SEVENTH JUDICIAL CIRCUIT OF VIRGINIA

COMMONWEALTH OF VIRGINIA
CITY OF NEWPORT NEWS

Matthew W. Hoffman
Judge

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

November 3, 2023

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 Plea in Bar which argues that Abigail Zwerner's (hereinafter "Plaintiff") remedy for the injuries she suffered after being shot by a student in her classroom falls exclusively under the Virginia Workers' Compensation Act (hereinafter the "Act").

I. FACTUAL BACKGROUND

The Newport News School Board, Dr. George Parker III, Ebony Parker and Briana Foster Newton (hereinafter collectively "Defendants") have stipulated that, for purposes of the Plea in Bar, the facts alleged in Paragraphs 9 through 34 of the Complaint are not merely allegations, but true. A summary of those facts are set forth below. The Defendants have also stipulated that a first-grade teacher would not expect nor anticipate getting shot by a student during the course of their employment.

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. The Student had a history of random violence. He committed acts of violence on family members, teachers, and students, including "strangl[ing] and chok[ing] a teacher" during the 2021-2022 school year, leading to his removal from the school. Compl. ¶ 14. The Student was permitted to re-enroll in the School during the 2022-2023 academic year, under a modified schedule. Under the modified schedule, Student was required to have a parent attend class with him because of his violent outbursts. On the day Plaintiff was shot, neither of Student's parents were with him at the School. While the Student maintained a history of general violence in the school environment, the Student displayed violent outbursts particularly targeted toward Plaintiff as well. On January 4, 2023, two days before Plaintiff was shot, the Student grabbed Plaintiff's cellphone and refused to give it back. The Student then slammed the cellphone on the ground, causing it to break. Plaintiff escorted the Student to Jenifer West (hereinafter "West"), another first-grade teacher, and Rolonzo Rawles (hereinafter "Rawles"), a guidance counselor and school administrator, to address the incident. The Student then called all three adults "bitches" and was subsequently suspended for one day due to this misconduct.

On the day of January 6, 2023, the Student brought a firearm, owned by his mother, to school in his backpack. During the school day, two other students informed Amy Kovac (hereinafter "Kovac"), a reading specialist at the School, that the Student had a gun in his backpack. While the students were at recess, Kovac searched the Student's backpack but did not find a firearm. Also while at recess, Plaintiff observed the Student take an object out of his backpack and go behind a rock-climbing wall with another student several times. Plaintiff then informed Kovac that prior to recess, Plaintiff observed the Student take something out of his backpack and place it into the pocket of his hoodie sweatshirt. At the conclusion of recess, the other student informed West that the Student showed him a firearm at recess and the firearm was located in the Student's pocket. With this information in hand, Rawles asked Defendant Ebony Parker (hereinafter "Defendant Parker"), the School's assistant principal, if he could search the Student's person for a firearm. Defendant Parker denied Rawles's request. The Student returned to class after recess and the Plaintiff began teaching. The Student then removed the firearm from his pocket and shot the Plaintiff. Plaintiff sustained significant injuries and is seeking $40 million dollars in compensatory damages.

II. LEGAL BACKGROUND

The Virginia Court of Appeals recently wrote:

> A plea in bar asserts a single issue, which, if proved, creates a bar to plaintiff's recovery. The party asserting the plea in bar bears the burden of proof. [W]here no evidence is taken in support of a plea in bar, the trial court … consider[s] solely the pleadings in resolving the issue presented. In doing so, the facts stated in the plaintiff's [complaint] are deemed true.

Taylor v. Posey, No. 1042-22-4, 2023 WL 5021240, at *3 (Va. Ct. App. Aug. 8, 2023) (quoting *Massenburg v. City of Petersburg*, 298 Va. 212, 216 (2019)) (quotation marks omitted). In this case, Defendants, as the jointly asserting parties, have the burden to prove that Plaintiff's injuries fall within the exclusive coverage of the Act.

