. Blue asked the school resource officer, who was a Rialto Police Officer,

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[1] The District was required to report the alleged abuse to law enforcement or the county child welfare agency. (Pen. Code, §§ 11165.7, subd. (a)(8) [a public school administrator is a mandated reporter], 11165.9, 11166, subd. (a).) The Child Abuse and Neglect Reporting Act (CANRA; Pen. Code 11164 et seq.) " 'requires persons in positions where abuse is likely to be detected to report promptly all suspected and known instances of child abuse to authorities for follow-up investigation.' . . . 'Once a report is made, responsibilities shift and governmental authorities take over.' [Citation.] For example, CANRA imposes on law enforcement agencies the duty to cross-report reports they receive to other agencies." (*B.H. v. County of San Bernardino* (2015) 62 Cal.4th 168, 174, 190.)

for the school's surveillance video but "for one reason or another, that was not available."

At the deposition, an attorney asked Blue, "Are you aware of any evidence that the school district tipped off Mr. Servin prior to Rialto P.D. investigating this case?" Blue responded, "It happens that way sometimes, that the information goes to the suspect. Usually out of some type of policy they're required to let someone know that they're doing it. I believe that—I was given that information." Servin was criminally charged in connection with the sexual abuse of A.O.

In her opposition, A.O. asserted the District ratified Servin's sexual misconduct because the school principal (1) learned of the allegations on March 5, 2019, but did not remove Servin from the school until March 6, 2019; (2) did not investigate the allegations; and (3) informed Servin of the allegations, which permitted Servin to delete Snapchat messages from his phone.

D. REPLY

In its reply, the District asserted, "[A.O.] provides **no evidence** the District had any knowledge of facts suggesting Servin posed a risk of harm to students." The District contended one would not reasonably suspect from A.O. being tardy to English class and visiting Servin during the day that Servin was sexually abusing A.O. Further, the District asserted, "[A.O.] offers no evidence any District administrator with the authority to discipline Servin or control his employment knew of any suspicious activities. The California Supreme Court unequivocally highlighted that it is the acts or omissions of an administrator, not an employee with no authority over Servin, that is the

basis for school district negligence." The District asserted that the declarations of the three students—J.C., A.A., and K.T.C.—"have no evidentiary value as none of them attest to coming forward to school administration about their observations of Servin."

In regard to the assertion that the District ratified Servin's sexual harassment of A.O., the District responded, "The fact that he was placed on leave shows the District was not endorsing the reported behavior."

E. HEARING AND RULING

At the start of the hearing on the summary judgment motion, the trial court remarked that there was an absence of evidence "showing that the District had any knowledge of [Servin's] conduct" prior to Classmate's report. The trial court said its tentative ruling was to grant the motion for summary judgment.

A.O. responded, "The standard is did the school know or should they have known." A.O. repeated, "The standard is should you have known." A.O. contended she provided declarations of "other people observing this in [the] open," so the District should have known of the problem. The District replied, "They rely on pure speculation by students who declare that [Servin] was, for lack of a better word, creepy and purely speculate that, hey, other teachers may have saw this when there's no evidence that any teacher did." As to the sexual harassment claim, the District asserted it did not ratify Servin's behavior because "[t]hey put him on leave. The police got involved. It's a criminal matter." The trial court granted the motion for summary judgment.

DISCUSSION

A. STANDARD OF REVIEW

When reviewing a grant of summary judgment, we apply the de novo standard of review. We " ' "consider[] all the evidence set forth in the moving and opposing papers . . . . We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." ' " (*Gonzalez v. Mathis* (2021) 12 Cal.5th 29, 39.) " 'A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law.' " (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.)

B. NEGLIGENT SUPERVISION

"School principals and other supervisory employees, to the extent their duties include overseeing the educational environment and the performance of teachers and counselors, also have the responsibility of taking reasonable measures to guard pupils against harassment and abuse from foreseeable sources, including any teachers or counselors they know or have reason to know are prone to such abuse." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 871 (*Hart*).) In other words, a school district may be liable for negligent supervision when a supervisor "knew or should have known of [the employee's] propensity or disposition for sexual acts with . . . students." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902, fn. 11; see also *D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 230 ["that LAUSD knew or should have known of the risk"].)

A.O.'s cause of action fails because she has not provided evidence of what, if anything, Servin's supervisors knew about Servin's propensity for sexual abuse. A.O.'s evidence establishes that students and a teacher were aware that Servin was "creepy." There is no credible evidence that a supervisor knew anything about the "creepy" behavior observed by students.

