QUESTIONS PRESENTED

1. Did the trial court improvidently fail to apply the heightened reasonably prudent parent standard in evaluating the scope of a duty owed by a music school in supervising an infant-student and teacher?

   Answer: Yes.

2. Did the trial court improvidently dismiss a negligent supervision claim against a music school where: (a) a teacher took an infant-student off school grounds in the middle of class over a period of many weeks before sexually molesting the infant-student; and (b) a teacher spent half of the lessons engaging in sex based conversation with an infant-student over a period of many weeks before sexually molesting the infant-student?

   Answer: Yes.

3. Did the trial court improvidently dismiss a claim for vicarious liability against a music school where the evidence showed conduct by its teacher that concomitantly served personal motives and furthered the business?

   Answer: Yes.

4. Did the trial court improvidently exercise its discretion in considering an untimely motion for summary judgment where good cause was predicated on delays in obtaining evidence from a witness controlled by movant?

   Answer: Yes.

5. Did the trial court improvidently deny appellants' cross motion to strike respondent's answer where the evidence showed respondent withheld the names of material witnesses until the deposition of its designee?

   Answer: Yes.

PRELIMINARY STATEMENT

In the underlying action, defendant-respondent Allegro Vivace Music School, Inc. ("Allegro"), successfully narrowed the tort duties owed by a school to its infant-student in the context of a negligent supervision claim. Considering that Allegro asserted an affirmative defense alleging that an infant-student bore negligent culpability in allowing himself to be sexually molested on school grounds by his teacher, it is not surprising that Allegro failed to identify a dangerous, obvious, and sustained pattern of activity by its teacher. Activity that included the infant-student being taken off school grounds in the middle of class for private lunches and prolong periods of musical silence during lessons. Conduct that Allegro's founder, himself, believed to be "unusual."

Though the facts strongly suggest that a reasonable factfinder can conclude Allegro had constructive notice of its teacher's improper behavior and failed to act accordingly, the trial court granted summary judgment without construing the facts and inferences in the light most favorable to the non-movant.

STATEMENT OF FACTS

Plaintiffs-appellants John Brennan ("JB"), an infant by his mother and natural guardian Helen Brennan ("Mrs. Brennan"), and Mrs. Brennan in her individual capacity (collectively "appellants"), commenced suit against Allegro and defendant Amos Duque ("Duque") in the Supreme Court of the State of New

York, County of Queens, on 6 June 2009 by summons and verified complaint. (Record on Appeal ("R.") 46-60). The theory of the case was straightforward: JB, while an Allegro student, was molested by his teacher, Duque, in class. (*Id.* 76). Various theories of negligence were asserted against Allegro, and various theories of intentional tort were asserted against Duque. (*See id.* 47-57, 74-75). A brief recitation of the underlying facts developed through *partially*-completed discovery and the trial court's rationale in granting summary judgment in favor of Allegro are discussed in turn.

I. THE UNDERLYING SUIT

Allegro is a private music school located in Flushing, N.Y., that began operating in 2007. (*Id.* 13, 660). It is co-owned by non-parties Martin Soderberg ("Soderberg") and Cecilia Soderberg. (*Id.* 660). Soderberg, a highly accomplished music professional, runs Allegro's day-to-day operations and concomitantly serves as director of the Harbor Conservatory located in Manhattan. (*See id.* 488-89, 491, 507-09). As to the music school's physical layout, a street level entrance leads to a reception area with a secretary's station. (*Id.* 498). And next to the secretary's station is a private studio. An adjoining twenty-foot hallway leads to two studios, identified by Soderberg as the "main studio" (25' x 25') and smaller studio (10' x 10'), and a bathroom. (*Id.* 498-99, 662).

JB, born in September 1997, began taking weekly guitar lessons at Allegro in the fall of 2007. (*Id.* 74, 110, 540). His schedule consisted of a single one hour[1] private lesson, Friday after school, for the guitar under the instruction of Benjamin Hiscock ("Hiscock"). (*Id.* 111-13). After approximately one year with Hiscock, JB changed instructors to Duque.[2,3] (*Id.* 116). The basis for this change was innocuous: Duque replaced Hiscock for a lesson and showed JB how to read music—teacher and student quickly formed a bond from that moment. (*Id.* 115). Shortly after changing instructors, JB's lessons moved from a weekday to Saturday—on Duque's request—and remained one hour long. (*Id.* 120, 129, 798). The lessons between Duque and JB were venued in the main studio and lasted for about three months until the molestation was reported. (*Id.* 117, 662).

During the course of JB's Saturday lessons, Soderberg would arrive at Allegro in the morning to open the school and then leave to Manhattan to fulfill his responsibilities at the Harbor Conservatory. (*Id.* 524). While Soderberg was away

[1] A critical point that is discussed later, the parties starkly disagreed as to the *scheduled* duration of JB's music lessons. JB and Mrs. Brennan testified that the lessons were for one hour. (R. 27, 364). Soderberg testified that JB's lessons were for thirty and forty-five minutes and that JB never had a scheduled lesson for one hour. (*Id.* 566). Despite testifying to the existence of records supporting Soderberg's contention (*id.*), Allegro neither produced nor annexed to its motion documentary evidence supporting Allegro's position. In this procedural setting, JB, as the non-movant, is entitled to have his contentions deemed true with the evidence and all inferences construed in the non-movant's favor. *Rockowitz v. City of New York*, 255 A.D.2d 434, 434, 680 N.Y.S.2d 864, 864 (2d Dep't 1998).

