IN THE IOWA DISTRICT COURT FOR LEE COUNTY (SOUTH)

JANE DOE II, **Plaintiff,** **vs.** **KEOKUK COMMUNITY SCHOOL DISTRICT and MICHELLE LUKAVSKY in her official and individual capacity,** **Defendants.**	**CAUSE NO. LALA006107** **ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In this summary judgment proceeding, the Court must determine the timeliness of the lawsuit Plaintiff Jane Doe II(Doe) filed against the Keokuk Community School District (District), Michelle Lukavsky , the principal of Keokuk High School, and the women's high school track coach, Ms. Gina Sisk. The suit alleges that Sisk sexually abused Doe, then a minor, while she was a student and track athlete at Keokuk High School. Plaintiff asserts that the abuse occurred repeatedly and continuously beginning in 2009 and ending in the spring of 2011. Doe also makes several claims against the District and the principal arising out of the abuse.

The Defendants moved for summary judgment contending that Plaintiff's Petition filed February 27, 2013, was not timely filed within two years of her loss or injury under the statute of limitations found in section 670.5 of the Iowa Municipal Tort Claims Act. Plaintiff vigorously resists the Motion, asserting that her claims were timely filed because: (1) under the common law discovery rule her claims did not accrue until 2011 when she discovered the causal link between the abuse and her injury; (2) a special

statute of limitations for sexual abuse applies to her claims; and (3) her causes of action did not accrue under the continuing tort doctrine until the last act of abuse occurred in the spring of 2011. Doe maintains that so long as the last acts of abuse occurred less than two years before she filed suit, the continuing tort doctrine (or continuing violation doctrine) allows her to recover for all acts of abuse.

Defendants assert that there is no discovery rule under Chapter 670; that no special statute of limitations applies; and that the continuing tort doctrine does not provide a defense to the statute of limitations. Defendants further claim that none of the contact between Doe and Sisk during the two years preceding the filing of the petition was actionable under Chapter 670.

For the reasons discussed in detail below, the Court **CONCLUDES:**

a. The common law discovery rule does not apply;

b. No special statute of limitations applies to Doe's claims; and

c. The continuing tort doctrine does not provide Doe with a defense to the statute of limitations.

Consequently, the Court concludes that the Defendants are entitled to summary judgment.

II. BACKGROUND FACTS AND PROCEEDINGS

Plaintiff was born October 10, 1992 and turned age 18 on October 10, 2010. She attended Keokuk High School, a school within the Keokuk Community School District (District), from about August 2007 to May 2011, when she graduated. Michelle Lukavsky served as Keokuk High School principal during this time frame. Defendant, Gina Sisk, held the position of girls track coach at the Keokuk High School.

Plaintiff first met Sisk at a basketball tournament when she was 16. Sisk asked Doe to join the girls track team in the spring of 2008. Doe consented. Later, in the fall of 2008, Sisk requested that Doe join the cross-country team. Doe participated in track again during the spring 2009 school semester.

During the spring of 2009, Doe and Sisk were riding on a District bus together after Doe competed in a track meet. Doe claims that Sisk sexually abused her during the trip. Within the same time frame, Doe states that Sisk took her on "dates" and then sexually abused her in Sisk's car or in Sisk's camper. According to Doe, Sisk continued to sexually abuse her in April and May 2009 at Sisk's home. Doe states that Sisk also sexually abused her on school grounds during the spring 2009 semester.

Doe competed in the state high school track meet in May 2009. She states that Sisk made inappropriate sexual comments to her while enroute to the track meet. After arriving at the meet, Doe maintains that Sisk "required that I come to her hotel room" [where] she sexually abused [me] throughout the track meet."

Doe reports that Sisk frequently threatened her during the episodes of sexual abuse. According to Doe, Sisk threatened Doe's family members, too. Further, Doe asserts that Sisk threatened to kill herself and make Plaintiff's life a "living hell" if she disclosed the abuse to others. As a result of these threats, Doe states that she became terrified of Sisk and afraid of telling anyone, including family members, of the abuse.

At the urging of her father, who was suspicious of Doe's relationship with Sisk, Doe reported the abuse to the District on September 22, 2009, when she filed a complaint against Sisk. Doe met with Defendant Lukavsky on September 24, 2009, and filed a formal written complaint against Sisk.

The District began an investigation into the alleged sexual abuse. However, Doe withdrew the complaint in writing on September 28, 2009. She states that she did so because of threats from Sisk. Doe resubmitted her complaint on October 9, 2009, to Principal Lukavsky. Within a week, the Keokuk Police Department interviewed Doe, at which time she disclosed the details of her relationship with Sisk. In early January 2010, the District notified Doe and her father in writing that the investigation "failed to establish sufficient evidence of probable cause." The notice advised Doe of various legal options.

