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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1736**

Jane Doe,
Appellant,

vs.

Special School District No. 6, South St. Paul Public Schools,
Respondent,

ABC School District, et al.,
Defendants.

**Filed July 24, 2023
Reversed and remanded
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19HA-CV-20-2201

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Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and
Bryan, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Jane Doe brought a vicarious-liability claim and three direct-negligence
claims—negligent supervision, negligent retention, and negligence—against respondent

Special School District No. 6 based on alleged sexual abuse by her former teacher. The district court granted the school district's motion for summary judgment and dismissed Doe's claims. Because we conclude that genuine issues of material fact exist for each of the four claims, we reverse and remand.

FACTS

This appeal arises from Doe's vicarious-liability and negligence-based claims against her former school district for sexual abuse perpetrated by Doe's elementary school teacher, Aric Babbitt. Doe alleges that Babbitt groomed her throughout her time in the school district, from first grade until ninth grade. Doe also alleges that, during the 2015-16 school year, when she was in tenth grade and no longer a student in the school district, Babbitt sexually assaulted her and that he continued to sexually assault her on multiple occasions during the summer of 2016.

The following facts are either undisputed or based on the evidence viewed in the light most favorable to Doe.¹

Doe attended elementary school in the school district from first through sixth grade. Babbitt was Doe's reading teacher in first and second grade. Babbitt often touched students on their lower back and had a rule that his students should give him a hug at the end of class.

¹ When reviewing a district court's grant of summary judgment, appellate courts view the facts in the light most favorable to the party against whom summary judgment was granted. *Henson v. Uptown Drink, LLC*, 922 N.W.2d 185, 190 (Minn. 2019).

Doe continued to interact with Babbitt regularly during third and fourth grade. Babbitt did not teach classes during those years and instead had an office in the library. Doe's teachers would sometimes send Doe to Babbitt if she was acting out in class, and Babbitt talked to her with the door closed and gave her gifts. According to Doe, Babbitt sometimes brushed her back or "butt" and, once, Doe sat on Babbitt's lap and Babbitt touched her butt.

Babbitt was Doe's teacher during fifth and sixth grade. Doe often ate lunch in Babbitt's classroom rather than the cafeteria, and Babbitt bought her lunch about once a week. Babbitt often drove Doe home after school, which violated school policy. Babbitt also gave Doe gifts, including books, an iPod, and a camera. Once, after a 5K run at school, Babbitt gave Doe a hug and squeezed her butt while other teachers were nearby. In addition, once, when Babbitt put his hand on students' backs to guide them into his classroom, Doe overheard a teacher say, "That's weird," and another teacher respond, "That's just Aric. He's very nice."

Babbitt started Doe's fifth-grade year with a rule requiring students to hug him before leaving his classroom, but he stopped requiring hugs and allowed high-fives instead after students stated they were uncomfortable. A teacher near Babbitt's classroom when he was teaching fifth grade that year recalled that "many students would seek out a hug from Mr. Babbitt when entering or leaving the classroom" and "observed other students not hug Mr. Babbitt when entering or leaving the classroom." Similarly, a teacher who observed Babbitt when he was later teaching fourth grade in 2015-16 saw "that many of Mr. Babbitt's students, both male and female, approached him to seek out a hug." A staff

member—the secretary to the principal and assistant principal—stated that Babbitt was a “hugger.”

During Doe’s sixth-grade year, Babbitt continued his hug or high-five policy. Doe would often stay after school and spend time with Babbitt. Once, during the lunch hour, Babbitt showed Doe “gay porn” that Babbitt claimed he found on a school laptop under Doe’s account. As a chaperone during a three-day class trip to a learning center, Babbitt stayed in Doe’s room with four other students and changed clothes in front of them. Babbitt discussed sexual jokes, orgasms, and wet dreams with the students. That year, according to Doe, a vice principal spoke to her class about whether Babbitt had “healthy boundaries.”

