STATE OF IDAHO)
County of BONNER)ss

FILED_____

AT_____ O'Clock _____M
CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF BONNER

RUSSELL CARRIER, et ux, et al,

Plaintiffs,

vs.

LAKE PEND OREILLE SCHOOL DISTRICT, et al.

Defendants.

Case No. **S CV 2002 1488**

MEMORANDUM DECISION AND ORDER ON DEFENDANTS' MOTION FOR APPLICATION OF I.C.§33-512B AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT, and ORDER DENYING STIPULATION TO VACATE TRIAL DATE

I. INTRODUCTION.

This case is about the defendants' alleged failure to notify parents that their high school student had suicidal tendencies. Specifically, plaintiffs allege negligence *per se* pursuant to I.C. § 33-512(4) and I.C. § 33-512B.

On October 13, 2004, defendants filed "Defendants' Motion for Application of Idaho Code 33-512B / Alternative Motion for Summary Judgment", arguing that under I.C. § 33-512B they had no duty to warn or any other kind of duty. Defendants submitted a brief. On November 17, 2004, plaintiffs submitted their "Memorandum in Opposition to Defendants' Motion for Application of Idaho Code §33-512B and Motion for Summary Judgment" (Plaintiffs' Brief). Oral argument was heard November 30, 2004.

Defendant Mike McNulty taught at Sandpoint Senior High School. During the 1999-2000 school year, Brian Carrier was a 17 year old student there, and a student in McNulty's class. In April 2000, Brian completed a journal essay assignment that McNulty reviewed in May 2000. Brian's essay was entitled "My Most Difficult Decision #5", which read as follows:

> I believe my most difficult decision of all time was not to kill myself. For a long time and a lot of reasons I was contemplating suicide. I thought it would just solve all my problems. And it would. But that means that I would not be around anymore and I couldn't enjoy all the things in life that everyone else seemed to. One time I actually tried to shoot myself but I started shaking so bad and I got scared that I just couldn't do it. I'm sure that every human being on the planet at one time in their lives has thought about killing themselves. I seemed to have these feeling a lot during my early years. I often listened to a song the bye band queen named Bohemian Rapsody(sic). One particular lyric in the song stated: "Goodbye everybody, I've got to go. Gotta leave you all behind and face the truth. I sometimes wish I'd never been born at all." This particular part of the song really appealed to me. But now I've turned my life around. Those little things that used to bother me so much, no don't even bother me anymore. I believe that I used to be so depressed at the time partly because my brother and dad used to fight, scream, and hit each other all the time. Today is the day my brother is leaving. I'm very happy that he's gone but a part of me is still wanting him to stay. I'm glad that he's gone because now he can't cause anymore problems with my dad. I can now enjoy life and all its little pleasures without any guilt.

Memorandum in Support of Defendants' Motion for Application of Idaho Code 33-512B / Alternative Motion for Summary Judgment (Defendants' Brief), pp. 4-5. Brian and his family then moved to Colville, Washington. *Id.* p. 6. On November 5, 2004, Brian's parents reported he was missing from work, found a note in Brian's bedroom that said: "I am sorry" and a note on Brian's calendar for November 5, 2000 that said: "goodbye". *Id.* On November 12, 2000, police located Brian's body in the wilderness, and it is believed he committed suicide on November 5, 2000. This is corroborated by Brian's death certificate that lists "self inflicted gunshot wound to rightside of head" as the description by the coroner as to how the injury occurred. Affidavit of Counsel (Brian K. Julian), Exhibit A, p. 1. Plaintiffs, the parents of Brian Carrier, filed this lawsuit on November 1, 2002.

