
In the
Court of Appeals of Virginia

Record No. 0382-26-1

EBONY V. PARKER,
Appellant,

v.

ABIGAIL ZWERNER,
Appellee.

From the Circuit Court for the City of Newport News
Case No. CL2301446H-00 (Hon. Matthew W. Hoffman)

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INTRODUCTION

On January 6, 2023, a six-year-old boy in Abby Zwerner’s first-grade class at Richneck Elementary School shot her in the chest and hand at point-blank range. For hours before the shooting, teachers and staff at Richneck received a series of increasingly alarming pieces of evidence suggesting that the boy (J.T.) had brought a loaded gun to school in his backpack. As they were trained to do and consistent with the school’s written policies, they reported each new piece of information up the chain of command to the assistant principal, Dr. Ebony Parker—the defendant here.

Parker didn’t take the gun threat seriously. She did not attempt to investigate the threat herself, nor did she call the police. While J.T. was outside at recess, another teacher searched his bag and found no gun. But by then, Abby had seen J.T. take “something” out of the bag, and she suspected that he had hidden the gun on his person. R.7592. When Parker heard that new information, she ridiculed the idea that J.T. could hide a gun in his “little pockets,” R.7593, and she directed her staff to “hold off” on searching J.T.’s person until his mother arrived to pick him up. R.7508. Parker’s directive *not* to search J.T.’s person—to wait and see—was conveyed by another staff member to Abby in her classroom. J.T. shot her there shortly afterwards.

Abby brought this suit to seek compensation for the life-threatening injuries that she suffered as a result of Parker's grossly negligent response to the threat of a gun at school. Parker's main response is to argue (Br. 1) that Abby's injuries fall within the exclusive coverage of the Virginia Workers' Compensation Act, which, if true, would preclude Abby from pursuing this lawsuit. But the Workers' Compensation Act applies only to an injury "arising out of" the injured party's employment, meaning that the injury was a natural incident of the work. Code § 65.2-300(A). Being shot is not a natural incident of teaching first grade at a public school in Virginia. In addition, and as the circuit court correctly recognized, the Act does not apply to workplace assaults like this one that are "personal" in nature.

Having failed to keep this lawsuit out of court, Parker also identifies no sound reason to throw out the jury's verdict. The jury reasonably concluded that Parker assumed a duty of care on the day of the shooting and that she acted grossly negligently. On appeal, Parker does not dispute that all of the ordinary elements for assumption-of-duty liability were satisfied here. She nonetheless argues (Br. 1–2) that she cannot be held liable unless she "expressly" promised Abby to protect her from J.T. That supposed requirement is drawn from inapposite cases addressing promises of protection against *crimes*. As a six-year-old, J.T. lacked the capacity to form

any criminal intent. In any event, a reasonable jury could have found Parker's undertaking here to be express, rather than merely implied.

Parker's remaining challenges fare no better. There was more than enough evidence for the jury to find her grossly negligent, given her utter indifference to the risk of a gun on campus, and to reject her theory of contributory negligence. Parker also falls far short of showing that she is entitled to a new trial based on her desire for the civil trial to occur only after the conclusion of a separate criminal case against her.

The judgment should be affirmed. If this Court concludes otherwise, the Court should also reach Abby's additional assignment of error: At summary judgment, the circuit court wrongly held that the parties lacked a "special relationship" giving rise to a duty of care. The circuit court reasoned that the relationship between an assistant principal and a teacher is not among the previously recognized categories of special relationships, such as employer/employee. But the Supreme Court has made clear that a special relationship may be recognized based on the particular facts of a case, even outside of those categories, and the facts of this case fit the doctrine to a tee.

ADDITIONAL ASSIGNMENT OF ERROR

The circuit court erred in granting summary judgment to Parker on Count III, alleging a breach of a duty of care arising out of a special

relationship between the parties, based on the court’s conclusion that no special relationship existed. (Preserved at R.13–17, R.1504–08, R.2190–92, R.2197–98, R.6099–106, R.6572, R.6843–47.)

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. Factual background

A. Two days before the shooting, J.T. is suspended for an outburst directed at Abby.

At the time of the shooting, Abigail Zwerner was a first-grade teacher at Richneck Elementary School in Newport News. R.2, R.6017. Teaching was her passion. R.7672. She got to school early and left late, spent her evenings working on lesson plans, and found “excitement” and “joy” in helping her students learn. R.7052–53, R.7672–73.¹

For the 2022–2023 school year, Abby’s first-grade class included a six-year-old boy referred to at trial as “J.T.” R.7392–93. The school was aware that J.T. had “behavioral issues.” R.7514. He had been sent to the assistant principal’s office multiple times. *Id.* He was also on a “modified” half-day schedule that involved being dropped off later and picked up earlier than his peers. R.7392, R.7610. But J.T. was in Abby’s regular first-grade class, not a special-education environment.