In seventh grade, Doe began attending the district’s secondary school, in a nearby but separate building. Doe often skipped class and visited Babbitt’s classroom at the elementary school during school hours, as well as after school. In eighth grade, she continued visiting Babbitt “almost every day” and often visited Babbitt in his classroom. Doe sometimes entered the building through the main door but, at Babbitt’s urging, sometimes also entered through a side door and did not check in at the main office, which violated the school’s policy requiring visitors to check in at the main office. When Doe was questioned by the front-desk staff person and other teachers why she was at the elementary school, she would tell them that she was visiting Babbitt.

Because of her frequent absences from school, the school district required Doe to see a mental-health therapist on the secondary school campus² and she was assigned a truancy officer. Doe told one of her teachers at the secondary school and the therapist that she was skipping school to visit Babbitt.

Soon after the start of ninth grade, Doe left the school district to attend a different high school. Doe continued to skip class and visit Babbitt's classroom in the district's elementary school during school hours.

During the 2015-16 school year, when Doe was in tenth grade, the assistant principal and principal's secretary at the elementary school was told by another staff member that Doe's volunteering arrangement was "okayed" by the principal, which the secretary later confirmed with the principal. The secretary knew that Doe was coming to assist in Babbitt's classroom.

That year, Babbitt sexually assaulted Doe in his classroom. He locked the classroom door, got his husband on a videocall on his phone, and then pulled down Doe's pants and underpants and sexually assaulted her. On another occasion, Babbitt tried to again assault Doe in the classroom, but he was interrupted by another teacher.

In March 2016, Doe also began "hanging out" with Babbitt outside of school. Babbitt provided Doe with log-in information for a pornography site sometime in 2016, and they began exchanging sexually explicit messages. During summer 2016, Doe was

² The therapist worked for Headway Emotional Health Services, with which the school district contracted to provide therapy for its students. The therapist was not an employee of the school district.

sexually assaulted multiple times by Babbitt and his husband during two trips to Babbitt's family cabin. Before summer 2016, Doe did not spend time with Babbitt "in private unless [they] were in his classroom."

In August 2016, another of Babbitt's former students reported to the police that Babbitt had sexually assaulted him. The police informed the school district, which placed Babbitt on administrative leave and began an internal investigation. About a week later, the school district learned that Babbitt had died in a murder-suicide with his husband. Before the August 2016 report, the school district had received no complaints about Babbitt, who had passed his background check and had not been subject to discipline or investigation.

Doe brought this civil action in June 2020. Following discovery, the school district moved for summary judgment. At the time of the summary judgment motion, Doe voluntarily dismissed her claims for negligent hiring, negligent failure to make a mandated report, and negligent infliction of emotional distress. The district court granted the school district's motion and dismissed Doe's claims four remaining claims: vicarious liability for Babbitt's conduct, negligent supervision, negligent retention, and negligence.

Doe appeals.

DECISION

"[Appellate courts] review the 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) (quotation omitted); *see also* Minn. R. Civ. P. 56.01. In doing so, we must not "weigh

facts or determine the credibility of affidavits and other evidence.” *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). Summary judgment is a “blunt instrument that is inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Montemayor*, 898 N.W.2d at 628 (quotations omitted). Thus, the moving party must show an absence of factual issues, and we view the evidence in the light most favorable to the nonmoving party. *Id.*

The district court granted summary judgment in favor of the school district on all four of Doe’s claims. We first address Doe’s vicarious-liability claim, then her negligent-retention and negligent-supervision claims, and finally her general negligence claim.