[2] Prior to his retention, Allegro obtained a background check of Duque that was negative. (R. 661, 665).

[3] Duque was twenty-four years old at the time of this incident. (R. 716).

from the school on Saturdays, Tatiana Molina ("Molina"), a secretary, was ostensibly placed in his stead. (*See id.* 525-26). As the de facto Saturday supervisor, Molina was responsible to keep track of the teachers, monitor lessons (report any that were shortened), and to "keep an eye on everything that's going on at the school when [Soderberg was] not there." (*Id.* 525-26, 531, 547). And *specifically* with respect to Duque's instruction of JB, Molina was instructed to "inform [Soderberg] of anything *unusual she would observe*." (*Id.* 552) (emphasis added).[4]

On Saturdays Molina worked from the secretary's station located near the entrance, approximately twenty feet from the main studio used by Duque and JB. (*Id.* 562, 666). And from Molina's vantage point at the secretary's station, one could clearly hear music and conversations taking place within the main studio—though it would be difficult, but not impossible, to appreciate the underlying "substance" of such conversation. (*Id.* 560-62 (confirmed by Soderberg at deposition), 666-67 (confirmed by Molina in affidavit); *cf. id.* 661 (Soderberg averring that "[i]t should be understood that Allegro Vivace's studios are *neither big nor lend themselves to concealed activity*.") (emphasis added)).

[4] There is no evidence in the record that this instruction was given by Soderberg to Molina for any other Allegro teacher.

Duque began a course of inappropriate sexual conduct in their second class. (*Id.* 130). After asking JB to read musical notes, Duque instructed JB, while in the main studio, to use the following mnemonic:

> A. Well, we were doing 'Oh To Joy', the song. And the notes were C, D, F and he would tell me - - I'd say oh, that's C? He'd say yes. Remember that as cock, F for fuck and D for dick.[5]

(*Id.* 131). JB, then eleven years old, simply chuckled to mask his nervousness. (*Id.*). And he did not tell anyone after class about what transpired. (*Id.* 132). JB's third class was no different, Duque continued utilizing the sexual mnemonic to teach musical notes and discussed masturbation and puberty. (*Id.* 133, 146-48). According to JB, Duque stopped half-way through the third class to talk "dirty stuff." (*Id.* 148). And no music played during this time—an estimated thirty minutes. (*Id.*).

The fourth lesson was similar to its predecessors. JB estimated that Duque spent forty minutes of the sixty minute lesson discussing masturbation. (*Id.* 152-53). At the conclusion of this lesson, Duque and JB went to lunch next at a Chinese restaurant next door to Allegro. (*Id.* 151-53). And Mrs. Brennan, who arrived to pick up her son before they left, allowed JB to have lunch with Duque. (*Id.* 151-52). And during this forty-five minute lunch, Duque continued his theme of sex based conversation with JB. (*Id.* 154-57).

[5] This testimony is admissible, and not hearsay, because it constitutes a party admission. *In re Daughtry A.*, 94 A.D.3d 878, 878, 941 N.Y.S.2d 888, 888 (2d Dep't 2012).

On approximately five to ten occasions, Duque stopped class mid-lesson—with approximately thirty minutes remaining—to take JB to the Chinese restaurant where sex based conversation would continue. (*Id.* 163, 166). Duque would return to Allegro with JB before Mrs. Brennan arrived to pickup her son. (*Id.* 164). And neither JB nor Allegro told Mrs. Brennan that Duque took him to lunch in the middle of a lesson prior to being molested. (*Id.* 172).

Months of sex based conversation and mid-lesson departures from the Allegro school culminated in Duque's molestation of JB. On 20 December 2008 Duque—twenty minutes into a lesson—took JB to the Chinese restaurant and asked to see JB's penis. (*Id.* 213). The two then returned to Allegro and continued the music lesson in the main studio until Duque asked JB to take photos and a video of his penis for twenty dollars. (*Id.* 213-14). JB went to the bathroom located behind the main studio and took the video and photos using Duque's cellular phone. (*Id.* 219-20). Upon returning to the main studio, JB returned the cellular phone to Duque, who, after reviewing the photos, asked to see JB's penis. (*Id.* 221). Duque then pulled JB's pants to his ankles and rubbed JB's genitalia. (*Id.* 222-24).

Within two weeks of this incident, JB informed his parents about what transpired. After the police interviewed JB (*id.* 714), Duque was arrested on 3 January 2009 and charged with five counts of promoting sexual performance of a

child, five counts of possession of sexual performance of a child, one count of sex abuse and endangering the welfare of a child (*id.* 720). Duque confessed to the crimes and ultimately was convicted. (*Id.* 729)

