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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

C.A., Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B281333 (Los Angeles County Super. Ct. No. BC510666)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lori Ann Fournier, Judge. Reversed and remanded with directions.

Johnston & Hutchinson and Thomas J. Johnston; The Kneafsey Firm and Sean M. Kneafsey, for Plaintiff and Appellant.

Coleman & Associates Lawyers, John M. Coleman and Bruce McIntosh, for Defendant and Respondent.

C.A. appeals from the judgment entered after the trial court granted summary judgment in favor of the Los Angeles Unified School District (LAUSD) on C.A.'s claims for negligence and for negligent hiring, supervision and retention. C.A., who was sexually abused by Kip Arnold, a teacher at her middle school, seeks to hold LAUSD vicariously liable for alleged failures of its employees to protect her while she was a minor student under their supervision. C.A. contends triable issues of fact exist as to whether LAUSD negligently failed to discover that Arnold had been accused of sexual battery while working at a school in the Long Beach Unified School District. C.A. also argues triable issues remain on the question whether LAUSD employees were negligent in failing to properly supervise her and in failing to report Arnold's violations of LAUSD policies. We reverse, as we conclude there is a triable issue of material fact with respect to whether LAUSD employees acted negligently in supervising C.A.

FACTUAL AND PROCEDURAL BACKGROUND

1. *C.A.'s Complaint*

C.A. filed a complaint against LAUSD alleging a cause of action for negligence and a second cause of action for negligent hiring, supervision and retention. Her complaint alleges that, beginning in 2005, Arnold used his position as a teacher at C.A.'s LAUSD school, Nimitz Middle School (Nimitz), "to begin a determined effort to 'groom' her for future sexual abuse" and then subjected her to severe sexual abuse on an ongoing basis from 2005 to 2010. The complaint alleges that LAUSD employees knew or should have known of prior complaints at another school about Arnold engaging in unlawful sexual touching and indecent exposure, and they negligently ignored facts indicating Arnold

"had the propensity to sexually abuse minors and was in fact likely sexually abusing Plaintiff." It further alleges that LAUSD employees owed C.A. a duty to protect her from sexual abuse by Arnold and to enforce policies designed to protect children from sexual abuse.

2. *LAUSD's Motion for Summary Judgment/Summary Adjudication*

LAUSD moved for summary judgment or, in the alternative, summary adjudication as to C.A.'s claims. First, LAUSD contended C.A. could not carry her burden to show LAUSD was negligent in hiring Arnold as a physical education (P.E.) teacher. LAUSD argued no reasonable factfinder could conclude LAUSD was on notice or should have been on notice of past sexual misconduct by Arnold, because LAUSD's thorough pre-employment screening of Arnold did not disclose any past record of sexual misconduct. As to the claim for negligent supervision, LAUSD contended there was no evidence that any LAUSD employee knew or had reason to know of sexually inappropriate behavior or propensities on the part of Arnold prior to C.A.'s disclosures to the police in 2012, years after the sexual abuse she endured as a minor. LAUSD offered the following evidence in support of its motion.

a. *Arnold's sexual misconduct at Long Beach school*

In 1993, Arnold was temporarily employed by Long Beach Unified School District as a supervisor of suspended students. A female aide in her mid-20's alleged Arnold touched her sexually without her consent while they were working, resulting in Arnold being arrested on suspicion of sexual battery in December 1993. The charges were later dropped.

b. *LAUSD hires Arnold*

Arnold applied for employment with LAUSD in June 2003. Arnold reported on his application that he had obtained an associate degree from Long Beach City College in June 1999 and a bachelor's degree in P.E. from California State University Long Beach (CSU) in January 2003. Arnold's application reported his prior employment history as consisting of work as a baseball umpire from 1980 to 1990 and as a self-employed cabinet maker from 1990 to 2003. Arnold also reported completing a student internship in P.E. at LAUSD's South Gate High School while he attended CSU. Arnold did not disclose his employment with Long Beach Unified School District in 1993, the position from which he had been discharged after being arrested for sexual battery.

At the time Arnold applied to LAUSD, its application asked applicants to report all prior criminal convictions or pending court cases. Labor Code section 432.7, subdivision (a), prohibited employers from asking applicants to disclose prior arrests that did not result in a conviction. Arnold's application identified a 2001 conviction for driving under the influence, which was not disqualifying under LAUSD policy. He did not disclose his arrest on suspicion of sexual battery in December 1993 or the underlying circumstances. In his application Arnold answered "No" in response to the question, "Have you ever been dismissed from, or not reemployed by, a public or private school while holding any teaching/non-teaching position(s), or while in any other type of employment?"