A. The Act Serves as an "Exclusive" Provision

Code § 65.2-307(A) provides, in pertinent part: "[t]he rights and remedies herein granted to an employee when his employer and he have accepted the provisions of this title respectively to pay and accept compensation on account of injury or death by accident *shall exclude all other rights and remedies of such employee*, [or] his personal representative ... on account of such injury ... or death. "Thus, the Act provides the sole remedy against employers for employees injured within its scope." *Taylor*, No. 1042-22-4 at *3-4.

Importantly, the Act itself balances conflicting legislative interests. *Id.* at *4. The Virginia Supreme Court stated in *Lopez v. Intercept Youth Services, Inc.*, 300 Va. 190, 196 (2021), the Act "reflects a legislative 'quid pro quo' that gave workers the right to assert no-fault liability against their employers (a right that they had never possessed) and took from them the right to sue their employers in tort for negligence (a right that they had possessed under the common law)." *Id.* at *4 (quoting *Lopez*, 300 Va. at 196 (2021)). "To be effective, the Act must be interpreted to maintain that delicate balance of competing policies implicit in this 'societal exchange.'" *Id.* "'A view of the Act's coverage that is too broad would authorize an award of compensation benefits but would bar a tort recovery, and a view that is too narrow would authorize a tort recovery but would bar an award of compensation benefits.'" *Id.* "To the extent a worker is entitled to coverage under the Act, workers' compensation provides the exclusive remedy for the employee's recovery against the employer and the worker is foreclosed from suing his employer in tort. *Id.* (citing *Hilton v. Martin*, 275 Va. 176, 180 (2008)).

B. Elements of a Workers' Compensation Claim

"An injury is subject to the exclusivity provision of the Act if it is the result of an accident and arises out of and in the course of the employment." *Combs v. Va. Elec. & Power Co.*, 259 Va. 503, 508, 525 S.E.2d 278, 281 (2000). Therefore, the crux of whether a Plaintiff's claim is to be barred by the exclusivity provision depends on whether Plaintiff's injury was: "(1) an injury by accident, (2) arising out of, (3) and in the course of, her employment."[1] *Id.* "If any one of these elements is missing, then [Plaintiff's] claim is not covered by the Act, and she can proceed with her personal injury claim in the circuit court." *Id.*

"[T]o establish an 'injury by accident,' a claimant must prove (1) that the injury appeared suddenly at a particular time and place and upon a particular occasion, (2) that it was caused by an identifiable incident or sudden precipitating event, and (3) that it resulted in an obvious

[1] *See Downey v. Malik*, 54 Va. Cir. 235, 2000 WL 34205417, at *1 (Alleghany County, Dec. 13, 2000) ("The issue presented is whether the plaintiff ... is barred from pursuing a common law action because her inquiry is exclusively covered by the Virginia Workers' Compensation Act. Virginia case law clearly states that for a claim to come within the exclusivity of Workers' Compensation, the injury involved must arise out of and in the course of employment.").

mechanical or structural change in the human body." *S. Exp. v. Green*, 257 Va. 181, 187, 509 S.E.2d 836, 839 (1999). Furthermore, the Virginia Supreme Court has addressed the circumstances in which an assault may qualify as an "accident." In *Reamer v. National Service Industries*, 237 Va. 466, 470, 377 S.E.2d 627, 629 (1989), the Supreme Court held "[a] physical assault may constitute an 'accident' with the meaning of the Act when it appears that it was the result of an actual risk arising out of the employment."

As an important distinction, the phrases 'arising out of' and 'in the course of' regarding the Plaintiff's employment in the context of the Act, are not synonymous. "The words 'arising out of' refer to the origin or cause of the injury while the words 'in the course of' refer to the time, place, and circumstances under which an accident occurs." *S. Motor Lines Co. v. Alvis*, 200 Va. 168, 170, 104 S.E.2d 735, 737 (1958) (citing *Bradshaw v. Aronovitch*, 170 Va. 329, 335, 196 S.E. 684 (1938); 71 C.J., Workmen's Compensation, § 396, p. 644). Each phrase serves as a separate test in the Workers' Compensation analysis and must be established in its individual capacity before compensation may be awarded. *Metcalf v. A.M. Express Moving Sys., Inc.*, 230 Va. 464, 467, 339 S.E.2d 177 (1986).

