SEVENTH JUDICIAL CIRCUIT OF VIRGINIA

COMMONWEALTH OF VIRGINIA
CITY OF NEWPORT NEWS

Matthew W. Hoffman
Chief Judge

2501 Huntington Avenue, CC #5
Newport News, Virginia 23607
(757) 926-8828

July 3, 2025

Diane P. Toscano, Esq. **(via email: diane@toscanolawgroup.com)**
Jeffrey A. Breit, Esq. **(via email: jeffrey@bbtrial.com)**
Kevin Biniazan, Esq. **(via email: kevin@bbtrial.com)**

Anne C. Lahren, Esq. **(via email: alahren@pendercoward.com)**
Sandra M. Douglas, Esq. **(via email: sdouglas@hancockdaniel.com)**

RE: Abigail Zwerner v. Newport News School Board, Dr. George Parker III, Ebony Parker, and Briana Foster Newton (Case No. CL2301446H-00)

Dear Ms. Toscano, Mr. Breit, Mr. Biniazan, Ms. Lahren and Ms. Douglas:

The Court is asked to rule on the Defendants' joint Pleas of Sovereign Immunity and associated Plea in Bar. The Newport News School Board, Dr. George Parker III, Briana Foster Newton, and Ebony Parker (hereinafter collectively "Defendants") argue that Abigail Zwerner's (hereinafter "Plaintiff") negligence and gross negligence claims against them must fail under the doctrine of sovereign immunity. The Court is also asked to rule on Defendants' joint Motions for Summary Judgment.

I. FACTUAL BACKGROUND

The Newport News School Board (hereinafter "School Board") oversees the schools created by the City of Newport News and exists pursuant to Title 22.2 of the Code of Virginia. At all times relevant to this matter, Dr. George Parker III (hereinafter "Superintendent Parker"), was the Superintendent of the School Board, Briana Foster Newton (hereinafter "Principal Newton") was the Principal of Richneck Elementary School, and Ebony Parker (hereinafter "Assistant Principal Parker") was the Assistant Principal of Richneck Elementary School.

On January 6, 2023, Plaintiff, a first-grade teacher at Richneck Elementary School (hereinafter the "School") in Newport News, Virginia, was shot by a six-year-old student (hereinafter the "Student") while she was teaching. Plaintiff sustained significant injuries and is seeking $40 million dollars in compensatory damages from the Defendants, jointly and severally.

Plaintiff alleges facts in Paragraphs 8 through 34 of the Complaint that are taken as true for purposes of the claims of sovereign immunity, associated pleas in bar and motions for summary judgment.

II. PROCEDURAL BACKGROUND

On June 11, 2025, the parties appeared before the Court. During this hearing, Plaintiff moved the Court to nonsuit the School Board as a defendant in this case. In response, the School Board objected and argued that the case against it should be dismissed, citing the Supreme Court of Virginia's recent ruling in *Newport News School Board v. Z.M.*, No. 240833, 2025 Va. LEXIS 26 (May 8, 2025). Upon consideration of the arguments of counsel, the Court grants Plaintiff's motion to nonsuit the School Board as a defendant in this matter. Accordingly, because Count II of Plaintiff's Complaint contains claims solely against the School Board, Count II of Plaintiff's Complaint is nonsuited.

As a result of the School Board's nonsuit, the remaining counts and their respective defendants are as follows:

Count I – Negligent, Grossly Negligent, and Reckless Breach of Assumed Duty of Care against Assistant Principal Parker;

Count III – Negligent, Grossly Negligent, and Reckless Breach of Duty Arising Out of Special Relationships against Superintendent Parker, Principal Newton, and Assistant Principal Parker (hereinafter collectively the "Remaining Defendants"); and

Count IV – Negligence, Gross Negligence, and Reckless Disregard – Breach of Duty Arising from Violation of Va. Code § 22.1-279.3:1 against the Remaining Defendants.

