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# Commonwealth of Kentucky

# Court of Appeals

NO. 2007-CA-002243-MR
&
NO. 2007-CA-002395-MR

FAYETTE COUNTY
BOARD OF EDUCATION — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CI-03467

CAROL LYNNE MANER,
AND HER ATTORNEYS
CHRISTOPHER D. MILLER,
CHARLES W. ARNOLD,
WILLIAM C. RAMBICURE, AND
THE LAW FIRMS, CHARLES W.
ARNOLD, PLC AND RAMBICURE
AND MILLER, PSC — APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND MOORE, JUDGES; KNOPF, SENIOR JUDGE.

MOORE, JUDGE: This matter is before us after a seven-day jury trial in the Fayette Circuit Court wherein the jury returned a $3,700,000 verdict in favor of Appellee Carol Lynne Maner (Lynne). Lynne also recovered her costs and attorneys' fees in the amount of $241,881.12. The Fayette County Board of Education appeals alleging errors on multiple grounds, and Lynne cross-appeals claiming the circuit court erred in denying post-judgment interest.

This is a most unfortunate case arising out of events beginning when Lynne was an eighth grade student at Beaumont Junior High School in 1978 and continuing through her senior year when she was a student at Lafayette High School. Evidence was presented at trial that she was sexually abused by several teachers and a guidance counselor while she was a student.

According to the testimony at trial, the abuse started when Roberta Blackwell, an art teacher at Beaumont, befriended Lynne. Blackwell took an interest in Lynne, which included Blackwell's spending time at Lynne's home; Lynne's spending time at Blackwell's home; Blackwell's driving Lynne to and from school; Blackwell's allowing Lynne to babysit at Blackwell's home and spending the night there when she did so; and Blackwell's taking Lynne on vacation and out to eat.

Lynne, whose own mother suffered from mental illness, testified that in the beginning her relationship with Blackwell was like a mother and daughter.

Blackwell even wrote a note to Lynne, which is of record, that she felt like Lynne's mother.

Lynne further testified that Blackwell became more and more involved in her life and that Blackwell started to say negative things about Lynne's parents to her, including that her mother was dangerous and crazy. Lynne's relationship with her parents worsened, and she felt safe with Blackwell, believing Blackwell to have a normal family life. Lynne later testified that she felt like Blackwell "brainwashed" her against her own family.

According to Lynne, Blackwell grew possessive and jealous of her. Blackwell did not like Lynne "hanging out" with her middle school friends.

Lynne testified that Blackwell began rubbing her back and touching her in a nonsexual way; however, the touching moved to sexual abuse when Lynne was fifteen. The first time the abuse occurred was after Lynne babysat Blackwell's child and spent the night in Blackwell's guest bedroom. Blackwell came into the guest bedroom; got into bed with Lynne; kissed her on the mouth and neck; and then sexually molested her. During her testimony, Lynne stated that Blackwell's sexual abuse of her continued through her senior year of high school and that she could not count the number of times Blackwell molested her. Blackwell even took Lynne out of high school classes to have sexual relations with her at Blackwell's residence.

Lynne testified that when she was in the ninth grade, around the age of fifteen, Blackwell got more possessive. Blackwell did not want Lynne to date nor have friends.

The situation with Blackwell, including the ongoing sexual molestation, confused Lynne. She believed that her science teacher, Russell Hubbard, was approachable about the situation with Blackwell. Lynne confided in Hubbard about the sexual relationship with Blackwell. At first, Hubbard was nurturing and concerned. Hubbard had been at Blackwell's house while Lynne was there.

According to Lynne, Hubbard told her she was special and that she should protect Blackwell. He told Lynne that she could confide in him any time.

Sometime later, Lynne was present at Blackwell's home and according to her, Hubbard told Blackwell to bring Lynne to his home. Blackwell drove Lynne there and told her to go into Hubbard's home. While inside, Lynne testified that Hubbard taught her how to roll and smoke a marijuana cigarette. Afterward, he took her into the bedroom, undressed her, had oral sex with her and then took her virginity in "the traditional sense." He then drove her home and later stopped by the drive through window at Burger Queen to pick up something to eat. The next day at school, Hubbard told Lynne that he noticed he still had her blood on his hands while at the pick-up window at Burger Queen. Lynne testified that Hubbard continued to abuse her until he left the Board's employment.

During the time that Hubbard sexually abused Lynne, Blackwell also continued to do so. According to Lynne, Blackwell would "work out" when Lynne could be with Hubbard. She would "pass" Lynne "off" to Hubbard. Lynne testified that when Blackwell found out that she had been with Hubbard without Blackwell's knowledge, Blackwell became very upset. Blackwell even wrote a letter, which is of record, regarding the betrayal she felt as a result of Hubbard's coming to pick up Lynne without her consent. In the letter, Blackwell wrote that when Lynne "gave" herself to Hubbard a second time, it was a betrayal of her. Lynne believed that so long as Blackwell told her it was okay to have sexual relations with Hubbard that Blackwell did not mind it. But when she did it without Blackwell's arranging it, Blackwell became furious. Lynne also identified a number of other cards and letters written to her by Blackwell that were suggestive of a sexual relationship. These were placed into evidence.

Lynne testified when Hubbard did not help her with the situation with Blackwell, she then went to her guidance counselor at Beaumont, Bill Martin, who she also had seen at Blackwell's house. Lynne felt like she was having a panic attack and needed to speak to someone. She thought it would be safe to report the abuse to Martin. Martin told Lynne that the bond between her and Blackwell was special and she should protect it. Martin further advised her not to tell anyone else about the abuse and that she should confide only in him. Martin wanted Lynne to tell him the details of the sexual acts between her and Blackwell and Hubbard. Lynne testified that Martin then started calling her out of class frequently to come

to his office to tell him about Blackwell and Hubbard. Although she wanted to talk about her home life with her parents, Martin focused on the sexual aspects of Lynne's relationship with Blackwell and Hubbard. She said he would make her sit on his lap while he slid his hand down the front of her pants, sexually molesting her. She testified that this happened on a number of occasions.

Lynne told the jury that the abuse was not just from staff at Beaumont. Once she started at Lafayette High School, Assistant Principal Dr. Fran Edwards called her out of class to speak to her. Edwards asked her how her relationship with Blackwell was going. Edwards made more and more contact with her. Soon after she called her out of class, Edwards asked Lynne to come out to the car and said she would like to take her to her house. Edwards had bought Lynne "a lot" of new clothes. Edwards asked to hear about Blackwell's relationship with Lynne. Lynne testified that Edwards took her on a trip to Nashville to an art exhibit early in her senior year. When they checked into the hotel room, Lynne noticed there was only one bed in the hotel room. She asked where she was going to sleep, and Edwards replied she was going to sleep with her. Lynne said she was not comfortable with that. Edwards then attempted to kiss her. Lynne became upset and started crying, letting Edwards know that she did not want to sleep with her. The two thereafter returned to Lexington.

According to Lynne, another teacher Robert Gardner, a teacher at Lafayette while Lynne attended there, knew about Blackwell's relationship with Lynne and asked her about it. Lynne testified that Gardner began touching her

sexually while at school. Later the touching moved into sexual intercourse, and he frequently called her out of class to engage in sex while at school. This occurred at Beeler Auditorium.

Lynne testified that she begged Gardner to stop having sex with her while at school. According to Lynne, Gardner told her that if she would come to his house to have intercourse, he would stop having sex with her at school. Lynne did so. Gardner's molestation of Lynne continued through her entire senior year.

Lynne further testified that another one of her teacher's at Lafayette, Rick Kazee, was also involved in the sexual abuse. During her senior year, Gardner took Lynne to Kazee's trailer, where the three of them smoked marijuana. Gardner took her into Kazee's bedroom and then both he and Kazee had sex with her.

Lynne testified that one day while she was still a student at Beaumont, Blackwell and Hubbard "pulled [her] out of class" and took her to an empty classroom after her mother made a complaint to Dr. Guy Potts, the superintendent. They told her that her mother had made a report to Dr. Potts, accusing them of an inappropriate sexual relationship with Lynne. Blackwell and Hubbard told Lynne that the principal of Beaumont, Robert Hume, had questioned them about it. They told Lynne she had put them in a "dangerous predicament" and that they could lose their jobs if anyone questioned them about her. They stated her family was crazy and that her mother was dangerous and that "bad things" could happen. Blackwell and Hubbard further informed her that if Hume called her in to speak to him, she

needed to protect them. Lynne testified that Hume questioned her a few minutes later about the complaint. Hume told her he just wanted to check in to see how she was doing; he did not ask her about any sexual relationships. Lynne testified that when questioned by Hume, she protected Blackwell and Hubbard.