"[A]n accident occurs in the 'course of employment' when it takes place within the period of employment, at a place where the employee may reasonably be expected to be, and while he is reasonably fulfilling the duties of his employment or is doing something which is reasonably incident thereto." *Brown v. Reed*, 209 Va. 562, 564, 165 S.E.2d 394, 396 (1969); *Painter v. Simmons*, 238 Va. 196, 199, 380 S.E.2d 663, 665 (1989); *Downey v. Malik*, 54 Va. Cir. 235, 2000 WL 34205417, at *2 (Alleghany County, Dec. 13, 2000).

A plaintiff's injury "arises 'out of' the employment when there is[,] apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Combs*, 259 Va. at 509 (quoting *In re Employers' Liab. Assur. Corp., Ltd.*, 215 Mass. 497, 102 N.E. 697 (1913)). The Virginia Supreme Court has addressed this element of a Workers' Compensation claim by applying the "actual risk" test. In *Combs*, the Virginia Supreme Court explained:

> Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Id. "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his contract." *S. Motor Lines Co. v. Alvis*, 200 Va. 168, 170–71,

104 S.E.2d 735, 738 (1958). "Such a risk may be incidental to the employment when it is either an ordinary risk directly connected with the employment or when it is an extraordinary risk which is only indirectly connected therewith, depending upon the special nature of the employment." *Id.* "Where the causative danger is peculiar to the work and incidental to the character of the business the injury is compensable." *Id.*

III. ANALYSIS

The Act was created to give employees a remedy against their employers that did not exist for them previously. Traditionally, cases regarding the Act involve employees seeking to recover under the Act, attempting to prove their injury meets the required elements of a Workers' Compensation claim, rather than trying to disprove the elements. Instead, in this case, the Plaintiff seeks compensatory damages via a personal injury claim, leaving it up to the Defendants to show the Plaintiff's claim meets the elements of Workers' Compensation.

It is undisputed by the parties that Plaintiff suffered an injury by accident. Plaintiff was shot through her hand and ultimately in her chest. Her injury appeared suddenly, at the moment the Student pulled the firearm from his backpack and pulled the trigger while aiming at Plaintiff. The injury was caused by the Student's fired weapon, resulting in a clear "mechanical or structural change in the human body," namely, the bullet wound in Plaintiff's hand and chest. Therefore, Plaintiff suffered an injury by accident.

Furthermore, the parties do not dispute whether the Plaintiff's injury occurred in the course of her employment. The "in the course of" element of the exclusivity provision is satisfied if the injury occurs during the period of employment, at a place the employee is expected to be, and while they are fulfilling their employment duties. Plaintiff was injured during the school day, while she was in her classroom, and engaged in a lesson at her reading table. Therefore, Plaintiff's injury occurred in the course of her employment.

The issue left for the Court to decide is whether Plaintiff's injury arose out of her employment.

Did Plaintiff's Injury Arise Out of Her Employment?

The Court of Appeals of Virginia has previously explained that each case that requires a determination as to whether there was a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed, must necessarily be determined on a *case-by-case basis. Carr v. City of Norfolk*, 15 Va. App. 266, 269, 422 S.E.2d 417, 418 (1992) (emphasis added). This Court looks to precedent in Workers' Compensation cases to both compare and distinguish the facts as portrayed in this case, to those in precedential opinions.