LAUSD staff reviewed Arnold's application, interviewed him in person, conducted reference checks, and confirmed Arnold qualified for California teaching credentials. LAUSD staff

contacted Arnold's listed character references by telephone. Arnold's three references were the Kinesiology and P.E. Coordinator at CSU, one of his professors at CSU, and Gary Cordray, the P.E. Department Chair at South Gate High School who supervised Arnold's student teaching in 2003. In Cordray's written evaluation, he rated Arnold as a "5" (the highest level) in overall teaching effectiveness and stated Arnold "demonstrated many outstanding qualities of a young teacher."

LAUSD subsequently placed Arnold on the teacher hire eligibility list, pending obtaining his background clearance. For Arnold's student-teaching job, LAUSD had previously fingerprinted him and submitted his fingerprints to the Federal Bureau of Investigation and the State Department of Justice (DOJ) to have these entities conduct nationwide searches for any prior criminal convictions or pending cases. LAUSD's Human Resources re-fingerprinted Arnold upon his application for permanent employment and again submitted his fingerprints to the DOJ. Arnold obtained a California Teaching Credential on August 22, 2003 and was cleared for employment.

Cordray contacted his friend, Nimitz Principal Frank Vasquez, and recommended that Vasquez consider Arnold for the open P.E. teacher position at Nimitz. Vasquez and P.E. Department Head Ricardo Valencia interviewed Arnold for the position, and Vasquez ultimately chose Arnold over another candidate. Arnold was hired on July 1, 2004.

c. *Arnold's sexual abuse of C.A.*

In 2005, when C.A. was in eighth grade at Nimitz, she became acquainted with Arnold. Over the summer vacation after her eighth grade year, Arnold made arrangements for C.A. to meet him at a motel. He told her to make sure no one knew

where she was going, and she took steps to make sure their meeting was kept a secret. At the motel, Arnold kissed and touched C.A., performed oral sex on her, and digitally penetrated her. He attempted to have intercourse with her as well.

C.A. started high school at Bell High School in the fall of 2005, but her contact with Arnold did not cease. At another meeting between Arnold and C.A. in September 2005, Arnold tried to kiss and touch her. Arnold continued to telephone C.A. during her freshman and sophomore years. During C.A.'s junior year, the 2007-2008 schoolyear, she and Arnold met occasionally at a mall or to go out to eat. LAUSD proffered C.A.'s March 29, 2013 declaration filed in the superior court, in which she averred that "[o]ne night in 2007, Arnold took me to his boat. He told me 'I'm going to take what's mine' . . . and proceeded to rape me."

After an anonymous caller reported seeing Arnold drop C.A. off at Bell High School in May 2008, leading to an investigation of Arnold (discussed further below), C.A. and Arnold stopped seeing each other for a few months. C.A. stopped attending Bell High School during her senior year, the 2008-2009 school year. Arnold began stalking and harassing her in person and over the phone and demanding she have sex with him as payment for the gifts he had given her. In the spring of 2010, C.A. (now 18 years old) gave in and met with Arnold twice and had sex with him. C.A. became pregnant with her boyfriend Juan's baby and stopped having contact with Arnold.

C.A. came forward to the police in 2012 after learning that Arnold had asked out another student at Nimitz when she too was in eighth grade. The City of Bell Police Department conducted a sting operation with C.A.'s assistance and ultimately arrested Arnold. On November 26, 2012, Arnold was convicted of

two counts of lewd and lascivious acts with a child and the court sentenced him to over four years in prison. (Pen. Code, § 288, subd. (c)(1).)

d. *2008 investigation of Arnold's relationship with C.A.*

On May 23, 2008, an anonymous caller reported to Vasquez that she had observed Arnold picking up a female student in the morning and dropping her off at Bell High School. Vasquez was concerned that Arnold was violating LAUSD policy prohibiting teachers from giving students rides without parental consent. Vasquez contacted the child abuse unit at the Bell Police Department to make a Suspected Child Abuse Report (SCAR) over the phone. Vasquez also contacted the Los Angeles School Police and his supervisor, Robert Hinojosa. Following Hinojosa's instructions, Vasquez then met with Arnold that same day, told him he was pulling him from his teaching position, and directed him to report to the LAUSD District Office the following day as an investigation was being opened. Arnold was not permitted to return to Nimitz at that time.

The Bell Police Department responded to Nimitz that same day. Officer Ferrari "spoke with all parties involved and concluded the allegations were unfounded. . . Arnold advised he is assisting [C.A.] in tutoring" and helping with C.A.'s high school flag team. The school police also responded to Nimitz that day and launched a criminal investigation into the facts and circumstances to determine if a crime had taken place. They interviewed Arnold, who stated he had been tutoring C.A. in math and had picked her up from her home on some occasions with the permission of C.A.'s mother. In addition, Arnold said the Bell High School girls' flag team coach had asked him for his

assistance in coaching the team, and he had sometimes transported some of the flag team girls to and from events. Arnold stated he was unaware if the Bell High School administration or lead flag team coach knew he was involved with the flag team, and he had never cleared his participation with school administration.

