SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 23-01615

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, DELCONTE, AND HANNAH, JJ.

VICTORIA VISIKO, PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

EDWIN D. FLEMING, DEFENDANT,
AND ROCHESTER CITY SCHOOL DISTRICT,
DEFENDANT-APPELLANT.

COZEN O'CONNOR, NEW YORK CITY (AMANDA L. NELSON OF COUNSEL), FOR DEFENDANT-APPELLANT.

BANSBACH LAW P.C., ROCHESTER (JOHN M. BANSBACH OF COUNSEL), AND O'BRIEN & FORD P.C., BUFFALO, FOR PLAINTIFF-RESPONDENT.

Appeal from an order and judgment (one paper) of the Supreme Court, Monroe County (Charles A. Schiano, Jr., J.), entered May 26, 2023. The order and judgment, inter alia, denied in part the motion of defendant Rochester City School District for summary judgment.

It is hereby ORDERED that the order and judgment so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this personal injury action pursuant to the Child Victims Act (*see* CPLR 214-g) alleging that, in the 1970s, she was sexually abused by defendant Edwin D. Fleming during and subsequent to her attendance at East High School in the Rochester City School District (defendant). After discovery, defendant moved for summary judgment dismissing plaintiff's complaint against it and plaintiff cross-moved for, inter alia, partial summary judgment on defendant's liability. Supreme Court, inter alia, denied defendant's motion to the extent that it sought dismissal of plaintiff's negligence and common-law failure to report causes of action and denied plaintiff's cross-motion to the extent that it sought partial summary judgment on defendant's liability. Defendant now appeals, as limited by its brief, from those parts of the order and judgment that denied its motion to the extent that it sought dismissal of plaintiff's negligence and common-law failure to report causes of action. We affirm.

Plaintiff's negligence cause of action is premised on two theories, specifically defendant's alleged negligent supervision of plaintiff and defendant's alleged negligent retention of Fleming, a music teacher employed by defendant. Both theories require consideration of whether Fleming's misconduct was reasonably

foreseeable. "Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision" (*Mirand v City of New York*, 84 NY2d 44, 49 [1994]; *see Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). That duty "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*BL Doe 3 v Female Academy of the Sacred Heart*, 199 AD3d 1419, 1422 [4th Dept 2021] [hereinafter *Female Academy*] [internal quotation marks omitted]; *see David v County of Suffolk*, 1 NY3d 525, 526 [2003]). A plaintiff may succeed on a claim of negligent supervision by establishing "that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury" (*Mirand*, 84 NY2d at 49). Further, although unanticipated third-party acts generally will not give rise to liability (*see Brandy B.*, 15 NY3d at 302), a school district may nonetheless "be held liable for an injury that is the reasonably foreseeable consequence of circumstances it created by its inaction" (*Doe v Fulton School Dist.*, 35 AD3d 1194, 1195 [4th Dept 2006] [hereinafter *Fulton School Dist.*]; *see Bell v Board of Educ. of City of N.Y.*, 90 NY2d 944, 946-947 [1997]; *Mirand*, 84 NY2d at 49-51; *Murray v Research Found. of State Univ. of N.Y.*, 283 AD2d 995, 997 [4th Dept 2001], *lv denied* 96 NY2d 719 [2001]). Similarly, to establish a claim of negligent retention, "it must be shown that the employer knew or should have known of the employee's propensity for the conduct which caused the injury" (*Shapiro v Syracuse Univ.*, 208 AD3d 958, 960 [4th Dept 2022] [internal quotation marks omitted]).

