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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0077**

Jane S. Doe,
Appellant,

vs.

Kelly Kirby,
Defendant,

Winona State University,
Respondent,

HTC Counselling, LLC,
Defendant.

**Filed August 24, 2020
Affirmed
Worke, Judge**

Winona County District Court
File No. 85-CV-19-1026

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respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's grant of judgment on the pleadings in favor of respondent, arguing that the district court: (1) erroneously applied a summary-judgment standard; and (2) drew impermissible inferences in favor of respondent. We affirm.

FACTS

In May 2019, appellant Jane Doe filed a complaint against defendants Kelly Kirby and HTC Counselling LLC (HTC) and respondent Winona State University (WSU). Doe's seventh claim for relief, the only claim at issue on appeal, alleged that WSU was vicariously liable for Kirby's sexual abuse, negligence, and negligence per se under the doctrine of respondeat superior.

WSU moved for judgment on the pleadings, or alternatively, summary judgment. Doe then moved to amend the first amended complaint, and the district court granted her motion.

Doe made the following allegations in her second amended complaint. In August 2008, Doe enrolled as a student at WSU. Doe suffered from severe depression and subsequently sought mental-health care through WSU. In March 2011, Doe was referred to Kirby, who was a counselor at WSU's counseling center, for mental-health counseling. While Doe was Kirby's client at WSU, Kirby began "grooming" Doe.¹ Kirby gave Doe gifts and engaged in inappropriate conversations with her on WSU's campus.

¹ Doe did not define the term "grooming" in her second amended complaint.

In December 2011, Kirby moved Doe's care to HTC while Kirby remained an employee of WSU. Kirby met with Doe for extended periods of time at Kirby's WSU counseling office while Doe was a patient at HTC and used WSU's email account, office phone line, and office space to facilitate inappropriate conversations with Doe.

During the spring of 2012 and while Doe was still Kirby's patient, Kirby informed Doe that she had romantic feelings for her and "engaged in social activities and unprofessional conversations with [Doe]." Doe graduated from WSU in May 2012, and her last therapy session with Kirby was later that month. From July 2012 until November 2016, Kirby engaged in sexual contact with Doe.

Doe alleged that Kirby committed third- and fourth-degree criminal sexual conduct by engaging in sexual contact with and the penetration of an emotionally-dependent former patient, claiming that Kirby was civilly liable for sexual abuse under Minn. Stat. § 541.073, subd. 1 (2018). The district court granted WSU's motion for judgment on the pleadings on the basis that Doe's respondeat-superior claim failed because the second amended complaint alleged that the sexual abuse occurred outside of the course and scope of Kirby's employment at WSU. This appeal followed.

DECISION

Doe argues that the district court erred by granting WSU's motion for judgment on the pleadings because she sufficiently pleaded a respondeat-superior claim against WSU. Doe contends that the district court erred by applying a summary-judgment standard and making impermissible inferences in favor of WSU.

We review a district court’s grant of a motion for judgment on the pleadings “to determine whether the complaint sets forth a legally sufficient claim for relief.” *Sec. Bank & Trust v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 495 (Minn. 2018) (quotations omitted). This court “consider[s] only the facts alleged in the complaint, accepting those facts as true and drawing all reasonable inferences in favor of the nonmoving party.” *Id.* (quotations omitted).

“To withstand a motion for judgment on the pleadings, [a plaintiff] must state facts that, if proven, would support a colorable claim and entitle it to relief.” *Midwest Pipe Insulation, Inc. v. MD Mech., Inc.*, 771 N.W.2d 28, 31 (Minn. 2009). This court reviews de novo whether a complaint sets forth a legally sufficient claim for relief. *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 606 (Minn. 2014).

“Under the doctrine of respondeat superior, an employer is vicariously liable for the torts of an employee committed within the course and scope of employment.” *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 583 (Minn. 2008) (quotation omitted). The supreme court has held that “an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place.” *Lange v. Nat’l Biscuit Co.*, 211 N.W.2d 783, 786 (Minn. 1973).

Doe first argues that the district court erroneously applied a summary-judgment standard. Doe contends that the district court’s order did not set forth a legal standard, referenced an allegation as being undisputed, and used language about an absence of evidence. However, these arguments mischaracterize the district court’s order. WSU’s

motion was for judgment on the pleadings, or alternatively, summary judgment. The district court granted WSU's motion in its entirety in an order captioned: "Order Granting Defendant Winona State University's Motion for Judgment on the Pleadings." The district court's order referenced Minn. R. Civ. P. 12.03 and made multiple references to viewing the allegations in the second amended complaint as true. And while it may have been improvident for the district court to refer to "undisputed facts, as plead[ed] in the [s]econd [a]mended [c]omplaint" and an "absence of evidence" in its order, viewing the order in its entirety indicates that the district court properly examined whether the second amended complaint sufficiently pleaded a claim for relief.

Doe next argues that the district court erred by making two impermissible inferences in WSU's favor. Specifically, Doe argues that the district court erred by inferring that: (1) her treatment at WSU terminated when her treatment moved to HTC; and (2) "sexual abuse" required "sexual contact" or "sexual assault."

The district court did not make impermissible inferences in WSU's favor. Doe alleged that Kirby's sexual abuse involved sexual contact and penetration that occurred off of WSU's campus and after her treatment with Kirby at WSU and HTC terminated. Whether Doe's treatment at WSU terminated when her treatment moved to HTC is therefore irrelevant, because the alleged sexual abuse did not occur within the scope of Kirby's employment as a therapist. *See Lange*, 211 N.W.2d at 786 (listing elements of respondeat-superior claim).

While Doe relies heavily on her allegations that "grooming" occurred while she received mental-health counseling from Kirby at WSU, as pleaded, this conduct does not

fall within an action for damages due to sexual abuse pursuant to Minn. Stat. § 541.073, subd. 1. In addition, Doe did not allege that Kirby's grooming behavior constituted another colorable claim for relief, and thus Kirby's alleged actionable conduct falls outside of the limits of time and place of her employment with WSU.

Accepting the facts alleged in Doe's second amended complaint as true and drawing reasonable inferences in her favor, we conclude that Doe did not set forth an actionable respondeat-superior claim premised on sexual abuse that occurred within Kirby's work-related limits of time and place. Therefore, the district court did not err by granting WSU's motion for judgment on the pleadings.

Affirmed.