"The court will look to see if the nature of the job increases the risk of injury." *Id.* (citing *Richmond Newspapers v. Hazelwood*, 249 Va. 369, 457 S.E.2d 56 (1995)). "It [the causative danger] need not have been foreseen or expected, but after the event it must appear to have had

its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence." *Bradshaw v. Aronovitch*, 170 Va. 329, 335, 196 S.E. 684, 686 (1938). "In other words, the injury must be linked to the employment as a contributing cause, or workers' compensation will not apply." *Id.* (citing *Richmond Newspapers*, 249 Va. at 372).) "All [cases involving assaults on employees] adhere to a common principle: 'If the assault is personal to the employee and not directed against him as an employee or because of his employment, the [resulting] injury does not arise out of the employment.'" *Hilton v. Martin*, 275 Va. 176, 180, 654 S.E.2d 572, 574 (2008) (quoting *Richmond Newspapers*, 249 Va. at 373, 457 S.E.2d at 58). "To decide if the tort is personal or employment related, the court looks at several factors, which help it to determine if there is the required causal connection between the injury and the employment." *Hafer v. Johnson*, 60 Va. Cir. 5, 2002 WL 32072921 (City of Richmond, Jan. 11, 2002) (citing *Carr*, 15 Va. App. 266, 422 S.E.2d 417.

Virginia courts have found on many occasions that an assault on an employee did not arise out of the employee's employment. *See Hilton*, 275 Va. 176 (finding the death of an employee after being shocked with a defibrillator by a coworker did not arise out of her employment because the evidence showed the assault had no relationship to the decedent's status as an employee) ("Whether intended as flirtatious, merely playful, or as harassment, it was purely personal."); *Reamer v. Nat'l Serv. Indus.*, 237 Va. 466, 377 S.E.2d 627 (1989) (finding the sexual assault of a furniture store employee by a customer of the store did not arise out of the employment because the assault was personal in nature and the assailant did not act to obtain money until after committing the assaults); *Carr*, Va. App. at 419 (finding the sexual assault of a police officer by a fellow officer did not arise out of her employment because the assault was personal to her and the job did not increase the risk of this particular assault); *Hafer*, 60 Va. Cir. 5 (finding the injury inflicted on an employee at a Veterinary Emergency Center when a coworker grabbed her arm did not arise out of the claimant's employment because it was not reasonable for the claimant to be injured in the way alleged, in the course of her employment.).

On the contrary, Virginia courts have found that, under certain circumstances, an assault does arise out of the claimant's employment. *See Lynchburg Steam Bakery v. Garrett*, 161 Va. 517, 171 S.E. 493 (1933) (finding the foreman at an industrial plant who was shot in the eye with a paper clip by the twelve-year-old son of the shipping clerk was entitled to worker's compensation coverage); *R&T Invs., Ltd. v. Johns*, 228 Va. 249, 321 S.E.2d 287 (1984) (upholding the Workers' Compensation Commission's award to an employee who suffered a back injury during a bank robbery because trips to the bank to deposit large sums of money was a regular part of the claimant's employment); *Plummer v. Landmark Communications, Inc.*, 235 Va. 78, 366 S.E.2d 73 (1988) (granting a plea in bar to a common law negligence lawsuit for injuries plaintiff suffered after being shot by an unknown assailant while waiting in her car late at night for her newspaper route deliveries); *Lopez v. Intercept Youth Servs., Inc.*, 300 Va. 190, 861 S.E.2d 392 (2021) (affirming the trial court's granting of defendant's plea in bar finding the facts "demonstrate[d] the probability of assault was augmented either because of the particular character of [the claimant's] job or because of the special liability to assault associated with the environment in which she was required to work"); *Herrera v. Simms*, 51 Va. Cir. 397, 2000 WL 516134. (Loudon County, Mar. 9, 2000) (finding the sexual assault of a 7-Eleven employee arose out of the employment because the nature of her employment, working the late evening and early morning hours, substantially increased the risk of such assault.); *Colona v. Accomack Cnty. Sch.*

Bd., 52 Va. Cir. 421, 2000 WL 1528703 (Accomack County, July 17, 2000) (finding the plaintiff's injury after being bitten by a special education student who was HIV positive arose out of the employment because the teacher would not have been equally exposed to the hazard of injury by an unruly student apart from her employment and the injury was peculiar to her work with special education students and incidental to the character of the school business in that type of setting.).

