IN THE CIRCUIT COURT OF THE
EIGHTH JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

ANNEKE ACREE, as parent and natural guardian of M.A.,

Plaintiff,

vs.

CASE NO.: 2024 CA 003461
DIVISION/SECTION: K

CITY OF ALACHUA, FLORIDA, and the ALACHUA COUNTY SCHOOL BOARD,

Defendants.
_____/

DEFENDANT ALACHUA COUNTY SCHOOL BOARD'S
MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendant, Alachua County School Board ("School Board"), by and through its undersigned counsel, and pursuant to Fla. R. Civ. P. 1.140, hereby files this Motion to Dismiss Plaintiff's Amended Complaint and in support thereof, states the following.

INTRODUCTION

This case arises from the alleged sexual harassment, abuse, neglect, and grooming that occurred on two separate occasions over the course of two weeks during the 2022-2023 school year when a School Board employee Travis Yeckring allegedly "forced" the minor Plaintiff, M.A., a sophomore at Santa Fe High School ("SFHS"), to view a "sexually explicit photograph of himself" on his personal cell phone and then, approximately one week later, made "sexually charged statements to M.A." *See* Amended Complaint at ¶¶ 27-28, 31-32, 34 ("both the first and second sexual incidents amount to sexual harassment and grooming of M.A. by Yeckring and therefore, amount to child abuse and/or neglect under Florida law"). After M.A. reported the "sexual incidents" no further sexual harassment occurred. *See generally*, Amended Complaint.

Plaintiff claims that as a result of the foregoing, M.A. suffered anxiety, depression, and psychological and emotional trauma, resulting in at least one migraine, nausea, sweating, fidgeting, stomach pain, loss of appetite, weight loss, hair loss, irregular menstruation cycle, and difficulty concentrating, retaining, and comprehending information. *Id.* at ¶¶ 29, 60.

As a result of the foregoing, Plaintiff brings a negligent supervision claim and a negligence per se claim against the School Board. This is Plaintiff's second attempt to state a negligence cause of action against the School Board. Because Plaintiff failed to cure all the deficiencies previously raised in the School Board's first motion to dismiss, the School Board again moves to dismiss this lawsuit against the School Board for failure to state a cause of action.

Plaintiff's Amended Complaint is barred by the impact rule.

Count II, negligence per se, Plaintiff's vicarious liability claim, is also subject to dismissal with prejudice for several, additional, independent reasons, First, because the School Board cannot be vicariously liable for the alleged unlawful sexual harassment, abuse, neglect, and grooming by its employee Yeckring – as such conduct is committed in bad faith, with malicious purpose, and/or in a manner exhibiting wanton and willful disregard of human rights, safety, or property – it is entitled to immunity from suit under § 768.28(9)(a), Florida Statutes, Florida's limited waiver of sovereign immunity. Second, Florida does not recognize a cause of action for sexual harassment, abuse, neglect, and grooming under a common law negligence theory. A party cannot negligently commit an intentional tort. Third, the School Board owes no duty to ensure its employees follow the law or follow the mandatory reporting statutes. Fourth, there is no such thing a private cause of action for an alleged violation of § 39.201 or § 39.101, Fla. Stat.

Counts I, negligent supervision claim, Plaintiff's direct liability claim, is also subject to dismissal for several, additional, independent reasons. First, Plaintiff failed to allege the School

Board employees committed an underlying wrongful tort outside the course and scope of their employment. Second, Plaintiff failed to allege the School Board was aware of prior similar bad acts committed by Rendek, Wright, and Faulk.

FACTUAL ALLEGATIONS

At all relevant times, Yeckring was employed by the School Board at Santa Fe High School; Mac Rendek was employed by the School Board as the Assistant Principal at Santa Fe High School; Timothy Wright was employed by the School Board as the Principal of Santa Fe High School; and Michelle Faulk was employed by the School Board as the Athletic Director at Santa Fe High School. Complaint at ¶¶ 8-9, 26, 32, 36; Exhibit A.

