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COURT GIVES GO-AHEAD FOR SUIT OVER ALLEGED SEXUAL ASSAULTS

by PAMELA MANSON

An appeals court has given the green light to a suit that accuses officials at a Fort Worth school of failure to prevent the alleged rape of a mentally retarded girl by a classmate.

In a 2-1 opinion on July 12, the 2nd Court of Appeals in Fort Worth upheld a lower court ruling rejecting a request by the school officials for summary judgment in the suit brought on behalf of the girl, who is identified as "Mary Doe." The action

came in an interlocutory appeal, *Myers, et al. v. John Doe and Jane Doe, Individually, and as Next Friends of Mary Doe*. The suit is in the 153rd District Court of Judge Ken Curry.

Lawyers for Mary claim

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that the girl was sexually assaulted twice after the initial rape because the officials failed to take corrective action to stop a recurrence. An attorney for the defendants, however, contends that the officials responded appropriately to what was believed to be a consensual encounter.

Two of the justices on the appeals panel, Dixon W. Holman and Anne Gardner, said the officials failed to meet their burden of establishing immunity. The third, Sam Day, dissented but did not write an opinion giving his reasons.

Lawyers for 17-year-old with the IQ of a 6- to 8-year old claim that the girl was sexually assaulted twice after an initial rape because school officials failed to take corrective action to stop a recurrence.

The appeals court, which says the facts of the case make it one of first impression, gives this account:

Officials at Castleberry High School were notified on Jan. 7, 1999, that the girl, a special education student with the IQ of a 6- to 8-year-old, had been involved in a sexual encounter with a classmate. The incident had occurred the previous day in an unlocked elevator during school hours.

Christy Hackett, the special education diagnostician in charge of disciplining special education students, discussed the incident with Mary, then 17. Although the girl said the encounter was not consensual, Hackett determined that it had been. She relayed that information to school principal Keith Burgett and vice principal Norma Nardone. Burgett told the school's superintendent, Terry Myers, about the incident.

Mary also told one of her teachers that the incident was not consensual, and the teacher prepared a memorandum for school officials.

Not Consensual?

Hackett informed Mary's mother that she had determined the sex was consensual and that both students needed to be disciplined. The mother disagreed with the con-

clusion that the encounter had involved consensual sex, but reluctantly agreed that her daughter should be disciplined so that the incident would not happen again.

The court notes that there is disagreement over whether the defendants disciplined Mary or the male student but says that Hackett's handwritten notes made at the time contain numerous references to the discipline she administered. Hackett reprimanded Mary only once, even though she admitted that she knew the girl did not have good reasoning skills and that she needed repetitive instruction to follow directions.

The opinion says that Nardone and Hackett decided to implement new procedures: They would instruct teachers that Mary and the male student were not to be left alone together; tell the teachers closest to the elevator not to allow the two on it; and have the two accompanied by an escort between classes. In addition, the door to the eleva-

tor was to be locked at all times, only adults would have access to the keys to the elevator and a mandatory tardy policy would be set up under which Mary and the male student were to be reported to the school office if either was late to class.

The policies were not carried out, and Mary was assaulted in the elevator two more times during school hours, according to the appeals court's description of the case.

Nardone learned about the two additional incidents on Jan. 27. The male student was removed from the classroom and placed in in-school suspension. Mary's parents brought suit against the officials under the Texas Education Code, contending that their failure to enforce the procedures and their negligent disciplining of their daughter led to her injuries.

In a brief filed with the 2nd Court of Appeals, the Does' attorneys — Geno Borchardt, of McGartland & Borchardt in Fort Worth; Paul Hood, a Dallas solo; and James Foster Smith and Andee Russell, both Fort Worth solos — wrote, "A person trained in special education must be prepared to communicate a reprimand or discipline special education students in an effective manner."

Hackett's reprimand was ineffective and failed to help Mary avoid the second and third assaults, the lawyers said. In addition, it was negligent to only reprimand the male student and not take further action, they claim.

"With children who can't defend themselves,

we have to depend on school officials to protect them when they're on school premises," Borchardt says.

Lawyers for the defendants, who are called appellants in the interlocutory appeal, moved for summary judgment based on statutory immunity: School district employees are not liable for any act that is within the scope of their duties and that involves the exercise of judgment or discretion unless they use excessive force or negligent discipline. They argued that the officials had used their judgment in this situation.

But the lawyers for the Does contended that the evidence was insufficient to prove that the defendants' acts were discretionary as defined under the law, and the appeals court agreed.

"Appellants created these policies and procedures and decided that they would be effective immediately," Holman wrote for the majority. "The policies defined the duties with such precision as to leave nothing to the exercise of Appellants' judgment or discretion."

Defense attorney Bruce A. Griggs, a partner in Locke Liddell & Sapp in Dallas, says that in all likelihood, the defendants will file a petition for review with the Texas Supreme Court. He believes that the appeals court ruling contradicts at least three decisions by the high court on the issue and will be overturned.

"Everyone agrees this is an unfortunate situation, but it doesn't mean the school officials did anything wrong," Griggs says. "I believe they're entitled to immunity."

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"With children who can't defend themselves, we have to depend on school officials to protect them when they're on school premises," says attorney Geno Borchardt.