III. ANALYSIS

A. Counts III and IV are Not Valid Causes of Action Against the Three Remaining Defendants

i. Count III

Count III alleges the negligent, grossly negligent, and reckless breach of a duty arising out of special relationships that existed between Plaintiff and the Remaining Defendants. Plaintiff argues that the Remaining Defendants "knew, or should have known," that Student "was dangerous and had assaulted teachers and students in the past" and "this knowledge gave rise to a special relationship between Plaintiff and [the Remaining] Defendants." *See* Pl.'s Br. in Opp'n to Defs.' Mots. For Summ. J. at 17. Plaintiff urges this Court to adopt the Supreme Court of Virginia's

analysis in *Burdette v. Marks*, 244 Va. 309, 421 S.E.2d 419 (1992) (finding a special relationship between a deputy sheriff and a plaintiff who was attacked by a third party in his presence) and the analysis of the Fairfax Circuit Court in *Doe v. Cong. Sch., Inc.*, 104 Va. Cir. 207 (2020).

It is well-established that a claim of negligence is only actionable if "there is a legal duty, a violation of the duty, and consequent damage." *Burns v. Gagnon,* 283 Va. 657, 668, 727 S.E.2d 634, 641 (2012) (citing *Marshall v. Winston*, 239 Va. 315, 318, 389 S.E.2d 902, 904 (1990). Accordingly, the first question a court must consider in analyzing a claim of negligence is whether the defendant(s) owed the plaintiff(s) a legal duty. *See id.*

In reaching its conclusion regarding the legal duty, if any, owed to Plaintiff by the Remaining Defendants, this Court is persuaded by the Supreme Court of Virginia's analysis in *Burns*. Of note, the Court rejects the application of Plaintiff's cited case law. The Court finds the Fairfax Circuit Court's decision in *Doe* is merely advisory and the Supreme Court of Virginia's ruling in *Burdette* is inapposite to this matter.

In *Burns*, the Supreme Court examined three separate theories giving rise to a legal duty owed to a high school student by an assistant principal. *See Burns*, 283 Va. at 668-73, 727 S.E.2d at 641-44. In that case, a high school student was severely injured after being involved in a fight during school. *Id.* at 664, 727 S.E.2d at 639. Earlier that morning, a different student informed the assistant principal that the high school student was going to be involved in a fight sometime that day. *Id.* The high school student argued that the assistant principal owed him "(1) an elevated duty of care to protect him from [another student's] conduct; (2) a common-law duty of ordinary care; and (3) an assumed duty to investigate [the reporting student's] report and notify school security about the fight." *Id.* at 668, 727 S.E.2d at 641. The Supreme Court began its analysis of legal duty by determining whether a special relationship between the high school student and the assistant principal existed, giving rise to the requisite legal duty for the high school student's negligence claim. *See id.* at 668-72, 727 S.E.2d at 641-44.

Generally, a person does not owe another a duty to protect them from the conduct of third persons. *Id.* at 668, 727 S.E.2d at 641 (citing *Kellermann v. McDonough*, 278 Va. 478, 492, 684 S.E.2d 786, 793 (2009)). This rule particularly applies to acts of assaultive criminal behavior, committed by a third party, because such acts cannot be reasonably foreseen. *Id.* (citing *Burdette*, 244 Va. at 311-12, 421 S.E.2d at 420). However, an exception applies if a special relationship exists "(1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff." *Id.* at 668-69, 727 S.E.2d at 641-42 (citing *Burdette*, 244 Va. at 312, 421 S.E.2d at 420).

Common carrier-passenger, business proprietor-invitee, innkeeper-guest, and employer-employee (with regard to the employer's potential duty of protecting or warning an employee) are all examples of special relationships recognized in Virginia law. *Id.* at 669, 727 S.E.2d at 642 (citing *Kellermann*, 278 Va. at 492, 684 S.E.2d at 793). "While 'this list of relationships that give rise to a special relationship is not exhaustive,'" the Supreme Court has "exercised caution in expanding it to include new relationships." *Id.* (quoting *Kellermann*, 278 Va. at 492, 684 S.E.2d at 793).