During the 2022-2023 school year, the minor Plaintiff M.A. was a sophomore at SFHS. *Id.* at ¶ 25. One day, while M.A. was in the hallway at SFHS, Yeckring "forced M.A. to view a sexually explicit photograph of himself on his personal cell phone" *Id.* at ¶ 27. Thereafter, M.A, "began to suffer from acute anxiety resulting in at least one (1) migraine episode." *Id.* at ¶ 29. "About one (1) week after the first sexual incident, M.A. was running late to class, when she against encountered Yeckring in the hallway" and he "proceeded to again make sexually charged statements to M.A." *Id.* at ¶¶ 31-32. "Both the first and second sexual incidents amount to sexual harassment and grooming of M.A. by Yeckring and therefore, amount to child abuse and/or neglect under Florida law." *Id.* at ¶ 34 "Despite the fact that Yeckring did not physically touch M.A., M.A.'s emotional trauma manifested physically immediately following each event….M.A. immediately suffered physical illness including, but not limited to, migraines…She also suffered from nausea, sweating, fidgeting, stomach pain, loss of appetite, severe weight loss, hair loss, irregular menstruation cycle, and she was unable to concentrate, retain, or comprehend information….Anxiety and depression became her new normal." *Id.* at ¶ 60. M.A. is was unable

to return to SFHS for the 2024-2025 school year, her Senior year, "because of the overwhelming phsycial, psychological and emotional trauma which she suffers." *Id.* at ¶ 63.

After the second encounter, M.A. "told her teacher about the first and second sexual incidents," and also went to the "front office to file a formal complaint against Yeckring." *Id.* at ¶¶ 33, 35. At the front office, M.A. reported the two incidents to Assistant Principal Rendek. *Id.* at ¶¶ 36-8. When she was done, Rendek replied "this is not the first time I have heard this type of thing about Yeckring," asked M.A. to write "a formal witness statement/complaint," and "assured" M.A. that the incident with Yeckring "would be handled." *Id.* at ¶¶ 38-40.

One to two weeks after she reported the incident with Yeckring, Yeckring was in one of M.A.'s classes as a substitute teacher. *Id.* at ¶ 42. M.A. then went to Principal Wright's office and told Principal Wright what happened. *Id.* at ¶ 44. During her meeting with Principal Wright, Athletic Director Faulk entered the room. *Id.* at ¶ 47. During this meeting, Principal Wright stated "we have had some issues in the past like this with Yeckring. This is not the first time I have heard this." *Id.* at ¶ 44. Plaintiff alleges Faulk had prior notice of Yeckring's prior sexual conduct "as shown by the act that Faulk threatened a female student with being benched in the next game if she did notstop referring to Yeckring as 'Pedo Yeck.'" *Id.* at ¶ 55. At this meeting, Wright and Faulk "again told" M.A. "that the matter with Yeckring would be properly handled." *Id.* at ¶ 48.

Prior to M.A.'s encounters with Yeckring, Plaintiff alleges that the School Board received multiple complaints from numerous children about sexual misconduct by Yeckring that was not reported as required by § 39.201, Fla. Stat. *Id.* at ¶ 49. The School Board took no action to suspend, investigate, report, dismiss, punish, or properly supervise Yeckring after students repeatedly reported incidents of sexual harassment, child abuse, and/or child neglect to…mandatory reporters employed by [the School Board.]" *Id.* at ¶ 57.

MEMORANDUM OF LAW

I. MOTION TO DISMISS STANDARD

A complaint must set forth a short and plain statement of ultimate facts showing that the pleader is entitled to relief. Fla. R. Civ. P. 1.110(b). In order to survive a motion to dismiss, the plaintiff must establish a *prima facie* case upon which relief may be granted. *Alvarez v. E&A Produce Corp.*, 708 So.2d 997 (Fla. 3d DCA 1998). The Court must take all well-plead allegations of *fact* as true. *Id.* However, whether or not a plaintiff has established a *prima facie* case depends on the sufficiency of the *allegations of fact* ***not*** *bare conclusions*. *Id.* at 1000 (emphasis added). While the Court must accept well-pleaded facts as true, it is not, and should not, be required to accept unsupported conclusions of fact. *Lloyd v. Hines*, 474 So.2d 376 (Fla. 1st DCA 1985) ("allegations, which are vague, unsupported by any description of particular overt acts, and conclusory" were properly dismissed as insufficient to state a claim against the defendant).