In Lynne's junior year of high school, Blackwell moved out of her home with her husband and told Lynne that she needed to move out of her parent's home. Blackwell paid rent for a month for Lynne and helped Lynne get a job to pay for her apartment. Blackwell had earlier purchased an automobile for Lynne. During this entire time, Blackwell molested Lynne when she was a student.

Lynne testified that as a result of the combined abuse, as a teenager she wet the bed and could not sleep. She also dreaded going to school and home. She could not focus. When she was out of school, her time was "spoken for" by Blackwell. She was not able to function in college. She attempted for six years to get a college degree but could not complete it. She has never been able to make a living for herself. She blames the sexual abuse she suffered while a student in Fayette County schools for this.

Lynne's mother, Carolyn Maner, was called to the stand. She testified that she suffered from emotional problems and was under a doctor's care. She had been diagnosed with a bipolar disorder.

Carolyn testified that at first she welcomed Blackwell's friendship with the family. Blackwell only lived one or two blocks from the Maner home. In the beginning, while on her way to school, Blackwell offered to pick up and drop

off Lynne. Carolyn allowed this. Blackwell then started coming inside the Maner home or would sit on the front porch. Carolyn trusted her, especially because she was a teacher.

Carolyn testified later that Hubbard also started stopping by their home. He befriended the Maners as well. She knew he was a science teacher at Lynne's school and believed he could be trusted as well.

During her testimony, Carolyn stated that she began to have concerns about these relationships. Lynne was no longer spending time with friends her own age. Rather, Lynne's free time was spent with teachers. Carolyn began to question whether or not this was natural.

Carolyn testified that one evening, she witnessed Blackwell massaging Lynne's back while they were in a room in the basement. Carolyn further testified that she would tell Blackwell that Lynne needed to spend more time with friends, not teachers. But, when Blackwell stayed away, Hubbard would start spending more time at the Maners. Carolyn testified that Blackwell and Hubbard were rarely at the Maner house at the same time. Hubbard also started to pick up Lynne for ballgames more and more often. At this time, Lynne was only in the eighth grade.

Carolyn testified that one evening Lynne was late getting home. That evening Hubbard dropped off Lynne at the corner and she walked home. According to Lynne's earlier testimony, this was the evening Hubbard had taken her virginity.

Carolyn testified that she could "feel" Lynne "pull further away." At one point, Carolyn tried to speak to Lynne about spending so much time with teachers. Lynne told her mother that there was not anything she could do about it.

After (1) seeing Blackwell rub Lynne's back; (2) being unsuccessful in keeping the teachers out of Lynne's personal life; and (3) hearing from Lynne that there was nothing Carolyn could do about the situation with the teachers, Carolyn made an appointment to see Dr. Potts. The meeting was sometime between Thanksgiving and Christmas in 1978.

Carolyn reported to Dr. Potts that there was an "unnatural" relationship between teachers and students at Beaumont. She told him about Blackwell and Hubbard's involvement in Lynne's life. Although Carolyn had not said it was of a sexual nature, Dr. Potts asked Carolyn if she thought it was a sexual relationship. Carolyn responded that both she and her husband believed it was.

According to Carolyn's testimony, Dr. Potts' response was that they were not going to tell anyone about this. Dr. Potts told her that he had confidence in Mr. Hume, the principal at Beaumont. He then told her that was all he wanted to know and that he would get to the bottom of the situation.

Carolyn testified that she believed Dr. Potts would take care of the situation. She stated that about two or three days after their conversation, she received a letter from Dr. Potts detailing what they had spoken about at the meeting. She testified the letter also stated that no one else should know about this

but the Maners, Hume and himself. She continued to believe that Dr. Potts would take care of the situation and that he was performing an investigation. Hume, however, never contacted her. She never heard from Dr. Potts again after he sent the letter to her. Carolyn testified that she got rid of the letter after Lynne married. On redirect examination, Carolyn again testified that Dr. Potts told her not to tell anyone and that she kept her promise to him.

Within a few days after Carolyn's meeting with Dr. Potts, a complaint was filed against her with the Cabinet for Social Services. Carolyn testified that she did not go to the police regarding her belief that Blackwell and Hubbard were involved in a sexual relationship with Lynne because after the complaint was filed with social services, she was afraid her children would be taken away from her. She again testified that she believed that Dr. Potts would take care of the situation.

Carolyn admitted at that time she was seeing a psychiatrist, had been hospitalized several times for mental issues and that her judgment was impaired by her medication. Carolyn's husband, Lynne's father, was an alcoholic.

After the complaint was made to social services, Carolyn left the home for three days around the Christmas holiday. She testified that social services told her that either she had to leave the home or the children had to. She did not want the children to have to leave.

Carolyn also testified in accord with Lynne that Lynne moved to the apartment complex where Blackwell lived when Lynne was sixteen. She also testified that Edwards had bought a lot of expensive clothing for Lynne.

Other former students at Beaumont and Lafayette also testified at trial. Janet Spickard testified that she sought counseling from Bill Martin while she was a student at Beaumont. She went to see him regarding problems she was having at home due to her stepfather's molesting and beating her.

According to Spickard, Martin wanted her to tell him the details of the sexual molestation. He put his hand down in his pants and had an erection. He also put his hand on her breasts while his hand was down his pants.

Spickard asked Martin if he reported her stepfather's abuse, but he did not. Martin gave her marijuana and a mini skirt. She testified that he told her not to tell anyone; that it was their "little secret." He also told her that if she told anyone, she would probably get sent away from home. Spickard did not report Martin's abuse to anyone. She came forward only after learning of Lynne's lawsuit.

Spickard also testified that Blackwell wanted to paint her in the nude, but she would not do so. She knew that Blackwell and Hubbard were good friends.

Another former student, Kevin Jenkins, testified that when he was in the eighth grade, he had sexual intercourse with Blackwell. He attended Beaumont when Lynne did. He did not report this to anyone.

Portions of the deposition testimony of Beau Goodman, a former Beaumont student, were read into the record before the jury. He testified that, beginning in his eighth grade year, Hubbard would invite him to his house and that he smoked marijuana with Hubbard. Goodman testified that Hubbard told him

about having sex with Lynne and taking her virginity. He testified that he was at Hubbard's home when Hubbard came home after dropping off Lynne and that Hubbard had blood on his hands. Hubbard told him it was from Lynne and that he had taken Lynne's virginity because a man needed to do it because a boy would be clumsy. He also testified that Hubbard touched him inappropriately and sexually abused him. Goodman testified that Hubbard molested him more than thirty times. He did not report this abuse or his knowledge of the sexual abuse of Lynne to anyone at the time. He did not tell anyone about his abuse until he was thirty-four years old.

Don Hines testified in accord with Goodman and Lynne regarding Hubbard's having taken Lynne's virginity. He testified that Hubbard had laughed when he told Hines about Lynne's blood on his hands. Hines did not report this to anyone.

The deposition testimony of Dr. Potts was read into the record in front of the jury by agreement of the parties. His testimony was as follows:

> Q: During the course of your employment as superintendent of the schools of Fayette County, how many complaints of sexual abuse or inappropriate behavior between students and teachers did you get?
>
> A: I have no idea.
>
> Q: Did you get any?
>
> A: I'm sure I did, but I can't honestly say, and since I can't honestly say it, I'm not going to say it.
>
> . . . .

Q: Lawyers do this and this really is unfair, but would it have been more than five, do you think?

A: I don't have a number in mind, sir. I honestly can't say.

Q: Could it have been one a month?

A: I can't honestly say. It could have been.

Q: But it could have been one a month?

A: Probably, but I can't attest to that, I'd have to go back and review all the files, if there were.

Q: Where would you find that information?

A: I don't think you'll find it anymore.

Q: Why is that?

A: Well, apparently they are not available.

Q: Do you know what happened to those records?

A: No, I don't have any idea. They -- Well, nothing else on that.

Q: Let me ask you this. If someone had reported an incident like we've talked about, would have [sic] made a record of that somewhere and stuck it in a file somewhere?

A: Absolutely.

Q: And I assume that when you went back to the board of education after this lawsuit was filed, those are the kinds of records would have been some of the kinds you were looking for [sic].

A: That's what I would have been looking for.

Q: And you didn't find any sexual abuse complaints?

A. I did not find any of those sorts of document that I filed.

. . . .

Q: Was [sic] there enough complaints about inappropriate behavior between students and teachers, or sexual abuse incidents like we've talked about in this complaint, that it's possible there were so many that you don't remember them all?

A: No, I think it's fair to say that over the years that I was there there wasn't an inordinate amount of that, if any, but I do not recall specifically that particular thing.

"That particular thing" in Dr. Potts' deposition testimony was the complaint Carolyn testified that she made to him. Dr. Potts left all his records, including diaries and appointment books in the record archives of the Board. He testified that these records were purged after he retired.