I. Genuine issues of material fact preclude summary judgment on Doe’s vicarious-liability claim.

Vicarious liability imposes liability on an employer for the tortious conduct of its employees, even if the employer is not at fault, when the employee was acting within the course and scope of employment. *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999). Vicarious liability is based on “a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business.” *Id.* An employer’s liability under this doctrine requires that the employee’s conduct be foreseeable. *Id.* at 912. Foreseeability with respect to vicarious liability means that “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.*³

For public employers, claims of vicarious liability are governed by the Minnesota State Tort Claims Act.⁴ That act provides that such claims are precluded unless the employee’s tortious conduct occurred “within the scope of office or employment.” Minn. Stat. § 3.736, subd. 1. A vicarious-liability claim against a public employer thus requires (1) that the employee was acting within the scope of office or employment as provided by the State Tort Claims Act and (2) that the conduct was foreseeable within the enterprise. *Sterry v. Dep’t of Corrections*, 986 N.W.2d 715, 719, 724 n.5 (Minn. App. 2023), *rev. granted* (Minn. June 20, 2023).

The district court determined that there were no disputed material facts about the school district’s vicarious liability for Babbitt’s conduct because Babbitt’s sexual assaults occurred outside the scope of employment and were not foreseeable. We disagree and conclude that, when the evidence is viewed in the light most favorable to Doe, issues of

³ Foreseeability for the purpose of an employer’s vicarious liability is different from foreseeability for determining negligence. *Fahrendorff*, 597 N.W.2d at 912. Foreseeability as a test for negligence addresses whether the employer should have reasonably anticipated the employee’s misconduct and taken precautions. *Id.*

⁴ Appellant’s claims are subject to the Minnesota Municipal Tort Claims Act. *See* Minn. Stat. § 466.01-15 (2022); *see also* Minn. Stat. § 466.01, subd. 1 (defining “municipality” to include a school district). But tort claims against municipalities under that act are precluded if the same claim would be excluded by Minnesota Statutes section 3.736 (2022) if brought against the state. Minn. Stat. § 466.03, subd. 15. For that reason, the State Tort Claims Act applies.

disputed material fact exist on both issues. We first address scope of employment and then foreseeability.

A. Scope of Employment

As used in the Minnesota State Tort Claims Act, “scope of employment” means “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). This definition 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. *Sterry*, 986 N.W.2d at 722. For the first part, “on behalf of” means that the employee was acting as “a representative or agent of their employer.” *Id.* For the second part, an employee’s act was “in the performance of duties or tasks” if the act was “related to the duties of the employee” and occurred “within work-related limits of time and place.” *Id.* (quoting *Fahrendorff*, 597 N.W.2d at 910). For the third part, “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. *Id.* at 722-23. Ultimately, this statutory definition of scope of employment is “consistent with the common law on the scope of employment for vicarious liability.” *Id.* at 723.

We recently applied this scope-of-employment definition in *Sterry*, which involved an alleged assault of an inmate by a corrections officer. *Id.*⁵ There, the district court granted the department of corrections’ motion to dismiss and we reversed, concluding that the

⁵ We note that the district court here did not have the benefit of the *Sterry* decision at the time of its decision.

complaint alleged facts relevant to all three parts of the statutory definition of scope of employment: (1) the corrections officer was supervising the inmate; (2) she was on duty, performing assigned duties and tasks; and (3) she was authorized to order the inmate into the room where she assaulted him, had authority to conduct bodily searches, and threatened the inmate with administrative discipline and criminal charges if he reported her. *Id.* at 724-25.

Here, the evidence, when viewed in the light most favorable to Doe, establishes the following. Babbitt was an elementary school teacher and, when the first sexual assault occurred, Doe was a high school student who was regularly returning to Babbitt's classroom to volunteer. That volunteering arrangement was "okayed" by the elementary school's principal. The first sexual assault occurred in Babbitt's classroom, near the end of the school day, either while or just after Doe volunteered in Babbitt's classroom. We conclude that a reasonable jury could find that, when Babbitt sexually assaulted Doe, Babbitt was acting "on behalf of" the school district as a volunteer supervisor and his supervision of Doe was "lawfully assigned by" the school district.⁶ Thus, issues of material fact exist as to the first and third parts of the scope-of-employment test.