Defendants argue that there was no unequivocal and unambiguous statement by Brian as to a suicidal tendency, such that McNulty would have to speculate as to its meaning, pursuant to I.C. § 33-512B. That statute reads:

> **Suicidal tendencies -- Duty to warn**
>
> (1) Notwithstanding the provisions of section 33-512(4), Idaho Code, neither a teacher nor a school district shall have a duty to warn of

> the suicidal tendencies of a student absent the teacher's knowledge of direct evidence of such suicidal tendencies.
>
> (2) "Direct evidence" means evidence which directly proves a fact without inference and which in itself, if true, conclusively establishes that fact. Direct evidence would include unequivocal and unambiguous oral or written statements by a student which would not cause a reasonable teacher to speculate regarding the existence of the fact in question; it would not include equivocal or ambiguous oral or written statements by a student which would cause a reasonable teacher to speculate regarding the existence of the fact in question.
>
> (3) The existence of the teacher's knowledge of the direct evidence referred to in subsections (1) and (2) of this section shall be determined by the court as a matter of law.

This statute was enacted in 1996 and has not been interpreted by Idaho's appellate courts. This statute was a result of the Idaho Supreme Court's decision in *Brooks v. Logan,* 132 Idaho 484, 903 P.2d 73 (1005) (*Brooks I).* Affidavit of Lawrence R. Beck, Exhibit 5; Statement of Purpose, RA 05763.

II. ANALYSIS.

A. McNULTY'S KNOWLEDGE OF BRIAN'S SUICIDAL TENDENCY BY DIRECT EVIDENCE AS A MATTER OF LAW.

Defendants argue that Brian's essay showed he was "very happy in his life and is looking forward to enjoying his life and all its little pleasures" and that "certainly nothing in the essay would have told [McNulty] that Brian would kill himself six months later." Defendants' Brief, pp. 8-9. Under Idaho Code § 33-512B, "whether Brian was going to kill himself" is not the standard, and whether he appeared "happy" is not the issue. The standard is whether McNulty knew of direct evidence (which would include unequivocal and unambiguous…written statements by a student) of suicidal tendencies, that would not cause McNulty to have to speculate about those suicidal tendencies. This Court finds as a matter of law Brian's essay entitled "My Most Difficult Decision #5" clearly meets that standard. Specifically, those portions of that essay which read:

> I believe my most difficult decision of all time was not to kill myself. For a long time and a lot of reasons I was contemplating suicide. I thought it would just solve all my problems. And it would. * * *
> One time I actually tried to shoot myself but I started shaking so bad and I got scared that I just couldn't do it.

There is nothing equivocal or ambiguous about that written statement. Defendants argue these feelings of Brian were in the past, and urges a *present* or *immediate* component to the suicidal tendencies. Nothing in Idaho Code §33-512B states there has to be an immediate or present danger of suicide, and this Court refuses to graft such an

interpretation into the clear language of the statue. "Where the language [of a statute] is unambiguous, the clearly expressed intent of the legislative body must be given effect." *Friends of Farm to Market v. Valley County,* 137 Idaho 192, 197, 46 P.3d 9, 14 (2002). The interpretation urged by defendants is completely at odds with the word "tendency", as one of the primary ways that a "tendency" is established **is based on past conduct, <u>past</u> actions!** Idaho Code §33-512B(3) makes it clear that it is the Court that determines whether McNulty knew of that direct evidence. This Court determines that McNulty had that knowledge as it is not disputed that McNulty read the essay in May 2000, well in advance of the suicide. There is no "speculation" here because Brian was being quite clear about his *suicidal thoughts and actions* and the essay was written for his teacher, in other words, Brian was essentially telling McNulty directly, unambiguously and unequivocally about these *suicidal thoughts and actions.*

B. IMMUNITY.

1. Discretionary Function Exception.

There appears to be no dispute as to defendants' immunity under the discretionary function exception (I.C. § 6-904(1)) for any alleged failure to set up policies and procedures to avoid suicide. *Brooks v. Logan,* 127 Idaho 484, 488, 903 P.2d 73, 77 (1995) (*Brooks I)*, where the Idaho Supreme Court held "…the decision to implement a suicide prevention program, including training teachers in the district, is a discretionary function." Plaintiffs have not argued to the contrary. Summary judgment is granted in favor of the defendants as to the cause of action stated in paragraph VII of plaintiffs' complaint. For reasons set forth in the section immediately following, the same reasoning applies to paragraph VIII of plaintiffs' complaint.