II. PLAINTIFF'S LAWSUIT IS BARRED BY THE IMPACT RULE

Plaintiff's lawsuit is barred by the impact rule. Plaintiff alleges that as a result of the School Board's negligence in supervising its employees and in failing to report prior complaints about Yeckring, Yeckring showed a sexually explicit photograph of himself on his cell phone to M.A. and, approximately one week later, made sexually charged statements to M.A. Plaintiff alleges that after the first incident, "M.A. started to suffer from acute anxiety resulting in at least one (1) migraine episode" (*id.* at ¶ 29) and as a result of both incidents, "suffered from nausea, sweating, fidgeting, stomach pain, loss of appetite, severe weight loss, hair loss, irregular menstruation cycle, and she was unable to concentrate, retain, or comprehend information….Anxiety and depression became her new normal." *Id.* at ¶ 60. As a result, Plaintiff seeks to recover damages for the alleged

"physical and emotional damages, trauma and pain and suffering…[that] are either permanent or continuing and [that] M.A. will suffered…in the future. *See* Count I at ¶ 76; Count II at ¶ 82.

Plaintiff's request for damages is barred by the impact rule. Plaintiff's allegations that M.A. suffered migraines, nausea, sweating, vomiting, fidgeting, stomach pain, loss of appetite, weight loss, hair loss, irregular periods, and difficult concentrating are insufficient to overcome the impact rule bar. *See R.J. v. Humana of Fla., Inc.,* 652 So.2d 360 (Fla. 1995) (holding that the plaintiff's allegations that, **as result of misdiagnosis**, he suffered bodily injury **including hypertension, pain and suffering, mental anguish, loss of capacity for enjoyment of life, and reasonable expense for medical care and attention** did not meet physical injury requirement under impact rule necessary to recover emotional distress damages); *Elliot v. Elliott*, 58 So.3d 878, 882 (Fla. 1st DCA 2011) (concluding that aggravation of pre-existing conditions, **including PTSD**, are insufficient to satisfy the impact rule); *Jenks v. Naples Cmty. Hosp., Inc.,* 829 F. Supp. 2d 1235, 1257–58 (M.D. Fla. 2011) (granting defendant's summary judgment on negligent supervision and retention claim where plaintiff failed to allege an impact and **failed to provide any evidence showing that emotional distress aggravated plaintiff's breast cancer**); *Weld v. Se. Cos., Inc.,* 10 F. Supp. 2d 1318, 1323 (M.D. Fla. 1998); *Geroux v. City of Oak Hill,* No. 6:05-CV-l 837-ORL-28, 2006 WL 2128630, at *7 (M.D. Fla. 2006) (NIED claim based on allegation that the plaintiff suffered "**physical symptomatologies, emotional and mental anguish**" dismissed as barred by impact rule); *LeGrande v. Emmanuel,* 889 So.2d 991, 995 (Fla. 3d DCA 2004), (the exacerbation of pre-existing diabetes and **memory loss** was "wholly insufficient"); *Gonzalez–Jimenez de Ruiz v. U.S.,* 231 F.Supp.2d 1187, 1201–02 (M.D.Fla. 2002) (concluding that aggravation of pre-existing conditions, such as diabetes and asthma, is insufficient to satisfy impact rule), *aff'd,* 378 F.3d 1229, 1231 (11th Cir. 2004) (emphasis added).

In *Elliot,* the appellate court held that the plaintiffs' PTSD symptoms did not establish a physical impact or sufficient physical injuries as required to overcome the impact rule and recovered on their negligence claims. *Elliott v. Elliott*, 58 So.3d 878 (Fla. 1st DCA 2011). In *Elliot*, the plaintiffs claimed their sibling dismembered their mother's corpse, burned it in a barrel, and scattered the remains on the family's farm. *Id.* As a result, one plaintiff claimed she suffered from "stress, insomnia, anxiety, diarrhea, loss of appetite, and hair loss following her mother's death. One physician diagnosed [the plaintiff] with situational anxiety depression and noted she had a history of depression, anxiety, and chronic pain." *Id.* Another plaintiff claimed he "began having headaches and developed diabetes and sleep apnea after the incident." *Id.* "Here, the ailments complained of are headaches, diabetes, sleep apnea, stress, insomnia, anxiety, loss of appetite, hair loss, and bowel trouble…are not the sort of…discernable physical injuries" sufficient to overcome the impact rule….While we do not diminish [the plaintiffs'] anguish and suffering in this distressing case, we hold that under controlling authority, we are not at liberty to affirm the judgment finding for [the plaintiffs.]" Nothing compels a different result here.