⁶ The school district asserts that Babbitt was never assigned to supervise volunteers, observing that Doe was not participating in a formal student-volunteer program that was offered at the elementary school. We are not persuaded that Babbitt indisputably was not performing lawfully assigned volunteer-supervisor duties as a teacher because Doe was not part of a formal student-volunteer program. Rather, because there is evidence that the elementary school principal approved the arrangement, whether the principal authorized Doe to volunteer in Babbitt's classroom is a question of fact that is inappropriate for resolution on summary judgment.

We also conclude that a reasonable jury could find that Babbitt's tortious conduct was "in the performance of" his lawfully assigned duties—the second part of the test. Because the first assault took place in the classroom near the end of the school day, it occurred within "work-related limits of time and place." And, we conclude, there is evidence that Babbitt's conduct "related to" his duties. We are guided by the supreme court's analysis in *Fahrendorff*.

In *Fahrendorff*, a minor resident of a group home sued the group-home operator for sexual assaults by a program counselor at the home. 597 N.W.2d at 907. The district court granted summary judgment against the plaintiff on her vicarious-liability claim, and the supreme court reversed. *Id.* at 909, 913. The supreme court reasoned that the sexual assault related to the program counselor's duties as the assault "would not have occurred but for [the program counselor's] employment," which "enabled him to be alone with [victim], to have unfettered access to her bedroom, and to conceal, at least for a short time, his criminal conduct." *Id.* at 911. The supreme court further explained that the program counselor "initiated his advances" toward the plaintiff by talking about why she was in the group home and that he could help her get out of the group home, and thus "the source of [the program counselor's] attack lay in activity that was directly related to his legitimate counselor duties." *Id.* As a result, the supreme court concluded that "there is evidence that [the program counselor's] assault, although wrong and illegal, was connected with or related to seemingly legitimate employment activities." *Id.*

As in *Fahrendorff*, here, there are disputed material facts about whether Babbitt's sexual abuse would not have occurred "but for" his employment and whether "the source

of [the] attack” was directly related to legitimate duties. *See id.* Babbitt’s position as a teacher enabled him to be alone with Doe in his classroom and to conceal his inappropriate behavior toward Doe; Doe indicated that, at the time she was sexually assaulted in Babbitt’s classroom, they were “never in private unless [they] were in his classroom.” And the source of Babbitt’s sexual assault in his classroom was related to his legitimate duties as a teacher. It is true, as the school district asserts, that Babbitt’s behavior toward Doe before that sexual assault—which included touching and gift-giving while he was her teacher in elementary school and continued contact while she volunteered in his classroom during secondary school—may not have been independent tortious conduct. But the supreme court’s analysis in *Fahrendorff* suggests that nontortious conduct preceding sexual assaults is relevant to whether the tortious conduct relates to employment duties. Here, there is evidence that Babbitt initiated his advances towards Doe using activity that directly related to his legitimate duties as her teacher.⁷

In sum, we conclude that there are genuine issues of material fact about whether Babbitt acted within the scope of employment.⁸

⁷ Doe contends that Babbitt’s “grooming” during elementary and secondary school is tortious conduct and qualifies as sexual abuse. Doe has not identified caselaw or other legal authority that Babbitt’s grooming behavior qualifies as independent tortious conduct for which the school district may be liable. Thus, our consideration of Babbitt’s behavior when he was Doe’s teacher is limited to determining if it supports the existence of a genuine factual dispute on the scope-of-employment issue.

⁸ We recently affirmed summary judgment for the school district in another case, brought by a different former student of Babbitt’s, asserting a vicarious-liability claim based on sexual abuse by Babbitt. *Doe 598 v. Special Sch. Dist. No. 6*, A22-0945, 2023 WL 2637351 (Minn. App. Mar. 27, 2023). The record in that case differs from the record here. In *Doe 598*, unlike here, it was undisputed that the alleged sexual assaults occurred outside school

B. Foreseeability

Because we conclude that a reasonable person could decide that Babbitt was acting within the scope of employment under the Minnesota State Tort Claims Act, we turn to whether there is evidence in the record that could establish the foreseeability required for the school district to be vicariously liable. As noted above, an employer's vicarious liability is based on public policy rather than on the fault of the employer. *Fahrendorff*, 597 N.W.2d at 910. As a result, rather than evaluate whether "the employer should have reasonably anticipated the employee's specific misconduct," courts must evaluate whether, "as a matter of fairness, an employer engaged in that business should bear the loss associated with such abuse as a foreseeable cost of doing business." *Id.* at 912. The supreme court has recognized that an expert affidavit opining that sexual abuse is a well-known hazard in the field creates a question of material fact to withstand summary judgment. *Id.* at 911-12.