Soderberg, who testified for Allegro, was unaware that any lessons between Duque and JB were shortened. (*Id.* 557). And he was also unaware, directly or through Molina, of long time periods without music being played during JB's lessons. (*Id.*). Likewise, Soderberg did not acknowledge JB's testimony regarding mid-lesson lunches with Duque. (*See id.* 526-27, 530-31). Rather, Soderberg testified that the lunches occurred *post*-lesson during a time that Duque could do as he freely chose. (*Id.* 579, 588). Notwithstanding this, Soderberg admonished Duque to be "very careful with the boy" and that "*every week* or so I would ask him about the restaurant . . . . [and] remind him every week to be careful if you go to the restaurant [with JB]." (*Id.* 578, 588 (emphasis added)). Similar testimony was given by Molina and Sophia Lazopoulous ("Lazopoulous"), a music teacher that worked Saturdays, in affidavits submitted by Allegro in support of their motion for summary judgment. (*See id.* 666-70).[6]

Appellants commenced suit by summons and verified complaint on 8 June 2009. (*Id.* 46). The complaint and bill of particulars asserted claims of negligent

[6] As discussed later, neither Molina nor Lazopoulous were deposed. And perhaps more importantly, neither the identities of Molina nor Lazopoulous were not disclosed by Allegro prior to Soderberg's deposition. (R. 850-51). This is true even though JB served a demand for witnesses (*id.* 732) with firsthand knowledge and received a response from Allegro that none existed (*id.* 810).

hiring, retention, and supervision, in addition to a claim for *respondeat superior* liability against Allegro and various intentional torts against Duque. (*Id.* 47-58, 74-75).

II. ALLEGRO'S MOTION FOR SUMMARY JUDGMENT AND THE TRIAL COURT'S DECISION

Though it addressed good cause in the motion, Allegro filed its untimely motion for summary judgment approximately ten weeks after expiration of a stipulated deadline. (*Id.* 45, 85). The motion sought dismissal of the direct and vicarious, tort claims asserted against Allegro. Appellants opposed the motion and cross moved to compel Allegro to complete the depositions of Soderberg, Molina, and Lazopoulous (or alternatively to strike its answer). (*Id.* 676-77).

In a short form order dated 23 March 2012 the Honorable Bernice D. Siegal, J.S.C. ("trial court"), granted Allegro's motion for summary judgment ("underlying motion") and denied appellants' cross motion as moot. (*Id.* 8-15). The trial court found the motion timely, *nunc pro trunc*, and noted that Allegro established good cause by asserting that Soderberg's in-complete deposition impeded their ability to bring the motion. (*Id.* 11). As to the underlying merits, it held that Allegro could not be vicariously liable for JB's molestation because it was outside the scope of Duque's employment due to personal motive. (*Id.* 11-12). And with respect to the various claims for negligence, the trial court determined

that there was no evidence in the record that Allegro "knew or should have known" of Duque's behavior. (*Id.* 14).

Improvidently, the trial court failed to address whether Allegro—in undertaking the responsibility as a music school teaching an eleven year old—acted *in loco parentis* giving rise to a heightened duty care. The trial court also failed to meaningfully address whether the lengthy periods of silence during lessons combined with systematic mid-lesson departures off school property created an issue of fact over whether Allegro "should have known" of Duque's conduct. For the reasons set forth below, this court should reverse the trial court's short form order and remand this matter for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

In order to obtain summary judgment, a movant must "tender[] sufficient evidence to demonstrate the absence of any material issues of fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986). The initial burden of showing that there is no material issue of fact lies with the movant. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 321, 908 N.E.2d 869, 872 (2009). Once a movant meets its burden, it shifts to the non-movant to provide evidence showing an issue of fact. *Id.* at 321, 908 N.E.2d at 872.

A fact is material when it can "'affect the outcome of the suit under the governing law.'" *People v. Grasso*, 50 A.D.3d 535, 545, 858 N.Y.S.2d 23, 32 (1st Dep't 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248, 106 S. Ct. 2505 (1986)). Because summary judgment is outcome determinative, the evidence—and all inferences—are viewed in the light most *favorable* to the non-movant. *Sheryll v. L & J Hairstylists of Plainview*, 272 A.D.2d 603, 604, 709 N.Y.S.2d 429, 430 (2d Dep't 2000). And assessments of credibility are improper, *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 631, 665 N.Y.S.2d 25, 30 (1997), because "issue-finding, rather than issue-determination," is the genesis of this exercise. *Matter of Corfian Enters., Ltd.*, 52 A.D.3d 828, 829, 861 N.Y.S.2d 392, 393 (2d Dep't 2008).

II. NEGLIGENT SUPERVISION

Though appellants advanced claims for negligent hiring, negligent retention, and negligent supervision, after due consideration of the record, this appeal is limited to the claim for negligent supervision. (There are two separate theories for negligent supervision against Allegro—supervision over an infant and supervision over an employee—but the *prima facie* case remains the same.)

Under New York law, the elements to a negligence claim are: (1) a duty owed to plaintiff by defendant; (2) a breach of that duty; and (3) an injury substantially caused by that breach. *Lapidus v. State*, 57 A.D.3d 83, 866 N.Y.S.2d

711 (2d Dep't 2008). In addition to these elements, a claim for negligent supervision also requires an added element: that the "employer knew or *should have known* of the employee's propensity for the conduct which caused the injury" prior to the injury's occurrence. *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161, 654 N.Y.S.2d 791, 793 (2d Dep't 1997) (emphasis added).