Robert Hume, who was the principal at Beaumont during the period in question, was called to testify. Hume testified that Jack Ambrose,[1] an assistant superintendent whose supervision area included Beaumont, told him that Carolyn had filed a complaint that Lynne was spending too much time with Blackwell and Hubbard and that Carolyn was worried about it. Despite Dr. Potts' failure to recollect that Carolyn had made a report, Hume's testimony before the jury was that Carolyn had made such a report. He did not, however, know to whom Carolyn made the report and he did not recall anything regarding sexual abuse in the report. He testified that had he been made aware that the complaint included

[1] Mr. Ambrose died prior to Lynne's lawsuit.

allegations of sexual abuse, he would have investigated and reported it. Hume did not speak with Dr. Potts about the report until the lawsuit was filed.

Hume's investigation included speaking with Blackwell and Hubbard about Carolyn's complaint as reported to him, *i.e.*, that they were spending too much time with Lynne. They responded that Lynne's home situation was bad and that her mother was crazy. He got the impression that Lynne was at risk due to the home situation. He also questioned Lynne about how she was doing, but he did not ask her about any sexual abuse.

Hume testified that he just reported back to Ambrose. He did not contact Carolyn, and he did not tell anyone else about the situation. Hume did not make a written report regarding his investigation. Hume testified at trial that he believed the relationship between Lynne and Blackwell and Hubbard was appropriate. However, Lynne's counsel pointed out that this was inconsistent with his deposition testimony where he testified that the relationships were inappropriate. Hume learned that after he spoke with Blackwell and Hubbard, Hubbard filed the complaint with social services against Carolyn.

The Board called Gardner and Edwards. Both contradicted the allegations of sexual abuse. Edwards also testified that she had not been formally trained regarding dealing with sexual abuse.

The Board called Chief Operating Officer, Mary Browning, to testify as its designee regarding school board policies. She was not employed by the Board when the allegations at issue occurred, and she did not work with Dr. Potts.

While not disputed before the Court, Browning testified that Dr. Potts, as superintendent during the time in question, was the executive agent of the Board and had the duty to develop policies and regulations for the operation of the Fayette County School Systems for the Board's approval. She testified that Dr. Potts was the appropriate person to make a report of sexual abuse and that Carolyn went to the correct person to make her complaint. Browning testified that there should have been written documentation made of Carolyn's complaint.

Browning also testified that it was appropriate for Lynne to make reports to teachers and counselors regarding the abuse and that these individuals had a duty to report the abuse. There were no records of any of the complaints Lynne made to teachers and counselors. There also were no records of Hume's investigation.

Regarding the written records of the Board for the time at issue, Browning testified that they no longer exist. She stated the Board has a regularly scheduled document retention policy. Personnel records and student transcripts are not destroyed. However, correspondence, such as the letter Carolyn testified she received from Dr. Potts would have been destroyed, along with any records or complaints of sexual abuse. Browning testified that, nonetheless, if Carolyn had made a report to Dr. Potts as Carolyn testified she did, Dr. Potts should have reported it to social services. Nothing was introduced by the Board of such a report, and no one testified that they were interviewed or questioned by social services regarding Carolyn's complaint.

Browning testified that the Board did not get involved in investigations of sexual abuse and that the superintendent was responsible for doing these investigations. If the superintendent fails to bring complaints or conduct investigations of sexual abuse, the Board would not know of it. The superintendent is the educational leader of the Board and school system. She testified that all school personnel knew they had a duty to report any allegation of sexual abuse.

Browning was then questioned by Lynne's attorney about Administrative Directives developed by Dr. Potts in 1980, which included the procedures for reporting abuse. These were directives that all school personnel were expected to follow. Section 56 of the directives informs school personnel that suspected child abuse should be reported by telephone to the child abuse team with the social services cabinet. The oral report then should be followed by a written report, copies of which "shall be sent to the office of Direct Pupil Services, Department of Special Pupil Services, Fayette County Public Schools." Thereafter this directive provides that "[s]chool personnel are not responsible for contacting the police or any other agency than the one designated earlier in this directive."

Regarding the relevant statute in effect at the time, KRS 199.335, Browning answered affirmatively when asked by the Board's attorney that the statute only required contacting the police if there was immediate risk of harm to the child and that the directives were in accord with this requirement. On cross-examination by Lynne's attorney, however, Browning testified that if there was the

potential of one more act of sexual abuse against a student, this would constitute immediate harm, requiring a report to police.

Lynne did not file suit for the abuse until August 18, 2003, when she was forty-years old. She sought relief under 42 U.S.C. §1983 for violations of her substantive due process rights under the United States Constitution and for relief under Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681(a) for sexual discrimination.[2] After a jury trial, she was awarded $3,700,000, plus attorneys' fees.

The Board filed the instant appeal arguing that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. According to the Board, the trial court erred specifically on the following issues it raised in its motions: (1) Lynne's causes of action were barred by the relevant statute of limitations and were not tolled by obstruction or otherwise; (2) that Lynne's claims were barred by laches; (3) that the trial court erred in allowing Lynne to present "pattern evidence" without showing that the Board had notice of the "pattern" prior to her claimed injury; (4) that the evidence was insufficient to prove actual knowledge of alleged sexual abuse or deliberate indifference by the Board as required by Title IX; (5) that the evidence was insufficient to prove causation; (6) that jury instructions were erroneous; and (7) that Lynne's claims were barred by the Board's governmental immunity.[3]

[2] Lynne also brought state-law claims, but they were dismissed.

[3] In the Board's brief at pages 10 through 13, it lists the issues on appeal. On page 13, the final issue the Board lists is "[w]hether the damages were excessive, having been awarded under passion and prejudice in disregard of the evidence." Despite having listed this as an issue in the

Lynne timely filed a cross-appeal. She claims that the trial court erred in failing to award her post-judgment interest.

## STANDARD OF REVIEW

The Board contends the trial court erred in denying its motions for a directed verdict and for a judgment notwithstanding the verdict. "This presents one question, because the considerations governing a proper decision on a motion for a judgment notwithstanding the verdict are exactly the same as those first presented on a motion for a directed verdict at the close of all the evidence." *Cassinelli v. Begley*, 433 S.W.2d 651, 652 (Ky. App. 1968); Rule of Civil Procedure (CR) 50.02. Thus, it is our task to examine the evidence to determine whether there was sufficient evidence to raise issues of fact for submission of the case to the jury.

In considering whether the Board was entitled to a directed verdict, the Court must draw all fair and rational inferences from the evidence in favor of Lynne, and the evidence of her witnesses must be accepted as true, for the purposes of such a motion. *Id.*

> Upon completion of such an evidentiary review, the appellate court must determine whether the verdict rendered is "'palpably or flagrantly' against the evidence so as 'to indicate that it was reached as a result of passion or prejudice.'"

*Brooks v. Lexington-Fayette Urban County Hous. Auth.*, 132 S.W.3d 790, 798 (Ky.

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appeal, the Board presented no further argument, analysis, law or facts in support of the issue. Nonetheless, under the facts of the case, we cannot say that the damages awarded were excessive or that the trial court was clearly erroneous in denying the Board's motions on this issue.

2004) (quoting *Lewis v. Bledsoe Surface Mining*, 798 S.W.2d 459, 461-62 (Ky. 1990) (internal citations omitted in *Brooks*).

> Thus, our review is independent of the grounds relied on or stated by the trial court to deny the directed verdict motion. Rather, we must make our own review of the entire record to determine whether the trial court's ruling was clearly erroneous.

*Brooks,* 132 S.W.2d at 798 (citing *Roethke v. Sanger*, 68 S.W.2d 352, 365 (Ky. 2001).

## ANALYSIS

## THE BOARD'S DIRECT APPEAL

1. The trial court did not commit error by tolling the statute of limitations.

Lynne's case was tried before the jury with claims brought under 42 U.S.C. §1983 and Title IX of the Education Amendments Act of 1972, 20 U.S.C. §1681(a) for sex discrimination.

> Since Congress has never legislated a statute of limitations period for section 1983 actions, the courts, pursuant to the mandate of 42 U.S.C. § 1988, have had to look to analogous state statutes. Considerable confusion was generated which the Supreme Court sought to resolve in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Since statutes of limitations differ from state to state, it was not possible for the Supreme Court to achieve country-wide uniformity. The Court did attempt to achieve as much uniformity as possible, however, by decreeing that only one statute in each state shall apply and that, in looking for the one applicable state statute, section 1983 claims should be "characterized as personal injury actions." 471 U.S. at 280, 105 S.Ct. at 1949.