One of the students, K.T.C., declared, "School administrators were aware of Mr. Servin's inappropriate behavior." However, there is no evidence explaining the basis for K.T.C.'s conclusion. For example, K.T.C. did not declare that she reported Servin's "creepy" behavior to an administrator or that she observed Servin being "creepy" in front of an administrator. As a result, K.T.C.'s conclusion that "[s]chool administrators were aware of Mr. Servin's inappropriate behavior" does not create a triable issue of material fact. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525-526 [" '[A]n issue of fact is not raised by "cryptic, broadly phrased, and conclusory assertions" [citation], or mere possibilities' "].)

A.O. asserts that Servin's supervisors should have been aware of his creepy conduct because students were aware of it, i.e., it occurred in the open and was observable. In other words, A.O. is asserting supervisors *should have known* about Servin's suspicious behavior, which would then mean they *should have known* he was prone to sexual abuse. Essentially, A.O. is asserting that Servin's supervisors did not know about his suspicious behavior, but they should have known about it. The flaw in A.O.'s argument is that there must be evidence a supervisor (1) subjectively knew the employee was prone to sexual abuse, or (2) subjectively knew suspicious information

such that an objectively reasonably person would have known the employee was prone to sexual abuse. The argument that Servin's supervisors *should have known* about Servin's "creepy" conduct fails because it acknowledges the supervisors did not know information that would have caused an objectively reasonable person to know that Servin was prone to sexual abuse.

A.O. asserts, "[A.O.] was repeatedly sexually assaulted on school property and the fact that the school failed to supervise Servin does not give it immunity. This would set a daunting precedent tantamount to do [*sic*] a 'don't ask don't tell' of sexual abuse where a school can feign ignorance and skirt liability. This is not the state of the law and this court should not countenance such a dastardly principle."

While Servin may be held liable for his misconduct, the District's liability for Servin's actions "is limited by requirements of causation and duty." (*Hart*, *supra*, 53 Cal.4th at p. 876.) Our Supreme Court has explained that a school district's duty is limited "by the *Rowland*[2] considerations of the extent of moral blame and the policy balance between the prevention of future harm and the burdens created by imposing a duty of care. [Citation.] Unless the individual alleged to be negligent in a [supervisory] decision knew or should have known of the dangerous propensities of the employee who injured the plaintiff, there is little or no moral blame attached to the person's action or inaction." (*Id.* at p. 878.) Thus, we are not concluding that school districts can gain immunity by ignoring misconduct. Rather, we are following our Supreme Court's

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2 *Rowland v. Christian* (1968) 69 Cal.2d 108.

precedent, which limits school districts' liability to situations in which a supervisor knew or had reason to know of the risk posed by the perpetrator. (*Hart*, *supra*, 53 Cal.4th at p. 871.)

A.O. contends the District relies upon cases that are "outdated, as recent California appellate opinions make clear that . . . 'school administrators have a duty to protect students from sexual abuse by school employees, even if the school does not have actual knowledge of a particular employee's history of committing, or propensity to commit, such abuse.' " A.O. supports that assertion with a citation to *Doe v. Lawndale Elementary School Dist.* (2021) 72 Cal.App.5th 113 (*Lawndale*).

In *Lawndale*, a music instructor allegedly sexually assaulted a student, and the student sued her school district for negligence. "The trial court granted the [school district's] motion for summary judgment, ruling the [school district] did not have a duty to protect [the student] from sexual abuse unless it knew [the instructor] had previously engaged in sexual misconduct with minors or had a propensity to do so." (*Lawndale*, *supra*, 72 Cal.App.5th. at p. 119.)

At the appellate court, the school district "argue[d] that it did not have a duty to protect [the student] from sexual abuse unless it had knowledge of 'prior sexual misconduct by [the music instructor].' " (*Lawndale*, *supra*, 72 Cal.App.5th at p. 124.) The appellate court concluded that "the [school district's] administrators had a duty to use reasonable measures to protect [the student] from foreseeable injury caused by [the music instructor's] intentional conduct." (*Id.* at p. 126, fn. omitted.) The appellate court then applied the *Rowland* factors to determine whether the school district's duty

should be limited. (*Lawndale*, at pp. 127, 130-131.) The appellate court concluded that "the *Rowland* factors do not weigh in favor of limiting [the school district's] duty to protect students from sexual abuse by teachers and other school employees as the [school district] proposes: to cases where school administrators have actual knowledge of prior sexual misconduct by the teacher or employee." (*Id.* at p. 131.)

We agree with *Lawndale* that a school district's duty is not limited to cases in which supervisors have actual knowledge of prior sexual abuse by the employee. However, that does not mean the duty is boundless. *Hart* limits the duty to situations in which supervisors "know or have reason to know" that the perpetrator is "prone to such abuse." (*Hart*, *supra*, 53 Cal.4th at p. 871.) As explained *ante*, A.O. failed to provide evidence that a supervisor knew or had reason to know that Servin was prone to abuse. Therefore, there is not a triable issue of fact concerning negligent supervision.