Ultimately, the Supreme Court in *Burns* refused "to expand [the] special relationship jurisprudence to include the principal-student relationship." *Id.* at 670, 727 S.E.2d at 643. In the same light, this Court declines to adopt Plaintiff's arguments that a special relationship existed between the Remaining Defendants and Plaintiff. The Court is of the opinion that if there is not a special relationship in a school setting between an assistant principal and a student, as decided by the Court in *Burns*, one cannot exist between a superintendent, a principal, an assistant principal, and a teacher, all of whom are merely coworkers. The Court further finds that Plaintiff fails to establish the existence of a special relationship between the Remaining Defendants and Plaintiff under the theory of an employer-employee relationship. Plaintiff and the Remaining Defendants are employed by the School Board. Therefore, the Court finds an employer-employee relationship exists between Plaintiff and the School Board. As the School Board is no longer a defendant in this matter, this Court declines to expand the special relationship jurisprudence to include a special relationship among coworkers, even if they are superiors. Accordingly, no legal duty *arising out of a special relationship*, as alleged in Count III, exists between Plaintiff and the Remaining Defendants.

"If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, that the moving party is entitled to judgment, the court shall grant the motion. Summary judgment ... may be entered as to the undisputed portion of a contested claim .... Summary judgment may not be entered if any material fact is genuinely in dispute." Rule 3:20 of the Rules of the Supreme Court of Virginia.

Since there exists no genuine dispute as to a material fact and Plaintiff has failed to establish a special relationship giving rise to a legal duty owed to her by the Remaining Defendants, the Court finds the Remaining Defendants are entitled to judgment. Accordingly, the Remaining Defendants' Motion for Summary Judgment, as to Count III, is granted.

Because the Court grants the Remaining Defendants' Motions for Summary Judgment as to Count III, the Court need not address the applicability of the doctrine of sovereign immunity as it relates to Count III of Plaintiff's Complaint.

ii. Count IV

Count IV alleges a breach of duty against the Remaining Defendants for violation of Va. Code § 22.1-279.3:1, which requires that certain school authorities report incidents involving the "illegal carrying of a firearm" to "the division superintendent and to the principal or his designee ...," *inter alia*. Va. Code § 22.1-279.3:1(A)(5). Plaintiff argues a negligence *per se* cause of action arises in this matter from the violation of this statute, citing *Steward v. Holland Fam. Props., LLC*, 284 Va. 282, 726 S.E.2d 251 (2012) for support. This Court disagrees.

First, in *Steward*, the Supreme Court of Virginia outlined the seven elements required for a plaintiff to maintain a claim of negligence *per se* based on the violation of a statute. *See Steward*, 284 Va. at 287, 726 S.E.2d at 254. The very first element "requires a showing that the tortfeasor had a duty of care to the plaintiff ...." *Id.* As stated above, the Court finds that no legal duty *arising out of a special relationship* exists between the Remaining Defendants and Plaintiff in this matter. Therefore, Plaintiff is unable to establish the first required element to maintain her negligence *per*

se cause of action. Additionally, the final requisite element a plaintiff must show is that "the violation of the statute was a *proximate cause* of the injury." *Id.* (emphasis added). Here, because Plaintiff's cited statute is a reporting statute only, as further discussed below, the Court finds that the Plaintiff has not alleged sufficient facts to show that the violation of this statute was a proximate cause of the injury suffered by Plaintiff.

Second, Virginia § 22.1-279.3:1(A) is a reporting statute. Subsection E provides a directive to school boards to include the statute's requirements in school board policies and directs the Board of Education to promulgate regulations. The only penalties provided for in the statute are the fine, suspension or removal of a school superintendent, or the "demotion or dismissal" of a principal. The statute does not create a civil cause of action nor is there any evidence that the legislature, in passing the statute, intended that it be the basis for a civil cause of action.

Finally, even if Plaintiff met the elements required in *Steward* and the statute created a cause of action, the claim would fail because only a claim of simple negligence could be created. As explained below in the context of Assistant Principal Parker, the Remaining Defendants enjoy sovereign immunity from acts of simple negligence.

Accordingly, the Remaining Defendants' Motion for Summary Judgment as to Count IV is granted.