The school police also interviewed C.A. that same day. C.A. said she considered Arnold a "friend only" and he in fact frequently gave her rides. She said Arnold picked her up from an intersection near her home, and her mother knew this and had no problem with it. She said her father did not know and he would get "mad with me and my mother" if he found out. She said Arnold was tutoring her in math and helping with her flag team.

The school police contacted the Bell High School flag team head coach, Ada Sanchez, who stated she was not aware of Arnold's participation as an assistant coach for the flag team. However, she had seen Arnold around the high school campus. Three girls on the flag team interviewed by the school police stated they would frequently see C.A. hanging out on campus with Arnold after school. None of the girls said they considered Arnold a coach of their team. They stated Arnold had transported them to one event in January 2008 but this was the last time they dealt with him.

Vasquez felt that "something fishy was going on." On October 6, 2008, he met with C.A. and her mother. C.A. said Arnold had taken her to a restaurant, but only when she needed help with her history class. C.A. told Vasquez that Arnold would take her to school in the morning when she had lots of "books and stuff" to carry, and he would give her rides home from flag practice when it was dark. He would pick her up at the corner

instead of from her house because she did not want her father to know, but her mother knew. Vasquez was concerned that she was concealing this information from her father.

Vasquez recommended dismissing Arnold for his "[f]ailure to follow District policies and procedures" and "[p]oor judgment in dealing with students." However, LAUSD determined that "the acts committed by Kip Arnold would not support a recommendation for dismissal." Instead, LAUSD suspended Arnold for 15 days (later reduced to 10 days) without pay and issued him a Notice of Unsatisfactory Acts for failing to follow LAUSD policies by transporting female students to and from events involving the flag team without having approval from the administration of Bell High School, and by working as a coach of the flag team without approval of the Bell High School administration. LAUSD instructed Arnold to avoid transporting students in his personal vehicle without proper written permission from school administration and from parents. LAUSD also admonished him not to accompany students off campus, except as part of authorized school activities. LAUSD reassigned Arnold to another middle school.

3. *C.A.'s Opposition to Motion*

C.A. filed an opposition contending there were triable issues of fact as to whether LAUSD used reasonable care in conducting a background check of Arnold, and contending a more thorough investigation would have yielded the information about Arnold's propensities for sexual impropriety. C.A. also contended triable issues remained as to whether LAUSD ignored the warning signs and events that "should have or actually did provide LAUSD notice of Arnold's dangerous propensities," including Arnold's conduct with C.A. in her eighth grade year at

Nimitz and his and C.A.'s conduct during the May 2008 investigation.

a. *C.A.'s declaration*

C.A. submitted her own declaration dated October 13, 2016 describing her history of abuse by Arnold, beginning spring semester of 2005 when she was 14 years old. She explained that she met Arnold when she was a student in Valencia's P.E. class, which was held at the same time and on the same schoolyard as Arnold's P.E. class. She described that "[o]n many occasions while I was a student in Mr. Valencia's P.E. class, Mr. Arnold would cause me to not participate in Mr. Valencia's class and do things in his class. For example, Mr. Arnold would ask me to take roll for his class, hold his coffee, and count laps for the students in his class. He called me 'coffee girl.' Often times, instead of participating in Mr. Valencia's P.E. class where I was enrolled, I would spend time with Mr. Arnold. [¶] I know that Mr. Valencia was aware that I was spending his class time in Arnold's class. These initial interactions with Mr. Arnold occurred during Mr. Valencia's class time. On at least one occasion, Mr. Valencia said something to me like 'I do not like this.' However, he never instructed me to stop leaving his class to be with Arnold and he never reported his concerns to the administration at Nimitz."

According to C.A., Arnold began to ask her to help him with a variety of administrative tasks in the boys' P.E. office or the P.E. storage area. C.A. confided in Arnold about problems in her home life. Arnold began flirting with her and gave her his phone number and told her to call him. While they were alone in the P.E. office together, he would compliment her jewelry and tell her how pretty and mature she was. On at least two occasions he

squeezed her thigh. He told her not to say anything or to let anyone see her go to the office because they could both get in trouble.

Later in the spring of 2005, Arnold told C.A. to meet him in the locked storage unit for P.E. equipment after all the students were gone. Inside the storage unit, he kissed her and touched her leg, waist, and buttocks. C.A. became uncomfortable and scared and told him she had to leave because her father was waiting to pick her up from school. He later told her not to tell anyone what had happened.[1]

Arnold began calling C.A. on the phone daily when her parents were at work. Over the summer of 2005, he told her he wanted to show her how much he loved her by having sex with her. C.A.'s declaration describes Arnold's severe sexual abuse of her at the motel room that summer and the event in September 2005 when he picked her up from her new high school and tried to kiss and touch her. In addition, later in September 2005, at Arnold's request, C.A. went to see him at the P.E. storage unit at Nimitz after his class was over. He kissed her and touched her sexually there.