Doe did not compete in track during the spring 2010 season. However, she participated in track again in the spring of 2011. Sisk coached Doe again. According to Doe, Sisk attempted to rekindle the relationship with Doe. She repeatedly asked Doe to get back together with her and tried to be alone with her in school buildings. In March 2011, Doe contends that Sisk stated that the two could still be together. During April 2011, Doe reports that Sisk voiced objection that Doe had become engaged. Doe states that Sisk asked her to leave her fiancé in April 2011 and expressed concern about their relationship ending on a bad note.

Doe graduated from Keokuk High School in May 2011. At about the same time, she states that she recognized that her depression and anxiety were connected to Sisk's sexual abuse. During August 2011, Doe states that she attempted to commit suicide.

On February 27, 2013, Doe, then age 20, filed a petition asserting claims of assault, battery, sexual abuse, and lascivious conduct with a minor, negligence, violations of due process and equal protection, and intentional infliction of emotional

distress against Sisk. Against the District and Lukavsky, she alleged claims for intentional infliction of emotional distress, negligence, and violations of her due process and equal protection rights. She also brought a premises liability claim against the District. The Defendants denied liability. They raised the statute of limitations as an affirmative defense. The District and Lukavsky now seek summary judgment claiming Doe failed to file suit within the applicable two year statute of limitations found in section 670.5.

To resolve the challenging statute of limitation issues presented, the Court begins with a discussion of summary judgment standards and principles. Those principles guide the discussion of the merits of the Motion.

III. SUMMARY JUDGMENT PRINCIPLES

The principles relating to summary judgment motions are well-established in our case law and Rules of Civil Procedure. Summary Judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The Court must determine whether summary judgment is appropriate by first examining the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine whether there is any genuine issue of material fact. When the facts are undisputed and the only issue is what consequences flow from the facts, summary judgment is appropriate. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. An issue of fact is “material” only when the dispute is over facts that might affect the outcome of the suit, given the applicable governing law.

The Defendants have the burden to show that no genuine issue of material fact exists. The Court must view the record in the light most favorable to the Plaintiff. The statement of undisputed facts submitted by the moving party does not "constitute a part of the record from which genuine issues of material fact may be determined, except insofar as the statement of undisputed facts may contain "expressed stipulations concerning the anticipated summary judgment ruling." The statement of undisputed facts is "intended to be a mere summary of claims that must rise or fall on the actual contents of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.

The party resisting the motion should be afforded every legitimate inference that can reasonably be deduced from the evidence. Clinkscales v. Nelson Securities, Inc., 697 N.W. 2nd 836, 841 (Iowa 2005). The Court applied these principles in this case.

IV. DISCUSSION AND ANAYSIS

A. INTRODUCTION

At the outset, the Court notes that Plaintiff dismissed Defendant Sisk from this lawsuit in April 2014, after the District and principal requested summary judgment. Counts I through III allege claims against only Sisk. None of these counts includes a claim against the District based upon the doctrine of respondeat superior or vicarious liability. Similarly, Doe made no request in any of the three counts for relief from any Defendant other than Sisk. Under these facts, the Court believes that Doe has effectively dismissed Counts I through III. Counts IV-VII make claims against Sisk and the other Defendants. The claims in those counts directed to Sisk only have also been effectively dismissed.

B. CHAPTER 670: THE IOWA MUNICIPAL TORT CLAIMS ACT

The parties agree that Doe's claims are brought under the Iowa Municipal Tort Claims Act, Chapter 670. Under Iowa law, the Keokuk School District is considered a "municipality". See Section 670.1(2), The Code (2013). Claims asserted against Sisk, acting in her capacity as a school district employee, are likewise governed by Chapter 670. There is no provision in Chapter 670 that removes claims asserted personally against an employee of a school district from the scope of Chapter 670, if the employee was acting within the scope of her employment.

Iowa Code Chapter 670 is the **exclusive** remedy for torts against municipalities and their employees. City of Cedar Falls v. Cedar Falls Community School District, 617 N.W. 2nd 11, 18 (Iowa 2000); Section 670.4, the Code (2013). Here, there is no question that Doe's claims against Sisk, now dismissed, and her claims against the District and principal implicate Chapter 670. Likewise, there is no question that the statute of limitations under Chapter 670 is two years from the date of injury or loss. See Section 670.5.

Doe concedes that she failed to file her Petition within two years of some of the alleged acts of sexual abuse. However, she argues that a common law discovery rule exists under Chapter 670 to extend the time she had to file her claims. She asserts that she did not "discover" the relationship between the alleged abuse and her injury until 2011, and that her suit was timely filed in 2013 within two years of the discovery. The Court respectfully disagrees that the discovery rule applies.