2. No Liability Under I.C. § 33-512(4) Due to the Idaho Tort Claim Act, I.C. § 6-904A(2) and 6-904(1).

Plaintiffs appear to concede defendants are immune under the tort claim act, I.C. §6-904A(2), for failure to supervise (under I.C. §33-512(4)) those under its care and control, as plaintiffs' write: "In the instant case, the Plaintiffs are asking the Court to find that Defendants breached their *duty to warn* of Brian Carrier's suicidal tendencies pursuant to I.C. Section 33-523B, not 33-512(4)." Plaintiffs' Brief, p. 8. A similar statement is made at p. 11 of Plaintiffs' Brief. In *Brooks v. Logan,* 130 Idaho 574, 577, 944 P.2d 709, 782 (1997), the Idaho Supreme Court made it clear that "…the school in this case should be immune for its failure to supervise and prevent one student from harming himself."

Plaintiffs allege defendants were negligent *per se* as they failed to comply with I.C. § 33-512(4). Complaint, ¶ XI. To the extent the Complaint alleges a failure to supervise Brian, summary judgment is granted in favor of defendants. This is mandated by *Brooks v. Logan,* 130 Idaho 574, 577, 944 P.2d 709, 712 (1997) (*Brooks II*).

Plaintiffs could make the claim that liability remains, under I.C. § 33-512(4), for the defendant school district's failure to supervise McNulty, and such claim would probably initially survive an immunity analysis for the reasons set forth below under *Coonse v. Boise School Dist.,* 132 Idaho 803, 979 P.2d 1161 (1999) and *Hei v. Holzer,* 139 Idaho 81, 73 P.3d 94 (2003). However, a review of the Complaint shows any claims of school district's failure to supervise McNulty are related to the school district's alleged failure "…to supervise others [McNulty] on how to reasonably carry out said policies and procedures." Complaint, ¶ VIII. Because the alleged failure to supervise is linked to the policies and procedures, and perhaps the alleged failure to implement any policy or procedures, the allegation falls within the parameters of the discretionary

function exception under I.C. § 6-904(1).

Because the Court finds defendant cannot be liable under I.C. § 33-512(4) due to the Idaho Tort Claim Act, there is no need for the Court to address the applicability of the doctrine of negligence *per se* to I.C. § 33-512(4).

3. Liability Under Idaho Code 33-512B and Negligence *Per Se*.

This Court agrees with plaintiffs' assertion that the Idaho Legislature, in creating Idaho Code § 33-512B in response to *Brooks I,* created a new limited legal duty to warn of a student's suicidal tendencies. This new limited duty *to warn* in I.C. § 33-512B is separate and apart from the list of other duties of school districts *to supervise* set forth in I.C. § 33-512. That list of duties includes the provision discussed above, I.C. § 33-512(4) and interpreted in *Brooks I,* that school districts must "protect the morals and health of the pupils".

This Court is convinced that I.C. § 33-512B is a separate and distinct statute, in which the legislature created a limited duty to warn, in response to the Idaho Supreme Court's decision in *Brooks I.* This Court is not persuaded that I.C. § 33-512B falls under the general provision of I.C. § 33-512(4) which would be subject to the immunity provisions of I.C. § 6-904A(2).

If the limited duty to warn under I.C. § 33-512B is breached, there is no immunity accorded under I.C. §6-904A because the breach under I.C. § 33-512B is for a failure to warn, not a failure to supervise.