> Unfortunately, *Wilson* did not completely solve the problem since many states had more than one statute of limitations governing personal injury actions. As a result, the Supreme Court was forced to revisit this issue in *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). In *Owens*, the defendants argued that a section 1983 action against two police officers should be governed by New York's one-year statute of limitations which covered eight intentional torts. The Court rejected the defendants' arguments and concluded that New York's three-year residual statute of limitations for claims of personal injury was the appropriate analogy. The Court reasoned that many states have a multiplicity of intentional tort statutes of limitations, but that "every State has one general or residual statute of limitations governing personal injury actions." 109 S.Ct. at 580. The Court concluded by stating:
>
> We accordingly hold that where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions.

*Collard v. Kentucky Board of Nursing*, 896 F.2d 179, 180-181 (6th Cir. 1990).

The Board relies on KRS 413.249,[4] which has a five-year limitation period, as the applicable statute, while Lynne relies on KRS 413.140,[5] which has a one-year limitation period, as the applicable statute. Despite this difference, the

[4] Pursuant to KRS 413.249(2):
A civil action for recovery of damages for injury or illness suffered as a result of childhood sexual abuse or childhood sexual assault shall be brought before whichever of the following periods last expires:
(a) Within five (5) years of the commission of the act or the last of a series of acts by the same perpetrator;
(b) Within five (5) years of the date the victim knew, or should have known, of the act; or
(c) Within five (5) years after the victim attains the age of eighteen (18) years.

[5] Pursuant to KRS 143.140(1):
The following actions shall be commenced within one (1) year after the cause of action accrued:
(a) An action for an injury to the person of the plaintiff, or of her husband, his wife, child, ward, apprentice, or servant. . . .

Board does not dispute that KRS 413.140 may be the applicable statute, stating in its brief that

> Plaintiff has argued that the one year statute of limitations found in KRS 413.040(1)(a) applies. The Board makes its arguments using the longer limitation period so that there is no question but that the matter is time barred. Using the Plaintiff's position that KRS 413.140(1)(a) applies, then the claims were barred by limitation on January 28, 1982.

(Internal citation omitted).

We agree with Lynne that her federal causes of action seek relief for violations of her civil rights.[6] Being the master of her complaint, this was her decision. Thus, following *Collard*, and in light of a seemingly apparent concession by the Board that KRS 413.140(1)(a) applies, this is the statute we will apply.

Lynne did not bring her cause of action within one year after reaching the age of majority. Thus, unless a tolling provision applies, her action is barred. The Board claims that tolling does not apply to her case because she has known since she was in high school that her mother had complained to Dr. Potts and that after the deposition of Dr. Potts, Lynne made the same allegations against the Board as she before. The Board contends that based on the information she had about her mother's report, Lynne could have filed the "exact same" complaint

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[6] A student's right to be free from sexual abuse by a school official is subject to constitutional protection. *Doe v. Claiborne County*, 103 F.3d 495, 506-07 (6th Cir. 1996) ("[The Court held that a] schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee. The substantive component of the Due Process Clause protects students against abusive governmental power as exercised by a school.").

within one year of reaching the age of majority. Consequently, the Board argues that tolling does not apply.

Both sides have cited to authority arguing it supports their respective views on tolling in the instant case. Notably both sides cite *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286 (Ky. App. 1998), contending it supports their view on tolling. Certainly, the Board is correct that in *Secter* the Court declined to expand the discovery rule; thus, the discovery rule cannot be used in a sexual abuse cause of action to toll the statute of limitation. *Id*. at 289-90 (*citing Rigazio v. Archdiocese of Louisville*, 853 S.W.2d 295 (Ky. App. 1993)). However, putting aside the discovery rule, we determine that *Secter* otherwise supports Lynne's rationale for tolling in the case at hand.

In reviewing tolling in detail in a sexual abuse case, the Court in *Secter* decided that

> [i]n bringing a cause of action for personal injury such as in this case, the statute of limitations may be tolled where the defendant absconds, conceals himself, or "by any other indirect means obstructs the prosecution of the action[.]" KRS 413.190(2). "Obstruction might also occur where a defendant conceals a plaintiff's cause of action so that it could not be discovered by the exercise of ordinary diligence on the plaintiff's part." *Rigazio*, *supra* at 297. The Diocese clearly obstructed the prosecution of [the plaintiff's] cause of action against it by continually concealing the fact that it had knowledge of [the priest's] problem well before the time that [the plaintiff] was abused as well as the fact that it continued to receive reports of sexual abuse of other students during part of the time period in which [the plaintiff] was abused.

> Furthermore, "where the law imposes a duty of disclosure, a failure of disclosure may constitute concealment under KRS 413.190(2), or at least amount to misleading or obstructive conduct." *Munday v. Mayfair Diagnostic Lab*., Ky., 831 S.W.2d 912, 915 (1992). **KRS 199.335, the statute in effect when these incidents occurred, imposed a legal duty on any person to report child abuse to law enforcement authorities. The Diocese failed to comply with this duty, and such failure constitutes evidence of concealment under KRS 413.190(2).** In short, the trial court properly denied the Diocese's directed verdict motion on this issue.

*Id.* at 290 (emphasis added and footnotes omitted). Consequently, following the Court's holding in *Secter* that where there is a statutory duty to report sexual abuse and a failure to so do, this constitutes evidence of concealment under KRS 413.190(2).[7]

Pursuant to *Secter*, there was evidence of concealment to allow tolling of the statute of limitations. There is no dispute in this case that Dr. Potts had a duty to report Carolyn's suspicion of a sexual relationship between her minor daughter and two teachers. The Board's own witness, Mary Browning, testified to this unequivocally. Although Dr. Potts could not recall a report from Carolyn, under a directed verdict standard, "[a]ll evidence which favors the prevailing party must be taken as true and the reviewing court is not at liberty to determine credibility or the weight which should be given to the evidence, these being

[7] Pursuant to KRS 413.190(2), "[w]hen a cause of action mentioned in KRS 413.090 to 413.160 accrues against a resident of this state, and he by absconding or concealing himself or by any other indirect means obstructs the prosecution of the action, the time of the continuance of the absence from the state or obstruction shall not be computed as any part of the period within which the action shall be commenced. But this saving shall not prevent the limitation from operating in favor of any other person not so acting, whether he is a necessary party to the action or not."

functions reserved to the trier of fact. The prevailing party is entitled to all reasonable inferences which may be drawn from the evidence." *Brooks*, 132 S.W.3d at 798. Thus, Carolyn's testimony that she told Dr. Potts that she believed the relationship between Lynne and Blackwell and Hubbard was of a sexual nature must be accepted as true for the purposes of a motion for a directed verdict. Thus, under *Secter*, Dr. Potts' failure to report sexual abuse where he had a statutory duty to do so constitutes concealment, justifying tolling the statute of limitation.

Despite this, the Board notes that Lynne testified that she knew of her mother's complaint to Dr. Potts and therefore could have filed her cause of action within one year of reaching the age of majority. This argument goes beyond what *Secter* requires. Nonetheless, while Lynne may have known of her mother's report, nothing was presented that Lynne knew that Dr. Potts had not reported her mother's complaint to social services or that he had a mandatory duty to do so. Moreover, there was nothing presented that Lynne knew that Dr. Potts *probably* had received complaints over the years of sexual abuse or that she knew other students were being abused by the same teachers. It was not until her case proceeded that evidence came to light of a pattern of sexual abuse by employees of Beaumont and Lafayette, which was necessary for Lynne to state claims under 42 U.S.C. §1983.

Turning to the evidence necessary to state a claim under 42 U.S.C. §1983, Lynne needed to present evidence that she was deprived of a right protected under the United States Constitution while an official was acting under the color of

law. *See Monell v. Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). *Respondeat superior* is not an avenue of recovery under §1983. *Id.*, 436 U.S. at 691, 98 S.Ct. at 2036. Thus, Lynne had to present evidence that the Board itself was the wrongdoer. As the agent for the Board, it was sufficient for Lynne to show that Dr. Potts was the wrongdoer.

Lynne also had to present evidence "that an officially executed policy, or the toleration of a custom within the school district lead[] to, cause[d], or result[ed] in the deprivation of a constitutionally protected right." *Claiborne County*, 103 F.3d at 508. Lynne's case was based on a custom of inaction by Dr. Potts and hence, the Board. She claims the Board had a custom, via its agent, of failing to act to prevent the sexual abuse she suffered.

To state a claim of a custom of failure to act under 42 U.S.C. §1983, Lynne needed to establish:

> (1) the existence of a clear and persistent pattern of sexual abuse of school employees;
> (2) notice or constructive notice on the part of the School Board;
> (3) the School Board's tacit approval of the unconstitutional conduct, such that their deliberate indifference in their failure to act can be said to amount to an official policy of inaction; and
> (4) that the School Board's custom was the "moving force" or direct causal link in the constitutional deprivation.

*Id*.