Contrary to defendant's contention, the court properly denied that part of its motion seeking dismissal of plaintiff's negligence cause of action inasmuch as defendant failed to meet its prima facie burden of establishing that the sexual abuse that led to plaintiff's injuries was unforeseeable as a matter of law (*see Bell*, 90 NY2d at 946-947). In support of its motion, defendant submitted, among other things, plaintiff's deposition testimony, wherein she testified that she never discussed Fleming's conduct with anyone during the time that it was occurring. Plaintiff, however, further testified that, during her time at East High School, Fleming was less than circumspect regarding his conduct with female students. Plaintiff observed Fleming during her time at East High School giving "piggyback rides [to female students] in the hallways, [with] his hands . . . holding them up [by] their bottom[s]." Plaintiff stated that "many students" would have seen Fleming hugging her in the hallways, hugs that plaintiff described as becoming "longer and longer" over her years at East High School, "always with hands groping and to the point that it became very embarrassing and very disgusting." Plaintiff also described an additional incident where Fleming groped her from behind in front of, at a minimum, several other students. Thus, defendant's own submissions raise a triable issue of fact whether Fleming's misconduct was so open and prevalent that a reasonable person would have been on notice to protect against the injury-causing conduct (*see Mirand*, 84 NY2d at 49-50; *Shapiro*, 208 AD3d at 960).

Further, defendant offered no affirmative evidence establishing as a matter of law the existence of any sexual harassment prevention

policies or the absence of any relevant complaints regarding Fleming prior to or during the relevant time period (*cf. Ernest L. v Charlton School*, 30 AD3d 649, 651 [3d Dept 2006]). Defendant did submit, among other things, the deposition testimony of a former special education coordinator who continued his career with defendant as an administrator. That administrator testified that, in reference to complaints regarding sexual misconduct, "there was a time where we didn't cross our T's and dot our I's." The administrator explained that, before "the '80s" when the state "got a lot more forceful," there was "always an effort to resolve the problem by removing the teacher." He said, "In this case the teacher resigned. So 75 percent of the problem had resolved itself." The administrator agreed, however, that defendant "didn't necessarily take the action that would prevent [the sexual abuse] from happening again." A factfinder could reasonably infer from that statement that defendant was aware of other instances of sexual misconduct by teachers with students occurring prior to the 1980s inasmuch as there was a practice of removing the offending teacher as a result. Thus, defendant's own submissions raise a triable issue of fact whether plaintiff's injuries were the "reasonably foreseeable consequence of circumstances it created by its inaction" (*Fulton School Dist.*, 35 AD3d at 1195).

Even assuming, arguendo, that defendant did meet its initial burden with respect to plaintiff's negligence cause of action, we conclude that plaintiff raised a triable issue of fact in opposition. In opposition to defendant's motion and in support of her cross-motion, plaintiff submitted, among other things, the deposition testimony of another student, identified as BL Doe 3, who attended East High School before plaintiff did and who alleges that she was also sexually abused by Fleming. BL Doe 3 testified that, beginning in the fall of 1972, she told several school staff members that Fleming "was too touchy-feely or [that] he was touching or [that] he gave [her] the creeps." She said to one staff member in particular, " 'Mr. Fleming makes me uncomfortable. He's very touchy. I don't like to be touched.' " She said to another staff member, " 'He touches too much.' " Contrary to defendant's contention, a factfinder could reasonably infer that, despite the absence of more explicit terminology, a student reporting that a teacher was touching her in a way that made her uncomfortable should have triggered defendant, in exercising such care as a parent of ordinary prudence would observe in comparable circumstances, to take a closer look at the teacher in question (*see generally David*, 1 NY3d at 526; *Shapiro*, 208 AD3d at 960).

The court also properly declined to dismiss plaintiff's cause of action alleging defendant's violation of the common-law duty to report. Contrary to defendant's contention, a *school's* duty to report falls within the scope of its "common-law duty to adequately supervise its students," which, as noted above, "requires that the school exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances" (*Female Academy*, 199 AD3d at 1422 [internal quotation marks omitted]; *see Matter of Kimberly S.M. v Bradford Cent. School*, 226 AD2d 85, 87-88 [4th Dept 1996]; *see*

generally Mirand, 84 NY2d at 49). Thus, regardless of whether a common-law cause of action exists in New York for failure to report child abuse by a defendant who lacks a school's in loco parentis relationship with a child (*see Heidt v Rome Mem. Hosp.*, 278 AD2d 786, 787 [4th Dept 2000, Lawton, J., dissenting], citing, inter alia, *Eiseman v State of New York*, 70 NY2d 175, 187-189 [1987]), here defendant's alleged failure to do so is a recognized form of negligence (*see Female Academy*, 199 AD3d at 1422-1423).

Entered: July 26, 2024

Ann Dillon Flynn
Clerk of the Court