Brooks I stated that the failure to warn about suicidal tendencies, did not require the evaluation of financial, political, economic and social effects, that it was an exercise of practical judgment and not a planning or policy formation, and thus, "operational". 127

Idaho 484, 488, 903 P.2d 73, 77. Thus, there is no immunity accorded defendants under I.C. §6-904(1).

There is no immunity under I.C. §6-904A is because McNulty was not supervised by the defendant Lake Pend Oreille School District #84. Plaintiffs are correct, that McNulty was not under the supervision, custody or care of a governmental entity, his negligence in failing to warn of Brian's suicidal tendencies is not immune under I.C. §6-904A(2) because that immunity only applies when a person is injured by someone who is under the supervision, custody or care of a governmental entity. "It is clear that the immunity [under I.C. § 6-904A(2)] arises from the status of the person(s) causing the injury, not the status of the person injured." *Coonse v. Boise School Dist.,* 132 Idaho 803, 806, 979 P.2d 1161, 1164 (1999). In *Hei v. Holzer*, 139 Idaho 81, 87, 73 P.3d 94, 100 (2003), the Idaho Supreme Court made it clear teachers are not under the supervision of school districts. "Thus, we find no supervisory relationship between a school district and its teachers for purposes of I.C. § 6-904A." *Id.*

Defendants make the following argument:

> Regardless of the title on the cause of action, whether phrased as negligence associated with policies and procedures, negligence associated with retention, supervision or training, negligence relating to the identification of suicidal tendencies or a failure to warn of suicidal tendencies, the Carrier Plaintiffs are seeking to recover from the District for failing to supervise the conduct of their child which they assert resulted in his death.

Defendants' brief, p. 12. This Court finds this argument not only unpersuasive, but false and deceptive. Defendants argue "failure to warn" is exactly the same cause of action as "failure to supervise". The obvious reason for this sleight of hand is to attempt to have the specific limited duty to warn provided under I.C. § 33-512B, eliminated by calling it a failure to supervise which is covered under I.C. § 33-512.

There is nothing about *Brooks v. Logan,* 130 Idaho 574, 944 P.2d 709 (1997) (*Brooks II*) which would change this Court's analysis. *Brooks II* did not deal with I.C. § 33-512B, and only discussed the fact that failure to supervise was barred by I.C. § 6-904A(2).

This Court finds that plaintiffs have met the elements of negligence *per se* under I.C. § 33-512B. Under that statute which creates a limited duty to warn, plaintiffs have demonstrated (1) that the statute clearly defines the required standard of conduct; (2) the statute was intended to prevent the type of harm the defendants' act or omission caused; the plaintiffs are a member of the class of persons the statute was designed to protect; and (4) the violation was the proximate cause of the injury. *O'Guinn v. Bingham County,* 139, Idaho 9, 16, 72 P.3d 849, 856 (2003). Defendants do not really counter this argument, other than to reiterate their argument that there is no liability under I.C. § 33-512B. Defendants' Brief, pp. 14-15. This Court has already disposed of that argument.

The Idaho Supreme Court in *Hei v. Holzer,* 139 Idaho 81, 88, 73 P.3d 94, 101 (2003) held that while a common law negligence claim may be based on a duty of care school districts owe to pupils, "we do not hold that I.C. § 33-512 creates a negligence per se duty." However, that statement was made specifically as to I.C. § 33-512 and only in the context of a negligent supervision claim, and did not in any way interpret I.C. § 33-512B and its duty to warn.

Negligence *per se* has been established in this case. Negligence *per se* in turn establishes the elements of a duty and a breach of that duty by defendants (*Ahles v. Tabor,* 136 Idaho 393, 395, 34 P.3d 1076 (2001)), and this Court has determined those elements have been established as a matter of law. Plaintiff must still prove causation and damages at trial.

