NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 9, 2020

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Re: *John Doe vs. Virginia Music Adventures, Inc. et al.*
Case No. CL-2020-3446

Dear Counsel:

This case came before the Court on October 2, 2020, for a hearing on Defendant Janet Cummins' Demurrer to one Count of Negligence in Plaintiff's Amended Complaint. Having taken the Demurrer under advisement and after reviewing the memoranda of law and arguments submitted by Counsel, the Court issues the following opinion sustaining Defendant Cummins' Demurrer to Count VIII of Plaintiff's Amended Complaint.

OPINION LETTER

BACKGROUND

Plaintiff filed his Original Complaint on February 27, 2020, alleging numerous claims against Virginia Music Adventures, Inc. ("VMA"), the Estate of Jeffrey Cummins ("the Estate"), and Mrs. Janet Cummins. Plaintiff alleges he was groomed and sexually assaulted by Jeffrey Cummins over the course of seven years during private music lessons in Mrs. Cummins' home and visits to perform yard work. Shortly after being arrested for molesting underage males, Mr. Cummins committed suicide. Consequently, his Estate is named as a defendant in this case along with VMA, a Virginia corporation founded by Jeffrey Cummins and others as a traveling group for school-age children, and Janet Cummins. Mrs. Cummins was married to Jeffrey Cummins during the alleged period of abuse.

On June 26, 2020, the Court heard Mrs. Cummins' first demurrer to Plaintiff's claims for grossly negligent misrepresentation and negligent infliction of emotional distress. The Court dismissed Plaintiff's claim for grossly negligent misrepresentation with leave to amend and sustained the demurrer to Plaintiff's claim of negligent infliction of emotional distress with prejudice. In addition, the Court gave Plaintiff leave to amend his Complaint to assert a claim for negligence against Mrs. Cummins and to amend his claim for punitive damages.

In stating a cause of action for negligence, the Amended Complaint contains multiple allegations imputing knowledge of Mr. Cummins' conduct on Mrs. Cummins. Plaintiff alleges Mrs. Cummins walked in on Mr. Cummins as he was touching Plaintiff's bare stomach during a vocal exercise, and Mrs. Cummins had knowledge of boy's underwear kept in the laundry room. (Am. Compl. ¶¶ 47-50). Further, Mrs. Cummins served as a chaperone occasionally for VMA trips and events, and Mr. and Mrs. Cummins hosted sleepovers where adolescent boys would stay the night at their home. (Am. Compl. ¶¶ 70-73). During these sleepovers, the Amended Complaint states Mrs. Cummins observed Mr. Cummins serve alcohol to the minors. (Am. Compl. ¶¶ 73-77). The Amended Complaint also states Mrs. Cummins was aware of a prior instance of inappropriate contact, or, at the very least, knew of an allegation of inappropriate contact. (Am. Compl. ¶ 82). Plaintiff asserts this negligence claim based on three relationships with Mrs. Cummins which require a duty of care to the Plaintiff: employer/employee, business owner/invitee, and custodial supervision.

Mrs. Cummins filed the instant demurrer to Plaintiff's Amended Complaint on July 22, 2020, claiming the Amended Complaint fails to state a cause of action against Mrs. Cummins upon which relief could be granted. Specifically, Mrs. Cummins alleges Plaintiff has not shown that Mrs. Cummins had a duty of care with respect to Plaintiff, thus preventing a successful negligence claim. Therefore, the questions the Court must answer are whether Plaintiff has alleged a special relationship with Mrs. Cummins and whether observing grooming behaviors[1],

[1] Plaintiff argues the incidents which Mrs. Cummins observed were of Mr. Cummins grooming his victims, and therefore the Court adopts this vernacular. The Amended Complaint defines grooming as "the process by which an offender draws a victim into a sexual relationship and maintains that relationship in secrecy." (Am. Compl. ¶ 8).

and not actual sexual assault, is enough to allege a duty to warn or protect in a cause of action for third-party negligence.