Having stated the elements Lynne needed to establish to state a claim under §1983, we turn back to the limitation issue and the Board's argument that

Lynne knew everything within a year of her eighteenth birthday that she needed to know to file a complaint. Despite the Board's characterization of Dr. Potts' testimony and Lynne's counsel's tactics in eliciting it, Dr. Potts first agreed with Lynne's counsel that it was possible that he was certain he received reports of sexual abuse and that it was "probable" that he could have received a complaint of sexual abuse or inappropriate behavior between students and teacher once a month but to confirm that, he need to "review all of the files if there were." Later in his deposition, Dr. Potts testified that he thought "it's fair to say that over the years [he] was there there wasn't an inordinate amount of [incidents of sexual abuse or inappropriate behavior between students and teachers], if any . . . ." Dr. Potts worked for the Fayette County Board for twenty-three years. During his deposition, he testified that no teachers were fired or disciplined for sexual relationships with students and he never made a single report to law enforcement authorities of abuse.

Mary Browning testified that personnel records of school employees are kept. Yet, there was nothing in personnel files of the teachers involved in the investigation conducted by Hume. Lynne did not know this prior to suit. There was no testimony that Lynne knew prior to bringing the action of the result of Hume's investigation or that according to Hume's testimony, he was not made aware that Lynne's mother's complaint concerned sexual relationships between Lynne and Blackwell and Hubbard. The evidence at trial was that only Dr. Potts knew this. Moreover, there was no testimony that prior to the lawsuit that Lynne

knew Dr. Potts had a statutory duty to report her mother's report to social services or law enforcement officials.

Regarding the tolling issue, Lynne did not have the necessary information under her theory of a custom of inaction which allowed the sexual abuse against her to continue for years until she pursued this lawsuit. The Board has not pointed the Court to any knowledge on Lynne's part that Dr. Potts told Carolyn not to speak to the police or anyone else about the situation. Moreover, Lynne did not know of the directives for school personnel not to report any abuse to the police. The evidence Lynne accumulated during her lawsuit was necessary for Lynne to establish the existence of a clear and persistent pattern of sexual abuse of school employees, notice or constructive notice of such on the part of the School Board, and concealment on the part of the Board.

In her testimony at trial, Mary Browning, the Board's designee, testified that if there was the potential of one more act of sexual abuse against a student, this would constitute immediate harm. Thus, the statute required a report be made to law enforcement officials, which was contrary to Dr. Potts' directives to school personnel. Nothing was shown that Lynne knew of this prior to the lawsuit.

Other than Lynne's knowledge of her own sexual abuse and her mother's reporting of it, the Board does not point the Court to any evidence establishing that Lynne knew or had reason to know of a pattern of sexual abuse of other students, including the reports made to Dr. Potts which may have consisted

of monthly complaints of inappropriate contact between teachers and students; the failure to report any of these complaints; and the concealment of his failure to report her mother's complaint prior to filing her case. Thus, under *Secter* and Lynne's lack of notice of many of the facts necessary for a 42 U.S.C. § 1983 cause of action, Lynne's has presented sufficient evidence of concealment to justify tolling the statute of limitations in this matter.

2. The circuit court did not err in denying the Board's motions regarding the doctrine of laches.

We decide that the circuit court did not commit error by holding that Lynne's causes of action were not barred by the doctrine of laches. We note that over the years, this doctrine has been altered somewhat. Traditionally laches was apply only to cases of equity. It has, over the years, been used interchangeably with more frequency with the doctrine of estoppel and applied to legal causes of action.

"The Kentucky cases have long held that laches requires something more than a delay in that it requires a change in position by the defendant to such a point that [it] could not be restored to [its] former state and that it would be inequitable to enforce the action of the plaintiff." *Fightmaster v. Leffler*, 556 S.W.2d 180, 183 (Ky. App. 1977). There is not a fixed rule by which to measure when laches should be applied; rather, each case must be considered on its own. *Id.* (citation omitted). Fairness will bar application of laches where the result

would be unjust, and laches should not operate harshly. 27A Am.Jur.2d Equity § 148 (1996) (footnotes omitted).

The Board claims it was prejudiced by Lynne's delay in bringing her action, including that witnesses have died, memories have faded and documents were destroyed in accord with the Board's regularly scheduled document retention policy. Lynne, however, faced the same issues in proving her case before a jury. Moreover, although the testimony at trial was that the Board destroyed records in accord with it policy of record retention, this was a matter within the Board's own control. The Board has pointed to nothing in case law or statutes that mandated it destroy the records at issue. The Board was no more prejudiced than Lynne in this matter.

Further, given that Dr. Potts ignored his statutory obligation to report Carolyn's complaint to the proper authorities and the multiple members of the Fayette County School System who exploited Lynne and her situation thereafter, we cannot say that in balancing the equities, the circuit court erred in giving Lynne her day in court.

3. The trial court did not err when it denied the Board's motions relating to Lynne's cause of action under 42 U.S.C. §1983.

The Board claims that the trial court erred in denying its motions in regard to Lynne's §1983 claim. As the elements for a §1983 claim were outlined above, as each issue arises, we will reference the relevant law under §1983.

First, the Board claims "the jury was not instructed on what constitutes a 'custom' for §1983 liability." We review jury instructions under a *de novo* standard. *Hamilton v. CSX Transportation, Inc*., 208 S.W.3d 272, 275 (Ky.App. 2006).

In proving her case, Lynne had the same difficulty as the plaintiff in *Claiborne County*, where the Court stated, "[t]he analytical difficulty in this case stems from the type of 'custom' that the plaintiff claims directly caused [a school employee] to sexually abuse her. Doe does not claim that the School Board had a custom of affirmatively condoning sexual abuse. Clearly, no municipality could have such a policy. Rather, Doe claims that the custom was to fail to act to prevent the sexual abuse."

To meet the custom requirement, which is an essential element of Lynne's claims, the evidence must show that the need to act was so obvious that the Board's "conscious" decision not to act can be said to amount to a "policy" of deliberate indifference to Doe's constitutional rights. *Claiborne County*, 103 F.3d at 508. While the term "custom" was not defined explicitly, the jury was asked to determine whether the elements of a custom of inaction were present in this case. In Instruction No. 2, the jury in this case was asked:

> Do you believe from the evidence that:
>
> 1. During the time Carol Lynne Maner was a student in the Fayette County School System there was a clear and persistent pattern of sexual abuse or a substantial risk of sexual abuse by one or more of its employees;

> 2. The School Board had notice through Dr. Guy Potts of the sexual abuse;
>
> 3. The School Board was deliberately indifferent to known facts that demonstrated an unreasonable risk to the safety of its students; and
>
> 4. The School Board's deliberate indifference to such allegations was a moving force or was a direct causal link in allowing such deprivations/sexual abuse to occur. In such case the School Board's failure to act can be said to amount to an official policy of inaction. [sic]

Jury Instruction No. 2 mirrors perfectly the requirements set forth by *Clairborne County* to establish a claim for an official custom of inaction. Thus, we find no error in the trial court's exclusion of an explicit definition of custom.

Next, the Board argues there was no probative evidence to support a finding of a "custom of inaction." Under our standard of review for a directed verdict, the Court must draw all fair and rational inferences from the evidence and the record in favor of Lynne, and the evidence of her witnesses must be accepted as true, for the purposes of such a motion. Lynne's mother testified that she made a complaint of sexual relationships between Lynne and Blackwell and Hubbard and that Dr. Potts told her to keep it to herself, her husband and him. He told her she should not report it to the police or talk to anyone else about it. Dr. Potts' deposition testimony was inconsistent, at one point he stated that although he was uncertain, it was *probable* that he received at least one complaint per month of inappropriate contact between teachers and students. Later, he testified that in his twenty-three years as superintendent, there was only an inordinate amount, if any,

incidents of inappropriate relationships between teachers and students or sexual abuse. Under a directed verdict standard, Lynne is entitled to have Dr. Potts' testimony favorably construed in a manner that gives her "all fair and rational inferences."

It was clearly established by Mary Browning's testimony that Dr. Potts had a duty, on behalf of the Board, to report complaints of sexual abuse and investigate them. Yet, there was nothing presented in the personnel records presented at trial regarding any such investigations or complaints. Moreover, the Board presented no evidence that any such reports were ever made to the proper authorities, despite a statutory obligation to do so. The Board simply failed to present any evidence that it responded to any complaints as the law required. Moreover, Dr. Potts encouraged Lynne's parents not to report the incident to the police and the Administrative Directives he developed instructed school personnel not to report any abuse to the police. This evidence is sufficiently favorably to Lynne to defeat the Board's motions for a directed verdict and JNOV.

The Board also complains of the trial court's allowing collateral witnesses to testify, over its objections, regarding their own sexual abuse or that they knew of someone who had been sexually abused. We find no error on the part of the trial court regarding this sufficient to warrant a JNOV. This evidence went toward establishing "the existence of a clear and persistent pattern of sexual abuse of school employees," which is the first element required under *Claiborne* to establish a custom of inaction. Thus, we find no error.