In Doe v. New London Community School District, 848 N.W. 2nd 347 (Iowa 2014), the Supreme Court confirmed that no common law discovery rule exists under

the pre- 2007 version of section 670.5. Doe correctly notes that the legislature amended section 670.5 in 2007. However, the amendment in 2007 did not add a discovery rule to the two year statute of limitations. In Doe v. New London, the Supreme Court specifically discussed the 2007 amendment. The Court remarked that the legislative summary of the 2007 amendment indicates that the amendment expressly requires a Chapter 670 claim to be filed within two years of the injury and was a continuation of the existing two year statute of limitations. Doe thus effectively rejected Plaintiff's argument that by amending section 670.5, the legislature added a discovery rule to the statute of limitations contained in section 670.5.

Under section 670.5, Doe had the obligation to file her chapter 670 claims within two years of the loss or injury. If she did not do so, her claims must be dismissed, unless she can establish that a different statute of limitations applies. Doe attempts to avoid application of the two year statute by arguing that section 614.8A applies to her claims. The Court discusses this issue next.

C. CLAIMS FOR SEXUAL ABUSE

Doe next argues that she is entitled to the benefit of the special statute of limitations found in Iowa Code Section 614.8A for child sexual abuse claims. This statute provides:

> "An action for damages for injuries suffered as a result of sexual abuse which occurred when the injured person was a **child**, but not discovered until after the injured person is of the age of majority, shall be brought within four years from the time of discovery by the injured party of both the injury and the causal relationship between the injury and the sexual abuse."

The Defendants assert that Section 614.8A is not available to Doe because she was not a **child**, as that term is used in the statute, at the time of the alleged abuse.

The Supreme Court settled this dispute in Doe v. New London, 848 N.W. 2nd at 354-355.

Over a strong dissent from three justices, the Supreme Court majority traced the history of section 614.8A and the case law discussing the statute and affirmed that the term "**child**" in Section 614.8A means a person under age 14. Here, Jane Doe II had already turned age 14 in 2008, before the alleged abuse started. Therefore, Jane Doe II cannot use the special statute of limitations for child sex abuse cases found in section 614.8A to preserve her claims.

Doe requests that this Court follow the dissenting opinion in Doe v. New London, and hold that the term "**child**" in Section 614.8A means a person under age 18. This Court declines the offer. The Court must follow existing precedent. The power to change precedent is properly vested only in the Supreme Court.

Importantly, the Supreme Court noted in Doe that its interpretation of section 614.8A "does not minimize the harm associated with sexual abuse of minors aged 14 to 17" because these persons can still utilize the tolling provisions of section 614.8. 848 N.W. 2nd at 356. Doe does not argue that section 614.8 applies to her claims. Section 614.8 provides that the time limits for actions in chapter 670 are extended in favor of minors so that they have one year from and after attainment of majority within which to file their complaint or to commence an action. Here, Doe turned age 18 on October 10, 2010. She filed suit on February 27, 2013. Her Petition was not filed within one year of the date she attained majority. Accordingly, Section 614.8 does not apply.

D. CONTINUING TORT DOCTRINE

Doe next contends that the continuing tort doctrine applies to her claims because Sisk and the other Defendants continually abused her or violated her rights from 2009 through 2011. Doe further alleges that under the continuing tort doctrine, her claims did not accrue until the last act of abuse occurred in the spring of 2011. Finally, she argues that she can recover damages for all of the actionable conduct of the Defendants, even if it occurred more than two years before she filed suit. For the reasons set out below, the Court disagrees with Doe's positions on the continuing tort doctrine. The Court begins with a general discussion of the continuing tort doctrine followed by a discussion of Iowa cases, including a case decided in March 2015.

Some states recognize the continuing tort doctrine and others do not. In some states, the court may apply the doctrine to some torts but not to others. See Mix v. Delaware and Hudson Railway Company, 345 F. 3d 82 (2d Cir. 2003)(refusing to apply the continuing tort doctrine to a FELA claim); Wenigar v. Johnson, 712 N.W.2d 190, 209 (Mn. App. 2006)(refusing to apply the continuing tort doctrine to a claim for intentional infliction of emotional distress). One federal judge has commented that the continuing tort doctrine is misnamed. Judge Posner of the 7th Circuit Court of Appeals wrote:

> "It is thus a doctrine not about a continuing but about a cumulative violation." Limestone Development Corporation v. Village of Lamont, IL, 520 F. 3rd 797, 801 (7th Cir. 2008).

