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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0945**

Doe 598,
Appellant,

vs.

Special School Dist. No. 6, et al.,
Respondents.

**Filed March 27, 2023
Affirmed
Jesson, Judge**

Dakota County District Court
File No. 19HA-CV-20-3542

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Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and
Frisch, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Doe 598 sued respondent Special School District Number 6 (the school district) for the actions of Doe's fifth and sixth grade teacher, Aric Babbitt, and Babbitt's husband, Matthew Deyo. Doe alleged that Babbitt and Deyo sexually assaulted him when he was 16 years old and that the school district was negligent and vicariously liable for

Babbitt's conduct. The school district moved for summary judgment, which the district court granted. Because the school district is not subject to liability under the Minnesota State Tort Claims Act, given that Babbitt was acting outside the scope of his employment when he sexually assaulted Doe, and because Babbitt's actions were not foreseeable to the school district, we affirm.

FACTS

In August 2016, Doe told his parents that Babbitt and Deyo sexually assaulted him.¹ Doe was enrolled in high school outside the school district at the time, but had attended schools in the district from kindergarten until eighth grade. Babbitt was Doe's teacher in fifth and sixth grade. As his teacher, Babbitt gave Doe small privileges in the classroom, such as allowing Doe and some friends to skip recess to have a longer lunch and buying sandwiches for Doe and a friend. These actions violated school policies, but no one reported these violations at the time. And when the class went on an overnight field trip in sixth grade, Babbitt requested to be assigned to Doe's room as a chaperone. Babbitt provided the four students staying in his room with snacks—even though they were not allowed to have any—and he changed clothes in view of the students.

Doe and Babbitt lost contact between 2012 and the fall of 2014, until Babbitt contacted Doe's mother, a friend of his, to offer support during Doe's process of coming out as gay. A year and a half later, Doe began to volunteer in Babbitt's classroom, around

¹ Because this case comes to this court on appeal from a summary-judgment motion, these facts, which we view in the light most favorable to Doe, come from documents and deposition transcripts submitted in support of the summary-judgment motion. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

his 16th birthday. In this role, after signing in as a visitor, Doe cleaned and organized the classroom, helped students with assignments, and assisted in other small tasks. Doe volunteered six times in Babbitt's classroom. Babbitt would occasionally give Doe rides home after volunteering. Once when Doe was volunteering, Babbitt gave him a pair of "tiny yoga shorts" in a brown bag. Later that day, Babbitt dropped off a bag of other clothes including underwear and tight t-shirts at Doe's house. Babbitt asked Doe to send photos "modeling" the underwear, which Doe eventually did. Doe told no one about the clothes except for his parents. And Babbitt provided Doe with the login to a pornographic website while Doe was at school volunteering in Babbitt's classroom.² Doe told no one at the school district about this incident.

In May 2016, Babbitt invited Doe to stay overnight for a weekend at a hotel in Minneapolis to celebrate Babbitt's and Doe's birthdays. Babbitt and Deyo sexually assaulted Doe at the hotel. At the time, Doe told no one at the school district about the hotel stay or the sexual assault. In June 2016, Doe took a trip to Babbitt's family cabin with Babbitt, Deyo, and another former student of Babbitt's. Babbitt and Deyo again

² There is some dispute over whether Babbitt gave Doe the login to the pornographic website while they were on school property. At Doe's deposition, he stated that Babbitt gave him the login at school while he was volunteering in Babbitt's classroom. However, the school district's attorneys provided Doe with visitor logs from his time volunteering that indicated that the date he alleged Babbitt gave him the login was not a date he had signed in at the school to volunteer. Doe responded that he was confident that the date was correct. For our summary-judgment review, we "view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR*, 644 N.W.2d at 76-77 (citations omitted). As a result, at this stage, we assume Doe's testimony is true.

sexually assaulted Doe. At the time, Doe told no one about the sexual assault that occurred at the cabin.

Doe told his family about these sexual assaults in August 2016. Doe's family encouraged him to report the assaults to the police, which he did the next day.³ The police investigation into Doe's report indicates that Babbitt and Deyo had other victims as well.

Doe sued the school district, alleging that it was liable for Babbitt's sexual assaults and the resulting harm. Discovery included depositions, multiple sets of interrogatories, disclosure of the school district's policies, police reports, and an expert affidavit from a related case involving Babbitt. The school district moved for summary judgment on all five claims—vicarious liability, negligence, negligent hiring, negligent supervision, and negligent retention. The district court granted the school district's motion and entered judgment dismissing Doe's claims.

Doe appeals.