Regarding whether Lynne presented sufficient evidence of deliberate indifference to present her case to jury, she was required to present evidence "that the need to act [was] so obvious that the School Board's 'conscious' decision not to act can be said to amount to a 'policy' of deliberate indifference to [her] constitutional rights." *Claiborne*, 103 F.3d at 508 (citations omitted). "'Deliberate indifference' in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to sexual abuse." *Id.*

A trial court "is precluded from entering either a directed verdict or judgment n.o.v. unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exists upon which reasonable men could differ." *Taylor v. Kennedy*, 700 S.W.2d 415, 416 (Ky. App. 1985) (citation omitted). Regarding the deliberate indifference element, given the foregoing evidence cited, viewed under the light of a directed verdict standard, including Dr. Potts' deposition testimony of complaints of inappropriate relationships between students and teachers; the lack of any evidence presented at trial of statutorily-required reports to appropriate authorities; the lack of any reference in personnel records presented at trial of any investigations into such allegations; Dr. Potts' directive to Lynne's parents and school personnel not to report any incidents of sexual abuse to the police; a pattern of sexual abuse occurring in the Fayette County School Systems during Lynne's tenure there, we decide that Lynne

presented sufficient evidence that the Board was deliberately indifference in its failure to act to present her claim to the jury.

Finally, the Board contends that Lynne failed to present sufficient evidence of causation. Lynne needed to present evidence that the Board or Dr. Potts was the "moving force" behind the deprivation of her constitutional rights. *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 609 (6th Cir. 2007) (citations omitted). "At bottom, this is a causation inquiry, requiring the plaintiff to show that it was the defendant's custom or policy that led to the complained of injury." *Id.* (citing *Garner v. Memphis Police Dept*., 8 F.3d 358, 363-64 (6th Cir.1993)). "Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim." *Id.* (citing *McKinley v. City of Mansfield*, 404 F.3d 418, 438 (6th Cir. 2005)). Thus, we look for both cause in fact and the proximate cause.

Cause in fact is typically assessed using the "but for" test. Thus, we ask "whether the harm would have occurred if the defendant had behaved other than it did." *Id.* (citing David W. Robertson, The Common Sense of Cause in Fact, 75 Tex. L.Rev. 1765, 1768-69 (1997)). "Conduct is the cause in fact of a particular result if the result would not have occurred but for the conduct. Similarly, if the result would have occurred without the conduct complained of, such conduct cannot be a cause in fact of that particular result." *Id.* (*Butler v. Dowd*, 979 F.2d 661, 669 (8th Cir.1992)).

Under the facts in *Powers*, the Court noted that while it could not conclude that the plaintiff's constitutional rights would not have been violated if the public defender had requested an indigency hearing prior to jailing him, it could not presume that had the public defender done so, that the court would have ignored this request. Likewise here, we cannot presume that had Dr. Potts complied with his statutory obligation to report to the proper authorities Lynne's mother's complaint of a sexual relationship between Lynne and two of her teachers, these authorities would have disregarded this report or their statutory duty to investigate it. Indeed, we must presume there is statutory intent behind the duty to report suspected sexual abuse to the appropriate authorities rather than just allowing an in-house investigation, like the one conducted by Hume, particularly given that Hume testified he was not told of the sexual nature of Lynne's mother's complaint. Thus, cause in fact is easily met in this case.

Regarding proximate cause, it "is not about causation at all but about the appropriate scope of responsibility." *Id.* (citing Dobbs on Torts § 181). "Proximate-cause analysis is a kind of line-drawing exercise in which we ask whether there are any policy or practical reasons that militate against holding a defendant liable even though that defendant is a but-for cause of the plaintiff's injury." *Id*. According to the United States Supreme Court §1983 " ' "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." ' " *Id*. (quoting *Malley v. Briggs*, 475 U.S. 335, 345, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (quoting *Monroe v. Pap*e, 365

U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled on other grounds by Monell*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611)). Thus, courts have viewed the proximate-cause question in a §1983 action as a matter of foreseeability, "asking whether it was reasonably foreseeable that the complained of harm would befall the §1983 plaintiff as a result of the defendant's conduct." *Id.*

We disagree with the Board's view of causation. The Board focuses on the in-house investigation conducted by Hume. Moreover, the Board argues that it was not foreseeable that additional school personnel would abuse Lynne. Beyond the additional abusers, the Board fails to acknowledge that after Lynne's mother complained to Dr. Potts, Lynne continued to be abused over and over again by the very individuals of whom Carolyn had complained: Blackwell and Hubbard. This abuse standing alone is sufficient on causation for Lynne to have presented her case to the jury.

Moreover, we cannot ignore Dr. Potts' duty to make a report to social services and the purposes behind it when looking at forseeability. Pursuant to KRS 199.335, which was the relevant statute at the time of the incidents under review:

> The purpose of this section . . . is to provide for the identifying of any abused or neglected child; to require reports of any suspected abused or neglected child; to assure that the protective services of the state will be made available to an abused or neglected child in order to protect such a child and his siblings; **to further prevent abuse or neglect [by any person];** to preserve and strengthen family life, where possible, by enhancing parental capacity for adequate child care; and to provide for immediate and prompt investigation of such reports.

(Emphasis added).

The General Assembly in passing KRS 199.335 clearly believed that it was necessary to make it a legal requirement to report suspected child abuse to **further prevent abuse by anyone**. Kentucky Revised Statute 199.335 required immediate reporting by school personnel so that the social services bureau can investigate the situation and where appropriate, so that law enforcement may get involved. This was a mandatory duty put in place by the General Assembly to, in part, prevent further abuse of a child. Given this we cannot say that when there is a failure to report abuse, it is not foreseeable that a child may suffer additional abuse. Consequently, considering this and the foregoing, Lynne presented sufficient evidence to present this issue to jury.

4. The trial court did not error in denying the Board's motions for a directed verdict and JNOV regarding Lynne's Title IX claims.

Section 901(a) of Title IX provides that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). This includes the duty not to discriminate on the basis of sex, which encompasses a teacher's sexual harassment or abuse of a student. *See Williams ex rel. Hart v. Paint Valley Local School Dist.,* 400 F.3d 360 (6th Cir. 2005) (citing *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 282, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) (citing *Franklin v. Gwinnett County Public Schools*, 503 U.S.

60, 74-75, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992))). Title IX is to be interpreted similarly to allow for parallel and concurrent §1983 claims. *Fitzgerald v. Barnstable School Committee*, ___ U.S. ___, 129 S.Ct. 788, 795-96 (2009). As noted in *Vance v. Spencer County Public School Dist*., 231 F.3d 253, 259-60 (6th Cir. 2000):

> The pivotal issue before us is what is required of federal assistance recipients under the "deliberate indifference standard." The recipient is liable for damages only where the recipient itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment. *See Davis* [*v. Monroe County Bd. of Educ*.], 526 U.S. [629,] 642, 119 S.Ct. 1661, 143 L.Ed.2d 839 [(1999)](discussing *Gebser v. Lago Vista School Dist*.[ 524 U.S. 274, 118 S.Ct. 1989 (1998)], stating liability arose from recipient's official decision not to remedy the violation). "[T]he deliberate indifference must, at a minimum, 'cause [students] to undergo harassment or make them liable or vulnerable' to it." *Davis*, 526 U.S. at 645, 119 S.Ct. 1661, 143 L.Ed.2d 839.
>
> In describing the proof necessary to satisfy the standard, the Supreme Court stated that a plaintiff may demonstrate defendant's deliberate indifference to discrimination "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Id*. at 648, 119 S.Ct. 1661 *Cf. Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (holding that a prison official may be liable under the Eighth Amendment based on deliberate indifference to the safety of prisoners if he knows of, and responds unreasonably to, "a substantial risk of serious harm"); *Gant v. Wallingford Bd. of Educ*., 195 F.3d 134 (2d Cir.1999) (stating that, under § 1981, a student-on-student racial discrimination claim does not require proof that "the defendant fully appreciated the harmful consequences of that discrimination, because deliberate indifference is not the

> same as action (or inaction) taken 'maliciously or sadistically for the very purpose of causing harm' ") (quoting *Farmer*, 511 U.S. at 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (internal quotation marks omitted)).

Consequently, the elements required to state a cause of action under Title IX parallel those in a §1983 action: deliberate indifference of a school district is shown where there is an official or other person with authority to take corrective action, who has actual knowledge of the abuse and fails adequately to respond. Having found that Lynne presented sufficient evidence to present her case to the jury under §1983, we conclude that she has likewise done so under her Title IX claim.