Before negligence can be found, "it must be shown that the defendant owes a duty to the plaintiff. 'Absent a duty running directly to the injured person there can be no liability in damages.'" *Safa v. Bay Ridge Auto*, 84 A.D.3d 1344, 1345, 924 N.Y.S.2d 535, 536 (2d Dep't 2011) (quoting *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 289, 727 N.Y.S.2d 49 (2001)). Once duty is established, the alleged injury must be the result of a foreseeable consequence—foreseeability defines the scope of a duty owed. And in this regard duty and foreseeability are properly joined "when [it can be] reasonably anticipated that the harm complained of would result from the natural and probable consequences of the act claimed to be negligent." *Nussbaum v. Lacopo*, 27 N.Y.2d 311, 320, 317 N.Y.S.2d 347, 354 (1970). Importantly, for our purposes here, a "plaintiff *need not demonstrate that the precise manner* in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the *risk of some*

injury from defendants' conduct was foreseeable." *Gordon v. Eastern Ry. Supply*, 82 N.Y.2d 555, 562, 606 N.Y.S.2d 127, 131 (1993) (emphasis added).

Allegro did not meaningfully dispute that it owed eleven-year-old JB a duty in its motion for summary judgment. (*See* R. 848 ("[w]hile Allegro Vivace surely owed [JB] a duty of care."). Nor could Allegro—a compensated music school that took weekly custody of an infant—because it was charged with JB's care and custody. *Appell v. Mandel*, 296 A.D.2d 514, 514, 745 N.Y.S.2d 491, 491 (2d Dep't 2002) (holding that a non-parent that "undertakes to control, care for, or supervise an infant, is required to use reasonable care to protect the infant over whom he or she has assumed temporary custody or control."); *see also* C.P.L.R. § 105(j) (defining an infant as a person under eighteen years old). The parties did, though, dispute two aspects of this claim: the nature of the duty owed by Allegro to JB and whether the evidence supported the propensity element. Each disputed contention is addressed in turn.

A. The Duty Element: Allegro Owed JB A Duty To Act As A Reasonably Prudent Parent Because They Were Charged With The Care Of An Infant-Student During Class

Appellants argued in the underlying motion that Allegro owed JB a duty to act under the heightened standard of the reasonably prudent parent (R. 696), whereas Allegro sought the less stringent reasonable person standard (*id.* 848). (The former requires more vigilance than the latter.) The trial court—though it did

not address this issue—improvidently applied the reasonable person standard in assessing the negligence claims. (*See id.* 14).

The doctrine of *in loco parentis* "refers to a person who, although not the parent of the child in question, has put himself or herself in a situation of a parent." 45 N.Y. Jur. 2d *Domestic Relations* § 326 (2d ed. 2012). When standing *in loco parentis* that person must act, under the heightened standard, of the reasonably prudent parent. *Mirand v. City of New York*, 84 N.Y.2d 44, 49, 614 N.Y.S.2d 372, 375 (1994). Stated differently, "persons having children entrusted to their care are . . . 'charged with the *highest degree of care*'. . . . Such an undertaking requires '*more vigilance*' than would be required for adults." *Willis v. Young Men's Christian Assn. of Amsterdam*, 28 N.Y.2d 375, 379, 321 N.Y.S.2d 895, 898 (1971) (emphasis added) (internal citations omitted).

Though application of *in loco parentis* is fact sensitve, *People v. Munck*, 92 A.D.3d 63, 73, 937 N.Y.S.2d 334, 342 (3d Dep't 2011), courts throughout New York have applied this heightened duty to daycares, babysitters, private camps, and schools. *E.g.*, *Gonzales v. Munchkind Child Care, LLC*, 89 A.D.3d 987, 987, 933 N.Y.S.2d 710, 711 (2d Dep't 2011) (holding that "defendants, as providers of day care services, owed the plaintiff[s] the same duty of care and supervision owed by a reasonably prudent parent under the circumstances."); *Phelps v. Boy Scouts of Am.*, 305 A.D.2d 335, 335, 762 N.Y.S.2d 32, 33 (1st Dep't 2003) (holding that a

"summer camp is duty-bound to supervise its campers as would a parent of ordinary prudence in comparable circumstances."); *Mary Anne ZZ v. Blasen*, 284 A.D.2d 773, 775, 725 N.Y.S.2d 767, 769 (3d Dept 2001) (finding that a babysitter that "undertakes a duty to care for or supervise a child is required to use reasonable care to protect the child . . . particularly since the standard of care owed a child is higher than that required for an adult."); *Shante D. v. City of New York*, 190 A.D.2d 356, 361, 598 N.Y.S.2d 475, 478 (1st Dep't 1993) (public school). For the reasons set forth below, Allegro, a fee-for-service music school, had a duty to act as the reasonably prudent parent during the time it was entrusted with JB's care as a student.

Analysis of Allegro's status *in loco parentis* begins with its founder, Soderberg, a highly accomplished "professional musician, performer, [and] teacher." (R. 483). Soderberg, who has a doctorate from the Manhattan School of Music (*id.*), received training on teaching music and has personally taught children from the ages of six and older (*id.* 486). Allegro sought and retained accomplished musical instructors. (*See id.* 513 (advertised at the Juilliard School), 536, 661). It also attempted to maintain structure over its operations. For example, when Soderberg was not present at the school for most of the weekends, he appointed his secretary, Molina, to monitor all school activity. (*Id.* 524-26, 531, 547, 552). And

end of the year examinations tracked the performance and development of both teachers and students. (*Id.* 545).

