Circuit Court for Harford County
Case No. 12-C-17-463

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 01985

September Term, 2017

LINDSAY LOVELESS

v.

ETHAN R. ESTEVEZ, *ET AL*.

Leahy,
Beachley,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: September 3, 2019

In this appeal from the grant of a motion to dismiss, we address three theories of negligence advanced in the underlying complaint filed by the appellant, Lindsay Loveless, against the appellees, the Harford County Board of Education (the "Board") and her former biology teacher, Ethan R. Estevez. Ms. Loveless's complaint alleged five causes of action arising out of sexual abuse by Estevez[1] that took place in 2013 and 2014, when she was a minor high school student. Three of the claims were brought against the Board and sounded in negligence; the remaining claims, battery and intentional infliction of emotional distress, were directed against Estevez.

The Board moved to dismiss the action filed in the Circuit Court for Harford County for failure to state a claim on which relief can be granted. A hearing on the motion was held on July 11, 2017, and on October 6, the court dismissed, with prejudice, the three counts against the Board. On November 6, 2017, Ms. Loveless voluntarily dismissed, without prejudice,[2] her claims against Estevez, thereby disposing of all claims in the circuit court. Her timely appeal presents two questions which we have rephrased:

1. Did the trial court err in dismissing the counts for negligence and negligent hiring and retention against the Board?

2. Did the trial court err in concluding that Estevez's actions were, as a matter of law, outside the scope of employment?

[1] Estevez pleaded guilty to misdemeanor fourth degree sexual offense under Maryland Code (2002, 2012 Repl. Vol.), Criminal Law ("CL"), § 3-308(c), the sexual abuse of a minor student by a person in a position of authority, on February 2, 2015, for which he was sentenced to 11 months' incarceration and 5 years' probation.

[2] Ms. Loveless represents in her brief that the claims against Mr. Estevez are subject to a tolling agreement.

We hold that Ms. Loveless's amended complaint contained factual predicate sufficient to withstand the Board's motion to dismiss as to the claims of negligence and negligent hiring and retention, and reverse the judgment of the circuit court as to those two counts. We affirm the circuit court's order dismissing court three, the respondeat superior claim.

BACKGROUND

A. Initial Complaint

On February 24, 2017, Ms. Loveless filed a complaint alleging five counts against the Board and Estevez: (1) battery against Estevez, (2) negligence against the Board, (3) respondeat superior against the Board, (4) negligent hiring and retention against the Board, and (5) intentional infliction of emotional distress against Estevez.

Under the heading "Facts Applicable to All Counts," Ms. Loveless alleged the following. Estevez taught her biology class during her junior year of high school. During her senior year, beginning in the fall of 2013 and lasting into 2014, Estevez "began a relationship with [her] that ultimately led to him engaging in sexual relations with her on multiple occasions." Throughout the period of abuse, Ms. Loveless "was a minor student and [] Estevez was in a position of authority over her." The Board, she alleged, was aware of her relationship with Estevez and yet did not meaningfully intervene by notifying her parents or taking steps to prevent further contact.

Count two alleged negligence on the part of the Board. At all pertinent times, "the vice principal and other supervising staff at the [high] [s]chool were aware of inappropriate activities and a relationship between" Estevez and Ms. Loveless. "In fact," Estevez "was

counseled on his behavior by the vice principal, Michael Thatcher, prior to the sexual relationship beginning." Yet, "[d]espite this knowledge," and a duty to act in Ms. Loveless's best interests, "the vice principal and other agents of [the Board] negligently failed to act to protect" Ms. Loveless, which was a "direct and proximate" cause of the injuries described in count one.

In count three for respondeat superior against the Board, Ms. Loveless alleged that during the time of the inappropriate relationship, Estevez "was an agent, servant and employee" of the Board, and as a direct result of his "engagement in a sexual relationship with" Ms. Loveless, she was "injured and damaged[.]"

In support of court four, negligent hiring and retention, Ms. Loveless alleged that the Board knew about the "inappropriate contact" between Ms. Loveless and Estevez, because Estevez called Ms. Loveless "to his classroom as opposed to where she was supposed to be," and engaged in "email exchanges unrelated to schoolwork and visit[ed] her home." Despite its knowledge, Ms. Loveless alleged, the Board "failed to discipline or remove [Estevez] from the school system, instead retaining him," causing Ms. Loveless to be injured.

B. Motion to Dismiss

On April 12, 2017, the Board filed a motion to dismiss the complaint against it with prejudice and requested a hearing. According to the Board, Ms. Loveless's complaint was "devoid of specific factual allegations of wrongdoing by the Board for which it c[ould] be held liable as a matter of law."

Regarding counts two and four, the Board argued that Ms. Loveless's claims of negligence were too conclusory, as she did not plead specific facts. She also failed to allege but-for causation or that the abuse occurred on school grounds. Citing *Bell Atlantic v. Twombly*, the Board averred that to survive a motion to dismiss, a complaint must be pleaded with enough specificity to "raise a right to relief above the speculative level." 550 U.S. 544, 555 (2007). Specific to count four, the Board contended that the last element of negligent hiring and retention —that the employer's negligence in training or supervising proximately caused Ms. Loveless's injury—was absent, and that the other elements were supported only cursorily.

As to count three, the respondeat superior claim, the Board argued that it could not be held vicariously liable for the intentional torts of its employees, as intentional torts inherently fall outside the scope of employment.

C. Amended Complaint and Opposition to the Motion to Dismiss

Ms. Loveless filed an amended complaint and an opposition to the motion to dismiss on May 15, 2017. As set out more fully in our discussion, the amended complaint expanded upon counts two and four.

In her opposition to the motion to dismiss, Ms. Loveless argued that the amended complaint contained facts sufficient to support counts two and four including:

> a. That the assistant principal and others were aware of inappropriate contact between [Ms. Loveless] and [Estevez] and failed to intervene.
> b. Estevez was counseled on his behavior by Thatcher, the assistant principal.
> c. Specific allegations of the Board's failure to act.
> d. An allegation that "as a direct and proximate result" of these failures, [Ms. Loveless] was injured.