¹ Unless otherwise specified, all internal quotation marks, emphases, alterations, and citations are omitted from quotations throughout.

On January 4, 2023, J.T. had a violent outburst directed at Abby in her classroom. R.6042. J.T. grabbed her phone and “slammed [it] to the ground,” breaking the screen protector. R.6042–43. Abby removed him from the classroom and took him across the hall to the classroom of another first-grade teacher, Jennifer West, who used a walkie-talkie to call for help from the school’s guidance counselors. R.6043; *see* R.7543. Two counselors, including Rolonzo Rawles, came to West’s classroom to remove J.T., who was suspended from school for a day. R.6043–44, R.7500, R.7514–15.

B. J.T. returns to school from his suspension with a loaded gun.

On January 6, 2023, J.T. returned to Richneck Elementary School with a loaded gun in his backpack. R.7392–93. His mother dropped him off in Abby’s classroom at around 10:30 am. R.7392. Although J.T. apologized for the phone incident, R.6044, his behavior quickly deteriorated.

Abby’s class went to lunch in the cafeteria from 11:15 to 11:45 am. R.6044. While in the cafeteria, J.T. “threatened a kindergartner” and was “aggressive with the security officer.” R.7581–83. Abby came to Assistant Principal Parker’s office during lunch and reported J.T.’s cafeteria outbursts. R.7582–83. Parker did not look up to acknowledge Abby’s presence, and Abby left the office to go pick up her students from lunch. *Id.*

Another teacher, Amy Kovac, was coincidentally present when Abby came to see Parker about J.T.'s behavior. R.7581–82. After Abby left Parker's office, Parker told Kovac to relay a message: "She told me I could tell her [i.e., Abby] that she could call his mom at any time to come pick him up." R.7583.

Kovac left the office to relay that message to Abby, who by that time was walking her students back to the classroom from the cafeteria. R.7583–84. Kovac waited until all the students were back in Abby's classroom to approach, intending to pass along the message. R.7584. While Kovac was still in the hallway, "two little girls came out of Abby's room to the doorway" and told Kovac "that J.T. had a gun in his bag." R.7584–85.

Kovac took the warning seriously. She "went straight to [J.T.]" at his desk in the classroom, pulled up a chair next to him, and asked, "What's going on? The girls tell me you have a gun in the bag." R.7585. His bag was sitting next to the desk, and J.T. was "balled up in his seat" in a way that Kovac found "not normal." *Id.* Kovac asked for the bag, and J.T. refused. R.7586. After being quiet for a moment, J.T. claimed that people were picking on his friend, "R.," and Kovac explained that R. could "tell an adult." *Id.* She then asked J.T. again, "Do you have a gun in that bag?" R.7587. J.T. again refused to give her the bag. *Id.*

Meanwhile, Abby had been settling the other students into place after lunch. R.7585. She proceeded to call the class together for a lesson. R.7587. Kovac sat next to J.T. for the lesson. *Id.* At that point, J.T. claimed to Kovac that he wouldn't hand over his bag because the bag contained shoes that he needed for recess. *Id.*

Kovac didn't buy it. She quietly informed Abby that two girls in the class had said that J.T. "might have a gun." R.6018; *see* R.7587–88. Kovac asked Abby to keep an eye on J.T. while Kovac went to report the situation to Parker. R.6018–19. Kovac also said that she would come back to the classroom and search J.T.'s bag while the class was outside at recess. R.7588.

