NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
4110 Chain Bridge Road
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703-246-2221 • Fax: 703-246-5496 • TDD: 703-352-4139

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February 5, 2020

Broderick C. Dunn
Philip C. Krone
COOK CRAIG & FRANCUZENKO, PLLC
3050 Chain Bridge Road, Suite 200
Fairfax, VA 22030
Counsel for Plaintiff

Jesse R. Binnall
Lindsay McKasson
HARVEY & BINNALL, PLLC
717 King Street, Suite 300
Alexandria, VA 22314
Counsel for Defendant [redacted]

John H. Carstens
Taylor R. Miles
JORDAN COYNE LLP
10509 Judicial Drive, Suite 200
Fairfax, VA 22030
Counsel for Defendants Congressional School, Inc., Janet March, Brent Hinrichs, Isabelle Rovinsky, and Derek Bowley

Joseph Jay, III
SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP
2099 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Co-Counsel for Defendant Congressional School, Inc.

RE: *Jane Doe v. Congressional School, Inc. et al.*, Case No. CL-2019-4131

This matter comes before the Court on a Defendants' Demurrer to Plaintiff's Amended Complaint. For the following reasons, the Demurrer to the Amended Complaint is overruled.

The facts are well known to counsel, and in my first opinion letter I discussed the facts at length. Therefore, a recitation of the facts in this letter is unnecessary.

This Court heard Defendants' first demurrer to the original complaint. As to that demurrer, I sustained the demurrer with leave to amend as to Count IV (negligence based on assumption duty), I overruled the demurrer to Count V (gross negligence) and as to punitive

OPINION LETTER

damages I sustained the demurrer as to Defendants Bowley and Rovinsky[1], but overruled the demurrer as to Defendants Congressional School, Marsh and Hinrichs, and as to Count VI (Intentional Infliction of Emotional Distress) I sustained without leave to amend as to all Defendants except [redacted].[2]

In the original complaint, Count IV was titled "Negligence—Restatement Second of Torts §324A—Assuming a Duty—Congressional, Ms. Marsh, Mr. Hinrichs, Mr. Bowley and Ms. Rovinsky." Count IV in the amended complaint is titled "Negligence—Restatement Second of Torts §315—Special Relationship—Congressional, Ms. Marsh, Mr. Hinrichs, Mr. Bowley and Ms. Rovinsky."

Defendants' Demurrer alleges that the amended Count IV pleads an entirely new cause of action and does not amend the original Count IV. Defendants argue that this amendment is improper because in my order I limited the scope of the amendment. Defendants place too much emphasis on the parenthetical titling of Count IV in my order.

The language in the parentheses merely restates the nomenclature of the counts. Thus, when I wrote "SUSTAINED with leave to amend for Count IV, negligence based on assumption of duty" I did not intend to limit the scope of the amendment to assumption of duty. I was merely restating the general gist of the title of Count IV.

Relying on their erroneous interpretation of my order, Defendants correctly cite *A.H. v. Church of God in Christ*, 297 Va. 604 (2019) for the proposition that the theories of "special relationship" and "assumed duty" are distinctly different causes of action. Defendants then argue that because I did not grant leave for such a broad amendment, the amendment is therefore invalid. But as noted, when I used the language "negligence based on assumption of duty" I did not intend to limit the scope of the amendment.

Moving on from the issue of whether Plaintiff exceeded the scope of the grant of authority to amend, I must now determine if the allegation in amended Count IV—that there existed a special relationship between Defendants and Plaintiff—states a cause of action sufficient to survive demurrer. It does.

While one generally does not have a duty to protect or warn another from the conduct of a third party, particularly if that conduct is criminal in nature, there is an exception if the parties have a "special relationship." *Burns v. Gagnon*, 283 Va. 657, 668-69 (2012); *Commonwealth v. Peterson*, 286 Va. 349, 356 (2013). There is no duty to control the conduct of a third person—to prevent him from causing physical harm to another—unless: (1) "a special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person's conduct, or (2) a special relation exists between the actor and the other which gives to the other a right to protection." *Restatement (Second) of Torts*, § 315; *Burns*, 283 Va. at 669.

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[1] At the demurrer hearing the Plaintiff had conceded that Count V (gross negligence), Count VI (Intentional Infliction of Emotional Distress) and the punitive damage claim should all be dismissed without leave to amend as to Defendants Bowley and Rovinsky. The parties memorialized these findings in a consent order dated October 2, 2019.

[2] In the amended complaint Defendant [redacted] is now Defendant [redacted].

While some special relationships are widely recognized, such as innkeeper-guest and common carrier-passenger, a special relationship may also arise from the specific facts of a case. *See, e.g., Burdette v. Marks*, 244 Va. 309, 312-13 (1992).[3]

The facts of this allegation are strikingly similar to the facts in *A.H. v. Church of God in Christ*, *supra.* In that case the Supreme Court noted that the plaintiff had alleged that the Church "knew or should have known that [abuse] might occur based upon the earlier allegation of sexual abuse…" *Church of God*, 297 Va. at 625. In the case at bar, Congressional and staff members knew of [redacted]'s assaultive behavior and did not, Plaintiff alleges, exercise reasonable care to protect Plaintiff. I am of the opinion that amended Count IV alleges sufficient facts that, if proven, would support a finding of a special relationship between Congressional and Plaintiff.

Finally, Defendants demur to amended Count IV as being duplicative of Count III. There are differences in the alleged facts between Count III and amended Count IV such that the counts are not duplicative. Moreover, Count III alleges simple negligence whereas amended Count IV alleges a special relationship between Defendants and Plaintiff. Therefore, both Count III and amended Count IV have been properly pled in Plaintiff's Amended Complaint.

Mr. Dunn will prepare and circulate an order memorializing this decision.

Sincerely,

[redacted]

Robert J. Smith
Judge, Fairfax County Circuit Court

[3] Here, the Court noted that while a special relationship between a deputy sheriff (Marks) and a citizen (Burdette) had not been previously recognized, the particular facts of this case imposed a duty on Marks to protect Burdette from the injuries of a third party. The facts that led to this conclusion were as follows: Marks was aware that the third party was savagely beating Burdette because Burdette called out for help and Marks witnessed the incident from a fairly close proximity; further, Marks was an armed deputy, capable of subduing the third party without great danger to himself. *Id.*