This professional framework was buttressed by the undisputed fact that the Brennan family entrusted infant JB to Allegro on a weekly basis for a period of at least one year prior to Duque becoming instructor. (*Id.* 110, 540). During his lessons, JB's parents generally were not present—leaving JB alone with his instructor for the duration of the class. (*Id.* 349-50). And rhetoric notwithstanding, Soderberg tacitly acknowledged Allegro's *in loco parentis* responsibility over JB during his relationship with Duque. For example, regarding the off-property lunches between Duque and JB, Soderberg testified:

> I repeated the same thing I said the first time. Be very careful with the boy. Make sure he doesn't fall, he doesn't hurt himself. Don't cross a street. Don't go anywhere else other than the restaurant and bring him back.
>
> . . .
>
> I spoke to [Duque] several times, yes, and every time I spoke to him it was the same conversation. Be careful with the boy. Bring him back to school. . . . Make sure that he goes [home] only with his parents and nobody else. . . . That was my big concern, that the boy wouldn't be hurt.

(*Id.* 578-80).

Against this backdrop, the degree *and* nature of Allegro's relationship with JB weigh heavily in favor of applying the reasonably prudent parent standard. Allegro, here, systematically took custody and control of an infant for quasi-

educational purposes for well over one year. Though the individual duration of such custodial oversight was approximately one hour, JB—then eleven years old—was wholly dependent on Allegro during their time together. (This is, of course, inherently reflected in Soderberg's testimony concerning his admonitions to Duque.) And in this important respect, Allegro, a private music school, shared attributes common to daycares, babysitters, private camps, and schools: parental cessation of custody over an infant to a third party, formal acceptance of the infant by the third party, rendition by the third party of a service to the infant attendant to the custody, and complete dependence by the infant on the third party during that time period for supervision. Allegro's conduct should, therefore, be measured against the standard of the reasonably prudent parent.

B. The Propensity Element: Allegro Should Have Known Because Duque's Conduct Developed Over Many Weeks

As discussed, distinguishing the negligent supervision claim from ordinary negligence is the additional element that an "employer knew or should have known of the employee's propensity for the conduct which caused the injury" prior to the injury's occurrence. *Kenneth R.*, 229 A.D.2d at 161, 654 N.Y.S.2d at 793. That is, in the absence of actual knowledge, constructive notice is required. In the school setting, constructive notice can be platformed on either a failure to notice a pattern of activity or on allowance of atypical activity. *Doe v. Whitney*, 8 A.D.3d 610, 611-12, 779 N.Y.S.2d 570, 572 (2d Dep't 2004) (finding the failure to notice student's

absence at recess sufficient); *accord Doe v. Chenango Valley Cent. School Dist*, 92 A.D.3d 1016, 1018, 938 N.Y.S.2d 360, 362-63 (3d Dep't 2012); *see also Kim L. v. Port Jervis City School Dist.*, 77 A.D.3d 627, 630, 908 N.Y.S.2d 725, 728 (2d Dep't 2010) (finding that allowing a student to repeatedly follow infant into bathroom where they remained unsupervised sufficient). And the propensity aspect of this element does not require evidence of identical prior conduct, but rather, evidence of conduct that shows a corollary to that at issue. *Shante D.*, 190 A.D.2d at 362, 598 N.Y.S.2d at 478-79 (citing *Mirand v. City of New York*, 190 A.D.2d at 290, 598 N.Y.S.2d at 469-70) (holding that "[n]or, on the issue of foreseeability, was it necessary, as defendants suggest, for plaintiff to show that [defendant] had a history of acting out sexually or that she had previously committed the same type of assault as was here involved."); *accord Kim L.*, 77 A.D.3d at 630, 908 N.Y.S.2d at 728. In the underlying motion, the trial court found the record devoid of any facts to support this element considering Allegro's background search of Duque was negative and there were no prior complaints or incidents.[7] (*See* R. 12-14). The trial court, though, improvidently failed to analyze evidence that Duque's

[7] Though anecdotal, the record indicates Soderberg obtained background searches for *male* employees only. (*Compare* R. 57 (Hiscock subjected to background search), 661 (Duque same) with *id.* 602 (Molina not subjected), 628 (Lazopoulos not subjected), 634 (Rahisa Jamal not subjected), 638 (Elena Diaz not subjected)). Though the range of permissible inferences are wide, these facts suggest a certain level of distrust or discomfort possessed by Soderberg in retaining male teachers.

misconduct developed over a sustained period of time through a series of events. Evidence that placed Allegro in a position where it reasonably *should* have known.

Viewing the evidence, and resolving all inferences, in the light most *favorable* to appellants, this element is platformed as follows: the teacher-student relationship between Duque and JB lasted approximately three months. (R. 117). And Duque's misconduct started during their second lesson when Duque taught JB to read music by using sexual mnemonics to remember notes. (*Id.* 130). By the fourth lesson, Duque took JB to lunch—post-lesson—where sex based conversation continued. (*Id.* 151-53). Though the parties disagreed as to the scheduled duration of each lesson, JB testified that on five to ten occasions *prior* to being molested, Duque stopped class thirty minutes into a one hour lesson to take Brennan off-property to a Chinese restaurant where sex based conversation continued. (*Id.* 163, 166; *compare id.* 27, 364 with *id.* 566 (disputing class duration)). And in this procedural setting JB is *entitled* to the presumption that the scheduled duration of the lessons were one hour. This is particularly true where, as here, Allegro's contention that class duration ranged from thirty to forty-five minutes went unsupported by documentary evidence Soderberg claimed to have. (*Id.* 566). Buttressing the mid-lesson off-property lunches, JB testified that there were numerous instances where Duque would spend half of a one hour class

engaging in, again, sex based conversation—and during that time neither music nor instruction occurred. (*Id.* 148).