C. Consistent with school policy, the teachers report the threat of a gun to Assistant Principal Parker.

Kovac went to Parker's office and told her that two girls had reported that J.T. had a gun in his bag; that Kovac had asked J.T. for the bag, but J.T. had refused to hand it over; and that J.T. was "not acting normal." R.7589–90. That conversation occurred at some point shortly before the 12:20 pm start of recess. R.7556, R.7590. Kovac also told Parker that she intended to check J.T.'s bag while the class was at recess. R.7590. Parker "just kind of nodded and acknowledged that that was what [Kovac] was going to do." *Id.*

Swiftly reporting the threat of a gun to school administrators was exactly what the teachers were supposed to do under the circumstances. Richneck Elementary School had a written protocol in place for responding to threats on campus. R.7444–45; *see* R.8263–66. The protocol stated that “[a]ny school staff member, upon receiving information that a person is threatening to commit an act of violence, shall ... [a]ssume [the] threat is serious.” R.8265. The protocol directed teachers to “[i]mmediately report the threat to a school administrator.” *Id.* The protocol then further directed any administrator receiving such a report to “[a]ssume [the] threat is credible until and unless analysis suggests differently.” *Id.* And the protocol made clear that the administrator, not the teachers, would then be responsible for taking further steps. *Id.*

The school’s staff handbook reiterated the respective roles of teachers and administrators in responding to a threat. R.7487–93; *see* R.8267–69. In a section on classroom safety, the handbook grouped various student behaviors into Levels 1, 2, and 3 and listed “Next Steps” for each tier. R.8268–69. The most serious “Level 3 Behaviors” were to be “[i]mmediately reported [to] the school security and/or an administrator.” R.8269. And one of the listed examples of a Level 3 behavior was “[p]ossession of a weapon.” *Id.* Thus, the handbook directed teachers to respond to a student’s

possession of a gun by “[i]mmediate notice to [an] administrator,” who was then expected to take further steps. *Id.*; see R.6025. Abby had a copy of that section of the staff handbook posted on her classroom wall. R.6021–22; see R.8293.

When Kovac reported to Parker that J.T. might have a gun, Parker did none of the things contemplated in the school’s threat protocol or staff handbook. She did not call 911 or a school resource officer—then or at any point before the shooting. R.7437–39. She did not direct that J.T. be separated from his bag or from other students, and she took no steps to investigate the threat on her own. *Id.*; see R.6913–16.

D. J.T. transfers the gun from his bag to his pocket and shows it to another student at recess.

When Kovac left Parker’s office after initially reporting the gun threat, she went back to her own office and saw that she had missed a text message from Abby. R.7590. Abby had texted to say that the class was now outside at recess but that she had seen J.T. go to his bag beforehand and take “something out,” which he then “put ... in his jacket pocket.” R.7590–91. Kovac went ahead and searched J.T.’s bag, but she was unsurprised to find that the gun wasn’t there. *Id.*

After searching J.T.'s bag, Kovac returned to Parker's office to report that the bag was empty but that Abby had observed J.T. take "something from the bag and ... put it in his pocket" before recess. R.7592. Parker was still sitting at her desk and responded, "Well, he has little pockets." R.7593.

In fact, J.T. had taken both the gun and bullets with him to recess, hidden in his pockets. The other first-grade teacher, Jennifer West, saw J.T. and R. repeatedly go to an area of the playground where they could be out of view of the teachers. R.7544–45. When the children went back to their classrooms after recess, West pulled R. aside and "asked him what was going on." R.7547. R. was visibly nervous and replied, "I can't tell you." *Id.* After some gentle prodding, R. began to cry and explained that J.T. had a gun, that J.T. had shown R. the gun and a bullet at recess, and that J.T. had threatened to "hurt us" if R. said anything. R.7547–48.

West was "convinced that there was a gun" after she spoke with R., who was upset and scared. R.7563; *see* R.7548–49. Consistent with the school's policies, West immediately reported the gun threat to the school administrators by calling the main office. R.7548. A music teacher, John Sims, was covering the phones that day. *Id.*; *see* R.7453–56. West wanted to know whether J.T. had been searched. R.7457. Parker explained to Sims that the "backpack had been searched," which Sims then relayed to West. R.7458.

At around the same time, Rolonzo Rawles—the guidance counselor involved in J.T.’s earlier phone-slamming incident—happened to be dropping off another student at West’s classroom. R.7502, R.7548. West explained to Rawles that R. was upset because J.T. had shown him a gun at recess and had threatened him. R.7504. She also mentioned that she had learned from her call to the main office that J.T.’s bag had been searched at recess. R.7549–50. She asked, “Why can’t we check his person? R says [J.T.] had it on him. Can we check him?” R.7550. Rawles spoke briefly with R. and then headed to Parker’s office to ask the assistant principal for permission to search J.T.’s person. R.7504–05, R.7551.