For the remainder of her freshman year and her whole sophomore year, C.A. did not see Arnold in person but had contact with him over the phone. After C.A. met her boyfriend Juan in the summer of 2006, Arnold became jealous. He would threaten to tell Juan about Arnold's and C.A.'s "relationship" if she did not break up with Juan. He began following her and

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[1] In Arnold's deposition testimony, he also described kissing C.A. in the storage room when they were working together to redo and organize the office at Nimitz. He stated that was the only sexual activity that occurred at school.

parking his car in her neighborhood to watch her. While she was in high school, one night Arnold took C.A. to his boat and raped her, after telling her he was going to "take what's mine."

In 2007, when C.A. was in her junior year and was involved in short flags team competition at her school, Arnold would attend her practices after school. He became friendly with her coach and drove the short flag team to competitions in December 2007 and January 2008.

Arnold's control of C.A. continued after she started attending college in the fall of 2009. He insisted on driving her to school and picking out her classes. Arnold said he would leave her alone if she repaid him $6,000 for all the gifts he had bought her. When she could not find a job, he told her she needed to pay him back with sex. He again raped her in early 2010. C.A. moved to conceal her whereabouts from Arnold and stopped having contact with him.

b. *C.A.'s unauthorized participation in Arnold's P.E. class*

Besides C.A.'s declaration, C.A. provided other evidence regarding her participation in Arnold's class and whether that was permissible under school policies. She submitted deposition testimony from Arnold that he first met C.A. when she came up to him during P.E. and said, "Mr. Arnold, can I play with your class?" Arnold told her that was fine if Valencia did not complain, and C.A. started hanging out with his class and participating. Arnold got to know C.A. and they became close. Arnold remembered that on one occasion Valencia may have gotten mad at C.A. for hanging out with his class, but no one ever spoke to Arnold about it. He testified that it was not "too unusual" or "out of the norm" for C.A. to participate with his

class, as there were other students from other classes who would come play different games with Arnold's class because Valencia's class was boring.

C.A. submitted excerpts from the depositions of Vasquez and several other Nimitz employees who, responding to hypothetical questions, maintained that a P.E. teacher was not allowed to bring a student from another P.E. class into his own class without the teacher having formally requested that the student be added to his class. If a teacher took a student from another teacher's class without the approval of school administration, this was a violation of school policy that should be reported to administration. In response to a hypothetical question, Valencia testified at his deposition that if he had observed C.A. participating in Arnold's class, his responsibility would have been to instruct C.A. that she needed to stay within the assigned area of her own class. Further, if he saw that another teacher was trying to teach his student, he would be required to talk to the other teacher about his purpose.

Vasquez testified that if he had learned that Arnold was taking C.A. out of Valencia's class, he would have held a conference with Arnold and Valencia. His supervisor Hinojosa also testified it would have been "inappropriate" for Arnold to bring C.A. into his P.E. class if she were not on his roster, and to have her act as his assistant and get him coffee. Had he been informed that this was occurring, he would have directed the principal to correct the matter.

c. *Shakeshaft's expert declaration*

In support of her opposition, C.A. submitted a declaration from Charol Shakeshaft, a professor of educational administration with experience in evaluating and developing

school policies for preventing educator sexual misconduct and harassment.

Shakeshaft's declaration included her opinion as to "the standard of care" for screening the backgrounds of prospective school employees in order to prevent child sexual abuse. Shakeshaft opined that those interviewing candidates for such positions should inquire as to their previous work experience, including gaps in their employment timelines. She opined that candidates and their references should be explicitly asked if the candidates had been previously accused of sexual misconduct. In addition, reference checks should extend beyond the individuals on the candidate's list. Shakeshaft specifically opined that LAUSD should have asked Arnold about the 13-year period in which he stated he was self-employed as a cabinet maker. LAUSD also should have explicitly asked him if he had ever worked for another school and if he had ever been investigated for or accused of sexual misconduct.

Shakeshaft further opined that "[d]istricts need clear policies and regulations that describe educator sexual abuse, detail acceptable and unacceptable behavior, provide mechanisms for reporting, guide students, teachers, administrators, and parents in prevention, describe a system of investigation, and describe the consequences." "These policies should provide guidance in identifying and reporting behaviors that might indicate sexual exploitation and make it clear that the entire school family is responsible for identification and reporting." Such policies should address communications between teachers and students outside of school, prohibit employees being alone with students in closed rooms, and require any after hours tutoring to be in a public and supervised location.