B. Count I is a Valid Cause of Action Against Assistant Principal Parker

1. Plaintiff has Alleged Sufficient Facts for a Jury to Determine if Assistant Principal Parker Assumed a Duty

Having granted the Remaining Defendants' Motions for Summary Judgement as to Counts III and IV of Plaintiff's Complaint, the Court notes that Count I of Plaintiff's Complaint is her only surviving claim. Count I alleges the negligent, grossly negligent, and reckless breach of an assumed duty of care by the sole remaining defendant, Assistant Principal Parker. As the Court ruled above, Plaintiff has failed to establish a legal duty owed to her under the theory that a duty exists as a result of a *special relationship*. However, the Court is now required to analyze whether Assistant Principal Parker owed Plaintiff a legal duty under the principle of assumption of duty.

Virginia law recognizes the existence of "the common-law principle of assumption of a duty." *Burns*, 283 Va. at 672, 727 S.E.2d at 643 (citing *Didato v. Strehler*, 262 Va. 617, 629, 554 S.E.2d 42, 48 (2001)). This principle provides, "'one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.'" *Id.* (quoting *Kellerman*, 278 Va. at 489, 684 S.E.2d at 791). Further, "an actor who fails to exercise reasonable care in performing his undertaking may be subject to liability for physical harm caused not only to the one whom he has agreed to render services, but also to a third person." *Id.* at 672, 727 S.E.2d at 643-44. The *Restatement (Second) of Torts § 324(A)* provides the elements in which an actor could be found liable to a third party under the assumption of duty principle. § 324(A) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his

things, is subject to liability to the third person for psychical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or
(b) he has undertaken to perform a duty owed by the other to the third person, or
(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324(A); *see Burns*, 283 Va. at 672, 727 S.E.2d at 644.

Importantly, the Supreme Court in *Burns* provided, "[W]hen the issue is not whether the law recognizes a duty, but rather whether the defendant by his conduct assumed a duty, the existence of a duty *is a question for the fact finder*." *Burns*, 283 Va. at 672, 727 S.E.2d at 643 (emphasis added).

In *Burns*, the high school student agued the assistant principal assumed a "duty to investigate" and "notify school security" after receiving the report of the fight from the reporting student and stating that he would "alert security," "look into it," and "take care of it." *Id.* at 672, 727 S.E.2d at 644. While the Supreme Court did not rule on whether the assistant principal ultimately assumed that duty, as the decision is meant for the fact-finder, the Court provided the following opinion:

> We stress, however, that [the assistant principal] can only be subject to liability for [the high school student's] physical harm under *Restatement § 324A* if [the high school student] proves, first that [the assistant principal] undertook to investigate [the reporting student's] report and notify school security about the fight, and then either (1) that [the assistant principal's] failure to exercise reasonable care in performing his undertaking increased the risk of harm; (2) that [the assistant principal] undertook to perform a duty owed by [the reporting student] to [the high school student]; or (3) that the harm was a result of [the reporting student's] or [the high school student's] reliance upon [the assistant principal's] undertaking.

Id. at 673, 727 S.E.2d at 644.

The Court finds that Plaintiff's Complaint alleges sufficient facts regarding Assistant Principal Parker's knowledge and conduct prior to, and on the day of, the shooting, that *could* support a finding of an assumed duty on her part, by a reasonable fact-finder. As such, whether Assistant Principal Parker did assume the duty Plaintiff alleges, is a material fact that is genuinely in dispute. Further, as provided by the *Burns* Court, whether Assistant Principal Parker assumed a duty, by her conduct, is a question meant for the finder of fact, not for this Court at this time.

2. Assistant Principal Parker is Shielded by the Doctrine of Sovereign Immunity for Acts of Simple Negligence, but not Gross or Wanton and Willful Acts

Assistant Principal Parker has pled sovereign immunity as to Plaintiff's claim of simple negligence. "The doctrine that the State and its governmental agencies, while acting in their

governmental capacities, are immune from liability for tortious personal injury negligently inflicted, has long been recognized in and applied in Virginia." *Kellam v. School Bd.*, 202 Va. 252, 254, 117 S.E.2d 96, 97 (1960). Generally, there are two theories of negligence: simple or common-law negligence and gross or willful and wanton negligence. Sovereign immunity only provides the entity or individual actor protection from tort claims for simple negligence. The issues of whether a plea of sovereign immunity for simple negligence is available and whether sufficient facts have been pled to overcome a motion for summary judgment are both intertwined and dependent on the status of each individual defendant.