ANALYSIS

I. Demurrer Standard

The purpose of a demurrer is to determine whether a complaint states a cause of action upon which relief may be granted. *Bell v. Saunders*, 278 Va. 49, 53, 677 S.E.2d 39, 40-41 (2009). A demurrer admits the truth of the facts contained in the pleading to which it is addressed as well as any facts that may be reasonably and fairly implied and inferred from those allegations. *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 136 (2001). In considering a demurrer, the court is limited to review of the complaint and any attachments to the complaint. *TC MidAtlantic Dev., Inc. v. Commonwealth*, 280 Va. 204, 212, 695 S.E.2d 543, 548 (2010). To withstand demurrer, a complaint need only contain "sufficient allegations of material facts to inform a defendant of the nature and character of the claim," and need not "descend into statements giving details of proof." *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993).

A demurrer, thus, tests the legal sufficiency of a pleading and should be sustained if the pleading fails to state a valid cause of action when viewed in the light most favorable to the plaintiff. VA. CODE ANN. § 8.01-273; *see Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 303, 618 S.E.2d 331, 333 (2005). Further, a demurrer cannot be used to decide the merits of a case, lest a trial court may incorrectly short-circuit litigation pretrial and determine a dispute without permitting the parties to reach a trial on the merits. *See Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 139, 747 S.E.2d 804, 805 (2013).

II. Common Law Negligence

There are four elements for a negligence claim: duty, breach, causation, and damages. When a negligence claim against one party is based on the alleged criminal conduct of a third person, there must be some special relationship or assumed duty between the defendant and either the plaintiff or the third person. *Terry v. Irish Fleet Inc.*, 296 Va. 129, 135 (2018). This duty is not absolute—it exists only when "the defendant could have foreseen the need to take affirmative action to protect the plaintiff from harm." *A.H. by next friends C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 620 (2019) (internal citations omitted). Moreover, the required degree of foreseeability "depends on the nature of the special relationship". *Id.* (quoting *Commonwealth v. Peterson*, 286 Va. 349, 357 (2013)). The Court will take each basis of negligence pled by Plaintiff in turn.

III. Assumed Duty

Generally, there is no duty to warn or protect against the criminal acts of a third party. *Terry*, 296 Va. at 129. The Supreme Court of Virginia has held on multiple occasions that "one

who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." *Kellermann v. McDonough*, 278 Va. 478, 489 (2009). Therefore, there can be a duty owed to another when a defendant "voluntarily [undertakes] such duty by expressly communicating [her] intention to do so." *Terry*, 296 Va. at 136. Such assumption cannot be implied. *See id.*

Because the Amended Complaint does not allege Mrs. Cummins expressly communicated her intentions to undertake a duty to protect or warn Plaintiff, she did not assume a duty of care over Plaintiff. Consequently, any duty must be formed through some special relationship or custodial supervision.

IV. Special Relationships

A. Employer-Employee

A special relationship exists between employers and employees, between an innkeeper and a guest, and between a common carrier and a passenger. *A.H. by next friends C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 621 (2019). In cases where a special relationship is created between employers and employees, there is a duty to protect against dangers that are either "known or reasonably foreseeable to the defendant" within the scope of employment. *Id.* (citing *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 136 (2018)). An action is within the scope of employment if "it be something fairly and naturally incident to the business, and (2) if it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interest . . ." *Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 307 (1948). In Virginia, an injury occurs in the course of employment when it occurs within the period of employment, at a place where the employee may reasonably be, and while the employee was reasonably fulfilling duties of her employment. *Jones v. Colonial Williamsburg Found.*, 8 Va.App. 432, 435 (1989) (internal citations omitted).

Mrs. Cummins argues there are no factual allegations in the Amended Complaint that Mrs. Cummins hired Plaintiff, had the power to dismiss Plaintiff, or exercised control over Plaintiff's actions. Mrs. Cummins goes on to cite to *Sutherlin* as holding there are four factors that must exist when determining a master-servant relationship in the employer-employee context. *See Sutherlin v. White*, 71 Va. Cir. 184, 187 fn. 1 (2006).[2] However, not all factors are needed for such a relationship to exist. *See Ideal Steam Laundry v. Williams*, 153 Va. 176,180 (1929).