DECISION

The allegations of sexual assault committed by Babbitt and Deyo are deeply disturbing. But the school district is not one of Doe's assailants. It is Babbitt's former employer. Accordingly, the legal claims before us require examination of two avenues for holding an employer liable for the misconduct of an employee.

Vicarious liability is the name of the first avenue. This legal doctrine imposes liability on an employer because of its relationship with the employee who injures a

³ On August 26, 2016, the school district learned that Babbitt and Deyo had died by murder-suicide in Washington.

plaintiff, even where the employer is not at fault. *See* Minn. Stat. § 466.02 (2022). The general policy behind vicarious liability is that it is imposed when there is some connection between the tort and the business such that the employer, in essence, assumed the risk when it chose to engage in the business. *See Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783, 785 (Minn. 1973). To assess whether the employer is liable under this legal theory, we determine whether the employee's acts were foreseeable and connected with acts within the scope of employment. *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 913 (Minn. 1999).

But if the employer is the state, or one of its subdivisions, a plaintiff must overcome an initial hurdle in order to succeed in its vicarious-liability claim: whether the public employer is subject to liability under the Minnesota State Tort Claims Act. Minn. Stat. § 3.736, subd. 1 (2022).⁴ Making this determination calls for a district court to examine whether the tortious acts of an employee—here, the sexual assaults—were within the scope of employment, meaning that the employee “was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority.” Minn. Stat. § 3.732, subd. 1(3) (2022). If the acts were within the scope of employment, the employer is potentially subject to liability, and we turn to examine whether it may be

⁴ A municipality is not subject to any claim against it if the same claim would be excluded under Minnesota Statutes section 3.736 (2022) if brought against the state. *See* Minn. Stat. § 466.03 (2022) (enumerating exceptions to claims brought pursuant to section 466.02). And the definition of municipality includes a school district. Minn. Stat. § 466.01, subd. 1 (2022).

vicariously liable for the acts of its employee, which includes a foreseeability analysis. *Fahrendorff*, 597 N.W.2d at 913.⁵

In addition to vicarious liability, where it is available, a second avenue of liability is to hold an employer directly liable for its own torts. For example, employers may be liable for their negligence in hiring, retaining, and supervising employees. Negligent hiring holds an employer liable for placing a person with known propensities in an employment position in which it should have been foreseeable that the hired individual posed a threat of injury to others. *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. App. 1993), *rev. denied* (Minn. Apr. 20, 1993). Negligent retention imposes liability for an employee's intentional torts if the employer knew or should have known of the employee's propensities. *Oslin v. State*, 543 N.W.2d 408, 415 (Minn. App. 1996), *rev. denied* (Minn. Apr. 1, 1996). Negligent supervision holds an employer liable for foreseeable conduct of an employee that harms another individual when the employer fails to exercise ordinary care when supervising the employee. *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726 N.W.2d 127, 136 (Minn. App. 2007).

Here, Doe asserts a vicarious-liability claim and four direct-negligence-based claims against the school district. The district court granted the school district's motions for summary judgment on all claims, holding that there was no genuine dispute of any

⁵ The foreseeability analysis in this context differs from the foreseeability test for negligence. *Fahrendorff*, 597 N.W.2d at 912. It addresses whether "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." *Id.* (quotation omitted).

material fact that Babbitt acted outside the scope of his employment with the school district when he assaulted Doe. As a result, the district court concluded that the school district was not subject to liability under the Minnesota State Tort Claims Act. It also held that because Babbitt's actions were not foreseeable, they could not be the source of any negligence claims.

This court reviews a grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). Because the district court dismissed all five of Doe's claims on summary judgment, this standard of review applies to all of Doe's arguments on appeal.

To begin our review, we must determine whether the school district is subject to liability under the Minnesota State Tort Claims Act. To answer that question, we ask whether Babbitt was acting within the scope of his employment when he assaulted Doe. Because we conclude that Babbitt was not acting within the scope of his employment when he assaulted Doe, we need not address Doe's underlying vicarious-liability claim. Finally, we turn to Doe's negligence-based claims.

I. Because Babbitt was not acting within the scope of his employment when he sexually assaulted Doe, the district court properly concluded that the school district is not subject to Doe's vicarious-liability claim.

Doe argues that the district court erred when it found that the school district is not subject to his vicarious-liability claim, arguing that Babbitt was acting within the scope of his employment when he groomed and sexually assaulted Doe. Because liability under the Minnesota State Tort Claims Act is a threshold issue, we turn to that issue first.