D. Answer and Hearing

The Board filed an answer generally denying all of Ms. Loveless's allegations and asserting several defenses: that the complaint was "barred by the applicable statute(s) of limitations[,]" and the doctrines of contributory negligence, assumption of risk, waiver and/or release, estoppel, and by fraud.[3]

On July 11, 2017, the parties appeared in the circuit court for a hearing on the Board's motion. The Board reiterated that count three should be dismissed because boards of education are not liable for the intentional torts of their employees. According to the Board, intentional torts constitute the abandonment of employment because they run contrary to the beneficent purpose of the educational system.

Counts two and four, the Board admitted, were in "a little bit of a grayer area[,]" but nevertheless lacked factual support sufficient to withstand a motion to dismiss. The Board emphasized that there had been no assertion that inappropriate "conduct happened on school grounds[.]" Additionally, the complaint lacked but-for language—and even if it had contained such language, the notion that the Board's negligence caused the "illicit relationship" was "preposterous," as the parties could have "started a relationship" via cell phone or Facebook. The Board maintained that, even if the court were to grant leave to amend for Ms. Loveless to buttress counts two and four, the court should nevertheless dismiss count three.

[3] Estevez also filed an answer denying the charges of the complaint and enumerating defenses. As this appeal concerns the negligence claims of the complaint, brought against the Board only, we need not further address Estevez's pleadings.

Ms. Loveless rebutted the Board's challenge, urging that an act can be within the scope of employment even if unlawful, and pointing out that the line between forbidden and permitted conduct was not yet demarcated. The work of a teacher—"talk[ing to students] after school, provid[ing] some counselling"—at some point became inappropriate. Ms. Loveless pointed out that Estevez's defense in his criminal trial was based on the fact that "he got involved with trying to help her[.]" At what point communication between the two became romantic, and at what point physical touching escalated to hugging, kissing, or sexual intercourse, would be useful information for ascertaining scope of employment—to be fleshed out during discovery.

As to the alleged factual deficiencies in counts three and four, Ms. Loveless contended that Maryland is a notice-pleading state and *Twombly*'s higher standard did not apply.

After the conclusion of argument, the court reserved its final ruling, stating "I don't want this to seem like it is the [c]ourt's final decision. I do want to take some time to read the cases that you cited and then to make a decision as to whether I think that should happen." The court did, however, comment that it did "think that Count 3, the *respondeat superior* claim, should be dismissed[,]" concluding, "I think I should grant that." As to counts two and four, the court reasoned that it "th[ought] those [were] appropriately pleaded." The court elaborated:

> As [Ms. Loveless] argues, Maryland is a notice pleading state. I think that that provides a sufficient basis. I reserve, of course, any decision as to whether once discovery is completed, there is more information upon which the [c]ourt can determine if there is no genuine dispute as to a material fact. But at least with respect to the standard of review on a motion to dismiss, I

> think that the Amended Complaint passes muster at that point. So those two [counts, count two and four,] will stand. So I will make that clear in the written opinion that I do and that my written opinion will focus on the respondeat superior claim.

E. The Memorandum Opinion and Order

Just over two months later, on October 6, 2017, the court issued its memorandum opinion and order dismissing with prejudice all counts against the Board. As to counts two and four, the court ruled that Ms. Loveless failed to demonstrate the elements of a cause of action in negligence. Ms. Loveless's claim that the Board breached its duty "by not doing more, such as informing her parents of Estevez's behavior," failed to show an actual breach, because Ms. Loveless neglected to "provide any facts as to what the Board could have or would have told her parents." The court emphasized that Ms. Loveless alleged that "the Board counseled Estevez about his behavior *prior to the sexual relationship beginning.*" The court found that the negligence claims, as drafted, did not put the Board on notice that it must defend against the claim that it was aware of the sexual relationship and failed to act:

> [Ms. Loveless] provides no facts as to what she means by "inappropriate conduct." Nor does she say that the Board had any knowledge, actual or constructive, that she and Estevez were having sex after he was counseled. These omissions render her claim too vague and speculative to put the Board on notice that the Board was aware that she and Estevez were engaged in a sexual relationship, let alone that Estevez continued to engage in any "inappropriate conduct." She certainly would have the ability to explain what "inappropriate conduct" means.

The court added that the claim fails because of ambiguity, which must be construed against the pleader, and that Ms. Loveless's "Amended Complaint did not address or cure the deficiency."

Regarding count three, the court agreed with the Board that personal activity is necessarily outside the scope of employment. Because "Estevez's tortious conduct was personal," no legal cause of action existed. The court thus dismissed count three with prejudice, as well.

DISCUSSION

I.

Causes of Actions Sounding in Negligence

On appeal, Ms. Loveless argues that she pleaded sufficient facts in support of counts two and four. Those facts include that she was a "minor student" and Estevez was a teacher; that "[s]upervisory persons were aware of a relationship between the two and counseled Estevez but failed to do anything else[;]" that "[s]uggested actions [] would or could have prevented the progress of the relationship to sexual intercourse[;]" and that she was "injured as a result of the failure to act." Ms. Loveless characterizes the Board's duty as a duty to supervise Estevez, "and if aware of actions that are wrongs . . . to act to prevent the further development of the relationship, to prevent the harm." Additionally, she states that the case *Montgomery Cty. Bd. of Educ. v. Horace Mann Ins. Co.*, 383 Md. 527 (2004), "by implication, tacitly recognizes" a negligence cause of action against a school board stemming from an "inappropriate relationship" between a teacher and student. As to negligent hiring and retention, Ms. Loveless recites the elements and asserts simply that "[t]he elements are stated in the Amended Complaint and the court was wrong to conclude otherwise."

The Board counters that the dismissal was legally correct because the negligence claims fail at the causation element, as Ms. Loveless's assertion that she would not have been injured "but for" the Board's failure to intervene or supervise "is a conclusory allegation that is nothing more than conjecture and speculation." The Board suggests that the relationship could have progressed regardless of the Board's actions, through "cell phones, social media, and the Internet—not to mention the age-old reality of rebellious teenagers and the draw of forbidden relationships[.]" In the Board's view, the amended complaint is devoid of allegations that the Board was aware of the sexual relationship or that the sexual relationship occurred on the Board's property. Lastly, according to the Board, Ms. Loveless's reliance on *Mann* is misplaced because *Mann* stated that specifically "sexual abuse of a minor is criminal conduct that is not within the scope of a teacher's employment or authority." *Id.* at 545.