The inquiry as to whether an individual enjoys sovereign immunity from alleged acts of simple negligence involves applying a four-factor test.

> The factors to be considered include: (1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion.

Lentz v. Morris, 236 Va. 78, 82, 372 S.E.2d 608, 610 (1988) (citing *Messina v. Burden*, 228 Va. 301, 313, 321 S.E.2d 657, 663 (1984)).

The *Burns* Court held that school assistant principals are entitled to sovereign immunity for acts of simple negligence. *See Burns*, 283 Va. 657 at 677, 727 S.E.2d at 646 ("[W]e conclude that [the assistant principal's] response (or lack thereof) was not simply a ministerial act; instead, it was an act involving the exercise of judgment and discretion. The circuit court therefore erred in holding that Burns was not entitled to common-law immunity from [the high school student's] simple negligence claim.").

Plaintiff and Assistant Principal Parker disagree as to the applicability of the fourth prong of the four-factor test. This Court finds that, like the assistant principal in *Burns*, Assistant Principal Parker's alleged actions, or lack thereof, involved the exercise of judgment and discretion. The knowledge and conduct prescribed to Assistant Principal Parker by the allegations in Plaintiff's Complaint were not ministerial acts, but decisions made, or not made, using her judgment and discretion. Accordingly, Assistant Principal Parker is immune from Plaintiff's claim of simple negligence under the doctrine of sovereign immunity. However, for the reasons below, Assistant Principal Parker does not enjoy immunity from Plaintiff's claims of gross negligence or willful and wanton conduct.

In *Burns*, the Court held that the assistant principal was not immune from claims of gross negligence. *Burns*, 283 Va. 657 at 677, 727 S.E.2d at 646. "If an individual working for an immune governmental entity is entitled to the protection of sovereign immunity under the common law, he is not immunized from suit. 'Rather, the degree of negligence which must be shown to impose liability is elevated from simple to gross negligence.'" *Id.* (quoting *Colby v. Boyden,* 241 Va. 125, 128, 400 S.E.2d 184, 186 (1991)).

Although governmental employees enjoy sovereign immunity from acts and decisions that are considered negligent, they may still be held liable for acts of gross negligence. "Gross negligence is the absence of slight diligence or the want of even scant care." *Cromartie v. Billings*, 298 Va. 294, 297, 837 S.E.2d 247, 254 (2020) (citing *Colby*, 241 Va. at 133, 400 S.E.2d at 189). "'Willful and wanton negligence is action undertaken in conscious disregard of another's rights, or with reckless indifference to consequences with the defendant aware, from his knowledge of existing circumstances and condition, that his conduct probably would cause injury to another.'" *Cromartie v. Billings*, 298 Va. 294, 297, 837 S.E.2d 247, 254 (2020) (quoting *Green v. Ingram*, 269 Va. 281, 292, 608 S.E.2d 917, 923 (2005)).

The allegations in Plaintiff's Complaint regarding Assistant Principal Parker's knowledge and conduct prior to, and on the day of, the shooting are sufficient to survive summary judgment. The Court finds that a reasonable trier of fact *could* find that Assistant Principal Parker's actions, or lack thereof, rose to the level of gross negligence or willful and wanton conduct. While Assistant Principal Parker is entitled to immunity from Plaintiff's simple negligence claim, she is not immune from the remainder of Plaintiff's Count I claims against her. Accordingly, for the reasons above, Assistant Principal Parker's Sovereign Immunity Plea in Bar is sustained as to Plaintiff's claim of simple negligence in Count I and her Motion for Summary Judgment as to the remaining claims in Count I, is denied.

IV. CONCLUSION

The Court finds that, for the reasons stated above, the Remaining Defendants' Motions for Summary Judgment as to Counts III and IV of Plaintiff's Complaint are granted.