Courts and commentators have defined the doctrine in various ways. Judge Posner stated the doctrine "allows suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought." 520 F. 3rd at 801. In 54 C.J.S. Limitations Section 223, the continuing tort doctrine is described as

> "In certain tort cases involving continuous or repeated injuries, the statute of limitations accrues upon the date of the last injury and that the Plaintiff may recover for the entire period of the Defendant's negligence provided that an act contributing to the claim occurs within the filing period."

These definitions demonstrate that the courts have not always uniformly defined the continuing violation doctrine.

Some courts have treated the continuing tort doctrine as a tolling doctrine. Others define the doctrine as one governing accrual. Heard v. Sheahan, 253 F. 3d 316, 319 (7th Cir. 2001). In Heard, the Circuit Court determined that the continuing tort doctrine was correctly characterized as a doctrine governing accrual. This seems to be the approach taken by the Iowa Supreme Court, as discussed below. The Illinois Supreme Court stated in Feltmeier v. Feltmeier, 798 N.E. 2d 75 (Ill. 2003) that the continuing tort doctrine is an exception to the statute of limitations just like the discovery rule.

Generally, courts have considered the continuing tort doctrine in three types of cases: **(1)** where a single event gives rise to continuing injuries; **(2)** where a continuous series of events gives rise to a cumulative injury; and **(3)** where repeated events give rise to discrete injuries. Heard, 253 F. 3d at 320. As will be demonstrated below, the Iowa appellate courts have considered cases in all three of these general categories.

Doe relies heavily on case law from Wisconsin to support her arguments on the continuing tort doctrine. See Kolpin v. Pioneer Power and Light Co. Inc., 469 N.W. 2nd 595 (Wis. 1991). In Kolpin, the Supreme Court of Wisconsin affirmed in dicta earlier rulings holding that:

> "…If a Defendant engages in a continuum of separate negligent acts which cause the plaintiff damage, the cause of action is not complete until the last act of negligence occurs. Once the cause of action is complete, then the cause of action accrues."

Under the doctrine reaffirmed in Kolpin, if an action is timely brought in relationship to the last act of negligence, then the entire cause of action is considered to be timely filed and the Plaintiff may recover for negligent acts falling outside the limitations period. This principle tracks the language from C.J.S. cited above. One judge explained this principle as follows:

> "…The continuing tort doctrine signifies that a plaintiff can reach back to its beginning even if that beginning lies outside the statutory limitations, when it would be unreasonable to require or even permit her to sue separately over every incident of the defendant's unlawful conduct." 253 F. 3rd at 319-320.

The Court now examines how the Iowa Supreme Court has considered the continuing tort doctrine. The Iowa Supreme Court has evaluated the continuing tort doctrine in a variety of contexts, including nuisance and trespass cases, hostile work environment cases, and in a select number of tort cases. In Hegg v. Hawkeye Tri-County, 512 N.W. 2nd 558 (Iowa 1994), dairy farmers brought suit against their electricity supplier on January 2, 1991, asserting that the R.E.C. was negligently delivering electricity to their farm in a manner that caused stray voltage and damaged their dairy herd. The Plaintiffs purchased an electronic grounding system in 1988 to correct the problem. The evidence showed that the farmers first noticed a reduction in the milk produced by their herd in late 1981.

The Defendants moved for summary judgment asserting that the suit was not timely brought within the applicable five-year statute of limitations because the farmers knew of their loss in 1981. In reply, the Plaintiffs alleged that their cause of action accrued in 1988 when they installed the E.G.S. monitoring device. Plaintiffs further claimed that their cause of action did not accrue until the last date on which the Defendants negligence occurred.

The Supreme Court agreed with the Plaintiff's argument stating:

> "We agree that where the wrongful act is continuous or repeated so that separate and successive actions for damages arise, the statute of limitations runs as to these latter actions at the date of their accrual, not from the date of the first wrong in the series." 512 N.W. 2nd at 559.

The Court stated further:

> "Recovery is limited to those actions accruing during the statutory period…preceding the inception of the current action for damages." 512 N.W. 2nd at 559 citing Earl v. Clark, 219 N.W. 2nd 487, 491 (Iowa 1974).

In Farmland Foods, Inc. v. Dubuque Human Rights Commission, 672 N.W. 2nd 733 (Iowa 2003), the employee of a meat-packing plant filed a complaint of discriminatory acts by his employer with the Human Rights Commission. After the Administrative Law Judge found probable cause, the employee amended the complaint to allege claims for racial discrimination, a racially-hostile work environment, constructive discharge, and unlawful retaliation.

After exhausting administrative channels and judicial review, the Iowa Court of Appeals held that the Plaintiff proved claims for racial discrimination and a racially-hostile work environment. The other claims were dismissed. On further review to the Supreme Court, the employer vigorously reasserted that the employee's complaints were not timely filed within 180 days after the alleged improper conduct had occurred. The Supreme Court agreed that the majority of the events complained of occurred more than 180 days earlier. 672 N.W. 2nd at 741.