Under Maryland Rule 2-322(b)(2), a defendant may seek a dismissal of a complaint if it fails "to state a claim upon which relief can be granted[.]" A motion to dismiss avers that, "despite the truth of the allegations, the plaintiff is barred from recovery as a matter of law." *Porterfield v. Mascari II, Inc*., 374 Md. 402, 414 (2003) (citation omitted).

We review whether the trial court in this case was legally correct to grant the Board's motion to dismiss for failure to state a claim. *Rounds v. Maryland-Nat'l. Capital Park and Planning Comm'n*, 441 Md. 621, 635 (2015). Confining our analysis to the "four corners" of the amended complaint, *Parks v. Alpharma, Inc.*, 421 Md. 59, 72 (2011), we determine "whether the [amended] complaint, on its face, discloses a legally sufficient cause of action." *Fioretti v. Md. State Bd. of Dental Exam'rs*, 351 Md. 66, 71-72 (1998)

(citations omitted). We review in the light most favorable to Ms. Loveless, the non-moving party, assuming the truth of all well-pleaded facts and allegations contained therein, as well as any reasonable inferences. *Alpharma, Inc.*, 421 Md. at 72. But "any ambiguity or uncertainty in the allegations bearing on whether the complaint states a cause of action must be construed against the pleader [Ms. Loveless]." *Figuiredo-Torres v. Nickel*, 321 Md. 642, 647 (1991) (citation omitted).

Maryland Rule 2-303(b) prescribes the composition of a complaint:

> **Contents:** Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings are required. A pleading shall contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense. It shall not include argument, unnecessary recitals of law, evidence, or documents, or any immaterial, impertinent, or scandalous matter.

The purpose of pleading is to inform the opposing party of the of the claims brought. In essence, "[t]he object of all pleading is that parties [] may be mutually apprised of the matters in controversy[.]" *Pearce v. Watkins*, 68 Md. 534, 538 (1888) (citation omitted).

Under Maryland's liberal pleading standard, "a plaintiff need only state such facts in his or her complaint as are necessary to show an entitlement to relief." *Johns Hopkins Hosp. v. Pepper*, 346 Md. 679, 698 (1997). A litigant need not "state minutely all the circumstances which may conduce to prove the general charge," *Smith v. Shiebeck*, 180 Md. 412, 420 (1942), but must describe the claim with "such reasonable accuracy as will show what is at issue between the parties[.]" *Fischer v. Longest*, 99 Md. App. 368, 380 (1994). We have observed that "essentially, a complaint is sufficient to state a cause of action even if it relates 'just the facts' necessary to establish its elements." *1000 Friends*

of Md. v. Ehrlich, 170 Md. App. 538, 546 (2006) (brackets and internal quotation marks omitted). Although the pleading standard is liberal, a plaintiff must still meet certain basic requirements. The facts establishing the cause of action "must be pleaded with sufficient specificity; bald assertions and conclusory statements by the pleader will not suffice." *Alpharma*, 421 Md. at 72 (internal quotations omitted). "A dismissal is proper only if the allegations and permissible inferences, if true, would not afford relief to the plaintiff." *Pittway Corp. v. Collins*, 409 Md. 218, 239 (2009) (citation omitted).

A. Count Two: Negligence

In count two of her amended complaint, Ms. Loveless alleged as follows:

> 10. At all times pertinent, the vice principal and other supervising staff . . . were aware of inappropriate activities and a relationship between [] Estevez and [Ms. Loveless]. In fact, [] Estevez was counseled on his behavior by the vice principal . . . prior to the sexual relationship beginning.
>
> 11. Despite this knowledge, and a duty to act in the best interests of the child, the vice principal and other agents of [the Board] negligently failed to act to protect the child. The [Board] failed to, among other respects:
>
> a. inform her parents;
>
> b. separate the two during school hours; and/or
>
> c. transfer [] Estevez or [Ms. Loveless] to a different school.
>
> d. The [Board] employees were otherwise negligent.
>
> 12. [The Board] had direct knowledge regarding the developing relationship between [Ms. Loveless] and [Estevez]. Despite this knowledge, [the Board] failed to intervene in any way. Had they taken one or more of the steps outlined in Paragraph 11 above, the boundary violations and sexual relationship would have been prevented. In particular, had [Ms. Loveless's] parents been informed, they would have taken steps to eliminate contact between [Ms. Loveless] and [Estevez], which they had no reason to believe was inappropriate.
>
> 13. As a direct and proximate result of the [Board]'s failure to act or intervene, [Ms. Loveless] suffered the injuries, losses and damages alleged in [c]ount 1[.]

To establish a valid claim of negligence, the litigant must plead facts in support of the following four elements: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty [by his or her action or inaction], (3) that the plaintiff suffered an actual injury or loss, and (4) that the defendant's breach of duty proximately caused the loss or injury." *Pendleton v. State*, 398 Md. 447, 460 (2007). We address each element of negligence in turn.

1. Duty

A legally recognized duty is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection." *Eisel v. Bd. of Educ. of Montgomery Cty.*, 324 Md. 376, 385-86 (1991) (internal quotation marks omitted). The Court of Appeals has explained that:

> [t]here can be no negligence where there is no duty that is due[.] As the duty owed varies with circumstances and with the relation to each other of the individuals concerned, so the alleged negligence varies, and the act complained of never amounts to negligence in law or in fact[,] if there has been no breach of duty.

Pendleton, 398 Md. at 460 (quoting *W. Va. Cent. & P. Ry. Co. v. Fuller*, 96 Md. 652, 666 (1903)). "Thus when analyzing a negligence action it is customary to begin with whether a legally cognizable duty exists." *Id*. at 461 (citations omitted).