The Court further finds that, for the reasons stated above, Assistant Principal Parker is entitled to the protection of the doctrine of sovereign immunity regarding the claim of simple negligence in Plaintiff's Complaint. However, Assistant Principal Parker does not enjoy sovereign immunity from claims of gross or willful and wanton negligence. Because Plaintiff's Complaint alleges sufficient facts that *could* lead the finder of fact to conclude that Assistant Principal Parker (1) assumed a duty and (2) conducted herself in a manner that rose to the level of gross negligence or willful and wanton conduct, Assistant Principal Parker's Motion for Summary Judgment as to the remaining claims in Count I of Plaintiff's Complaint, is denied.

An Order reflecting the Court's decision is attached.

Sincerely,

Matthew W. Hoffman, Chief Judge
7th Judicial Circuit

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ABIGAIL ZWERNER,
Plaintiff

v. **Case No. 2301446H-00**

NEWPORT NEWS SCHOOL BOARD,
DR. GEORGE PARKER, III,
EBONY V. PARKER,
BRIANA FOSTER NEWTON,
Defendants.

ORDER

NOW COMES the matter on Defendants' joint Pleas of Sovereign Immunity and Plea In Bar. Also before the Court is Defendants' joint Motions for Summary Judgment.

Anne C. Lahren, Esq. appeared on behalf of Defendants Newport News School Board, Dr. George Parker, III and Briana Foster Newton. Sandra M. Douglas, Esq. appeared on behalf of Defendant Ebony V. Parker. Diane P. Toscano, Esq. and Jeffrey A. Breit, Esq. appeared on behalf of the Plaintiff.

Upon consideration of the briefs filed and hearing argument of counsel, the Court **FINDS** that, as to Count III, no duty of care arising out of a special relationship exists between Plaintiff and Dr. George Parker, III, Briana Foster Newton or Ebony Parker. The Court **FINDS** that, as to Count IV, Plaintiff has not pled a valid cause of action of negligence *per se* based on an alleged violation of Va. Code § 22.1-279.3:1. The Court **FINDS** that Plaintiff has alleged a valid cause of action in Count I against Ebony V. Parker. The Court **FINDS** that Ebony V. Parker enjoys sovereign immunity for claims of simple negligence, but not for claims of gross, reckless or wanton and willful negligence.

The Court adopts, as if reiterated herein, the opinion letter issued by the Court on July 3, 2025.

It is hereby ADJUDGED, ORDERED and DECREED that Defendants' joint Motions for Summary Judgment are **GRANTED** as to Counts III and IV and **DENIED** as to Count I. The Plea in Bar as to simple negligence in Count I is **GRANTED**. The Plea in Bar as to gross, reckless or willful and wanton conduct in Count I is **DENIED**. The Clerk of Court is directed to forward a certified copy of this Order to the parties and their signatures are waived as an endorsement to this Order.

Entered this 3 day of July, 2025.

Matthew W. Hoffman, Chief Judge
7th Judicial Circuit

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NEWPORT NEWS

ABIGAIL ZWERNER,
Plaintiff

v. **Case No. 2301446H-00**

NEWPORT NEWS SCHOOL BOARD,
DR. GEORGE PARKER, III,
EBONY V. PARKER,
BRIANA FOSTER NEWTON,
Defendants.

ORDER

NOW COMES the matter on Defendants' joint Motion to Continue the jury trial date scheduled to begin October 27, 2025.

Anne C. Lahren, Esq. appeared on behalf of Defendants Newport News School Board, Dr. George Parker, III and Briana Foster Newton. Sandra M. Douglas, Esq. appeared on behalf of Defendant Ebony V. Parker. Diane P. Toscano, Esq. and Jeffrey A. Breit, Esq. appeared on behalf of the Plaintiff.

Upon consideration of the arguments of counsel, the Court does not find any good cause, at this time, to continue the case and **DENIES** the Motion to Continue. The Clerk of Court is directed to forward a certified copy of this Order to the parties and their signatures are waived as an endorsement to this Order.

Entered this 3 day of July, 2025.

Matthew W. Hoffman, Chief Judge
7th Judicial Circuit