C. CAUSATION.

The Court has decided that Brian's essay which McNulty read, contained unequivocal and unambiguous statements of suicidal tendencies which created the limited duty to warn pursuant to I.C. § 33-512B, and that defendants' breached that duty by failing to warn plaintiffs', Brian's parents. The next issue raised on summary judgment is whether plaintiffs have put forth any proof that defendants' breach of their duty to warn Brian's parents of his suicidal tendencies, denied those parents their opportunity to help their son obtain professional treatment for those same suicidal tendencies…in other words, *causation.*

Defendants' argument is that Brian's suicide "was a deliberate and intentional action of his own choosing that served as a superseding cause of his death and thus the Defendants can not be held liable." Defendants' brief, p. 15. Defendants cite *McMahon v. St. Croix Falls School District, et. al.,* 228 Wis.2d 215; 596 N.W.2d 875 (1999) as authority for that claim. This case, from another jurisdiction, did not deal with <u>any</u> statute, let alone a statute which specifically carves out a duty, albeit limited, as does I.C. §33-512B. That case did not concern a failure to warn, but rather failure to supervise, and as stated above, for reasons different than those given by the Court of Appeals of Wisconsin, there is no failure to supervise claim that survives in the instant case. Finally, the facts in *McMahon* are relatively innocuous, the decedent merely skipped school, committed suicide, and liability was sought to be imposed for a breach of the school's policy to notify the student's parents of an unexcused absence. Defendants also cited an "unreported decision" from Connecticut, but failed to supply the Court with a copy of such unreported decision. Due to the unreported nature of such case, this Court attaches no weight to that authority.

Defendants' argument that Brian's suicide "was a deliberate and intentional action of his own choosing that served as a superseding cause of his death and thus the Defendants can not be held liable", is logically inconsistent with the State of Idaho Legislature's action in passing I.C. § 33-512B into law in 1999. Why would the Idaho Legislature impose this limited duty to warn of the suicidal tendencies of a student when the teacher has knowledge of direct evidence of such tendencies, when recovery for the breach of that duty and the very harm to be prevented, ie., suicide, is an impossibility due to the doctrine of superseding cause? Adopting defendants' argument, this Court would have to find the Idaho Legislature passed a law establishing a duty for which there is absolutely no remedy. This Court finds the Wisconsin authority entirely without merit.

IV. ORDER.

IT IS HEREBY ORDERED under I.C. § 6-904(1), summary judgment is GRANTED in favor of the defendants as to the causes of action stated in paragraph VII and VIII of plaintiffs' complaint. To the extent the Complaint alleges any failure by defendants to supervise plaintiffs' son Brian, summary judgment is GRANTED in favor of defendants, under *Brooks v. Logan,* 130 Idaho 574, 577, 944 P.2d 709, 782 (1997).

IT IS FURTHER ORDERED as to plaintiffs' claims under I.C. § 33-512B, defendants' motion for summary judgment is DENIED. Negligence per se under I.C. § 33-512B has been established as a matter of law. However, this Court is mindful on the prohibition of entering a partial summary judgment in favor of plaintiffs *sua sponte. Mason v. Tucker and Associates,* 125 Idaho 429, 431-32, 871 P.2d 846, 848-49.

IT IS FURTHER ORDERED the Stipulation to Vacate Trial Date made December 23, 2004 is DENIED. The stipulation was based on the fact that this Court's decision on summary judgment had not been made as of the date of the stipulation, that "it could be a

tremendous waste to incur the rather substantial expenses that would be necessary for further pre-trial preparations, depending on how the Court rules on said motion" and that the parties wished mediation prior to the February 14, 2005 trial date. This Court's decision on summary judgment comes two weeks after the Stipulation to Vacate Trial Date was filed, and over five weeks before trial is scheduled to begin. Mediation could occur during that five week period, and the fact that the Court's decision on summary judgment was pending certainly did not prevent the parties from scheduling such a mediation.

ENTERED this 7th day of January, 2005.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of January, 2005, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Lawrence R. Beck	772 7243	Brian Julian	208-344-5510

_____
Secretary