In general, "a person is under no special duty to protect another from . . . acts by a third person, in the absence of statutes, or of a special relationship." *Pace v. State*, 425 Md. 145, 156 (2012) (internal quotations omitted). The Court of Appeals has recognized that a school has such a duty: specifically, "a special duty to exercise reasonable care to protect a pupil from harm." *Lunsford v. Bd. of Educ. of Prince George's Cty.*, 280 Md. 665, 676

(1977). The duty is analogous to the common law doctrine of *in loco parentis*. *Id.*; *see also* 82 Md. Op. Att'y Gen. 65, 70 (1997) (stating that school systems have a special duty to exercise reasonable care to protect students from harm). Under the *in loco parentis* doctrine, school officials serve "in the place of a parent." *See Holson v. State,* 99 Md. App. 411 ("*In loco parentis* means 'In the place of a parent[.]'); BLACK'S LAW DICTIONARY 908 (10th ed. 2014). In sum, school authorities have a common law duty, "as the temporary custodians of children, to exercise reasonable care for their protection[.]" *See Collins v. Bd. of Educ. of Kent Cty.*, 48 Md. App. 213, 218 (1981).

In addition to the simple, easily perceived common-law duty, it is undisputed that the Maryland Code imposes a duty on educators and all other persons to report suspected child abuse the Department of Social Services or the police.[4] *See* Maryland Code (1984, 2012 Repl. Vol.), Family Law Article ("FL"), § 5-704 (requiring health practitioners, police officers, educators, and human service workers to report suspected abuse to certain authorities); FL § 5-705 (requiring other persons to report suspected abuse to certain authorities). The statutes require any Marylander, with few exceptions, "who has reason to believe that a child has been subjected to abuse or neglect [to] notify the local department or the appropriate law enforcement agency." FL §§ 5-704(a)(1); 5-705(a).

[4] At oral argument before this Court, the Board agreed that teachers and vice principals have a duty to report sexual misconduct but asserted that Ms. Loveless failed to allege "that the Vice Principal knew of any inappropriate sexual contact, which is the heart of the complaint." According to the Board, it had no "reason to believe that a child has been subject to abuse."

2. Breach

Breach is an act or failure to act in violation of a duty. *See Pendleton*, 398 Md. at 482-84. To establish breach, the plaintiff must show "the observance of which duty would have averted or avoided the injury." *W.Va. Cent. & P. Ry. Co.*, 96 Md. at 672. How specifically a plaintiff must plead breach depends on the type of duty at issue:

> [W]here the plaintiff's right and the defendant's corresponding duty are simple and easily perceived, a simple factual statement of the defendant's act or omission in breach thereof, coupled with the general characterization of the defendant's act or omission as negligent, will suffice. On the other hand, the less apparent the plaintiff's right and the defendant's duty, the more likely the pleader will be required to specify the acts or omissions relied upon to constitute the negligent conduct. Otherwise stated, in simple situations involving an easily recognized breach of duty, a general averment of negligence following a simple statement of the defendant's act or omission will be regarded as an ultimate fact; while in more complex situations where the breach of duty is not readily apparent, such an averment will be regarded as a mere legal conclusion.

Pendleton, 398 Md. at 482 (citations and emphasis omitted).

In *Pendleton*, for instance, the Court of Appeals held that the plaintiff failed to allege breach sufficiently because "the amended complaint d[id] not address a situation where 'the plaintiff's right and the defendant's corresponding duty' are 'simple and easily perceived,' or involve[d] an easily recognized breach of duty.'" *Id.* at 484 (citations and brackets from *Pendleton* omitted). There, the plaintiff-victim, a ten-year-old child who brought suit by and through his father, had alleged that the State negligently placed him in foster care with a 16-year-old roommate, Wratchford, who sexually abused and battered him. *Id.* at 451-52. The complaint alleged the State owed the victim a duty to keep him safe and follow certain policies, and that that duty was breached by, *inter alia*, "failing to

protect [the victim] from the foreseeable risk of harm[.]" *Id.* at 454-55. The Court took issue with the complaint's failure to assert specific facts that the State had knowledge that Wratchford was a "potential danger to a roommate." *Id.* at 484. The Court observed that the complaint "did not allege that Wratchford had committed assaults prior to those alleged by the appellant or that the State had knowledge of any sexual tendencies . . .in short, no factual allegation as to the basis for the knowledge attributed to the State or that related why the State should have been aware of any deviant tendencies that Wratchord may have had[.]" *Id.* at 455.

In this case, Ms. Loveless alleged, specifically, that the vice principal and other supervising staff "were aware of inappropriate activities" by Estevez and had even counseled him on that behavior. "Despite this knowledge and a duty to act in the best interests of the child," Ms. Loveless alleged that the vice principal and other agents of [the Board] negligently failed to act to protect the child." Ms. Loveless then proceeded to set out several steps that the Board's agents failed to take to protect her. In contrast to the instant case, in *Pendleton*, "once the operators of the group home were notified of the situation, they acted to assure that there was no further contact between appellant and Wratchford." *Id.* at 453.

The duty of a school, its vice principal, and other supervising staff to protect students from inappropriate sexual conduct is easily perceived. *See, e.g.*, *Campbell*, 73 Md. App. at 63 ("Patently, if [a teacher], the Board's agent, servant or employee, was negligent [in supervising a locker room in which a student was sexually assaulted], the Board is liable, since there is no question as to the former's being within the scope of his employment.").

Given this, we conclude that Ms. Loveless sufficiently alleged facts that could support a claim that the Board (and its agents) failed to act in the face of their duty to act.

3. Causation

Negligence is not actionable unless it is the proximate cause of the alleged harm. *Pittway*, 409 Md. at 243. To be the proximate cause of an injury, the negligence must be both a cause-in-fact and a legally-cognizable cause of the injury. *Id.* The question of legal causation "most often involves a determination of whether the injuries were a foreseeable result of the negligent conduct." *Id.* at 246.

The causation-in-fact inquiry examines whether the defendant's conduct actually produced the complainant's injury. *Id.* at 243. There are two tests for ascertaining causation-in-fact: the "but for" test and the substantial factor test. *Id.* at 244. The "but for" test applies when only one negligent act is alleged. *Id.* The substantial factor test applies when two or more independent negligent acts contributed to the complainant's injury. *Id.*; *see also* Restatement (Second) of Torts § 431 (1965) ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability[.]")