M.A.'s alleged ailments are insufficient to overcome the impact rule. Thus, Plaintiff's negligence claims are barred by Florida's impact rule. *See G4S Secure Sols. USA, Inc. v. Golzar*, 208 So.3d 204 (Fla. 3d DCA 2016) (holding that Florida's impact rule, which provides that, before a plaintiff can recover damages for emotional distress caused by the negligence of another, the emotional distress suffered must flow from physical injuries the plaintiff sustained in an impact, applies to the torts of negligent hiring, negligent retention, and negligent supervision)*; see also Miami-Dade Cnty. v. Cardoso,* 922 So.2d 301 (Fla. 3d DCA 2006) (pursuant to "impact rule," the plaintiff, who was repeatedly arrested was not entitled to damages on his negligent training and supervision claims where the plaintiff failed to show an impact or physical injury); *Resley v. Ritz–*

Carlton Hotel Co., 989 F. Supp. 1442, 1449 (M.D. Fla. 1997) (holding that plaintiff's negligent retention and hiring claims failed because the plaintiff did not allege physical injury, thereby satisfying Florida's impact rule); (granting motion to dismiss negligent supervision cause of action for failure to state a claim where plaintiff's complaint failed to satisfy the impact rule); *Degitz v. S. Mgmt. Servs., Inc.,* 996 F.Supp. 1451, 1462 (M.D. Fla. 1998) (applying Florida's impact rule to plaintiff's negligent retention claim and granting defendant's summary judgment "to the extent [p]laintiff seeks damages for emotional distress").

It is well established that the elements of negligence are duty, breach, causation, and "actual loss or damage." *Jackson Hewitt, Inc. v. Kaman,* 100 So.3d 19, 28 (Fla. 2d DCA 2011). In the absence of any allegation of recoverable damages, Plaintiff has failed to allege each element of her negligence claims. *Id.* Because Plaintiff has failed to state a negligent cause of action, Counts I and II against the School Board should be dismissed.

III. PLAINTIFF'S VICARIOUS LIABILITY CLAIM (COUNT II) FAILS TO STATE A CAUSE OF ACTION

A. Plaintiff's Vicarious Liability Claim Fails Because The School Board Is Entitled To Sovereign Immunity Where Its Employee Acted In Bad Faith Or With Maliciously Purpose Or In A Manner Exhibiting Wanton And Willful Disregard Of Human Rights, Safety Or Property

The crux of Plaintiff's lawsuit is that the School Board's should be held liable for the alleged sexual harassment, abuse, neglect, and grooming to M.A. by its employee Yeckring. It is well established that "in any given situation either the agency can be held liable under Florida law, or the employee, but not both." *McGhee v. Volusia Cnty.,* 679 So.2d 729, 733 (Fla. 1996). Where a governmental employee's alleged conduct is committed within the course and scope of their employment but "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property," then the employing agency, here the School

Board, is immune as a matter of law. *See* 768.28(9)(a), Fla. Stat. ("The state or its subdivisions are not liable in tort for the acts or omissions of an officer, employee, or agent committed…in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property"); *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 360 (1990) ("There is no question under Florida law that agencies of the state, including school boards and municipalities, are the beneficiaries of sovereign immunity"); *District School Board of Lake County v. Talmadge*, 381 So.2d 698 (Fla. 1980) (state immune from suit when state employee acted in bad faith or with malicious purpose).

Here, the alleged offensive conduct occurred on school property, during the school day. The reasonable conclusion is that Plaintiff is alleging the offensive conduct occurred within the course and scope of Yeckring's employment. Plaintiff alleged that M.A. did not invite nor want the alleged offensive conduct. Thus, the reasonable conclusion is that he alleged offensive conduct was committed in bad faith, with malicious purpose, and/or in a manner exhibiting a wanton and willful disregard to M.A.'s rights, safety and property. Thus, the School Board cannot be held vicariously liable for Yeckring's intentional torts and Plaintiff's vicarious theory of liability alleged in Count II is due to be dismissed. The School Board is entitled to an immediate interlocutory appeal for denial of its entitlement to sovereign immunity. Fla. R. App. P. 9.130(a)(3)(F)(iii).