We will, however, pause to point out that we find no merit to the Board's argument that it did not have actual knowledge of the abuse based on "Mrs. Maner's vague complaint to Dr. Potts about Blackwell and Hubbard." It has already been established that notice to Dr. Potts can be imputed to the Board, and the Board does not dispute this point. Carolyn Maner's testimony was that she reported to Dr. Potts that she believed there was an inappropriate relationship between Lynne and two teachers, Blackwell and Hubbard, which was of a sexual nature. Under the standard of review for a directed verdict, we are to construe that evidence in a favorable fashion with all reasonable inferences to the non-movant. Thus, we determine that Lynne presented sufficient evidence to defeat the Board's motions for directed verdict and JNOV on Lynne's Title IX claim.

5. The Board is not immune from §1983 and Title IX claims.

As a preliminary matter, to the extent the Board is putting forth an argument, as stated in its brief, that Lynne's "federal law claims are . . . barred in state court," this lacks all merit. "Numerous courts have held that state courts exercise concurrent jurisdiction with federal district courts over cases arising under 42 U.S.C. §1983 and related civil rights statutes." *Scott v. Campbell County Bd. of Educ*., 618 S.W.2d 589, 590 (Ky. App. 1981) (string citation omitted); *see also Walters v. Moore*, 121 S.W.3d 210, 218, n. 32 (Ky. App. 2003) ("The law is well-settled that §1983 claims can be brought in state court.") (String citation omitted). Thus, the circuit court did not error in taking jurisdiction over Lynne's federal claims.

Turning to the Board's argument that it is entitled to immunity against Lynne's action, we must disagree. As a preliminary matter, we note that the Board interchangeably uses sovereign immunity and governmental immunity. As pointed out in the seminal case in Kentucky in describing immunities, *Yanero v. Davis*, 65 S.w.3d 510, 517 and 519 (Ky. 2001), these terms often need to be clarified and are often confused. In its answer and motion for JNOV, the Board cited it was entitled to governmental immunity, and this was the correct term to use. However, in its brief before this Court, it cites to both sovereign immunity and governmental immunity. As *Yanero* has been repeated often enough regarding the differences in the immunities, it is suffice here to note that governmental immunity applies to state agencies carrying out state functions. *Id.* at 527. "A local board of education

is not a 'government,' but an agency of state government. As such, it is entitled to governmental immunity, but not sovereign immunity." *Id.*

The concept of immunity to States against suit derives from the Eleventh Amendment to the United States Constitution. This amendment provides that

> [t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any foreign State.

There is much confusion in the area of the law dealing with the Eleventh Amendment, immunities in general, who are "persons" under §1983, and whether state law or federal law answers these question. Despite the confusion, we conclude that the answer is found in *Jefferson County Fiscal Court v. Peerce*, 132 S.W.3d 824 (Ky. 2004), *as modified*.

In *Peerce*, the Court determined its prior holding in *Clevinger v. Bd. of Educ. of Pike County*, 789 S.W.2d 5 (Ky. 1990), that boards of education enjoyed sovereign immunity[8] from §1983 liability was in error after the decision in *Howlett v. Rose*, 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990) was rendered. *Peerce*, 132 S.W.3d 835-837. After analyzing the *Howlett* decision in

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[8] *Clevinger* was decided before *Yanero* regarding whether school boards had sovereign or governmental immunity. Regardless of which is applied, the outcome of this matter remains the same. Accordingly, we may use quotes from cases that use the terms interchangeably, without impacting the outcome of this matter.

detail, the Kentucky Supreme Court held in *Peerce* that despite immunity being granted to school boards as state agencies under the law of the Commonwealth,

> *Howlett* states clearly that state treatment of sovereign immunity is not relevant to a determination of whether a party is immune from §1983 liability because only federal jurisprudence is controlling on the issue.
>
> Accordingly, it is clear that "'[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 . . . cannot be immunized by state law.'"

*Id.* at 836 (footnotes and citations omitted).

Consequently, in *Peerce* the Kentucky Supreme Court held that the county was not protected from liability under §1983 via the Eleventh Amendment. As noted earlier, to the extent that the Court's prior opinion in *Clevinger* held otherwise, the Court in *Peerce* no longer accepted that view.

The Board argues before us that despite the High Court's decision in *Peerce* rejecting the earlier holding in *Clevinger*, *Clevinger* should now be revived and recognized as controlling law rather than *Peerce.* According to the Board, *Peerce* is now questionable. We disagree.

The Board's argument relies on the cases *McMillian v. Monroe County, Ala*., 520 U.S. 781, 520 U.S. 781, 117 S.Ct. 1734 (1997) and *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240,144 L.Ed.2d 636 (1999), arguing that these two cases have made clear that what "constitutes the "State" for state court and state law purposes is determined by **state** rather than federal law."

We do not find *McMillian* applicable whatsoever to the case at hand. *McMillian* was a §1983 case, but the Court only relied on state law to determine

whether a county sheriff had final policymaking authority. The question of whether the Court should look to state law to determine whether the Eleventh Amendment provided immunity from suits for violations of the United Stated Constitution was not at issue. Thus, *McMillian* does not alter the *Peerce* decision.

Likewise, *Alden* has no applicability in the present matter. *Alden* was not a §1983 action, rather it was brought under Fair Labor Standards Act, 29 U.S.C. § 201 *et seq*. In *Alden*, the Supreme Court engaged in an in-depth analysis of immunity as it developed since the formation of our country. Upon its review, the Court set forth a number of principles in regard to Eleventh Amendment immunity. Relevant for our analysis is the following from *Alden*:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI.
>
> Sovereign immunity, moreover, does not bar all judicial review of state compliance with the Constitution and valid federal law. Rather, certain limits are implicit in the constitutional principle of state sovereign immunity.
>
> * * *
>
> We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to

> them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). By imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe* [*of Florida v. Florida*], 517 U.S. [44], 59, 116 S.Ct. 1114 [(1996)]. When Congress enacts appropriate legislation to enforce this Amendment, *see City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), federal interests are paramount, and Congress may assert an authority over the States which would be otherwise unauthorized by the Constitution. *Fitzpatrick, supra*, at 456, 96 S.Ct. 2666.

*Alden*, 527 U.S. at 754-756, 119 S.Ct. at 2226- 2267.

Thus, pursuant to *Alden*, states cannot disregard the Constitution or valid federal law under the guise of the Eleventh Amendment. Thus, contrary to the Board's assertion, *Alden* does not support its theory that *Peerce* is now questionable and that *Clevinger* should be revived regarding boards of education not being subject to §1983 actions. Thus, *Peerce* remains good law, and we are bound by it.

Under *Peerce's* holding, we must look to federal law to answer the question of immunity and civil rights arising under the federal constitution. Numerous federal district court cases have held that the issue of whether a local board of education is an arm of the state entitled to Eleventh Amendment immunity is to be decided by applying federal law. *See, e.g., Tolliver v. Harlan County Bd. of Educ.,* 887 F.Supp. 144 (E.D. Ky. 1995); *Blackburn v. Floyd County*

*Bd. of Educ.*, 749 F.Supp. 159 (E.D. Ky. 1990). In apply federal law, the federal courts have concluded time after time that local school board are not entities entitled to Eleventh Amendment immunity in §1983 cases.[9] *See, e.g., Adkins v. Bd. of Educ., of Magoffin County, Ky*., 982 F.2d 952 (6th Cir. 1993); *Ghassomians v. Ashland Indep. Sch. Dist*., 55 F.Supp.2d 675 (E.D. Ky. 1998); *Doe v. Knox County Bd. of Educ.*, 918 F.Supp. 181 (E.D. Ky 1996); *Tolliver*, 887 F.Supp. 144; *Blackburn*, 749 F.Supp. 159.

As the foregoing analysis illustrates, the Board's reliance on *McMillian* and *Alden* to replace the binding precedent of *Peerce* on this intermediate appellate Court is without merit. Thus, pursuant to *Peerce*, notwithstanding that the state law would grant immunity to local school boards,

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[9] In arriving at this decisions, federal courts relying on *Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 44-51, 115 S.Ct. 394, 115 S.Ct. 394 (1994) apply the following test to determine whether an entity is an arm of the state entitled to Eleventh Amendment immunity: (1) the state's potential for a judgment against the entity; (2) the language by which the state statutes and state courts reference to the entity, the degree of state control and its veto power over the entity's actions; (3) whether the state or local official appoint board members of the entity; and (4) whether the entity's functions fall within the traditional purview of state or local government. Federal courts within the Sixth Circuit reviewing this issue have concluded that the balance of these elements weigh against local school boards being state agencies entitled to Eleventh Amendment immunity. As to the first factor, courts have determined that local school boards retain the power to levy school taxes through the county fiscal court. *See Cunningham v. Grayson*, 541 F.2d 538, 543 (6th Cir. 1976); *Blackburn*, 749 F.Supp. at 162. Regarding the second factor, federal courts have determined that numerous statutes allow local school boards to manage and control school districts, the power to establish schools, manage funds, appoint the superintendent. *Cunningham*, 541 F.2d at 543; *Blackburn*, 749 F.Supp. at 162. Thus, it has been held that school boards retain a high degree of autonomy and independence of state control. As to the third factor, under KRS 160.160 and 160.210, school board members are elected, not appointed by the state. Finally, the last factor is somewhat mixed. Under the Kentucky Constitution §183, "[t]he General Assembly shall provide for an efficient system of common schools. . . ." Nonetheless, the decisions of a number of cases cited *supra* have held that the actual decision making of a school district takes place at the local school board level. *See, e.g., Tolliver*, 887 F.Supp. at 147. Thus, in weighing these factors, the federal courts have determined that the balance weighs in a finding that local school boards are not entitled to Eleventh Amendment immunity.

this is insufficient to expand that immunity in the context of a §1983 claim as federal jurisprudence is controlling on this issue. Thus, we find no error in the circuit court's denial of the Board's motions regarding immunity.