Shakeshaft opined that school districts should conduct annual trainings for all employees focused on adult-to-student sexual misconduct, the signs of such misconduct, and investigation practices. Although LAUSD instituted such annual trainings as of 2013, previously its employees "did not receive any training on educator sexual misconduct specifically." She concluded that "[i]f LAUSD employees had received adequate training on educator misconduct, they would have been better able to recognize and address Arnold's behavior and better protect C.A. and the other students."

Shakeshaft also opined that LAUSD's level of supervision on school grounds was inadequate. She noted that "[s]exual abuse of students is diminished through active supervision of the school," including "hall sweeps, checking classrooms at lunch and before and after school to make sure that an adult is not alone with a child." Increased supervision was necessary for employees who consistently crossed boundaries, hung out with students regularly, or drove them in their cars. In addition, teachers must know where their students are during class time. If policy violations are discovered by employees, they should understand their responsibility to report to administration.

Shakeshaft opined that "[b]ased on the above standard of care, LAUSD did not adequately supervise" Arnold or other employees, the premises of Nimitz, or C.A. Shakeshaft specifically referred to Valencia's failure to report that Arnold had taken C.A. out of her assigned P.E. class on numerous occasions. Further, she opined that regular checks of rooms when class was not in session "would have likely uncovered" the private meetings between C.A. and Arnold.

4. *LAUSD's Reply in Support of Its Motion for Summary Judgment*

In its reply, LAUSD asserted that Shakeshaft's opinions lacked specificity because she failed to identify any specific employee who "knew or should have known" of Arnold's propensities and failed to act appropriately. LAUSD further asserted that "Shakeshaft's opinions concerning hiring, supervision, and firing policies of LAUSD are irrelevant as LAUSD is immune from liability arising from policy decision making in connection with hiring and firing public employees and policies and practices to be followed by employees." LAUSD also contended C.A. presented no evidence from which to conclude that if more robust policies and training had been in place, Arnold's sexual abuse of C.A. would not have occurred.

5. *The Court's Ruling Granting Summary Judgment*

In its ruling on the summary judgment motion, the trial court, like the parties, treated the first cause of action for negligence as co-extensive with the second cause of action for negligent hiring, retention and supervision.

As to the negligent hiring theory, the court found that LAUSD's "evidence that it adequately screened Arnold before offering him employment remains undisputed by admissible evidence to the contrary." The court noted that LAUSD was prohibited by Labor Code section 432.7, subdivision (a), from asking Arnold questions about whether he had been arrested for, as opposed to convicted of, any offense. The court emphasized that Arnold failed to disclose his work history with the Long Beach Unified School District and did not truthfully answer the question asking if he had ever been dismissed or "not reemployed" by any school. Further, the court concluded it was

"speculative" to assume that if LAUSD had asked Arnold if he had ever been accused of sexual misconduct, he would have disclosed his history at Long Beach Unified School District.

As for C.A.'s negligent supervision and retention theory, the court concluded C.A. failed to identify any particular events that reasonably provided notice to LAUSD that Arnold was having improper contact with C.A. Specifically, the court found "C.A.'s participation in another class [in 2005], even if against policy, is not sufficient to impart constructive knowledge on the District." Further, when LAUSD was notified by an anonymous call on May 23, 2008 that Arnold was driving C.A. in his personal vehicle in violation of school policy, LAUSD responded appropriately and conducted a reasonable investigation into Arnold's conduct.

With respect to Shakeshaft's opinion that LAUSD did not have sufficient policies in place aimed at detecting and reporting concerns of sexual abuse, the court found the conclusions were "not supported by reasoned opinion as to how the alleged failure caused C.A.'s injuries." The court deemed speculative Shakeshaft's opinion that had LAUSD employees received adequate training, these unspecified employees would have been better able to recognize Arnold's inappropriate behavior.

The trial court thus granted LAUSD's summary judgment motion and entered judgment in its favor.

DISCUSSION

A. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled

to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party or a determination a cause of action has no merit as a matter of law. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286; *Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) The evidence must be viewed in the light most favorable to the nonmoving party. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 703; *Schachter*, at p. 618.)

B. *Negligent Hiring, Supervision and Retention*

"'California law has long imposed on school authorities a duty to "supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection."'" (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869 (*Hart Union High*); see *J.H. v. Los Angeles Unified School Dist.* (2010) 183 Cal.App.4th 123, 148 (*J.H.*)) [school district may be liable for staff's ineffective supervision of young children on school grounds resulting in assault on child if jury finds negligent supervision was proximate cause of injury and injury was foreseeable by school staff]; *Thompson v. Sacramento City Unified School Dist.* (2003) 107 Cal.App.4th 1352, 1371-1372 ["where a school fails to provide supervision and an injury results from conduct that would not have occurred had supervision been provided, liability may be imposed"].)