B. Plaintiff's Vicarious Liability Claim Fails Because Florida Does Not Recognize A Sexual Harassment Cause Of Action Under A Common Law Negligence Theory

Plaintiff failed to state a cause of action in Count II because there is no such thing as a negligent intentional tort. Here, Plaintiff alleges Yeckring "forced" M.A. to view a sexually explicit photograph of himself and made sexually charged comments against M.A.'s will. Plaintiff alleges these two sexual incidents amount to sexual harassment, child abuse, and/or neglect and

grooming. Plaintiff's allegations thus clearly allege intentional conduct. Understandably, there are no reported cases involving the mere showing of a photograph, however, by analog, "a cause of action for battery requires the showing of intentional affirmative conduct and cannot be premised upon an omission or failure to act." *City of Miami v. Sanders*, 672 So.2d 46, 47 (Fla. 3d DCA 1996) ("we come to the inescapable conclusion that it is not possible to have a cause of action for 'negligent' use of excessive force because there is no such thing as the "negligent" commission of an "intentional" tort," such as battery); *McDonald v. Ford,* 223 So.2d 553 (Fla. 2d DCA 1969) ("an assault and battery is not negligence for such action is intentional, while negligence connotes an unintentional act"). Thus, the inescapable conclusion is, it is not possible to have a cause of action of negligent sexual harassment.

To the extent Plaintiff is trying to establish vicarious liability in a negligence cause of action *vis a vis* the intentional tortious conduct of Yeckring, such cause of action does not exist. The alleged tortious-conduct-causing-injury in the case at bar does not pertain to anything other than the alleged sexual harassment, abuse, neglect, and grooming by Yeckring to M.A. – *see* ¶¶ 79, 81-82 (Defendants violated § 39.201, Fla. Stat., "by failing or refusing to report the above recenced acts of harassment, grooming, child abuse and/or neglect") and therefore is insufficient to serve as a basis for liability. Thus, Plaintiff's negligence claim against the School Board fails.

This case is similar to the facts in *Guerra*. *City of Miami Beach v. Guerra*, 746 So.2d 1159, 1159-60 (Fla. 3d DCA 1999). The plaintiff, an employee of the city's police department, brought a single negligence claim against the city, alleging she was subjected to a pattern of sexual harassment as a city employee, she informed her supervisor of the harassment, and the city had a duty to ensure a safe work place and to protect her from a "hostile work environment." *Id.* The city moved for summary judgment on the grounds that there is no recognition in Florida law for a

negligence action based on alleged sexual harassment in the workplace. *Id.* The appellate court agreed, holding that "Florida does not recognize a cause of action for sexual harassment under a common law negligence theory," and entered judgment in favor of the city. *Id.* (holding the plaintiff's "complaint, [common law negligence for sexual harassment], is for a cause of action that does not exist"). Here, nothing compels a different result. The crux of Plaintiff's negligence claim is that M.A. was subjected to sexual harassment, abuse, neglect, and grooming by a School Board employee. Florida does not recognized a cause of action for and sexual harassment under a common law negligence theory. *Guerra*, 746 So.2d at 1159-60. Thus, Plaintiff's negligence claim against the Board under a *respondeat superior* theory of liability does not exist, and this Court should not be the first one to recognize what does not exist. Accordingly, Count II, Plaintiff's vicarious liability negligence claim, should be dismissed with prejudice for this additional basis.

C. Plaintiff's Vicarious Liability Claim Fails Because The School Board Owes No Duty To Ensure That Its Employees Follow The Law

Plaintiff claims that because School Board employees are mandatory reporters according to § 39.201, Fla. Stat., the School Board is liable for the alleged failure of its employees in failing to report suspected child abuse as required by § 39.201, Florida Statutes. *See* Count III; *see also* Count IV at ¶¶ 93-94 (alleging that the School Board has "a duty to report all complaints made by students that are harassing and/or sexual in nature" and the School Board breached those duties when their employees repeatedly failed and refused "to report complaints of harassment, abuse, and neglect"). Plaintiff also claims that the School Board owed a duty to M.A. "to ensure that applicable policies and procedures and laws were being implemented and strictly adhered to" (Count I at ¶ 57) and "to ensure that [its employees] followed the law as caretakers employed by ACSB and mandatory reporters under the law." Count I at ¶¶ 59-60; *see also* Count II at ¶¶ 70 (School Board employees "failed or refused to properly report"). In support thereof, Plaintiff

alleges that (1) School Board employees are "mandatory reporters" of child abuse and neglect as defined in § 39.201, Fla. Stat. (Complaint at ¶ 14); the "Jeffrey Johnston Stand up for All Students Act," § 1006.147, Fla. Stat., prohibits sexual harassment of any student (*id.* at ¶ 15); and School Board employees failed to report previous complains by Santa Fe High School students regarding Yeckring's sexually inappropriate conduct. Complaint at ¶ 44. The foregoing is insufficient to create a duty or private cause of action against the School Board for which Plaintiff can establish civil liability or recover monetary damages.