In cases where "the actionable duty is to protect another from harm, proximate cause must be judged in terms of the foreseeability of such harm being inflicted." *Horridge*, 382 Md. at 193-94. "[O]rdinarily, the question of whether causation is proximate . . . is a matter to be resolved by the jury." *Collins v. Li*, 176 Md. App. 502, 536 (2007).

The Court of Appeals addressed whether a complaint for negligence was prematurely dismissed because of an insufficiently pleaded causation element in *Pittway*.

409 Md. 218. In *Pittway*, a fire broke out in a residential home during a power outage, killing two overnight guests and severely injuring the children in the home. *Id.* at 223-22. The plaintiffs, the parents of the children and the personal relatives of the deceased, sued the builder, subcontractors, landlords, and smoke-alarm manufacturers for negligence associated with the lack of a battery back-up power source for the AC-powered smoke detector. *Id.* at 223, 230. The circuit court granted the defendants' motion to dismiss, finding substantial intervening acts of negligence, which constituted superseding causes of the injuries, interrupting the chain of causation from the ineffective smoke alarm to the injuries caused by the fire. *Id.* at 231-33. The circuit court emphasized the lack of foreseeability on the part of the manufacturer, concluding that it would be impossible to foresee that the owner would finish the basement, or that the renters would allow children to keep candles lit while they were sleeping. *Id.* at 232.

On appeal, this Court explained that we could affirm the circuit court's foreseeability determination only "if we are convinced that the facts of this case are susceptible of but one inference and that they gravitate so close to the polar extreme that the issue of causation is rendered a matter of law." *Id.* at 234 (citation and quotation marks omitted). We concluded that the circumstances gave rise to multiple inferences. *Id.* The Court of Appeals affirmed, adding that "the facts alleged in the [c]omplaint admit of more than one inference, making it improper to determine—on a motion to dismiss"—whether intervening acts were superseding causes of the plaintiffs' injuries. *Id.* at 253. One reasonable inference from the facts pleaded, the Court suggested, was that "because the smoke detector did not go off, the children may have had less time to escape the fire than

they otherwise would have." *Id.* at 254-55. *See also Horridge,* 382 Md. at 195-96 (reversing the grant of DSS's motion to dismiss a father's negligence action over a child's death because, even though the child's mother and step-father killed the child, the complaint sufficiently alleged that DSS had "enhanced" the risk of the child's death).

In Ms. Loveless's amended complaint, she alleged that the Board "failed to act to protect the child" from Estevez, and that, "[h]ad [the Board] taken one or more of the steps outlined . . . above, the boundary violations and sexual relationship would have been prevented." In addition to alleging but-for causation (*i.e.*, but for the Board's omission, the boundary violations would have been prevented), count two also alleged that the Board's inaction was a substantial factor in causing her injuries.

This is surely a case where "the actionable duty is to protect another from harm," and therefore "proximate cause must be judged in terms of the foreseeability of such harm being inflicted." *Horridge*, 382 Md. at 193-94; *see also* FL § 5-704. Ms. Loveless alleged that the Board knew of Estevez's "inappropriate activities and [] relationship" with Ms. Loveless such that it "counseled" Estevez "on his behavior . . . prior to the sexual relationship beginning." One reasonable inference from the facts Ms. Loveless alleged is that the Board "enhanced the risk" that Ms. Loveless would be harmed by failing to intervene as its duty to Ms. Loveless required. *Horridge*, 382 Md. at 195. We conclude that the allegations in the amended complaint were sufficient to render proximate causation a jury question. *Li*, 176 Md. App. at 536.

4. Injury

A cause of action in negligence must also establish that the plaintiff suffered an actual injury or loss. *See Pendleton*, 398 Md. at 460. The amended complaint alleged that Ms. Loveless "suffered and will suffer pain, humiliation, mental anguish, embarrassment and emotional upset, and she was otherwise injured[,]" and that the "injuries are lifelong and permanent." There is no dispute Estevez's criminal sexual conduct caused Ms. Loveless's injury. Because the amended complaint alleged every element of negligence, we hold that the trial court erred in granting the Board's motion to dismiss count two.

B. Count Four: Negligent Hiring and Retention

In count four of her amended complaint, Ms. Loveless alleged as follows:

> 16. The Defendant [Board] knew that the Defendant [Estevez] was engaging in inappropriate contact with [Ms. Loveless]. For example, having her come to his classroom as opposed to where she was supposed to be, email exchanges unrelated to schoolwork[,] and visiting her at her home.
>
> 17. Despite this, the Defendant [Board] failed to discipline or remove the Defendant [Estevez] from the school system, instead retaining him. He then engaged in a sexual relationship with a minor.
>
> 18. The Defendant [Board] had a duty to properly train, manage[,] and supervise the Defendant [Estevez]. When on notice that the Defendant [Estevez] was engaging in "boundary violation" conduct, they did nothing, despite a duty to supervise. It is likely, that had the Defendant [Board] discharged its duty by doing one or more of the items listed in Paragraph 11 above, the inappropriate relationship would have been prevented and the sexual relationship stopped before it occurred.
>
> 19. Whether this issue represents a failure to train or is negligent retention will depend in large part on discovery, not yet had.
>
> 20. As a direct and proximate result, [Ms. Loveless] suffered the injuries and damages set forth above, all without any negligence on her part contributing.

Ms. Loveless aptly describes the relationship between negligence and negligent hiring and supervision when she states that the counts are "substantially similar," except

that count four "is aimed more at the Board's failure to adequately train and/or discipline Estevez while this relationship was developing[.]" To succeed in an action alleging negligent hiring, retention, or supervision, a litigant must establish:

> (1) the existence of an employment relationship;
> (2) the employee's incompetence;
> (3) the employer's actual or constructive knowledge of such incompetence;
> (4) the employee's act or omission causing the plaintiff's injuries; and
> (5) the employer's negligence in hiring, supervising, or retaining the employee as the proximate cause of the plaintiff's injuries.

Latty, 198 Md. App. at 272 (brackets omitted). Unlike a claim of respondeat superior, which we discuss below, "a claim of negligent employment does not require proof that the employee's tort was committed in the scope of employment, as long as proximate cause is established." *Henley*, 60 Md. App. 24, 38 (1984), *rev'd on other grounds*, 305 Md. 320 (1986).