"'The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care "which a person of

ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.'"" (*Hart Union High*, *supra*, 53 Cal.4th at p. 869.) "What constitutes ordinary care is a matter for the trier of fact with reference to the facts of the case." (*J.H., supra*, 183 Cal.App.4th at p. 148.) Because of the special relationship between school district employees and the district's pupils, "the duty of care owed by school personnel includes the duty to use reasonable measures to protect students from foreseeable injury at the hands of third parties acting negligently or intentionally," including sexual misconduct. (*Hart Union High,* at pp. 869-870; see *Dailey v. Los Angeles Unified School Dist.* (1970) 2 Cal.3d 741, 747 (*Dailey*) [school district could be liable where student died while engaging in a "slap boxing" bout with a fellow student in the lunchroom that was not being supervised].)

"That an individual school employee has committed sexual misconduct with a student or students does not of itself establish, or raise any presumption, that the employing district should bear liability for the resulting injuries." (*Hart Union High, supra,* 53 Cal.4th at p. 878.) A school district cannot be held vicariously liable for its employee's torts, including sexual assault of a student. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 441, 447.) However, if a school district's administrators or supervisors knew, or should have known, of an employee's propensities for sexual misconduct, the school district "may be vicariously liable . . . for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*Hart Union High*, at p. 879; *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1855 (*Virginia G.*) ["if individual

District employees responsible for hiring and/or supervising teachers knew or should have known of [teacher's] prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, . . . the employees owed a duty to protect the students from such harm"].)[2]

1. *Sovereign immunity of LAUSD as to policymaking*

C.A. relies on Shakeshaft's opinion that LAUSD's policies and trainings in place at the time Arnold sexually abused C.A. were inadequate, leading to LAUSD employees' failure to detect Arnold's history of sexual deviance in a school setting and their failure to recognize the ways in which Arnold was grooming C.A. for sexual abuse. To the extent C.A. contends summary judgment was inappropriately granted due to the inadequacy of LAUSD's policies in these respects, LAUSD is immune from liability for any such failures to adopt more robust policies.

Government Code section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Government Code section 815.2, subdivision (b), extends that discretionary act immunity to the public entity whose employee's conduct is at issue, providing: "Except as otherwise provided by statute, a

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[2] "'[T]he general rule is that an employee of a public entity is liable for his torts to the same extent as a private person ([Gov. Code,] § 820, subd. (a)) and the public entity is vicariously liable for any injury which its employee causes ([Gov. Code,] § 815.2, subd. (a)) to the same extent as a private employer ([Gov. Code,] § 815, subd. (b))." (*Hart Union High, supra*, 53 Cal.4th at p. 868.)

public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability."

"The Supreme Court has interpreted section 820.2 to 'allow[ ] immunity for basic policy decisions' by government officials, but not for 'the ministerial implementation of that basic policy.'" (*Regents of University of California v. Superior Court* (2018) 29 Cal.App.5th 890, 915 (*Regents of UC*), citing *Johnson v. State of California* (1968) 69 Cal.2d 782, 796.) In *Regents of UC*, this court addressed the limits of immunity under section 820.2 in the context of a challenge to a university's alleged failure to protect its students from another violent student. (*Regents of UC*, at pp. 914-915.) We concluded that "a university's decision to create specific programs and protocols to identify and respond to threats of violence on campus would appear to qualify as a planning or policy determination, and thus 'discretionary' within the meaning of Government Code section 820.2." (*Id.* at p. 915.) However, because the plaintiff in that case was not challenging "the adequacy of the university's safety programs or protocols" but rather "the manner in which the university and its employees executed those programs" with respect to the student presenting a threat of harm, the university was not immune from liability under Government Code section 820.2. (*Id.* at pp. 915-916.)

Government Code section 820.2 likewise does not shield LAUSD from liability for its employees' failures to comply with LAUSD policies. However, LAUSD's decisions with respect to the creation of policies or trainings designed to prevent sexual abuse of children constitute basic policy determinations and, accordingly, LAUSD is immune from liability for the alleged inadequacy of those policies or trainings.

2. *Negligent hiring*

A defendant may be liable for negligent hiring if it "knows the employee is unfit, or has reason to believe the employee is unfit or fails to use reasonable care to discover the employee's unfitness before hiring him." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 (*Evan F.*).) In *Evan F.*, the defendant church hired a pastor who had previously sexually abused a child; the pastor then molested the plaintiff, a young boy. (*Id.* at pp. 832-833.) Although the church did not have actual knowledge when it hired the pastor of his prior sexual abuse, it had become "aware of some difficulty" with the pastor's reappointment to the active ministry and understood he had been on a sabbatical. Nevertheless, the church did not make any inquiry regarding the pastor's past or his fitness to serve. (*Id.* at p. 843.) The trial court granted summary judgment in favor of the church on the plaintiff's negligent hiring claim, but the appellate court reversed that decision, finding triable issues of material fact existed regarding whether the church had reason to believe the pastor was unfit and whether the church failed to use reasonable care in investigating him. (*Ibid.* see also *Virginia G., supra*, 15 Cal.App.4th at p. 1851 [school district may be liable for negligent hiring of teacher who sexually assaulted a student where the district performed an inadequate background check and did not discover teacher's history of sex abuse].)