In Farmland, the Court held that the continuing violation doctrine applies differently depending on whether the claim is one for hostile work environment or whether the suit is based upon discrete discriminatory acts. In the second situation, each discrete act is separately actionable. Thus, the Court held that a claim based

upon discrete acts must be filed within the relevant limitation period after the act occurs. 672 N.W. 2nd at 741-742. With respect to a hostile work environment claim, the Court stated "they involve repeated conduct and are based on the cumulative impact of separate acts." With such a claim, the Court ruled that so long as an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a Court for the purposes of determining liability. The Court thus held that the Plaintiff's claim of discrimination was **not** timely filed, but his claim for hostile work environment was timely filed. Interestingly, the Court considered in Farmland two of the three general classes of cases invoking the continuing tort doctrine: **(1)** Those where repeated events give rise to discrete injuries; and **(2)** those where a series of events give rise to a cumulative injury. The hostile work environment claim in Farmland is a typical example of a cumulative injury case.

On March 6, 2015 the Supreme Court decided Dindinger v. Allsteel, _____ N.W. 2nd _____ (Iowa 2015), and stated that Farmland Foods adopted the "discrete acts" approach to continuing violations, namely that "if an employer commits a discrete act of discrimination that can be a basis for a civil rights action, the limitations statute begins to run on that act, even if the act is repeated and in that sense continues". Further, the Court stated directly that the continuing violation doctrine does not apply to cases involving discrete discriminatory acts because those discrete acts are "separately actionable".

Our appellate court has also applied the continuous tort doctrine in a case involving an ongoing nuisance. See Anderson v. Yearous, 249 N.W. 2nd 955 (Iowa 1977). The Iowa Court of Appeals mentioned the continuing tort doctrine in Riniker v.

Wilson, 623 N.W. 2nd 220 (Iowa Ct. App. 2000). In Riniker, the Plaintiff asserted claims against the Defendant for assault, battery, and intentional infliction of emotional distress. More specifically, Plaintiff claimed that the Defendant sexually abused her on several occasions. In Riniker, the Court of Appeals had to determine whether a jury instruction concerning the statute of limitations was appropriate. The district court ruled that the alleged negligent acts of the Defendant were ongoing and continuous. The court instructed the jury that Plaintiff's recovery was limited to those wrongful actions occurring during the two years preceding the time the Defendant filed her claim for damages.

The Defendant challenged the instruction because it put the burden on him to prove the limitations defense and how it applied. The Court of Appeals held:

> "We conclude the statute of limitations instruction was a correct statement of the law and did not cause prejudice to Wilson."

While the Court in Riniker did not directly address the application of the continuing tort doctrine to claims of sexual abuse, it appears that the Court explicitly endorsed an instruction telling the jury that Plaintiff could not recover damages for alleged acts of wrongful conduct occurring outside the two year period prior to the time Plaintiff filed her suit. This rule appears to coincide with Hegg. The rule is inconsistent with the Kolpin rule that Doe advocates.

In S.O. et al v. Carlisle School District, 766 N.W. 2nd 648 (Iowa Ct. App. 2009) (unpublished), the parent of a student filed suit in 2006 against the school district, administrator, and principal asserting that his child had been sexually abused in 2001-2002 by another student. The parent alleged claims for breach of fiduciary duty, intentional infliction of emotional distress, and negligent supervision. The parent also

filed a claim asserting that the Defendants failed to report the alleged abuse as required by Section 232.75.

The Defendant moved for summary judgment claiming that the father's claims were not timely filed under Chapter 670 of the Code of Iowa. The District Court granted summary judgment and the parent appealed. On appeal, the parent asserted that the continuing tort doctrine applied to the cause of action based upon Iowa Code Section 232.75. The Court held that the continuing tort doctrine did not apply to that specific claim because there was but a single act of omission – failure to report the abuse – even if the injury was continuing in nature. Thus, the Iowa Court of Appeals in S.O. recognized that the continuing tort doctrine does not apply where a single act of omission occurs outside the applicable statute of limitations, even though the injury continues.

In Rockas v. Stockdale, _____ N.W. 2nd _____ (Iowa Ct. App. 2012)(unpublished), the Iowa Court of Appeals affirmed the principles enunciated in Riniker, namely that if the continuing tort doctrine applies, the Plaintiff is entitled to recover damages only for a limited period of time. So far as this Court can determine, Rockas is the most recent Court of Appeals case discussing the continuing tort doctrine.