Against appellants' contentions, Allegro denied knowledge of shortened lessons for off-property lunches and classes where approximately half a lesson (*i.e.*, thirty minutes) was without music or instruction. (*Id.*). Denials notwithstanding, Soderberg testified that *no* other teacher-student pair went to lunch together.[8] And that he, in fact, found an adult-teacher taking an infant-student to lunch regularly to be "unusual":

> Q. Were you aware of any other students they [*sic*] were being taken to that restaurant or any other place outside of the music school by any of the teachers?
>
> [Objection by counsel.]
>
> A. I'm not aware of anybody else being taken away.
>
> . . .
>
> Q. Did you find it unusual?
>
> [Objection by counsel.]
>
> A. I found it unusual and that's why I told [Duque] to be careful.
>
> Q. Why was it unusual?
>
> A. Because teachers don't take a student out to lunch.

[8] Soderberg knew of the first Duque-JB lunch two months prior to the molestation. (R. 553).

(*Id.* 550-51). Soderberg also testified that it would have been "unusual" if thirty minutes of a one hour lesson consistently went without music being played. (*Id.* 558).

Though his testimony attempted to militate against actual knowledge, Soderberg's actions provide strong inferential evidence that Allegro possessed grave concerns about Duque's relationship with JB before the molestation. Evidence of this flows from Soderberg's instruction to Molina that she observe Duque's interaction with JB:

> Q. After the first day, did you give any instructions to [Molina] with respect to the lessons that were going on between Amos [Duque] and [JB]?
>
> A. Yes, I did.
>
> Q. What were the instructions?
>
> A. To inform me of anything unusual she would observe.
>
> Q. What did you mean by that?
>
> A. Anything unusual. Anything other than what Amos [Duque] was supposed to be doing at the school which is to teach.

(*Id.* 551-52). Not surprisingly, there is *no* evidence that Molina was instructed to specifically observe the relationship between any other teacher-student pair.

The juxtaposition of JB's and Soderberg's testimony accentuates the existence of disputed material facts when considered against the overall structure of the school. On weekends, when Soderberg was generally absent, Molina

oversaw the school and reported on "unusual" activity, shortened lessons, and the Duque-JB relationship to Soderberg. (*Id.* 524-26). And during this time Molina sat-post at the secretary's station by Allegro's only entrance. (*Id.* 666). Or just twenty feet from the room occupied by Duque and JB for class—clearly within the audible range of music and conversation. (*Id.* 560-62, 666-67).

Given that Allegro believed its "studios are neither big nor lend themselves to concealed activity," (*id.* 661) a factfinder can reasonably conclude—crediting JB's testimony as required—that Allegro's employees completely disregarded (or avoided) warning signs flowing from the synergism of two facts: long periods of musical inactivity during class and mid-lesson lunches off-property that occurred in the weeks leading to the molestation. Stated differently, under either the reasonably prudent parent or reasonable person standard (due to the brazenness of Duque's conduct) Allegro, in the exercise of reasonable care, should have known because Duque's conduct developed over a period of approximately ten weeks.

Two cases from this court instructfully show the viability of appellants' claims against Allegro under the facts presented. Under similar facts, this court found in *Doe v. Whitney*, 8 A.D.3d 610, 779 N.Y.S.2d 570 (2d Dep't 2004), a valid claim for negligent supervision (applying the reasonably prudent parent standard) with evidence that a teacher kept the infant-plaintiff in a classroom during recess and removed the infant-plaintiff from his second and third grade classes on a

weekly basis. *Id.* at 611, 779 N.Y.S.2d at 572. This court observed that a "factfinder could reasonably conclude that the *failure to notice* the plaintiff's absence at recess and the teachers' allowing [defendant] to constantly remove the infant plaintiff from class without explanation constituted a breach of the duty of care." *Id.* at 611-12, 779 N.Y.S.2d at 572 (emphasis added).

And in *Kim L. v. Port Jervis City School Dist.*, 77 A.D.3d 627, 908 N.Y.S.2d 725 (2d Dep't 2010), this court ruled that a valid claim for negligent supervision could be predicated against a school where the evidence showed students repeatedly followed infant-plaintiff into a bathroom in order to engage in a sexual assault. *Id.* at 630, 908 N.Y.S.2d at 728. Perhaps more importantly, the propensity element was present—not by *specific* prior conduct—because the school "permit[ed] the other student to repeatedly follow the infant plaintiff to the bathroom where the two remained, unsupervised, *for periods of time sufficient to permit them to perform the acts alleged*." *Id.*, 908 N.Y.S.2d at 728-29 (emphasis added). This aspect of the *Kim L.* holding reflects the judicial intuition that negligence has never required the precise offending conduct to be foreseeable. And that foreseeability is predicated on the attendant facts.