C.A. contends that a triable issue remains as to whether LAUSD was negligent in its failure to discover Arnold's prior sexual misconduct at the Long Beach school. Specifically, C.A. faults LAUSD for not asking Arnold if he had previously worked at a school or had prior teaching experience; for not asking him anything about his 13 years of self-employment as a

cabinetmaker; and for not asking him if he had ever been accused of sexual abuse or sexual harassment.

We conclude that the trial court correctly found no reasonable jury could find LAUSD liable on C.A.'s negligent hiring theory. Unlike in *Evan F.*, where the church knew there had been some problems with the pastor in the past and thus should have investigated further, none of the available information about Arnold reasonably should have given LAUSD any cause for concern. Arnold had just finished student-teaching, and his supervisor gave him a superlative review. A professor and an administrator at his college program had also vouched for him. Because Arnold omitted his employment with the Long Beach Unified School District and did not list any other work experience in a school setting on his application, it was reasonable for LAUSD to assume he did not have any other experience working at a school and pointless to ask this question. In the absence of any clue at the time that Arnold had not been truthful or had misconduct in his past, there was no reason to probe further.

Given that LAUSD was able to get several references from Arnold's most recent and most relevant employment as a student teacher as well as from his time as a student studying P.E., it would not be reasonable to conclude that LAUSD was negligent because it did not obtain a reference from a more remote time period when Arnold worked in the unrelated field of cabinetmaking. Because it is not unusual for people to switch careers, Arnold's prior history as a self-employed cabinetmaker would not reasonably have raised any concerns or a need to follow up with questions on this particular subject.

Finally, we disagree that LAUSD could reasonably be faulted for not asking Arnold about whether anyone had previously accused him of sexual impropriety. LAUSD had run two background checks using his fingerprints, which yielded only a conviction for driving under the influence. LAUSD was prohibited under Labor Code section 432.7 from asking about prior arrests that did not result in a conviction. Arnold answered "No" to the question asking if he had been dismissed from or not reemployed by any school or any other type of employment. Although Arnold testified at his deposition that he would have "told the truth" if LAUSD had asked him about his arrest while working for the Long Beach school, this does not mean that LAUSD was negligent for not ferreting out information about his prior arrest and misconduct in another district and questioning him about it. We conclude no reasonable jury could find LAUSD was negligent in failing to make further inquiries when it had no reason to suspect anything problematic about Arnold or his background.

3. *Negligent supervision/retention*

Ineffective supervision of a student, as well as the failure to use reasonable measures to protect a student from foreseeable injury from a third party, may constitute a lack of ordinary care on the part of those responsible for student supervision. (*Hart Union High, supra,* 53 Cal.4th at pp. 869-870; *Dailey, supra*, 2 Cal.3d at p. 747; *J.H., supra,* 183 Cal.App.4th at p. 148; *Virginia G., supra*, 15 Cal.App.4th at p. 1855.) Further, "[r]esponsibility for the safety of public school students is not borne solely by instructional personnel. 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." (*Hart Union High,* at p. 871.)

Breach of the standard of care is ordinarily a question of fact for the jury to decide. (*Regents of U.C., supra*, 29 Cal.App.5th at p. 912.) "It is for the trier of fact to determine whether an unreasonable risk of harm was foreseeable under the facts of a case." (*J.H., supra*, 183 Cal.App.4th at p. 146.) "However, where reasonable jurors could draw only one conclusion from the evidence presented, lack of negligence may be determined as a matter of law, and summary judgment granted." (*Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1214; see *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 188 ["the question of breach can be decided as a matter of law where 'no reasonable jury could find the defendant failed to act with reasonable prudence under the circumstances'"].)