The record here contains an expert affidavit submitted by Doe, which opines that the risk of adult sexual abuse of children is well-known in the field of youth education. The school district contends that we should not consider that expert affidavit because that

hours and off school property. *Id.* at *2. Specifically, Doe 598 submitted evidence that Babbitt sexually abused him at a hotel over a weekend and at Babbitt's family cabin over the summer. Because the sexual assaults occurred outside school hours and off school property, we concluded that there were no disputed material facts about whether Babbitt acted within the scope of employment when he engaged in the tortious conduct. *Id.* at *4. We recognized that Doe 598 volunteered in Babbitt's classroom in the time leading up to the sexual abuse, but we concluded that, because Babbitt was not acting as a teacher or a volunteer supervisor at the time of the sexual assaults, the evidence remained insufficient to create a genuine issue of fact as to whether Babbitt was acting within the scope of his employment. *See id.* Here, in contrast, Doe submitted evidence that Babbitt's sexual abuse took place in the classroom, near the end of the school day, when Doe was volunteering in Babbitt's classroom.

affidavit did not comply with expert disclosure requirements under the Minnesota Civil Rules of Procedure.⁹ But we need not consider the admissibility of Doe's expert affidavit at this stage of the litigation because the school district's own expert affidavit states, "The School District understands that the risk of adult sexual abuse of children is a very real and present danger." As a result, when viewed in the light most favorable to Doe, there is a factual question about whether Babbitt's sexual abuse is foreseeable for Doe's vicarious-liability claim.

In sum, the record raises a question of fact about whether Babbitt's tortious conduct was within the scope of employment and foreseeable within a school setting. As a result, we reverse the district court's grant of summary judgment on Doe's vicarious-liability claim.

II. Genuine issues of material fact preclude summary judgment on Doe's negligent-supervision and negligent-retention claims.

Negligent supervision and negligent retention are two direct-negligence claims by which an employer may be held liable for injuries caused by its employee. "To make out a successful claim for negligent supervision, the plaintiff must prove (1) the employee's conduct was foreseeable; and (2) the employer failed to exercise ordinary care when supervising the employee."¹⁰ *C.B. ex rel. L.B. v. Evangelical Lutheran Church in Am.*, 726

⁹ The school district raised this objection in the district court, but the district court did not rule on it.

¹⁰ For a negligent-supervision claim to be successful, a plaintiff must also establish that the employee acted within the scope of employment. *See Yunker v. Honeywell, Inc.*, 496 N.W.2d 419, 422 (Minn. App. 1993), *rev. denied* (Minn. Apr. 20, 1993). As discussed

N.W.2d 127, 136 (Minn. App. 2007) (quotation omitted). Similarly, a claim for negligent retention requires that (1) “the employer was on notice that an employee posed a threat,” meaning “the employer [became] aware or should have become aware of problems with an employee that indicated [their] unfitness”; and (2) the employer “failed to take steps to insure the safety of third parties,” such as discipline, discharge, or reassignment. *Yunker*, 496 N.W.2d at 423-24 (quotation omitted). Thus, for both negligent-supervision and negligent-retention claims, the plaintiff must show that the employer owed them a duty based on the foreseeability of the employee’s misconduct and that the employer breached that duty by failing to act with reasonable care. *C.B.*, 726 N.W.2d at 136; *Yunker*, 496 N.W.2d at 422, 424.