Within the *Lawndale* court's *Rowland* analysis, the appellate court concluded that it is generally foreseeable that adults who work with children will sexually abuse children. Specifically, the court wrote, "[S]exual abuse by members 'of an organization that provide[s] activities exclusively for children'—like an elementary school district—is reasonably foreseeable, even where the organization 'had no knowledge that [the employee] had previously sexually or physically abused anyone or had a propensity to do so.' " (*Lawndale*, *supra*, 72 Cal.App.5th at p. 132.) The appellate court concluded that, because such abuse is generally foreseeable, the true issue in the case was one of breach, i.e., "[w]hether the measures the [school d]istrict took to prevent sexual abuse of students . . . were reasonable." (*Id.* at p. 137.)

In the instant appeal, A.O. asserts the *Lawndale* opinion has ushered in a change in California law in which a supervisor's prior knowledge about a specific employee's propensity for abuse is no longer a requirement for liability. As an intermediate court, we must follow our Supreme Court's opinion in *Hart*. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455-456.) In *Hart*, the high court limited school districts' liability to situations in which supervisors "know or have reason to know [the perpetrators] are prone to such abuse." (*Hart*, *supra*, 53 Cal.4th at p. 871.) The high court also phrased the standard as "knew or should have known" of the propensity for abuse. (*Id.* at p. 878.) Because we adhere to our Supreme Court's precedent, we conclude that a plaintiff must still present evidence that the perpetrator's supervisor was previously aware of information that would have led a reasonable person to know that the perpetrator was prone to abuse, i.e., the supervisor "should have known." (*Id.* at pp. 871 & 878; *Z.V. v. County of Riverside*, *supra*, 238 Cal.App.4th at p. 902, fn. 11; *D.Z. v. Los Angeles Unified School Dist.*, *supra*, 35 Cal.App.5th at p. 230.)

C. SEXUAL HARASSMENT

Civil Code section 51.9 prohibits unwelcome "physical conduct of a sexual nature" by a teacher. (Civil Code, § 51.9, subd. (a)(1)(E) & (a)(2).) "Principles of ratification apply to a [Civil Code] section 51.9 cause of action." (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1111.) "It is undoubtedly true that a principal may ratify and approve the oppressive acts of an agent and that failure to discharge such agent may be evidence tending to show ratification, but the omission to

dispense with the services of the offender, standing by itself and unsupported by any other circumstances indicating the employer's approval of his course, is never sufficient to establish ratification." (*Edmunds v. Atchison, T. & S.F. Ry. Co.* (1917) 174 Cal. 246, 249.)

A.O. contends the District ratified Servin's misconduct by allowing him to stay on campus on March 5, 2019; by informing Servin of the allegations, which permitted Servin to delete Snapchat messages from his phone; and by not reviewing the school's surveillance recordings.

We begin with Servin staying on campus on March 5, 2019. The evidence reflects that the District's Human Resources Department and the police were involved in investigating the allegations, and that, on March 6, 2019, Servin was given a letter notifying him that he had been placed on administrative leave. The only plausible inference from that evidence is that it took several hours for all the people involved in the District's decision to place a teacher on administrative leave to be informed of the situation, make the decision, draft the letter, and deliver the letter. Thus, a trier of fact could not conclude from Servin staying on campus for the remainder of March 5th that the District approved of Servin's sexual abuse. (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 118 ["Summary judgment may be based on an inference where it is the only plausible inference that may be drawn from undisputed facts"].)

In regard to the District notifying Servin of the allegations, Officer Blue testified that employers sometimes notify employees of the allegations against them, and that is

usually due to "some type of policy they're required to let someone know that they're doing it." The only reasonable inference supported by the evidence is that the District may have informed Servin of the allegations if the District had to notify Servin of the basis for his administrative leave. In other words, there is no evidence indicating that the District informed Servin of the allegations in order to aid him in destroying evidence. Accordingly, the District informing Servin of the allegations does not indicate ratification.

As to the security footage not being reviewed, the evidence reflects that Officer Blue wanted to watch the recordings, but the school resource officer, who was a Rialto Police Officer, said that "for one reason or another, that was not available." It was a Rialto Police Officer who had access to the recordings and who said they were unavailable; it was not the District that told Officer Blue the recordings were unavailable. Additionally, Dominguez was told "[t]hat personnel and law enforcement would investigate," which indicates Dominguez did not have a role in investigating the incident, i.e., she had no reason to watch the recordings. Accordingly, the failure to watch the video recordings could not support a finding that the District ratified Servin's misconduct.

There is not a triable issue of fact concerning ratification. Therefore, the sexual harassment cause of action fails. The trial court did not err by granting summary judgment. (Code Civ. Proc., § 437c.)

DISPOSITION

The judgment is affirmed. Rialto Unified School District is awarded its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

FIELDS
J.

MENETREZ
J.