In *Forgnone v. Salvador U.E. School Dist.* (1940) 41 Cal.App.2d 423, 426, the complaint alleged that "while the children were eating their luncheons in the class-room a fellow student engaged in scuffling with [the plaintiff] during which encounter her arm was twisted and broken." The court held that "the mere lack of supervision, or inadequate supervision may not necessarily create liability on the part of a school district to compensate for injuries sustained by a pupil. If it appears that a supervisor could not have reasonably anticipated or prevented the conduct of fellow students which resulted in injuries, it might not be material whether they were present at the time of the act complained of, or not. But when the omission to perform a duty,

like that of being present to supervise the conduct of pupils during an intermission while they are eating their lunches in a school room, may reasonably be expected to result in rough and dangerous practices of wrestling and scuffling among the students, the wrongful absence of a supervisor may constitute negligence creating a liability on the part of the school district." (*Ibid.*)

In *Santillan v. Roman Catholic Bishop of Fresno* (2008) 163 Cal.App.4th 4, 8-12, the court addressed whether the plaintiffs had raised a triable issue regarding whether the defendant diocese was on notice that its priest may have been sexually abusing minors. The plaintiff had proffered evidence that the rectory housekeeper frequently let minors into the priest's bedroom knowing they were alone with him. The court concluded a triable issue remained as to whether the housekeeper knew or should have known of the sexual abuse. (*Id.* at p. 12.) Further, there was a triable issue as to whether the housekeeper's employment included a duty to report such abuse to the diocese based on the bishop's testimony that he would have expected the housekeeper to tell someone what was going on. (*Id.* at p. 13.)

C.A. argues a triable dispute remains as to whether, when she was in Valencia's P.E. class in 2005, Valencia failed to adequately supervise her and failed to report to school administration that Arnold was violating school policy.[3] C.A.'s

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[3] C.A. also contends that during the 2007-2008 schoolyear the coaches of the Bell High School girls' flag team violated LAUSD policy and were negligent by allowing Arnold to act as an unauthorized coach for the team and allowing him to drive C.A. and other girls on the team. C.A. contends these coaches' failures

declaration provided that when she was an eighth grade student in Valencia's P.E. class, Arnold often had her participate in Arnold's class instead of her assigned P.E. class taught by Valencia. During this P.E. time, Arnold gave C.A. attention and assigned her special tasks, which was the beginning of Arnold's grooming process. According to C.A., "Valencia was aware that I was spending his class time in Arnold's class. These initial interactions with Mr. Arnold occurred during Mr. Valencia's class time. On at least one occasion, Mr. Valencia said something to me like 'I do not like this.' However, he never instructed me to stop leaving his class to be with Arnold and he never reported his concerns to the administration at Nimitz."

C.A. also relies on deposition testimony from Vasquez and other school employees stating that it would have been against school policy for Arnold to teach C.A. when she was a student on another teacher's roster. Further, C.A. proffered testimony from

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to uphold school policies allowed Arnold continued access to C.A. However, in the trial court, she never asserted (either in her complaint or her opposition to the motion for summary judgment) that these coaches were negligent or asserted that LAUSD was vicariously liable for their negligence. Rather, she contended only that the 2008 investigation of Arnold revealed policy violations by him, including that he was driving C.A. and her flag team teammates, which discovery reasonably should have put LAUSD on notice that Arnold was likely abusing C.A. Because C.A. did not raise this negligence theory below, she has forfeited it on appeal. (*Perez v. Grajales* (2008) 169 Cal.App.4th 580, 591-592 [arguments raised for the first time on appeal are deemed forfeited]; see *Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1254 ["'[w]e do not require the [defendant] to negate elements of causes of action plaintiffs never pleaded'"].)

school employees that any such violation of policy should have been reported to school administration.

While there is no evidence that Valencia was aware that Arnold was ever alone with C.A. or had actual knowledge that sexual abuse or, preliminarily, grooming was occurring, Valencia had a duty to supervise P.E. students in his class, including C.A. Reasonable minds could differ as to whether Valencia's lack of supervision that allowed Arnold access to C.A. for grooming constituted negligence for which LAUSD is vicariously liable. (See *Dailey, supra*, 2 Cal.3d at p. 750 [where instructor "ostensibly on duty" at the time of slap boxing bout between students did not devote his full attention to supervision, "a jury could reasonably conclude that those employees of the defendant school district who were charged with the responsibility of providing supervision failed to exercise due care in the performance of this duty and that their negligence was the proximate cause of the tragedy"].) Further, C.A. proffered evidence tending to show that Valencia failed to uphold school policy by not reporting Arnold's violation of the policy prohibiting switching a student's P.E. class without formal approval. Particularly given his status as P.E. department head at Nimitz, Valencia's failure to report Arnold's violation of school policy may support a finding of negligence. The trial court erred in concluding no reasonable jury could find Valencia failed to act with reasonable prudence or that there was a foreseeable risk of inappropriate behavior on Arnold's part. We reverse the summary judgment in favor of LAUSD.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting LAUSD's motion for summary judgment, and to enter a new order (1) denying the motion for summary judgment; (2) granting the motion for summary adjudication as to the causes of action based on negligent hiring; and (3) denying the motion for summary adjudication as to the causes of action based on negligent retention and supervision. The parties shall bear their own costs on appeal.

STONE, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.