For over twenty-five years, the Florida Supreme Court has held that where a statute does not expressly provide for a civil cause of action and the legislative history did not reveal intent to create a cause of action, a Florida statute does not create a private cause of action upon which a party is entitled to relief. *Murthy v. N. Sinha Corp.*, 644 So.2d 983 (Fla. 1994) (holding Ch. 489, the licensing and regulatory chapter governing construction contracting, did not create private cause of action because "there is no evidence in the language or the legislative history of chapter 489 of a legislative intent to create a private remedy") (citing *Parker v. State,* 406 So.2d 1089, 1092 (Fla. 1981) ("legislative intent is the pole star by which we must be guided in interpreting the provisions of a law"). "In general, a statute that does not purport to establish civil liability but merely makes provision to secure the safety or welfare of the public as an entity, will not be construed as establishing a civil liability." *Id.* at 986.

First, Florida courts have consistently refused to impose civil liability for the failure to report suspected child abuse. *See J.B. v. Department of Health and Rehab. Servs.,* 591 So.2d 317 (Fla. 4th DCA 1991); *Freehauf v. School Bd. of Seminole County,* 623 So.2d 761 (Fla. 5th DCA 1993); *Fischer v. Metcalf,* 543 So.2d 785 (Fla. 3d DCA 1989).

Second, neither § 39.201 nor § 39.101, Florida Statutes, creates a private cause of action. Neither statute creates a cause of action against those who fail to report an incident of harassment, neglect, or abuse. *See Welker v. S. Baptist Hosp. of Fla., Inc.,* 864 So.2d 1178, 1183 (Fla. 1st DCA 2004), decision quashed on other grounds, 908 So.2d 317 (Fla. 2005) (affirming the trial court's dismissal with prejudice of count I of the amended complaint because statute requiring the reporting of known or suspected child abuse, § 39.201, Fla. Stat., does not create an implied cause of action for damages for a party's failure to comply with terms of the statute). Rather, "a person who knowingly and willfully fails to report to the central abuse hotline known or suspected child abuse, abandonment, or neglect, or who knowingly and willfully prevents another person from doing so, commits a felony of the third degree." § 39.205, Fla. Stat. This is not a case of first impression. The appellate court in *Welker* explicitly addressed and rejected the plaintiff's exact same claim of negligence for failing to report in violation of § 39.201, Fla. Stat. *Welker,* 864 So.2d 1183.

Because there is neither a common law duty owed to Plaintiff to be a mandatory reporter nor a statute expressly authorizing a private cause of action where a mandatory reporter fails to report actual or suspected abuse, Plaintiff cannot recover from the School Board under the theory that its employees failed to report prior complaints. *See Mora v. S. Broward Hosp. Dist.,* 710 So.2d 633, 634 (Fla. 4th DCA 1998) (hospital's failure to report knowledge or suspicion of abuse of elderly patient did not result in civil cause of action against hospital under reporting statute); *see also Trianon,* 468 So.2d 912 (explaining that no common law duty of care exists with regard to how government bodies carry out their functions of enacting and enforcing laws). There is no statute that provides a mechanism for a private citizen to challenge the School Board's employee's

alleged failure to report in court. Thus, for this additional, separate basis, Plaintiff's vicarious liability claim, Count II, should be dismissed with prejudice.

IV. PLAINTIFF'S DIRECT LIABILITY CLAIM (COUNT I) FAILS TO STATE A CAUSE OF ACTION

In Counts I, Plaintiff is trying to hold the School Board directly liable for *its own conduct* in negligently supervising School Board employees Yeckring, Rendek, Wright, and Faulk. Amended Complaint at ¶¶ 72-73. Because Plaintiff failed to allege the ultimate facts necessary to show, or even any legal conclusions alleging, these employees committed an underlying tort that caused M.A. injury and that the underlying tortious conduct at the time M.A. was injured was outside the course and scope of their employment, these claims fail as a matter of law. Because Plaintiff failed to allege the School Board knew (scienter) that Rendek, Wright, and Faulk were unfit prior to the alleged sexual harassment, but failed to act appropriately after gaining that knowledge, Plaintiff's direct liability claim fails for these additional reasons as it relates to Rendek, Wright, and Faulk.