From this review of the Iowa case law, several principles emerge. First, the Iowa appellate courts have never adopted the continuing tort doctrine as set out in dicta in Kolpin. At best, where our appellate courts have applied the doctrine, they allowed recovery only for those acts accruing within two years of the date the suit was filed and not for acts occurring outside the relevant statute of limitations. Moreover, Kolpin can be distinguished in several ways. First, Kolpin was a stray voltage case like Hegg, not a

municipal tort claim case. Next, the result in Kolpin depended upon the discovery rule more than the continuing tort doctrine. As already noted, no discovery rule exists under Chapter 670. In the end, Kolpin provides no help to Doe.

Neither party cited a single case discussing, yet alone answering, the precise question raised in this summary judgment proceeding: "Does the continuing tort doctrine apply to a Chapter 670 claim?" Plaintiff assumes the doctrine applies. Defendant makes the identical assumption but argues that the Plaintiff cannot avail herself of the doctrine here. The Court now tackles the fundamental issue whether the continuing tort doctrine applies to a Chapter 670 tort claim.

In S.O. v. Carlisle School District, 766 N.W. 2nd 648 (Iowa Ct. App. 2009)(unpublished), the Court of Appeals refused to apply the continuing tort doctrine to a claim under Chapter 670 where the wrongful conduct claimed was not continuing in nature. 766 N.W. 2nd 648 at *5. The Court did not consider, however, the more fundamental question whether the continuing tort doctrine should apply to a Chapter 670 claim alleging repeated acts of misconduct.

To determine whether the continuing tort doctrine applies under Chapter 670, the Court must begin by examining Chapter 670 and its statute of limitations provision found in section 670.5. Center for Biological Diversity v. Hamilton, 453 F. 3rd 1331 (11th Cir. 2006). As already noted, section 670.5 does not contain the word "accrue". Many other statutes of limitations contain that term. See Callahan v. State, 464 N.W. 2nd 268, 270 (Iowa 1990). In Doe, the Supreme Court explained that the absence of the word "accrue" was significant:

> "We found that Iowa Code Section 613A.5 (now Section 670.5) was a "statute of creation" where the deadlines for…filing suit were triggered by

> the injury. We emphasized that the Iowa Municipal Tort Claims Act contains no term like "accrues" to give the statute elasticity for the court to consider "when a cause of action accrues."

The Court continued:

> "Because the Iowa Municipal Tort Claims Act required an injured person to commence an action…we concluded the legislature did not intend to extend the time for filing claims except in the situations elsewhere covered by the statute such as a person incapacitated by injury."

Based upon the existing case law, the Doe Court reaffirmed that a discovery rule does not exist under section 670.5. Years earlier in Perkins v. Dallas Center – Grimes, 727 N.W. 2nd 377 (Iowa 2007), the Supreme Court similarly declined to incorporate a tolling provision into section 670.5 because the "Iowa legislature never intended to incorporate a tolling provision in Chapter 670, and we decline to do so." 727 N.W. 2nd at 381.

Here, if the Court accepts Plaintiff's argument that her cause of action did not accrue until April – May 2011 under the continuing tort doctrine, the Court will effectively engraft onto section 670.5 an "elasticity" allowing the Court to determine when the Plaintiff's cause of action **accrued**. This result seems inconsistent with the ruling in Doe holding that the legislature did not intend that a common law discovery rule exist. This Court concludes that it should not find that the legislature intended for the continuing tort doctrine to apply under section 670.5. If the discovery rule and the continuing tort doctrine are equitable exceptions to the statute of limitations as the Illinois Supreme Court stated, then this Court should not find that the continuing tort doctrine applies under section 670.5 when the discovery rule clearly does not.

Furthermore, Chapter 670 establishes a general waiver of sovereign immunity. The Court must give effect to the intent of the legislature. To do so, the Court must look

to the specific words used in the statute. In Sprung v. Rasmussen, 180 N.W. 2nd 430, 433 (Iowa 1970), the Court discussed the predecessor to section 670.5. The Court called the statute one of creation, rather than a statute of limitation. The Court remarked:

> "It being a statute of creation, the commencement of the action within the time this statute fixes is an indispensable condition of the liability and of the action permitted. The time element is an inherent element of the right so created and the limitation of the remedy is likewise a limitation of the right."

In Center for Biological Diversity, the 11th Circuit Court of Appeals needed to determine whether the continuing tort doctrine applied to the statute of limitations contained in the Endangered Species Act. The Court first examined the text of the statute. The Court concluded that the statute of limitations was six years; that the suit was not timely filed; and that the continuing tort doctrine did not apply. In reaching this conclusion, the Circuit Court of Appeals remarked that:

> "The terms upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." 453 F. 3d at 1335 (Internal citations omitted).

Further, the Court noted that courts generally do not read into a statute of limitations an exception which has not been embodied there.