E. Parker directs her staff to “hold off” on searching J.T.’s person.

Rawles asked Parker if “it would be okay if I [Rawles] checked his person,” given the mounting evidence that J.T. had taken the gun from his bag. R.7508. At some point, Sims—the music teacher covering the phones—poked his head into the office to say that West had also called again to ask “if J.T.’s person had been searched.” R.7458–59.

Parker refused to allow her staff to search J.T.’s person for the gun. R.7459, R.7508. In her judgment, the teachers and staff “could hold off and wait” because J.T.’s mother was scheduled to pick him up at 2:30 pm under

his modified schedule. R.7508; see R.7397. Parker instructed Rawles to “hold off” and indicated that, when J.T.’s mother arrived to pick him up, “maybe” Parker would authorize a search of his person. R.7508. That conversation ended at 1:40 pm. R.7437.

Rawles returned to Abby’s classroom and conveyed Parker’s decision that the school would “hold off” on any search of J.T.’s person. R.7508–10. Abby gave him a “look of shock”: “[H]er eyes were very wide.” R.7526. Rawles told her to hang tight and left her there with J.T.—and the gun. *Id.*

F. J.T. shoots Abby in the hand and chest, nearly killing her and forever altering her life.

At around 2:00 pm, J.T. shot Abby in her classroom. R.7598. The last thing that Abby can remember before being shot at point-blank range was seeing J.T.’s face, as she raised her hand to try to defend herself. R.6026.

Abby was rushed to Riverside Hospital. R.6872–73. The bullet tore through her left hand and entered the left side of her chest, fracturing a rib, piercing her lung, and fragmenting inside her. R.6957–59, R.7651–53, R.7659, R.7662. A large fragment came to rest near her aorta and remains there today because removing it would be too dangerous. R.6963, R.7660–61. She was in critical care for days, and her doctors had to insert a tube into

her chest to prevent the cavity created by her collapsed lung from filling with blood or air and crushing her heart. R.6959–60, R.7656–57, R.7664.

The wound to Abby’s hand was equally gruesome. The orthopedic surgeon who treated her at Riverside described her hand injury as “devastating,” a “10-type injury” on a scale of 1 to 10, and “much more similar” to the war injuries that he had treated while previously working at Walter Reed National Hospital than to what Riverside typically saw. R.6978–79, R.6992. After multiple surgeries and years of occupational therapy, Abby’s hand remains painful, and her doctors do not expect it ever to be fully functional or pain-free again. R.7019–23, R.7038–39.

Abby also developed post-traumatic stress disorder and found it difficult to leave her house. R.5961–93, R.7056, R.7684, R.7687. Her mother and twin sister described her as a “shell” of her formerly vivacious self, living “from [doctor’s] appointment to appointment,” without the purpose or fulfilment that teaching had given her. R.7685; *see* R.7056–59.

II. Procedural background

A. Pretrial proceedings

1. In 2023, Abby filed a complaint in the Circuit Court for the City of Newport News asserting, as relevant here, that Parker had breached an assumed duty of care (Count I) and a duty arising out of a special relationship

between the parties (Count III). R.9–17. The complaint asserted claims against other defendants as well, but the case ultimately proceeded only against Parker. R.2190, R.2196.

2. Parker filed a plea in bar in May 2023, arguing that Abby’s injuries were covered by the Virginia Workers’ Compensation Act. R.38–39. The Workers’ Compensation Act allows injured workers to seek benefits from a state agency for injuries “by accident arising out of and in the course of the employment.” Code § 65.2-300(A). When the Act applies, it bars any other remedies an injured employee would otherwise have against her employer or co-employees. Code § 65.2-307(A).

The circuit court denied Parker’s plea in bar. R.269–77. The court explained that an injury “arises out of” employment for purposes of the Act only if the injury is a “natural incident of the work.” R.271–72. The court further explained that an assault that occurs in the workplace does not “arise out of the employment” if the assault is “personal to the employee and not directed against him as an employee or because of his employment.” R.274.

Here, accepting the allegations in the complaint as true, the court found J.T.’s assault “personal in nature.” R.275. The court observed that J.T. had targeted only Abby, despite having the gun at school for hours and showing it to other students, and that the shooting had occurred two days

after J.T. was suspended for a prior outburst also targeted at Abby personally. *Id.* The court also observed that teaching first graders is not the kind of job that involves a “peculiar or unique” risk of being shot. *Id.* The court therefore found that Parker had failed to show that Abby’s injury fell “within the exclusive coverage of the Act.” *Id.*

The circuit court certified its order denying the plea in bar for interlocutory review, but both this Court and the Supreme Court declined to hear Parker’s appeal. R.413–14; *see* Parker Br. 7.