The district court concluded that there were no genuine factual disputes about whether Babbitt’s sexual abuse of Doe was foreseeable and whether the school district should have known about Babbitt’s inappropriate behavior. The district court also concluded that there were no genuine factual disputes about whether the school district failed to exercise ordinary care when supervising Babbitt. We disagree and conclude that, when the evidence is viewed in the light most favorable to Doe, disputes of material fact exist on both issues. We first address foreseeability and then whether the school district acted with ordinary care when supervising Babbitt.

above, there are disputed material facts about whether Babbitt acted within the scope of employment when engaging in the tortious conduct.

A. Foreseeability

To determine whether a danger is foreseeable for purposes of a negligence claim, courts “look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.” *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 205 (Minn. 2018) (quotation omitted). Although foreseeability is generally a threshold issue for decision by the court, “in close cases, the question of foreseeability is for the jury.” *Montemayor*, 898 N.W.2d at 629. In addressing foreseeability in cases involving sexual abuse, this court has evaluated whether the plaintiff has identified evidence of “red flags” observed by other employees. *See, e.g., Doe 175 ex rel. Doe 175 v. Columbia Heights Sch. Dist.*, 873 N.W.2d 352, 359 (Minn. App. 2016); *C.B.*, 726 N.W.2d at 136.

For example, in *Doe 175*, we evaluated whether the sexual abuse of a student by an employee who coached the football team and supervised the weight room was foreseeable and whether the school district had reason to know about an inappropriate relationship. 873 N.W.2d at 354-55, 360. The student was a ninth-grader who had come to know the employee through her friends on the football team. *Id.* at 354-55. We ultimately concluded that the limited incidents observed by other school district employees—the plaintiff yelling, “I love you,” at the coach during a football practice; the plaintiff and the coach talking in the school parking lot while others were present; the plaintiff using a computer in the weight room; and the coach being alone with an unidentified young girl in the weight

room on a Saturday—did not give notice to the school district that an inappropriate relationship existed between the plaintiff and the coach. *Id.* at 360-61.¹¹

This case is unlike *Doe 175*. Here, the record contains evidence of extensive contact between Doe and Babbitt at the elementary school, during school hours, from the time she was in first grade until the sexual assault in tenth grade.¹² When Doe was truant from her secondary school in the district, Doe visited the elementary school and, when questioned by the front-desk staff person and other teachers, told them that she was visiting Babbitt. In fact, in eighth grade, because of Doe’s many absences, the school district assigned her a mental-health therapist and a truancy officer. During the 2015-16 school year—the year

¹¹ In *Doe 175*, we noted that “[s]exual abuse will rarely be deemed foreseeable in the absence of prior similar incidents.” 873 N.W.2d at 360 (quotation omitted). The school district contends that this statement means that there is a presumption against the foreseeability of sexual abuse that Doe must overcome. We disagree. Not only did we not use the term “presumption” in *Doe 175*, but, in analyzing foreseeability, we followed the same analysis we follow here: whether the evidence of “red flags” asserted by the plaintiff created a genuine issue of material fact as to whether sexual abuse was foreseeable. *See id.* We concluded that the incidents cited by the plaintiff in *Doe 175* were not “sufficiently similar to or indicative of sexual abuse as to give the school district notice that an inappropriate relationship existed.” *Id.*

¹² Doe identifies many instances of alleged “grooming” behavior during that time, including that Babbitt had a rule that students should hug him when leaving at the end of the day, that Babbitt touched her back and butt on multiple occasions, that Babbitt gave her gifts and bought her lunch regularly, that Babbitt drove her home alone and allowed her to use a side door to access his classroom in violation of school policy, and that Babbitt changed clothes in front of Doe and other students during an overnight class field trip. But the record does not contain evidence that other employees at the school district were aware of Babbitt’s behavior towards Doe or his policy violations before the sexual assault that occurred in the classroom. As a result, even though this evidence may be relevant to whether the school district properly supervised Babbitt, we decline to consider that conduct when evaluating the school district’s duty to Doe based on its continued employment of Babbitt. Rather, our inquiry focuses on behavior known to other school district employees, consistent with our recent analysis in *Doe 598*.