**LYNNE'S CROSS-APPEAL**

1. The trial court did not err in deciding that Lynne is not entitled to post-judgment interest.

Initially, the trial court awarded Lynne post-judgment interest at the rate of 12 percent annum on the $3,700,000 the jury awarded her and on the $238,766 attorneys' fee award. Thereafter, the court granted the Board's post-judgment motion, striking its earlier ruling on post-judgment interest. Lynne cross- appeals, arguing this was error.

Ordinarily, the issue of post-judgment interest would not be quite so convoluted. The rub in this case, however, is Lynne recovered only on federal claims that were brought in a state court. Both parties point to numerous cases and theories to support their respective views.

Post-judgment interest in federal claims brought in federal district courts are governed by 28 U.S.C. §1961. This includes claims under 42 U.S.C. §1983 and Title IX of the Education Amendments Act of 1972. Pursuant to 28 U.S.C. §1961(a), "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." Section 4 of that statute provides that "[t]his section shall not be construed to affect the interest on any judgment of any court not specified in this section." Thus, the federal statute allowing for post-judgment

interest in claims brought under federal law only apply to cases brought in federal court.

That 28 U.S.C. §1961 only applies to recoveries received in federal courts is illustrated by the legislative history of the act.

> Section 1961 was amended, as part of the Federal Courts Improvement Act of 1982, to standardize the calculation of interest rates applicable to civil judgments obtained in federal court. Instead of continuing the practice of calculating interest on civil judgment in accordance with varying state formulae, Congress intended, in amending section 1961, to "set[] a realistic and [uniform] rate of interest on judgments" which would be "applicable to *litigation in the Federal courts."* S. Rep., No. 97-275, at 30 91981), *reprinted in* 1982 U.S.C.C.A.N. p. 11, 40.

*Alkon v. United States*, 239 F.3d. 565, 570 (3rd Cir. 2001) (emphasis added in citing case).

Consequently, 28 U.S.C. §1961 specifically providing that it applies to federal district courts and the legislative history illustrating that it was amended to have a uniform method of calculation of post-judgment interest in "litigation in the Federal courts," we can discern no intent that it should be expanded to apply to post-judgment interest for recoveries received in state courts.

Lynne argues, however, that as a federal civil rights plaintiff in state court, her recovery is treated differently because she brought her action in state court. "'[T]he plaintiff is the master of her complaint.'" *See, e.g., Glancy v. Taubman Centers, Inc.*, 373 F.3d 656, 663 (6th Cir. 2004) (quoting *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831, 122 S.Ct. 1889, 153

L.Ed.2d 13 (2002)). Thus, having pleaded both state and federal claims, Lynne could have chosen to have her case heard in state or federal court. This type of choice may often include "pitfalls." *Id.* In Lynne's case it did. Having chosen to pursue her claims in state court, she is saddled with the consequences of her decision.

There are a multitude of areas in which state courts treat the law differently from federal courts and vice versa. Thus, having chosen a state court forum, Lynne cannot complain of the results.

Furthermore, there being no Kentucky case law on the matter and while post-judgment interest may have a substantive component in that it can increase a monetary award, we find persuasive the determination of federal courts that post-judgment interest "is better characterized as procedural because it confers no right in and of itself." *Nissho-Iwai Co, LTD, v. Occidental Crude Sales, Inc*., 848 F.2d 613, 623-24 (5th Cir. 1988). "Substantive law substantially affects 'primary private activity' while procedural substantially affects litigation conduct." *Id.* (citing *Hanna v. Plumer*, 380 U.S. 460, 474-75, 85 S.Ct. 1136, 1145-46, 14 L.Ed.2d 8 (1965)). Our determination that post-judgment interest is procedural in nature finds support in a prior case from our Court. As in the federal cases, in *Stone v. Kentucky Ins. Guaranty Assn*., 908 S.W.2d 675, 678 (Ky. App. 1995), we stated that while the purpose of KRS 360.040 was in part to compensate the plaintiff after judgment has been entered, its purpose was also to encourage settlement and to prevent delay tactics in the payment of the judgment. Post-

judgment interest works to impede frivolous appeals and end litigation as timely as possible. Thus, while it may have somewhat of a substantive nature, we conclude it is more properly characterized as a procedural mechanism.

For purposes of Lynne's substantive rights brought pursuant to federal law under 42 U.S.C. §1983 and Title IX, the Board is not immune from suit as earlier analyzed. But when looking to post-judgment interest, federal law does not apply. Thus, when we turn to state law regarding post-judgment interest, *Powell* instructs us that "a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified." 829 S.W.2d at 941. Lynne has not cited a statute, nor have we located one during our intense review of this issue, waiving immunity such that state agencies sued for federal causes of action are subject to payment of post-judgment interest.

The federal claims go to the substantive portion of Lynne's case, while post-judgment interest is procedural in nature. Thus, Lynne was permitted to have her day in court to litigate her federal claims, but she chose to bring it in state court. And, using Kentucky law regarding post-judgment interest, we can discern nothing in our state case law that would waive immunity for a state agency even for violation of federal civil rights. It is well settled in Kentucky that the Commonwealth and its agencies are immune from paying post-judgment interest. *See Kenton County Fiscal Court v. Elfers*, 981 S.W.2d 553, 560 (Ky. App.1998); *Powell v. Board of Educ. of Harrodsburg*, 829 S.W.2d 940, 941 (Ky. App.1991); *Commonwealth, Dept. of Transportation v. Lamb*, 549 S.W.2d 504, 507 (1976)

(citing *Bankers Bond Co. v. Buckingham, Commonwealth Treasurer*, 265 Ky. 712, 718, 97 S.W.2d 596 (1936)).

We find *Powell* instructive on allowing a recovery against a state agency but denying post-judgment interest.[10] In *Powell*, we held that

> [m]erely because a state agency has waived its sovereign immunity for purpose of suit, it does not necessarily follow that the agency has also waived its immunity from liability for payment of interest in such suit. The fact that KRS 160.160 makes a board of education a body politic and subject to suit, does not divest the board of immunity regarding interest, absent a statutory provision. Since a state can be sued only with its consent, a statute waiving immunity must be strictly construed and cannot be read to encompass the allowance of interest unless so specified. *See generally Brown v. State Highway Commission*, 206 Kan. 49, 476 P.2d 233, 234 (1970); Annot., 24 ALR 2d 928 (1952). Furthermore, we do not believe that the general interest on judgment statute (KRS 360.040) applies to state agencies without an explicit declaration by the legislature or contract provisions expressly so stating.

Based on the foregoing, we determine the trial court did not err in striking its prior order allowing post-judgment interest.

For the reasons as stated, we find no error on the part of the trial court. Accordingly, we affirm.

KNOPF, SENIOR JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT.

[10] We note that in *Powell*, we discussed Kentucky's waiving immunity, while in the present suit our analysis is that Eleventh Immunity does not exist for the Board under the facts of this case. Thus, there was not a waiver of immunity. We determine for the purposes of our review, this difference has no impact our conclusion. Reliance on *Powell* is proper.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE:

Larry C. Deener
Elizabeth A. Deener
Lexington, Kentucky

Stephen L. Barker
Bryan H. Beauman
Merrie K. Winfrey
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLANT/CROSS-
APPELLEE:

Larry Deener
Lexington, Kentucky

Stephen L. Barker
Lexington, Kentucky

BRIEFS FOR APPELLEES/CROSS-
APPELLANTS:

Charles W. Arnold
Lexington, Kentucky

Christopher D. Miller
William C. Rambicure
Lexington, Kentucky

ORAL ARGUMENT FOR
APPELLEES/CROSS-
APPELLANTS:

Christopher D. Miller
Lexington, Kentucky