The rationale of the 11th Circuit Court of Appeals declining to engraft a continuing tort doctrine upon the statute of limitations contained in the Endangered Species Act seems to apply with equal force to this Court's determination of whether to engraft the continuing tort doctrine onto Section 670.5. Based upon this analysis, the Court concludes that it should not apply the continuing tort doctrine to extend the statute of limitations for Plaintiff's claims brought under Chapter 670.

The Court concludes the continuing tort doctrine should not apply in this case for other reasons. The Court believes that there is a serious question of whether the torts allegedly committed by Sisk (or the other Defendants) were "continuous" or "continuing" in the sense that the term is used under the continuing tort doctrine. The summary judgment record demonstrates that Doe does not allege any improper conduct by Sisk between the fall of 2009 and the spring of 2011.

In Davis v. Bostick, 580 P. 2d 544 (Ore. 1978), an ex-wife sued her former husband alleging that he had engaged in ten incidents of abusive conduct committed over a period of several years, ending in 1974. The Plaintiff filed her suit in August 1976. The Court noted that the allegedly abusive conduct occurring in that case over a two-year period was "discontinuous in the sense that each had a beginning and an end, each was separated from the next by some period of relative quiescence, and each was capable of producing compensable harm." 580 P. 2d at 548. Similarly, in Doe v. Doe, the Louisiana Court of Appeals considered a case involving sexual abuse over a three-and-a-half year period. The Court declined to apply the continuing tort doctrine holding:

> "In this case, numerous sexual acts of a similar nature occurred over a span of several years. However, each act was separate and distinct. The acts did not occur daily or on any other regular basis, and were not continuous." 671 S. 2d at 470.

Because of the significant gap between Sisk's conduct occurring outside the two year statute of limitations and her conduct occurring inside the two-year period prior to the filing of Doe's suit, the Court concludes that the "continuing" tort doctrine should not apply.

The Court declines to apply the continuous tort doctrine for a third reason. In Dindinger, the Supreme Court of Iowa identified and defined the three general classes

of cases invoking the continuing tort doctrine. First, the Court stated that the continuing violation doctrine does not apply to cases involving discrete acts. This rule exists because discrete acts are "separately actionable". Next, the Court stated that where only an ongoing effect of a single, past wrong occurs within the limitations period, the claim is time-barred. Finally, the Court stated that conduct that is not separately actionable but may become actionable based upon its "cumulative impact" may be pursued on a continuing violation theory. The acts complained of by Doe appear to be discrete acts similar to those described in Farmland Foods and Dindinger. Where discrete acts are alleged, the statute of limitations begins to run on each discrete act, even if the act is repeated and in that sense continues. Dindinger v. All Steel, _____ N.W. 2nd _____ (Iowa 2015).

In Davis v. Bostick, the Court applied the discrete acts principle in the context of allegations of sexual abuse. The Court stated:

> "Designating a series of discrete acts, even if common in design or intent, a "continuing tort" ought not to be a rationale by which the statute of limitations policy can be avoided…." See also Hertel v. Sulivan, 633 N.E. 2nd 36, 40 (Ill. 1994); Doe v. Doe, 671 S. 2nd 466, 469-470 (La. App. 1995).

For all of the above reasons, this Court declines to apply the continuing tort doctrine to Doe's claims under Chapter 670.

With her final argument, Doe maintains that even if the continuing tort doctrine does not apply, Sisk's conduct in the spring of 2011 is actionable, and Doe's claims based upon that conduct were thus timely filed. As already noted, Doe has dismissed Sisk from this lawsuit. Doe does not allege that either the District or principal committed specific acts of omission or other improper conduct actionable under Chapter 670

during the spring of 2011. At most, Doe alleges that prior conduct by the District or principal continued through the spring of 2011.

Under Count IV, the Plaintiff alleges that the District and Lukavsky committed tortious infliction of emotional distress by "permitting [Doe] to retract her allegations because of [Sisk's] threats and they required Plaintiff to sign a document indicating that her allegations were a lie without investigating into her allegations." These alleged acts occurred more than two years prior to the filing of Doe's suit. Thus, the claim for tortious infliction of emotional distress was not timely filed under the applicable two year statute of limitations. Moreover, S.O. teaches that the continuing tort doctrine would not apply to this count because the alleged injury relates to a single act occurring more than two years prior to the date Doe filed her suit. Defendants are thus entitled to summary judgment on Count IV.

Doe asserts in Count V that the District and principal were negligent in these respects:

a. By failing and neglecting to properly investigate allegations of a sexual relationship between Doe and Sisk;

b. By failing and neglecting to remove Sisk from her position at the District;

c. By failing and neglecting to ensure that Sisk had no opportunity to befriend, groom, and threaten minors on school premises and at school functions; and

d. By failing and neglecting to act at all times in a reasonable and prudent manner.