that Doe was sexually assaulted in Babbitt's classroom—the elementary school secretary noticed Doe's visits to the elementary school and knew that Doe was coming to volunteer in Babbitt's classroom. The secretary spoke with another employee, who told her that the principal "okayed" Doe being at the elementary school, even though she was no longer a student. The secretary explained that Doe's visits "raise[d] a question" about Doe's presence at the elementary school. When the secretary spoke with the principal directly, the principal confirmed that Doe was there to help students.

In addition, a reasonable jury could find that the school district knew or should have known that Babbitt engaged in inappropriate physical contact with his students. Doe testified that Babbitt was a "huggy" and "touchy" teacher throughout her time in elementary school. When Babbitt taught fifth grade, a teacher near Babbitt's classroom "recall[ed] that many students would seek out a hug from Mr. Babbitt when entering or leaving the classroom" but also "observed other students not hug Mr. Babbitt when entering or leaving the classroom." When Babbitt taught fourth grade, another teacher "observed that many of Mr. Babbitt's students, both male and female, approached him to seek out a hug." The secretary at the elementary school likewise described Babbitt as a "hugger" and often saw Babbitt hugging students. Once while Babbitt touched students' backs to guide them into his classroom, Doe overheard a teacher comment, "That's weird,"¹³ and another teacher respond, "That's just Aric. He's very nice." And Doe stated

¹³ This teacher provided an affidavit stating that she did not recall this conversation but did "not think [she] would have stated it was 'weird' for Mr. Babbitt to guide students into his classroom." Whether this conversation occurred raises a credibility issue that is inappropriate for resolution on summary judgment. *See Stringer*, 705 N.W.2d at 754.

that, in sixth grade, the vice principal spoke to her class about whether Babbitt had “healthy boundaries.”

The above facts do not conclusively establish that the school district should have known about Babbitt’s inappropriate relationship with Doe nor do they make Babbitt’s sexual abuse foreseeable as a matter of law. And we acknowledge that, according to undisputed evidence in the record, Babbitt was never the subject of investigations or discipline during his employment and the school district was unaware that Babbitt sexually abused children until August 2016. Nonetheless, when the evidence is viewed in the light most favorable to Doe, a reasonable jury could conclude that the school district should have known about the inappropriate relationship between Doe and Babbitt and that the sexual abuse was foreseeable. The record contains evidence that the school district should have known that Doe spent time alone in Babbitt’s classroom during the school day, that much of Doe’s time with Babbitt occurred while Doe was truant from school, and that Babbitt had propensities for engaging in physical contact with students. On this record, foreseeability is a close call that should be made by the jury. *See Montemayor*, 898 N.W.2d at 633.

B. Breach of Duty

Generally, whether an employer breached its duty is a factual question for the jury. *See Yunker*, 496 N.W.2d at 424. And, given our conclusion that a reasonable jury could conclude that Babbitt’s behavior should have been known to the school district, we conclude that there are genuine issues of material fact as to the school district’s supervision of Babbitt. Babbitt brought Doe into his classroom as a volunteer, outside the formal

volunteering program established by the school. There is evidence that this arrangement was allowed by the principal, and Babbitt spent significant time alone with Doe in his classroom. Babbitt first sexually assaulted Doe in his classroom and was prevented from assaulting her on another occasion when someone entered the classroom. Given these facts, and the facts regarding the school district's knowledge of other behavior by Babbitt, a jury could find that the school district failed to exercise reasonable care when supervising Babbitt.

In sum, the record raises questions of fact regarding the existence of a duty and regarding breach. As a result, we reverse the district court's grant of summary judgment on Doe's negligent-supervision and negligent-retention claims.