A. Plaintiff's Direct Liability Claims Fails As It Relates To Rendek, Wright, And Faulk, Because Plaintiff Failed To Allege An Underlying Tort Committed By These Employees That Caused M.A. Injury

First, "in order to impose liability on an employer for [negligent supervision,] a plaintiff must first show she was injured by the wrongful act of an employee. *Texas Skaggs, Inc. v. Joannides*, 372 So.2d 985, 987 (Fla. 2nd DCA 1979). "It is necessary that the underlying wrong — the actions of the employee or servant — be a tort." *Acts Ret.-Life Communities Inc. v. Est. of Zimmer*, 206 So.3d 112, 115 (Fla. 4th DCA 2016); *Williams v. Feather Sound, Inc.,* 386 So.2d 1238, 1239–40 (Fla. 2d DCA 1980) (recognizing employer liability for "willful tort[s]" of employees). Absent from the Amended Complaint are any factual or legal allegations alleging an underlying wrongful tort committed by Rendek, Wright, or Faulk that caused M.A. injury. This in

and of itself is sufficient to dismiss Plaintiff's direct liability claim, Count I, for failure to state a cause of action.

B. Plaintiff's Direct Liability Claims Fails Because Absent From The Amended Complaint Are Allegations That The School Board Employees' Underlying Tortious Conduct Was Committed Outside The Course And Scope Of Employment

Second, the underlying wrongful tort committed by the employee must be performed **outside** the scope of employment. *Total Rehab. & Med. Ctrs. v. E.B.O.*, 915 So.2d 694, 696-97 (Fla. 3d DCA 2005) ("our case law since *Mallory* has recognized the existence of negligence actions against employers for acts of [the defendant's] employee committed **outside** the scope and course of his employment"); *Gillis v. Sports Auth., Inc.*, 123 F. Supp. 2d 611, 617 (S.D. Fla. 2000) ("a claim for negligent hiring or retention allows for recovery against an employer for acts of an employee committed **outside** the scope and course of employment"); *Watson v. City of Hialeah*, 552 So.2d 1146, 1148 (Fla. 3d DCA 1989) ("by its very nature, an action for negligent retention involves acts which are **not within** the course and scope of employment…"); *Muegge v. Heritage Oaks Golf & Country Club, Inc.*, 2006 WL 1037096, at 6 (M.D. Fla. 2006) ("claims based on negligent hiring, retention, or supervision allow recovery against an employer for acts of an employee that are committed **outside** of the scope and course of employment") (emphasis added). This issue is not a close one: a plaintiff is not even entitled to discovery on direct liability negligent supervision claim where the employee was working within the course and scope of employment, because such discovery is not reasonably calculated to lead to the discovery of admissible evidence. *Delaurentos*, 47 So.3d 879.

Here, Plaintiff failed to allege the bare minimum to satisfy a direct liability claim as absent from the Amended Complaint is an allegation that the School Board employees' conduct, in

committing the underlying wrongful tort, was **outside** the course and scope of their employment. For this additional reason, Plaintiff's direct liability claim, Count I, fails to state a cause of action.

C. Plaintiff's Direct Liability Claims Fails As It Relates To Rendek, Wright, and Faulk Fails Because Absent From The Amended Complaint Are Allegations That The School Board Knew Of Prior Similar Misconduct

Third, Plaintiff failed to allege the ultimate facts necessary to establish a direct liability claim as it relates to Rendek, Wright, or Faulk. "Negligent supervision occurs when during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigation, discharge, or reassignment." *Dep't of Envtl. Prot. v. Hardy,* 907 So.2d 655, 660 (Fla. 5th DCA 2005). Put slightly differently, negligent supervision exists when the defendant "negligently placed [the plaintiff/purported victim] under the supervision of [an employee], when [the defendant] either knew or should have known that [the employee] had the propensity to commit [the torts committed]." *Malicki v. Doe,* 814 So.2d 347, 362 (Fla. 2002). In yet another form, a supervisor who "(i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control," "is under a duty to exercise reasonable care so to control his servant while acting outside the course of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them ...." *Id.* at 361 n. 14 (emphasis omitted) (quoting Restatement (Second) of Torts § 317 (Am. Law Inst. 1965)).