A factfinder (accepting JB's version as true) can reasonably conclude that Allegro was negligent in supervising its employee and student by allowing Duque to repeatedly take JB off-property for mid-lesson lunches *and* to conduct class with

long periods of musical silence (for sex-based conversation) without taking action. Two acts that Soderberg conceded, at least generically, were "unusual." And considering that JB's parents were only aware of one or two lunches that occurred post-lesson (opposed to the approximately ten lunches that occurred mid-lesson), any argument by Allegro that parental consent militates against the existence of a material issue of fact exalts form over substance. (*Id.* 362-63).

i. *Allegro Failed To File A Cross Notice Of Appeal And Cannot Challenge The Trial Court's Consideration Of Edward F. Dragan's Expert Affidavit*

In opposition to the underlying motion, appellants submitted the affidavit of Edward F. Dragan, Ed.D. ("Dragan affidavit"), to establish the appropriate level of supervision and the basis for Allegro's departure from that standard. (*Id.* 827-32). Allegro challenged the admissibility of the Dragan affidavit on the basis of untimely disclosure. (*Id.* 836). The trial court ruled the Dragan affidavit admissible but assigned no weight to its merits. (*Id.* 14). Here, Allegro does not have standing to challenge the trial court's decision to *consider* the Dragan affidavit. This is because Allegro did not file a cross notice of appeal, as required, because the trial court's decision was adverse in this limited respect. *Whitfield v. JWP/Forest Elec. Corp.*, 223 A.D.2d 423, 423, 637 N.Y.S.2d 4, 5 (1st Dep't 1996). The Dragan affidavit established the nature of Allegro's departure from the accepted standard

of care. It also established causation between the breach of the duty and JB's resulting injuries.

For this and the other reasons stated, the trial court's dismissal of the claims for negligent supervision should be reversed.

III. RESPONDEAT SUPERIOR LIABILITY IS PREDICATED ON CONDUCT BY AN EMPLOYEE THAT CONCOMITANTLY SERVED PERSONAL AND BUSINESS INTERESTS

"An employer is vicariously liable for its employees' torts, even where the offending employee's conduct was intentional, if the acts were committed while the employee was acting within the scope of his or her employment." *Yildiz v. PJ Food Service, Inc.*, 82 A.D.3d 971, 972, 918 N.Y.S.2d 572, 574 (2d Dep't 2011). An act is not "within the scope of employment unless the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business." *Davis v. City of New York*, 226 A.D.2d 271, 272, 641 N.Y.S.2d 275, 276 (1st Dep't 1996). No liability therefore will attach to conduct predicated "'*solely* for personal motives *unrelated* to the furtherance of the employer's business.'" *Horvath v. L & B Gardens, Inc.*, 89 A.D.3d 803, 803, 932 N.Y.S.2d 184, 185 (2d Dep't 2011) (quoting *Fernandez v. Rustic Inn, Inc.*, 60 A.D.3d 893, 876 N.Y.S.2d 99 (2d Dep't 2009) (emphasis added)). And acts of sexual assault by an employee are outside an employee's scope of employment. *N.X. v. Cabrini Medical Ctr.*, 97 N.Y.2d 247, 251, 765

N.E.2d 844, 847 (2002). For the reasons set forth below, the trial court's dismissal of the vicarious liability claim against Allegro should be reversed for two independent reasons.

First, the agency defense—that an employee was acting *outside* the scope of his employment—is an affirmative defense. *City of New York v. Corwen*, 164 A.D.2d 212, 218, 565 N.Y.S.2d 457, 460 (1st Dep't 1990). An affirmative defense not expressly pled is waived and cannot be cured by even a timely motion to amend because "courts are reluctant to allow an amendment based on facts which were known prior to commencement of the action." *Surlak v. Surlak*, 95 A.D.2d 371, 383, 466 N.Y.S.2d 461, 470-71 (2d Dep't 1983). Here, Allegro failed to raise the agency affirmative defense in its answer, though Allegro did raise (as its first defense) the defense that JB was molested "wholly or part by reason of [JB's] *own culpable conduct, carelessness and negligence*." (R. 65-66 (emphasis added)). Stated differently, Allegro knowingly raised the defense that an infant negligently allowed himself to be molested, while concomitantly failing to assert that Duque was outside the scope of his employment during that time.

Second, an issue of fact exists as to whether Duque's instruction of sexual mnemonics to aid JB in learning to read music was—separate and apart from the molestation—within the scope of his employment. Considering, of course, that there can be more than one proximate cause of an injury, *Argentina v. Emery*

World Wide Delivery Corp., 93 N.Y.2d 554, 560 n.2, 693 N.Y.S.2d 493 (1999), Allegro did not submit any medical evidence showing that Duque's utilization of sexual mnemonics during class did not contribute to JB's injuries (as disconnected from the molestation). Against this backdrop, Soderberg testified:

> Q. [D]id you have any conversations with Duque regarding the content of the lessons that he gave [JB]?
>
> [Objection by counsel.]
>
> A. I was just *emphasizing* and reminding [Duque] that I wanted him to, again, teach him reading notes. . . .