In the context of determining proximate cause in negligent hiring and retention claims, the Court of Appeals has cautioned that the foreseeability requirement should operate "to avoid the attachment of liability where it appears highly extraordinary that the negligent conduct should have brought the harm." *Henley*, 305 Md. at 334 (citation omitted). Employers have a duty to "use reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee." *Id.* at 336. Further, the class of persons to be protected by the duty include members of the public who might reasonably come into contact with the employee. *Id.* at 336-37.

This Court addressed whether a complaint sufficiently alleged that an employer's conduct was the cause of the plaintiffs' injury in *Latty*, 198 Md. App. 254. Two children, Carla and Adrian, born of a relationship between a priest and the church organist, sued the Josephites, a religious society, for the negligent hiring, supervision, and retention of their priest father. *Id.* at 260. They alleged that the Josephites forced their mother to give up Carla for adoption and to conceal the identity of their father, and that neither the organization nor their father ever financially supported them. *Id.* at 262. The Josephites moved to dismiss on "numerous grounds," and the motion was granted by the circuit court that same day. *Id.*

On appeal, regarding the matter of negligent hiring, supervision, and retention, the children argued that the Josephites "knew or should have known that [the priest] used his position in the church to engage in sexual relations with [the organist] . . . which resulted in" their birth. *Id.* at 272. We held that the appellants had not pleaded facts aside from the conclusory allegation that the priest took advantage of their mother, that were sufficient to sustain the claim. *Id.* Furthermore, only the organist could bring a negligence claim because she was the only party potentially injured by the priest's conduct. *Id.* at 274. We concluded, "[w]e are unable to connect the dots of liability from the [Josephite] society's alleged failure to properly hire and supervise [the priest], and the affair supposedly resulting from the alleged breach, to the injury appellants allege." *Id.* at 274-75.

In *Mann*, *supra*, the Court of Appeals considered whether a teacher's conduct fell within the scope of employment. 383 Md. at 546-47. The facts are as follows: a former student alleged that while in a mentoring program, his teacher, Ms. Robbins, sexually

abused him and abused him in other "numerous ways." *Id.* at 531. The school board refused to defend Ms. Robbins, asserting that her conduct fell outside the scope of employment. *Id.* at 533. Ms. Robbins was eventually defended by Horace Mann Insurance Company pursuant to a liability policy issued through the Maryland State Teachers Association, whereby Horace Mann agreed to defend claims arising out of a teacher's educational employment activities. *Id.* Horace Mann settled the claim and filed suit in the circuit court seeking reimbursement from the school board. *Id.* The circuit court ruled in favor of Horace Mann, and the board appealed. *Id.*

After this Court affirmed, the Court of Appeals granted certiorari to determine whether, *inter alia*, "a claim against a teacher based on sexual abuse of a student is potentially covered under the board's self-insurance program where the only extrinsic evidence favorable to the employee is her denial[.]" *Id.* at 541. The Court explained that sexual abuse falls outside the scope of employment, and that if the complaint had alleged sexual abuse *only*, then there would be no potentiality for coverage. *Id.* at 545-56.

The Court further explained, however, that "what dooms the board's position" is that the complaint alleged, and the available extrinsic evidence showed, more than "simply sexual abuse," including, *inter alia*, love notes from Ms. Robbins to the student and deposition testimony that Ms. Robbins "regularly bought" the student food and gifts, and gave him money, over his mother's objections. *Id.* at 546-47. The Court concluded:

> Although [the student's] complaint could have been more carefully drawn. . . [the student] listed the various ways in which he claimed Ms. Robbins abused her special relationship with him—the gifts, the love notes, etc.—and averred that she "intentionally and inappropriately interfered with his parents and guardians by inappropriately blending and confusing the roles of mentor,

> teacher, lover, friend and parent." At the end of his preliminary statement and summary, Doe alleged that "[a]s a direct and proximate result of the wrongful acts of the Defendants" he suffered damages for which he sought compensation. **That covered more than just the alleged sexual abuse.**

Id. at 547 (emphasis added). There was, therefore, a potentiality for the insurance coverage of Ms. Robbins. *Id.*

Returning to the case before us, we apply the lessons of *Latty* and *Mann* to determine whether Ms. Loveless sufficiently pleaded the elements of negligent hiring and retention.

1. Employment Relationship

The amended complaint states that "[a]t all times pertinent, [Estevez] was a teacher employed at the Aberdeen Alternative Education School by [the Board]." The Board does not dispute that Ms. Loveless pleaded this element sufficiently.

2. Employee's Incompetence

Ms. Loveless alleged that Estevez "began a relationship" with her "that ultimately led to him engaging in sexual relations with her on multiple occasions." The incompetence Ms. Loveless alleged was criminal misconduct—the absence of which doomed the claim in *Latty*, 198 Md. App. at 273 (reflecting that if the plaintiffs had alleged criminal misconduct, rather than merely conclusory allegation that the priest took advantage of their mother, the children's claim might have stood). Criminal sexual conduct suffices to fulfill the element of employee incompetence required for negligent hiring and retention. *Id.*

The Board challenges "inappropriate conduct," however, as "far too vague and speculative" to constitute wrongdoing and insists that this ambiguity be construed against

the pleader. Judge Eaves agreed, stating in her written opinion that Ms. Loveless "provides no facts as to what she means by 'inappropriate conduct.'" We disagree.

While Ms. Loveless could have drafted her amended complaint more precisely, the complaint plainly and specifically states that Estevez called Ms. Loveless "to his classroom as opposed to where she was supposed to be," engaged in "email exchanges unrelated to schoolwork," and "visited [Ms. Loveless] at her home." Alone, the first two facts might be considered innocuous. The latter fact, however, approaches "inappropriate conduct," like that in *Mann*, 583 Md. at 532. Moreover, these three facts, when considered collectively, constitute conduct "more involved than would be the normal relationship between a teacher and a student" and seem inappropriate. *Id.* at 531 n.1. As we review the amended complaint in the light most favorable to Ms. Loveless, as well as with all reasonable inferences, *Alpharma, Inc.*, 421 Md. at 72; *Pendleton*, 398 Md. at 459, we hold that the amended complaint sufficiently pleaded Estevez's incompetence—demonstrated by his inappropriate conduct toward a student.