This Court finds no cases "on point". However, there are both similarities and distinctions between the facts of this case and those of the relevant cases cited above. The Court finds the facts in *Hilton*, *Reamer*, *Carr*, and *Hafer* more analogous to the case at hand because, unlike the plaintiffs in *R&T Investments, Lopez, Herrera,* and *Colona*, Plaintiff's job as a first-grade teacher does not come with the inherent risk that is attached to: (1) an employee who regularly delivers large sums of money to a bank; (2) an employee who works as a counselor for at-risk youth with mental health concerns; (3) an employee who works late night and early mornings at a gas station; or (4) a teacher who works solely with special needs students.

In using the "actual risk" test, this Court does not find that the injury of a gun shot wound is one that is a "natural incident of the work" or its origin "connected with the employment" of a first-grade teacher and would not be contemplated by a reasonable person, as evidenced by the parties' stipulation that a first-grade teacher would not expect to be shot by one of their students. Nothing in the facts of this case allege any situation similar to *Colona* or *Lopez*. Plaintiff's classroom was not a classroom designed specifically for students with special needs nor was it a classroom for at-risk youth with mental health concerns. The danger of being shot by a student is not one that is peculiar or unique to the job of a first-grade teacher in a class, without additional factors like those seen in *Colona* and *Lopez*. The risk, in this case, does not arise from the employment because the nature of the job as a first-grade teacher in a general classroom setting does not increase the risk of an injury like the one inflicted by the Student.

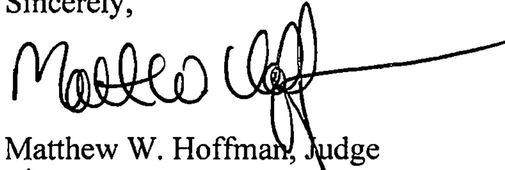
Furthermore, the decisions that the injuries the plaintiff's suffered in *Plummer* and *Lynchburg Steam Bakery* were subject to the exclusive remedies provided by workers' compensation are inapposite if the conduct which caused the injuries sustained was personal in nature. *See Richmond Newspapers*, 249 Va. at 375 n.4, 457 S.E.2d at 59. The Student slammed Plaintiff's cell phone and was suspended for that behavior two days before the shooting. Student had the firearm from the beginning of the school day until just before dismissal. He transferred the firearm from his backpack to his pocket right before recess. He then proceeded to show that firearm to another student while at recess. It was not until the Student was back in Plaintiff's classroom that he decided to fire it once, striking the Plaintiff. He did not at any time threaten any other student, teacher, or administrator at the school with the firearm. The shooting was "personal" and was directed against Plaintiff.

IV. CONCLUSION

The Court finds the injury suffered by Plaintiff did not arise out of her employment. This is one of the three essential elements for an injury to fall within the exclusive provisions of workers' compensation coverage. Defendants have not met their burden to prove the Plaintiff's injuries fall within the exclusive coverage of the Act, as is required at the plea in bar stage.

Defendants' joint plea in bar is denied. An Order reflecting the Court's decision is attached.

Sincerely,



Matthew W. Hoffman, 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

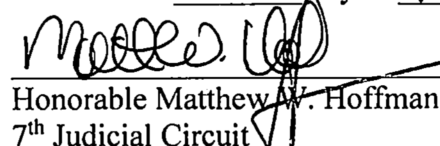
NOW COMES the matter on Defendants' Plea In Bar asking the Court to find that compensation for the Plaintiff's injuries she suffered as the result of being shot on January 6, 2023 falls exclusively under the Virginia Workers' Compensation Act.

Anne C. Lahren, Esq. and Robert E. Samuel, Jr. appeared on behalf of Defendant's Newport News School Board, Dr. George Parker and Briana Foster Newton. Sandra M. Douglas, Esq. appeared on behalf of Defendant Ebony V. Parker. Kevin Biniazan, Esq., 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 the Plaintiff's injuries did not arise out of her employment. The Court adopts, as if reiterated herein, the opinion letter issued by the Court on November 3, 2023.

It is hereby ADJUDGED, ORDERED and DECREED that Defendants' Plea in Bar 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 3rd day of November, 2023.



Honorable Matthew W. Hoffman
7th Judicial Circuit