(*Id.* 586) (emphasis added). Though reproachable, the evidence suggests that Duque's use of sexual mnemonics in teaching JB to read music was not solely predicated on personal motive. Given Allegro's prioritization of reading instruction and the use of sexual mnemonics during lessons on Allegro property, a reasonable factfinder can conclude that Duque furthered his interests *and* Allegro's interests because of the teacher-student relationship. Here, Allegro passively allowed Duque to use sexual mnemonics in class because it had no "protocols" in place to verify the manner classes were taught. (*Id.* 541).

IV. ALLEGRO DID NOT SHOW THE GOOD CAUSE FOR ITS UNTIMELY MOTION BECAUSE THE ALLEGRO CONTROLLED THE WITNESS THAT DELAYED A TIMELY FILED MOTION

The deadline for making a summary judgment motion is one hundred twenty days from the date the note of issue is filed. *Brill v. City of New York*, 2 N.Y.3d

648, 652, 781 N.Y.S.2d 261, 265 (2004) (citing C.P.L.R. § 3212(a)). This deadline can be extended by stipulation. *Powell v. Kasper*, 84 A.D.3d 915, 917, 921 N.Y.S.2d 890, 892 (2d Dep't 2011). And the court can consider an otherwise untimely motion for summary judgment if the movant establishes good cause. *Alexander v. Gordon*, 95 A.D.3d 1245, 1246-47, 945 N.Y.S.2d 397, 399 (2d Dep't 2012). A delay in completing or obtaining discovery may satisfy this threshold. *See Kunz v. Gleeson*, 9 A.D.3d 480, 481, 781 N.Y.S.2d 50, 51 (2d Dep't 2004). In its underlying motion, Allegro advanced the following argument to support good cause:

> Despite a full day of testimony, plaintiff's counsel did not complete Mr. Soderberg's deposition and all parties agreed that his EBT would conclude on a later date.
>
> . . .
>
> As Mr. Soderberg's deposition remained outstanding, Allegro Vivace could not move for summary judgment as Mr. Soderberg's deposition had not been completed [*sic*].

(R. 42). And the trial court found this basis sufficient for good cause. (*Id.* 10-11). Scrutiny of Allegro's position, however, reveals an argument that cannot satisfy the good cause requirement because it dramatically exalts for over substance for two reasons.

First, there is disingenuity to this argument considering, of course, that Soderberg testified on behalf of Allegro. Placing aside the esoterical dispute

concerning the delays attendant to rescheduling the continued deposition, Allegro cannot evade the simple fact that it maintained *full* control over the witness and could—absent an explanation—easily have obtained an alternate form of testimony from Soderberg in lieu of a deposition. (Which Allegro did, in fact, do by submitting an affidavit.)

Second, and perhaps more importantly, the affidavit of Soderberg used by Allegro, in lieu of the failed continued deposition, failed to add material facts not already established in the deposition and paper discovery. Stated differently, Soderberg's affidavit did not contain any material averments not previously discovered during discovery. For example, in both instances Soderberg testified about Allegro's knowledge of the off-property lunches (*compare id.* 552-53 with 662), the disputed duration of the classes (*compare id.* 566 with 662), and a general denial of constructive notice (*compare id.* 493, 594-95 with 663). Duque's negative pre-employment background check was established through paper discovery and Soderberg's deposition. (*Compare id.* 493, 810, 818 with 661).

Rather than provide new or additional facts that colorably impacted the merits of the underlying motion, Allegro used Soderberg's affidavit to provide redundant information. Its contention that the parties' failure to complete Soderberg's deposition justified a ten week delay in bringing the underlying motion is therefore meritless. Allegro both controlled the witness and otherwise

had knowledge of all material facts contained in Soderberg's affidavit well before expiration of the deadline for summary judgment.

V. THE CROSS MOTION TO STRIKE THE ANSWER SHOULD BE GRANTED FOR CONTUMACIOUS DISCOVERY PRACTICES BY ALLEGRO

In opposing the underlying motion, appellants cross moved to strike Allegro's answer pursuant to C.P.L.R. § 3126(3). The basis for the motion was contumacious discovery practices by Allegro prior to filing its belated motion that prejudiced appellants' case-in-chief. The trial court denied the cross motion as moot. (*Id.* 15).

On 12 November 2009 appellants served Allegro with a demand for "[t]he names and addresses of any and all persons . . . who have firsthand knowledge of the facts and circumstances regarding this occurrence." (*Id.* 732). Allegro did not provide a response to this demand before Soderberg's deposition on 14 January 2012. And at this deposition Soderberg identified two employees, Molina and Lazopoulous, as individuals with firsthand knowledge (albeit favorable to Allegro). Shortly after Soderberg's deposition, Allegro provided a written response to this demand on 8 February 2011 stating "[d]efendant is not aware of any witnesses to the incident." (*Id.* 810).

Allegro's delayed and surreptitious identification of the two employees present on its property during JB's Saturday lessons with Duque dovetails with its

failure to produce Soderberg for his continued deposition. Here, Allegro's counsel failed to return a phone call from appellants' counsel's office to schedule the continued deposition. (*Id.* 833). This sequence of activity strongly supports the inference that Allegro conducted discovery, not in good faith as required, but in a manner geared to prejudicing appellants through gamesmanship.

CONCLUSION

For this and the other reasons stated, the trial court's short form order granting summary judgment in favor of Allegro should be reversed and this matter remanded for further proceedings.

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Astoria, New York

Respectfully submitted,

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