As discussed above, the school district is not subject to Doe’s vicarious-liability claims if Babbitt’s assault of Doe did not occur within the scope of his employment. We recently analyzed this issue in *Sterry*. *Sterry v. Minn. Dep’t of Corr.*, ___ N.W.2d ___, 2023 WL 2505041, at *1 (Minn. App. Mar. 13, 2023). In *Sterry*, we explained that the definition of scope of employment in this context has three operative parts: (1) the employee was acting on behalf of the state, (2) in the performance of duties or tasks, (3) lawfully assigned by competent authority. *Id.* at *5; Minn. Stat. § 3.732, subd. 1(3). *Sterry* further instructs that “on behalf of” means that the employee was acting as a representative of their employer; “in the performance of duties or tasks” means that the act relates to the duties of the employee and occurs within work-related limits of time and place; and “lawfully assigned by competent authority” means that the duties and tasks were lawfully assigned, not that the tortious act itself was an assigned duty or task. *Sterry*, 2023 WL 2505041, at *6. Based on the definition of scope of employment in *Sterry*, and given our summary-judgment standard,⁶ we conclude there is no genuine issue of material fact surrounding liability under the Minnesota State Tort Claims Act because Babbitt was not acting within the scope of his employment with the school district when he assaulted Doe, as explained below.

First, Babbitt was not acting as a representative of his employer when he assaulted Doe. No one argues that Babbitt was acting as Doe’s teacher or volunteer supervisor at the

⁶ While the *Sterry* construct applies here, we observe that in *Sterry*, we applied the scope-of-employment test in the context of a motion to dismiss as opposed to the case here where the record is more fully developed and at the summary-judgment stage. *Sterry*, 2023 WL 2505041, at *2.

time the assaults occurred. Nor is there an allegation that the school district directed Babbitt to assault Doe. And neither party contests that Babbitt performed lawfully assigned tasks under the third prong.

For the second prong—whether Babbitt’s actions related to his duties and occurred within work-related limits of time and place—Doe argues that the school district should face liability for Babbitt’s actions because Babbitt used his role as a teacher to groom potential victims while acting within the scope of his usual duties and tasks.⁷ Doe points to several acts of grooming that Babbitt committed while Doe was his student: he gave Doe special privileges in the classroom, bought him food, and on one occasion, changed clothes in front of Doe while chaperoning an overnight field trip. Each of these actions violated school policies. After Doe was no longer Babbitt’s student, but was volunteering in his classroom, Babbitt gave Doe short shorts, tight t-shirts, and underwear, requested photos of Doe wearing those clothing items, gave Doe the login to a pornographic website, and ultimately sexually assaulted him.

But the grooming Doe points to, which occurred during Babbitt’s duties or tasks as a grade-school teacher, are far removed—both in time and scope—from the sexual assaults when Doe was in high school. And while Babbitt’s actions when Doe was a volunteer in his classroom are closer in time (although not place) to the assaults, Doe fails to identify any duties or tasks Babbitt was subject to regarding classroom volunteers. Neither the

⁷ Doe’s expert identified six stages of grooming: (1) targeting the victim, (2) gaining the victim’s trust, (3) filling a need, (4) isolating the victim, (5) sexualizing the relationship, and (6) maintaining control.

policy nor the job description in this record outline a responsibility in this regard. The only school-district policy in the record which focused on volunteer roles was a policy requiring Doe to sign in and identify himself as a volunteer. Which he did. And the sexual assaults took place off school property, outside of school hours, and involved Babbitt's husband, who was not an employee of the school district. Finally, Babbitt's conduct while Doe volunteered, while inappropriate, is not the tortious conduct for which Doe seeks to hold the school district liable. After review of the facts developed at the summary-judgment stage, interpreted in Doe's favor, we conclude that Babbitt's tortious conduct—the sexual assaults—were neither related to his duties as a teacher, nor did they occur within work-related limits of time and place.

Recent caselaw bolsters this conclusion. The acts between a student and football coach and weight room supervisor, which formed the alleged basis for a vicarious-liability claim in *Doe 175*, were closer in time and scope than here, yet we observed there that there was “no dispute that [the employee] engaged in sexual misconduct for his own personal reasons, not ‘on behalf of’ the school district ‘in the performance of duties or tasks lawfully assigned by competent authority.’” *Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352, 358 (Minn. App. 2016) (quoting Minn. Stat. § 3.732, subd. 1(3)). And although *Sterry* provides the operative law that controls liability under the Minnesota State Tort Claims Act, these facts are distinguishable from *Sterry*, where we held that the facts pleaded raised a question of fact about the employer's vicarious liability. 2023 WL 2505041, at *8. According to the complaint, Sterry was assaulted by a corrections officer who was directly supervising him while on duty. *Id.* at *1-2. She had

the authority to order Sterry into the supply room, where she assaulted him, and she had the authority to conduct bodily searches, which she arguably did. *Id.* at *2. And she used her authority to threaten Sterry with administrative discipline and criminal charges if he reported her conduct. *Id.*