> Once liability began to be imposed on employers for acts of their employees outside the scope of employment, the courts were faced with the necessity of finding some rational basis for limiting the boundaries of that liability; otherwise, an employer would be an absolute guarantor and strictly liable for any acts committed by his employee against any person under any circumstances. Such unrestricted liability would be an intolerable and unfair burden on employers. **Only when an employer has somehow been responsible for bringing a third person into contact with an employee, whom the employer knows or should have known is predisposed to**

> **committing a wrong under circumstances that create an opportunity or enticement to commit such a wrong, should the law impose liability on the employer**.

Garcia v. Duffy, 492 So.2d 435, 439 (Fla. DCA 1986)(emphasis added). Absent from the Amended Complaint are factual allegations that the School Board was aware that these employees were predisposed to committing a wrong under similar circumstances **before** the conduct giving rise to the claim but failed to take reasonable corrective action. For this additional reason, Plaintiff failed to state a direct liability cause of action as it relates to Rendek, Wright, and Faulk.

D. Plaintiff's Negligent Hiring Claim Fails To Allege The Ultimate Facts Necessary To State A Cause Of Action

In Count I, "negligent supervision," Plaintiff alleges that the School Board "owed a legal duty to M.A. to exercise reasonable care in **selecting**, training, and supervising qualified, competent employees." Complaint at ¶ 55 (emphasis added). To the extent Plaintiff is claiming the School Board was negligent in "selecting" its employees, Plaintiff failed to state a cause of action. "Selecting" employees is simply another way of saying "hiring." Absent from the Amended Complaint are any facts to support Plaintiff's allegation it was negligent in selecting its employees. The lack of such facts to corroborate Plaintiff's conclusory claim in and of itself is sufficient to dismiss Plaintiff's negligent training theory of liability. *Lloyd v. Hines*, 474 So.2d 376 (Fla. 1st DCA 1985) ("allegations, which are vague, unsupported by any description of particular overt acts, and conclusory" were properly dismissed as insufficient to state a claim against the defendant).

An employer may be liable for "negligent hiring" where the employer knew or should have known of the employee's unfitness **at the time he or she was hired**. *Garcia v. Duffy*, 492 So.2d 435, 438–39 (Fla. 2d DCA 1986).

> The principal difference between negligent hiring and negligent retention as bases for employer liability is the time at which the employer is charged with knowledge of the employee's unfitness. **Negligent hiring occurs when, prior to the time the**

> **employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background.** *See, e.g., Williams v. Feathersound, Inc.,* 386 So.2d 1238 (Fla. 2d DCA 1980), *petition for review denied,* 392 So.2d 1374 (1981); *Abbott.* Negligent retention, on the other hand, occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment. *See, e.g., McCrink v. City of New York,* 296 N.Y. 99, 71 N.E.2d 419 (1947); *Fernelius v. Pierce,* 22 Cal.2d 226, 138 P.2d 12 (1943); *see also, Riddle v. Aero Mayflower Transit Co.,* 73 So.2d 71 (Fla. 1954).

Id. (emphasis added).

In Florida, it is presumed that an employer is not negligent in the hiring of its employees where, "before hiring the employee, the employer conducted a background investigation of the prospective employee and the investigation did not reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for employment in general." § 768.096, Fla. Stat. The Florida Education Code requires the criminal screening and employment history screening before employing instructional or non-instructional personnel or school administrators in any position that requires direct contact with students. *See* §§ 1002.421, 1012.32, 1012.465, 1012.56, Fla. Stat.

Here, Plaintiff failed to allege any facts in the Amended Complaint showing that at the time the School Board hired Yeckring, Rendek, Wright, and Faulk, the School Board knew or should have known of their unfitness. Plaintiff also failed to allege any facts overcoming the School Board's presumption against negligent hiring. For this reason, Count I, to the extent it relies on a negligent selecting/hiring theory of liability should be dismissed for failure to state a cause of action.

CONCLUSION

WHEREFORE, Defendant, Alachua County School Board, respectfully requests an order dismissing Plaintiff's Amended Complaint and for any other relief that is just and proper.

Respectfully submitted,

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CERTIFICATE OF CONFERRAL

Pursuant to Administrative Order 3.09, Appendix A Standing Case Management Order effective April 30, 2021, counsel for Defendant, Alachua County School Board, has conferred with counsel for the Plaintiff, Anneke Acree, in a good faith effort to resolve the issues raised in the motion. The parties do not agree on the resolution of the motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to the following, this 17th day of January, 2025:

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