With respect to the employer/employee relationship, the Amended Complaint adequately alleges Plaintiff was hired to mow the lawn and paid by Mr. and Mrs. Cummins. (Am. Compl. ¶¶ 40-50). Specifically, the Amended Complaint states the yard work was performed for and paid

[2] "Virginia Courts consider the following four factors in determining whether a master-servant relationship exists: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual." *Sutherlin*, 71 Va. Cir. at *2 (internal citations omitted).

by Mr. and Mrs. Cummins. (*Id.*) Given such representations, an employer-employee relationship existed between Mrs. Cummins and Plaintiff. However, the Amended Complaint does not specifically allege any abuse occurred during the lawn mowing employment.

The Amended Complaint acknowledges that Plaintiff performed yard work on several occasions without inappropriate touching by Mr. Cummins. (*Id.* at ¶ 43). In fact, it is directly alleged in the Amended Complaint that Mr. Cummins abused Plaintiff while they were in the hot tub. (*Id.* at ¶ 59). Because the alleged molestation happened outside the purview of lawn mowing, it did not occur within the scope of employment.

Consequently, although the alleged molestation occurred at the place of employment, Plaintiff does not allege that such molestation occurred while Plaintiff was reasonably fulfilling the duties of his employment. As a result, Mrs. Cummins' duty as an employer did not extend to occasions outside the scope of employment.

B. Business Proprietor-Invitee

A special relationship exists between a business owner and an invitee, thus giving rise to a duty of care. *A.H. by next friends C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 620 (2019). Ordinarily, the owner of land is under no duty to protect an invitee from criminal acts committed by a third person while the invitee was on the owner's premises. *Thompson ex rel. Thompson v. Skate America, Inc.*, 261 Va. 121, 128 (2001). However, a duty to warn or protect from reasonably foreseeable criminal acts committed by a third person may arise based on the factual circumstances of the case. *Id.* at 129. As a result, a business owner only owes a duty to protect against the acts of a third party when "**there [is] an imminent probability of injury from a third party act**." *Church of God in Christ*, 297 Va. at 620 (citing *Wright v. Webb*, 234 Va. 527, 533 (1987) (emphasis added). The Supreme Court of Virginia has held a business invitor does not have a duty to protect an invitee against criminal assault unless his business is the type to attract a "climate for assaultive crimes", or if "**he knows that criminal assaults against persons are occurring, or about to occur**, on the premises which indicate an imminent probability of harm to an invitee." *Wright*, 234 Va. at 533 (emphasis added).

The Court in *Thompson* found a business owner owed a duty of care to protect invitees from the criminal acts of a third person because the defendant knew the specific third person "to be violent and to have committed assaults on other invitees on its property in the recent past." *Thompson*, 261 Va. at 128 (2001). More specifically, the business owner in *Thompson* "had specific knowledge of [the third party's] propensity to assault its other invitees, had intervened to inhibit that behavior in the past, and had taken steps to avoid a reoccurrence of that behavior in the future." *Id.* Alternatively, the Court in *Wright* found two prior acts of violence were not enough to conclude there was an imminent danger of criminal assault. *Wright*, 234 Va. at 533.

Mrs. Cummins argues she was not a partner of her husband's music business, and even if she were, she did not have a duty to protect Plaintiff/invitee from Mr. Cummins because the Amended Complaint fails to show she knew criminal assaults against Plaintiff were occurring or

about to occur. In contrast, Plaintiff alleges Mrs. Cummins had knowledge of such criminal assaults because she witnessed and ratified the grooming of sexual assaultive behavior.

Although Mrs. Cummins claims she was not a business owner, the Amended Complaint alleges she was, and thus the Court will proceed upon such allegation, taking it as true. As such, Mrs. Cummins was a business partner and therefore owed a duty of care to invitees; however, her duty only extended to foreseeable criminal activity. Despite the allegations in the Amended Complaint, a "business owner does not owe a duty of care to protect its invitee unless it 'knows that criminal assaults against persons are occurring, or are about to occur, on the premises which indicate an imminent probability of harm to [its] invitee.'" *Thompson*, 261 Va. at 129 (internal citation omitted).