The Court concludes that the alleged conduct supporting these claims of negligence occurred more than two years prior to the filing of the suit. Doe made no complaint to the District or the principal within the two year period prior to the date she

filed suit. Between February 27, 2011 and February 27, 2013, the record is devoid of any reason for the District to have removed Sisk as an employee. Sisk's allegedly actionable conduct had occurred more than two years prior and Doe had not reported any further misconduct.

The allegations found in Paragraphs 64(c) and 64(d) of the Petition relate to events occurring outside the two year statute of limitations. The Court concludes that the Defendants are entitled to summary judgment on Count V.

In Counts VI and VII, Doe complains that the Defendants violated her due process and equal protection rights. For the most part, Doe simply re-alleges the allegations made under Counts IV and V. These causes of action depend upon allegations occurring outside the two year statute of limitations. Doe did not timely file these causes of action. Therefore, the Defendants are entitled to summary judgment on Counts VI and VII.

In her final claim, Doe asserts that the District was "negligent in failing to take reasonable measures to protect Plaintiff from Defendant Sisk." See Paragraph 86. The summary judgment record shows that Doe did not complain to the District or its representatives about any improper conduct by Sisk for the two year period before Doe filed suit. Doe's complaints occurred outside the two year limitations period. Also, the District investigated the abuse complaint. Law enforcement also investigated the alleged abuse. Both entities agreed that insufficient evidence existed to show Sisk acted improperly toward Doe. Under the existing record, the Defendants are therefore entitled to summary judgment on the premises liability claim asserted in Count VIII.

E. RESPONDEAT SUPERIOR

Under the doctrine of respondeat superior, an employer is vicariously liable for the negligent acts of its employees. Jean v. HyVee, Inc., 825 N.W. 2nd 327 (Iowa Ct. App. 2012). The Plaintiff must prove two elements: **(1)** The existence of an employer/employee relationship, and **(2)** proof the injury occurred within the scope of that relationship. Walderbach v. Archdiocese of Dubuque, Inc., 730 N.W. 2nd 198, 201 (Iowa 2007).

Generally, an employee's conduct is within the scope of his or her employment "if it is of the kind which she is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated at least in part by a purpose to serve the master." 623 N.W. 2nd at 231.

A deviation from the employer's business or interest to pursue the employee's own business or interest must be substantial in nature to relieve the employer from liability. Sandman v. Hagan, 154 N.W. 2nd 113, 118 (Iowa 1967).

Generally, the jury decides whether an employee's act falls within the scope of employment. However, the Court may decide the issue as a matter of law under some circumstances. 623 N.W. 2nd at 231-232. (Trial court decided this issue as a matter of law during trial upon Defendant's Motion for directed verdict.) See also Godar v. Edwards, 585 N.W. 2nd 701 (Iowa 1999). In Godar, a former student brought suit against the school district and a former district employee alleging that the employee had sexually abused him both on and off school grounds. Plaintiff alleged claims for failing to prevent abuse, negligent hiring, negligent retention, and negligent supervision.

At the close of the evidence, the Defendant moved for a directed verdict. The trial court concluded that the former employee was not acting within the scope of his employment during the course of the alleged sexual abuse. The Court held the district was thus not liable under the doctrine of respondeat superior. The Court also dismissed Plaintiff's other claims.

On appeal, the Supreme Court ruled that the ultimate question in determining whether an employee's conduct falls within the scope of employment is:

> "Whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed." 588 N.W. 2nd at 706, citing Restatement (Second) of Agency Section 229, and commenta.

Significantly, Supreme Court upheld the trial court, specifically stating:

> "We do not believe that sexual abuse by a teacher is a "normal risk associated with the objectives of educating students such that it should be a risk that should be borne by the school district." 588 N.W. 2nd at 707.

Further, the Court concluded that:

> "…any alleged sexual abuse…would be conduct so far removed from [the teacher's] authorized duties…that the question of whether any alleged sexual abuse…was within the scope of his employment, was properly determined by the Court." 588 N.W. 2nd at 708.

Here, the Defendants brief intimates that the Court should determine as a matter of law that they are not liable for Sisk's conduct under the doctrine of respondeat superior. The Court declines to rule on the summary judgment motion based upon this argument because Defendant did not clearly raise the point.

CONCLUSION

For the reasons explained, the Court **CONCLUDES** that the Defendant's Motion should be and hereby is **GRANTED**.

IT IS SO ORDERED.

Dated and signed this 18th day of March, 2015.

/s/_____
Michael J. Schilling
District Court Judge
Eighth Judicial District of Iowa

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By: _____