3. In July 2025, the circuit court denied Parker’s motion for summary judgment on Count I (breach of an assumed duty of care). R.2193–94. The court observed that, under the “principle of assumption of a duty,” a person who “assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.” R.2193. And the court found that whether Parker had assumed a duty of care on January 6 was “a question meant for the finder of fact.” R.2194. In light of sovereign-immunity principles, however, the court ruled that Parker could be held liable only if her conduct “rose to the level of gross negligence or willful and wanton conduct.” R.2196.

By contrast, the circuit court granted Parker’s motion for summary judgment on Count III (breach of a duty arising out of a special relationship). R.2190. Abby had contended that Virginia recognizes special relationships

“either as a matter of law or because of the particular factual circumstances in a given case,” and she relied on the latter theory here. R.1504–05. In particular, Abby contended that this case is analogous to *Burdette v. Marks*, 244 Va. 309 (1992), in which the Supreme Court found a special relationship between a public official and a specific victim attacked by a third party in the official’s presence. R.1506. The circuit court deemed *Burdette* “inapposite.” R.2190. In its view, other cases established that no special relationship exists as a matter of law between an assistant principal and a teacher because they are “merely coworkers.” R.2192.

4. In April 2024, a special grand jury charged Parker with eight counts of felony child neglect. R.1566. Parker requested that the trial date in this case be postponed until after her criminal trial to avoid “being prejudiced in this civil case by asserting her Fifth Amendment privilege.” R.1477. With the agreement of all parties, the circuit court postponed the civil trial until October 2025. R.1402, R.1476, R.8011. But when Parker’s criminal trial was further delayed, the court here found no “good cause” to further postpone the civil trial. R.2188; *see* R.2216–17, R.2609.

B. The trial and jury verdict

1. The case proceeded to an eight-day jury trial in October and November 2025. Abby presented sixteen witnesses, including herself, her

mother, and her sister; the teachers and staff members who warned Parker about the gun on the day of the shooting; the law enforcement officers who responded to the shooting; the physicians who treated her injuries; and an expert on crisis management within school systems. Parker did not testify, nor did she present any fact witnesses in her defense. She instead called two experts—a clinical psychiatrist who had never examined Abby, R.6275–84, and an expert on school safety who opined that Parker did not breach professional standards, R.6358–63.

By contrast, Abby’s school-safety expert opined that Parker’s actions breached the standard of care, both cumulatively and considered individually at each moment on January 6 when Parker received a new piece of information about the gun threat and responded to the new information in a grossly negligent way. R.6914, R.6923–24. In response to a suggestion that other teachers could have called 911 too, the expert explained that “there’s a chain of command” in a school, that teachers “are taught [to] report to an administrator,” and that teachers then rely on the administrator to decide the next steps. R.6916.

2. At the charging conference, the circuit court rejected several proposed defense instructions relevant to this appeal. First, Parker asked that the jury be instructed that she could be held liable only if she “expressly

communicated to Ms. Zwerner a specifically described undertaking ... to protect Ms. Zwerner from third party criminal harm.” R.4720; see R.4717 (similar). The court declined, instead giving an instruction on assumption of duty drawn from section 324A of the *Restatement (Second) of Torts* (1965) (*Restatement*). R.6531–36, R.6682. Second, Parker proposed that the jury be instructed that she could not be liable for gross negligence “as a matter of law” if the evidence showed that she “exercised at least some degree of care.” R.4730. The court again declined, opting instead to give the model Virginia instruction on gross negligence. R.6558–60, R.6681.

In rebuttal argument at summation, Abby’s counsel stated that if Parker disagreed with the version of events set forth by all the teachers and staff members who testified at trial, Parker could “get on the witness stand and tell us.” R.6773. Counsel further stated that in a civil case a witness cannot “plead the Fifth Amendment” without taking the stand and invoking the “right to remain silent.” *Id.* Parker objected. *Id.* The court overruled her objection but gave an additional, curative instruction before the start of deliberations, telling the jury that “in any civil action, the exercise by a party of any constitutional protection shall be not used against her,” and that

Parker “does not have to testify and [her] exercise of that right cannot be considered by” the jury. R.6789–90.²

3. The jury returned a verdict for Abby, assessing damages at \$10 million. R.6222; *see* R.4776. Parker moved to set aside the verdict or for a new trial. R.4804–43. On January 30, 2026, the circuit court denied Parker’s post-trial motions and entered final judgment for Abby. R.4907–08.