Ms. Cummins clearly observed inappropriate behavior on the part of her husband; touching of Plaintiff's bare chest during lessons, boys' underwear in the laundry room, alcohol being served to minors, and knowledge of a past allegation of abuse. These allegations of grooming observations do not rise to a level demonstrating Mrs. Cummins actually knew there was an "imminent probability of harm". *See id.* Unlike in *Thompson* where the defendant had specific knowledge of a third party's past assaultive behavior to invitees, had intervened to stop the behavior in the past, and had taken steps to avoid a reoccurrence of the behavior, the Amended Complaint does not allege Mrs. Cummins had specific knowledge Mr. Cummins was actually molesting young boys, or even Plaintiff specifically. For there to be a duty under third party negligence, the level of foreseeability must be clear and unequivocable with no room for uncertainty. One could speculate as to hunches and deniability but that is not the purview of the Court. The allegations in the Amended Complaint, even when taken as true, do not demonstrate that the observations and knowledge Mrs. Cummins allegedly possessed indicated there was an imminent probability of injury.

V. Custodial Supervision

There is no special relationship between an adult and a minor who agrees to supervise and provide care to a minor. Traditionally, however, when a parent temporarily relinquishes the care and supervision of a child to another adult "who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care." *Kellermann v. McDonough*, 278 Va. 478, 487 (2009). But such duty must have limits. The supervising adult does not become "an insurer of the child's safety", but instead, must carry out her duties "as a reasonably prudent person would under similar circumstances." *Id.* The reasonable care required is commensurate with what harm is reasonably foreseeable. *Id.* at 488 (citing *Hernandez v. Toney*, 289 So.2d 318, 320 (La.Ct.App.1973)).

Because Plaintiff was a minor while under the supervision of the Cummins, the Cummins were to supervise Plaintiff with reasonable care. *Kellermann v. McDonough*, 278 Va. 478, 487 (2009). The Amended Complaint alleges Mrs. Cummins served as a chaperone and assumed an obligation to look after the children. While Mrs. Cummins argues she did not expressly agree to

supervise Plaintiff, by acting as a chaperone, as alleged in the Amended Complaint, she cannot escape her duty of care.

However, the same issue of foreseeability previously discussed arises here. Mrs. Cummins cannot be expected to be an "insurer" of Plaintiff's safety. *See Kellerman*, 278 at 487. Even though the Amended Complaint alleges that Mrs. Cummins was a chaperone at certain VMA events, the Amended Complaint does not allege any sexual assaults occurred while the children were under Mrs. Cummins' supervision.

Third party negligence is rare. *Church of God in Christ*, 297 Va. at 618 (internal citations omitted). There are no allegations Mrs. Cummins knew criminal conduct had occurred or was about to occur. Knowing of a prior allegation of sexual assault is not enough to survive demurrer.[3] Furthermore, the alleged facts of grooming observations and knowledge in the case at bar is not enough to give rise to reasonable foreseeability for the assaultive behavior of a third party. As a result, Plaintiff has not alleged a cause of action for negligence under custodial supervision.

VI. Punitive Damages

Punitive damages are available when "there is misconduct or actual malice, or such recklessness or negligence as to evince a conscious disregard of the rights of others." *Condominium Servs., Inc. v. First Owners' Ass'n of Forty Six Hundred Condominium, Inc*, 281 Va. 561, 579 (2011).

However, because Plaintiff has not properly alleged a negligence claim against Defendant Cummins, the Punitive Damages claim should be dismissed.

CONCLUSION

Even when taking all factual allegations discussed in the Amended Complaint as true, the facts in the Amended Complaint are insufficient to state a claim upon which Plaintiff may seek relief against Mrs. Cummins. Defendant Janet Cummins' Demurrer is sustained with prejudice as to both the negligence claim and the punitive damages claim. The Court requests Mrs. Cummins' counsel to prepare an order reflecting the Court's ruling.

Sincerely,

[redacted]

Penney S. Azcarate
Fairfax County Circuit Court

PSA/mra

[3] Demurrer sustained as to the wife of the abuser in *Church of God* who knew there was a prior claim of sexual assault against the abuser. *A.H. by next friends C.H. v. Church of God in Christ*, Inc., 297 Va. 604, 620 (2019).