The facts here stand in sharp contrast. Doe was sexually assaulted by his former teacher off campus, on the weekend, and over the summer. Babbitt had no supervisory position over Doe at the time. Given that Sterry has the potential to bring forth evidence to support his claim at the early stage of his lawsuit, while Doe has already had that chance, we conclude that Doe has not brought forth sufficient evidence to create any genuine issues of material fact over whether Babbitt was acting within the scope of his employment when he assaulted Doe.

In sum, the district court erred neither in its application of the law nor in its determination that there were no genuine issues of material fact when it granted summary judgment to the school district because, given the definition of scope of employment in *Sterry*, the school district is not liable under the Minnesota State Tort Claims Act.

II. The district court did not err in dismissing Doe's direct-negligence-based claims on summary judgment.

Four of Doe's claims, however, are not barred by the Minnesota State Tort Claims Act. These are negligence, negligent hiring, negligent supervision, and negligent retention. Doe includes no arguments in his brief about the negligence or negligent-hiring claims dismissed on summary judgment. We decline to reach these issues. *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that arguments not briefed are

waived in an appeal in which the appellant alluded to an issue but failed to address it in the argument portion of the brief). But Doe contends that his negligent-supervision and negligent-retention claims should not have been dismissed because Babbitt's actions were foreseeable due to the circumstances that the school district created.

First, negligent supervision imposes liability on an employer for harm caused by an employee acting *in the scope of the employment* when the employer was under a duty to prevent the employee from inflicting harm on a third person. *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 534 (Minn. 1992). Because we conclude that Babbitt's conduct occurred outside the scope of his employment, Doe cannot succeed on this negligent-supervision claim. *Id.*

But liability can be imposed for an employee's torts outside the scope of employment when the risk it seeks to address is the risk of an employer exposing others to a potentially dangerous individual. *Yunker*, 496 N.W.2d at 422-23. Doe's second negligence-based claim alleges that there were numerous "red flags" which should have placed the school district on notice of Babbitt's potential to hurt Doe, thereby making the school district liable for negligent retention. These include:

- Babbitt gave Doe the login to a pornographic website while on school property;
- Babbitt gave Doe short shorts while on school property and later asked him for photos modeling them;
- Babbitt gave Doe rides home from school when he was a volunteer; and
- Babbitt changed in front of Doe and other students on a school-sponsored field trip.

However, liability in a negligent-retention claim is based on the negligence of an employer in placing a person with *known propensities*, or propensities which should have been discovered by reasonable investigation, in an employment position in which it should have been foreseeable that the hired individual posed a threat of injury to others. *Ponticas v. K.M.S. Invs.*, 331 N.W.2d 907, 911 (Minn. 1983). And there is no contention that the school district knew of any of this red-flag conduct. After Babbitt was hired, the school district received no complaints about him. He was never subject to investigation. And Doe did not report any of Babbitt’s actions to the school district until he reported the sexual assaults to the police in 2016. Nor is the submission of one expert affidavit that generally states, “it is well-known in the field of youth education that the risk of adult sexual abuse of children is a very real and present danger” enough to overcome this lack of evidence to support the foreseeability of Babbitt’s actions.⁸

Still, Doe argues that it is up to the school district to monitor the legitimate actions of teachers that inherently overlap with grooming behaviors. That is not what negligent retention requires. Babbitt did not have known propensities, and reasonable investigation when he was hired—multiple background checks—did not suggest otherwise. *Ponticas*, 331 N.W.2d at 911. Because there is no genuine issue of material fact whether the school

⁸ This case is distinguishable from *Yunker* where the record contained evidence that the employer was aware of several episodes over the course of an employee’s time with the company that demonstrated a propensity for abuse and violence toward coworkers. *Yunker*, 496 N.W.2d at 424. Here, nothing in the record suggests that the school district was aware of Babbitt’s actions until Doe’s police report in August 2016.

district should have learned that Babbitt posed a threat of injury to children during his employment, the district court did not err in granting summary judgment on this claim.

In sum, because Babbitt was acting outside the scope of his employment when he sexually assaulted Doe, the school district is not subject to Doe's vicarious-liability claim. And because Babbitt's actions were not foreseeable to the school district, Doe's negligence claims cannot succeed. We affirm the district court's grant of summary judgment.

Affirmed.