3. Employer's Actual or Constructive Knowledge of the Incompetence

The amended complaint alleged that the Board "knew that [Estevez] was engaging in inappropriate contact with [Ms. Loveless]. For example, . . . visiting her at her home." Additionally, earlier in the complaint, under count two, Ms. Loveless alleged that "the vice principal and other supervising staff at [the school] were aware of inappropriate activities and a relationship between [Estevez] and [Ms. Loveless]." This awareness, Ms. Loveless alleged, led the Vice Principal Thatcher to "counsel[]" Estevez "on his behavior." Applying the foreseeability test for proximate cause, we conclude that it is not "highly

extraordinary" that a teacher's aberrant conduct—described in the amended complaint as "boundary violation conduct" that included emailing, calling Ms. Loveless to his classroom, and visiting Ms. Loveless at her home—would have brought about the harm of a sexual relationship. *Henley*, 305 Md. at 334.

Moreover, that the vice principal believed Estevez's relationship with Ms. Loveless warranted counseling "showed that the relationship, exclusive of any sexual contact, was an inappropriate relationship, that it had gone over the line from a teacher mentoring a student into a more personal relationship that was not appropriate and not within the behavior expected of a professional." *Mann*, 383 Md. at 547. We conclude that Ms. Loveless's allegation that the Board knew of Estevez's inappropriate behavior—apart from knowledge of the sexual relationship—was sufficient. *See Mann*, 383 Md. at 547.

4. Employee's Act or Omission Causing the Plaintiff's Injuries

The Board does not dispute that Estevez's relationship with Ms. Loveless is the cause of her injuries. The complained-of acts are that Estevez "engaged in illicit sexual relations" and "inappropriate contact" with Ms. Loveless, including visiting her at her home. The Board concedes that the sexual relationship happened and challenges only its responsibility for it. The amended complaint, then sufficiently alleges that the employee's acts caused Ms. Loveless's injury.

5. Employer's Negligence in Hiring, Supervising, or Retaining Employee as the Proximate Cause of the Plaintiff's Injuries

The amended complaint alleges plainly the Board's omission: "[the Board] failed to discipline or remove [Estevez], instead retaining him." As we stated above, Ms. Loveless

does not allege that the Board was aware of the sexual relationship, but applying the foreseeability test for proximate cause, we hold it is not "highly extraordinary" that a teacher's aberrant conduct—described in the amended complaint as "boundary violation conduct" which included emailing, calling Ms. Loveless to his classroom, and visiting Ms. Loveless at her home—would have brought about the harm of a sexual relationship. *Henley*, 305 Md. at 334.

Accordingly, we hold that Ms. Loveless pleaded sufficiently all the elements of negligent hiring, supervising, and retaining of Estevez, and the circuit court erred in granting the Board's motion to dismiss count four.

II.

Count Three: *Respondeat Superior*

Ms. Loveless argues that an employer can be responsible for the intentional torts of its employees under *Tall v. Board of School Commissioners of Baltimore City*, 120 Md. App. 236, 252 (1998). She insists that the liability of the employer is normally a factual question left to the jury. In her view, the amended complaint sufficiently pleaded that Thatcher knew about the relationship.

The Board counters, also relying on *Tall*, that county boards of education cannot be held liable for the intentional torts of their employees. 120 Md. App. at 254. It argues that as a matter of law, personal conduct does not fall within the scope of employment, and that sexual abuse in particular can never fall within the scope of employment. According to the Board, Ms. Loveless's contention that she was injured by the development of the relationship fails because the amended complaint specifically states that she was injured

"as a direct and proximate result of [Estevez's] engagement in a sexual relationship" with her; it does not mention that she was injured from the "developing relationship."

Under the doctrine of respondeat superior, or vicarious liability, an employer is liable for a tort committed by its employee acting within the scope of his or her employment. *Women First OB/GYN Assocs., L.L.C. v. Harris*, 232 Md. App. 647, 657-58 (2017), *cert. denied*, 456 Md. 73 (2017). It is a principle of tort law which

> means that, by reason of some relationship existing between A and B, the negligence of A is to be charged against B, although B has played no part in it, has done nothing whatever to aid or encourage it, or indeed has done all that he possibly can to prevent it.

Id. (citation and quotation marks omitted). When an agent commits a tort while acting within the scope of his or her employment, the injured party can sue the agent and the employer separately or jointly. *Id.* at 638. "Under this doctrine, the Board, as employer, cannot be liable for [employee's] actions unless his conduct was within the scope of employment." *Tall*, 120 Md. App. at 247.

As we discussed *supra* I. B. Count Four: Negligent Hiring and Retention, the *Mann* court explained that "sexual abuse of a minor is criminal conduct that is not within the scope of a teacher's employment authority." 383 Md. at 545 (citing Maryland Code (2002, 2003 Supp.), Criminal Law Article ("CL"), § 3-602). The "inappropriate conduct" is the issue remaining before us. First, we briefly review the cases relied upon by the parties and by the circuit court in its written opinion.

In *Tall*, this Court held that the physical abuse of a student by a teacher was not within the scope of employment, and thus the Board of Education was not liable. 120 Md.

App. at 260. Parents discovered that a teacher had physically disciplined their developmentally disabled nine-year old son. *Id.* at 239-40. In an amended complaint, the boy's father sued the abuser and the school board under, *inter alia*, a theory of negligence. *Id.* at 239. The board moved to dismiss, attaching a copy of Maryland Code forbidding corporal punishment in schools. *Id.* at 240. The lower court granted the motion, and we affirmed. *Id.* at 239.