III. Genuine issues of material fact preclude summary judgment on Doe's negligence claim.

Finally, separate from her negligence claims predicated on the school district's employer-employee relationship with Babbitt, Doe also brought a general negligence claim against the school district. A negligence action requires "(1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) the breach of that duty being the proximate cause of the injury." *Fenrich*, 920 N.W.2d at 201. The district court concluded that summary judgment was appropriate because the school district did not have a duty to protect Doe from Babbitt's sexual abuse.¹⁴

¹⁴ In addition to an absence of duty, the district court also concluded that the school district did not proximately cause Doe's injury based on its determination that Babbitt's conduct was not foreseeable. As explained above, we conclude there are disputed material facts about whether the risk was foreseeable. As an alternative basis for affirming, the school district contends that Babbitt's criminal acts were a superseding cause that broke the

Generally, “a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party’s conduct.” *Doe 169 v. Brandon*, 845 N.W.2d 174, 177-78 (Minn. 2014). But a duty to protect will be imposed if “(1) there is a special relationship between the parties and (2) the risk is foreseeable.” *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007). The district court concluded that there was no evidence that a special relationship existed between the school district and Doe and that the sexual abuse was not foreseeable. Because, as we explained, we conclude that there are disputed material facts about whether the risk was foreseeable, we now consider whether the school district had a special relationship with Doe.¹⁵

As relevant here, a special relationship giving rise to a duty to protect exists “when an individual, whether voluntarily or as required by law, has custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.” *Id.* (quotation omitted). Generally, the plaintiff must be “particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the

causation chain. But, as the school district acknowledges, criminal conduct that is “reasonably foreseeable” is not considered a superseding cause. *See Pearson v. Henkemeyer*, 503 N.W.2d 504, 507 (Minn. App. 1993) (stating general rule that “a third person’s criminal act breaks the causation chain” but an exception “exists when the occurrence of the criminal act is reasonably foreseeable”). Thus, the school district’s theory does not present an alternative basis for affirming summary judgment on Doe’s negligence claim.

¹⁵ The school district argues that we cannot consider Doe’s special-relationship arguments because the only mention of a special relationship in the district court was “the alleged existence of a mentoring relationship as a special relationship.” But the school district made extensive arguments about special relationship, and the district court expressly ruled on the existence of a special relationship. Thus, we are unpersuaded that Doe’s arguments about a special relationship are outside our scope of review.

plaintiff's welfare." *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995).

The existence of a special relationship imposing a duty is generally a question of law that an appellate court considers de novo. *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996). But that does not "foreclose the possibility that there may be situations in which the facts necessary to establish a special relationship are in dispute and should be submitted to the jury." *Bjerke*, 742 N.W.2d at 667 n.4.

Here, the school district does not dispute that a special relationship may have existed between the school district and Doe while she was a student in the school district, from first grade to the beginning of ninth grade. But the parties disagree whether a special relationship existed at the time of the sexual assault in the classroom. Doe contends that the school district fostered a relationship between her and Babbitt, that the school district ignored her truancy while Babbitt groomed her, and that she was uniquely vulnerable because of that grooming. The school district contends that Doe was not part of a formal volunteer program at the elementary school and thus the school district did not sanction a relationship between Babbitt and Doe.

We conclude that the record, when viewed in the light most favorable to Doe, creates genuine factual disputes about whether Doe was within the school district's custody and control. As discussed above, there is evidence that the principal "okayed" Doe's volunteering at the elementary school at the time of the sexual assault in the classroom and that elementary school employees knew that Doe volunteered with Babbitt. This arrangement occurred during the school day while Doe was truant from her high school,

after she had been consistently truant from her secondary school in the school district. Even if Doe was not a student in the school district and was not required by law to be at the elementary school, Doe was still a minor child who was volunteering in the school district's classroom and was subject to its policies. Genuine factual disputes therefore exist about whether the school district owed a duty of care to Doe under the special-relationship theory, and we thus reverse the grant of summary judgment on Doe's negligence claim.

In conclusion, we reverse summary judgment in favor of the school district on all four of Doe's claims and remand the case to the district court for further proceedings.

Reversed and remanded.