Before this Court, the parents argued that merely because the abuser's acts were intentional "does not compel the conclusion that his conduct was beyond the scope of employment," and instead, the question is one of material fact that should be submitted to a jury. *Id.* at 247-48. The lower court, the appellants argued, "erred in deciding, as a matter of law, that [the abuser's] conduct was outside the scope of employment." *Id.*

We explained that "an employee's tortious conduct is considered within the scope of employment when the conduct is in furtherance of the business of the employer and is authorized by the employer." *Id.* at 251 (citing *Sawyer v. Humphries*, 322 Md. 247, 255 (1991)). Further,

> [t]o be within the scope of the employment the conduct must be of the kind the servant is employed to perform and must occur during a period not unreasonably disconnected from the authorized period of employment in a locality not unreasonably distant from the authorized area, and actuated at least in part by a purpose to serve the master.

Id. An employer may nevertheless be liable for the wrongful conduct of the employee, even if the employee was "willful" or "reckless," as long as the employee's conduct was in the furtherance of the employer's business and within the scope of employment. *Id.* at 252 (quotation marks and citation omitted). Additionally, "a master may be held liable for

the intentional torts of his servant where the servant's actions are within the scope and in furtherance of the master's business and the harm complained of was foreseeable." *Id.* (citing *Cox v. Prince George's County*, 296 Md. 162, 171 (1983)). Consequently, "an act may be within the scope of employment, even though forbidden or done in a forbidden manner, or consciously criminal or tortious[.]" *Id.* (citing *Great Atl. & Pac. Tea Co. v. Noppenberger*, 171 Md. 378, 391 (1937).

We clarified that although a forbidden act may be within the scope of employment, a *personal* forbidden act is not:

> where an employee's actions are personal, or where they represent a departure from the purpose of furthering the employer's business, or where the employee is acting to protect his own interests, even if during normal duty hours and at an authorized locality, the employee's actions are outside the scope of his employment.

Id. (citing *Sawyer*, 322 Md. at 256-57). Conduct that is "unprovoked, highly unusual, and quite outrageous," courts tend to hold as "sufficient to indicate that the motive was a purely personal one." *Id.* We provided a list of factors to consider in ascertaining whether the conduct fell within the scope of employment, which included "whether or not the act is seriously criminal" and "the extent of departure from the normal method of accomplishing an authorized result." *Id.* (citing *Sawyer*, 322 Md. at 256).

Thus, in *Tall*, we concluded that the crux of the issue was that the appellant had "not generated a genuine dispute as to whether the assaultive conduct alleged [] is of a type that is sanctioned by the Board." *Id.* at 259. In considering whether the abuse was in furtherance of the Board's objectives, we acknowledged that there were situations in which a teacher may legitimately touch a student, and that it was foreseeable that a teacher of a

child with special needs in particular may have to touch the student in order to assist him or her. *Id.* The legitimate physical contact, however, did not constitute an implied authority to physically discipline the child. *Id.* at 259-60. Additionally, the abuser was convicted in a criminal proceeding, which lent "support to the Board's claim that his action was outside the scope of his employment." *Id.* at 259. The teacher's conduct was "so extreme in nature, and so far beyond the bounds of appropriate behavior, that it [could not] possibly be considered to have been in furtherance of [the Board's] objectives." *Id.* at 260. Because the teacher's conduct was neither "expected, foreseeable, nor sanctioned," we concluded that no material factual dispute existed. *Id.*; *see also Hunter*, 292 Md. at 491 n.8 (noting that when a complaint alleged that "individual educators have willfully and maliciously acted to injure a student enrolled in a public school, . . . such alleged intentional torts constitute an abandonment of employment, [and] the Board is absolved of liability for these purported acts of its individual employees").

Returning to the case before us, we emphasize that our review is limited to the "four corners" of Ms. Loveless's amended complaint.[5] *See Parks*, 421 Md. at 72. The claim in its entirety reads as follows:

[5] In Ms. Loveless's brief before this Court, she asserts that "inappropriate" acts (*e.g.*, the emailing, calling Ms. Loveless to his class, and visiting Ms. Loveless at her home) can fall within the scope of employment under *Tall*, 120 Md. App. at 251, and that she may have been injured as a result of the "developing relationship" with Estevez. Ms. Loveless also averred at the July 11 hearing before Judge Eaves that there are many things that "are part and parcel of what the teacher does," including "talk[ing] to you after school, provid[ing] some counseling, the guidance" that bled into Estevez's tortious conduct. She also recounted to Judge Eaves that at Estevez's criminal trial, part of his defense was that "he got involved with trying to help [Ms. Loveless]." But Ms. Loveless did not link any of these facts to her claim for respondeat superior in her amended complaint.

COUNT III
(RESPONDEAT SUPERIOR)

> [Ms. Loveless] adopts and realleges the facts set forth above as if set forth more fully herein.
>
> 14. At all times pertinent, [Estevez] was an agent, servant, and employee of [the Board].
>
> 15. *As a direct and proximate result of his engagement in a sexual relationship with [Ms. Loveless], she was injured and damaged*, as set forth above, all without any negligence on her part contributing.

(Emphasis added).

As the Court made clear in *Mann*, a teacher's sexual abuse of a student falls outside the scope of the teacher's employment. 383 Md. at 545-56. Estevez's criminal conviction for that conduct also lends further "support to the Board's claim that his action was outside the scope of his employment." *Tall*, 120 Md. App. at 259. Indeed, the conduct on which Ms. Loveless based her claim for respondeat superior was "so extreme in nature, and so far beyond the bounds of appropriate behavior," that no material dispute of fact could exist as to whether Estevez's conduct was "expected, foreseeable, []or sanctioned" by the Board. *Id.* at 259-60. Accordingly, we hold that the court did not err in dismissing of count three of the amended complaint.

JUDGMENT OF THE CIRCUIT COURT FOR HARFORD COUNTY REVERSED IN PART AND AFFIRMED IN PART; JUDGMENT REVERSED AS TO CLAIMS OF NEGLIGENCE AND NEGLIGENT HIRING AND RETENTION (COUNTS TWO AND FOUR); JUDGMENT AS TO

Consequently, her complaint failed to apprise the Board that this other conduct by Estevez was part of her claim. *See Pearce*, 68 Md. at 538.

CLAIM FOR RESPONDEAT SUPERIOR AFFIRMED. CASE REMANDED TO THE CIRCUIT COURT FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. APPELLEE HARFORD COUNTY BOARD OF EDUCATION TO PAY COSTS.