STANDARDS OF REVIEW

Plea in bar. The circuit court denied Parker’s plea in bar without taking evidence. R.171–72, R.269–70. This Court’s review is “functionally de novo.” *Massenberg v. City of Petersburg*, 298 Va. 212, 216 (2019); *see Hilton v. Martin*, 275 Va. 176, 179–80 (2008).

Challenges to the verdict. The circuit court sustained the jury’s verdict in Abby’s favor. R.6222, R.4907–08. The judgment is therefore presumed to be correct and may not be set aside on appeal unless it is “plainly wrong or without evidence to support it.” *N. Va. Kitchen, Bath & Basement, Inc. v. Ellis*, 299 Va. 615, 622 (2021); *see* Code § 8.01-680.

² Parker had injected the Fifth Amendment into the proceedings during jury selection. Over Abby’s objection, Parker had referred to the Fifth Amendment both on a questionnaire sent to potential jurors and during voir dire—asking, for example, whether potential jurors would feel that Parker “did something wrong” if she “t[ook] the Fifth.” R.7296; *see* R.4888.

Jury instructions. A trial court’s decision to deny a proposed instruction is reviewed for “abuse of discretion.” *Under Wilds Skies, Inc. v. Nat’l Rifle Ass’n*, 304 Va. 310, 316 (2025). Whether a proposed instruction “is a correct statement of the law” is reviewed de novo. *Id.*

Denial of a continuance. The trial court’s denial of a motion to continue a civil trial is reviewed for abuse of discretion and is not reversible error unless the movant shows both an “abuse of discretion *and* resulting prejudice.” *Haugen v. Shenandoah Valley Dep’t of Soc. Servs.*, 274 Va. 27, 34 (2007) (original emphasis).

Summary judgment (additional assignment of error). The circuit court’s entry of summary judgment for Parker on Count III is reviewed “de novo.” *Stahl v. Stitt*, 301 Va. 1, 8 (2022). Summary judgment is a “drastic remedy, available only when there are no material facts genuinely in dispute.” *Fultz v. Delhaize Am., Inc.*, 278 Va. 84, 88 (2009).

ARGUMENT

I. The Workers’ Compensation Act does not apply.

As explained above, the Workers’ Compensation Act bars an injured employee from pursuing tort remedies against her employer or co-employees for injuries suffered “by accident arising out of and in the course of the employment.” Code § 65.2-300(A). The parties do not dispute that Abby’s

injury occurred “in the course of” her employment. R.273. But the Act does not apply unless her injury also satisfies the separate “arising out of” element. *See Butler v. S. States Coop., Inc.*, 270 Va. 459, 465 (2005).

The circuit court correctly held that the “arising out of” element is not satisfied here, so the Workers’ Compensation Act does not apply to Abby’s injury and does not bar her suit. R.271–77. First, Abby’s injury did not arise out of her employment because teaching first grade does not carry any “peculiar” or heightened risk of being shot. *Lopez v. Intercept Youth Servs., Inc.*, 300 Va. 190, 197 (2021). Second, Abby’s injury did not arise out of her employment because the shooting was “personal” to her and not directed at her as an employee. *Hilton v. Martin*, 275 Va. 176, 180 (2008).

A. Being shot is not a natural incident of teaching first grade at a public school.

1. An injury arises out of employment only if it “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.” *Richmond Newspapers, Inc. v. Hazelwood*, 249 Va. 369, 372 (1995) (quoting *Bradshaw v. Aronovitch*, 170 Va. 329, 335 (1938)). That test excludes injuries that “cannot fairly be traced to the employment as a contributing

proximate cause,” including where the hazard that caused the injury is common to the general public and not “peculiar to the work.” *Id.*

“In assault cases,” the necessary causal link between the injury and the employment can be established by showing that “the conditions of the employment raise the risk of assault.” *King v. DTH Contract Servs.*, 69 Va. App. 703, 713 (2019). That could be true when, for example, the employee is required to perform duties that heighten the risk of being assaulted, such as carrying large amounts of cash. *See, e.g., R&T Investments v. Johns*, 228 Va. 249, 253–55 (1984) (employee assaulted in robbery while carrying cash to bank for deposit). Or it could be true because of a “special liability to assault associated with the environment in which [the employee] must work,” such as working late at night in a dangerous part of town. *Lopez*, 300 Va. at 197.

Parker fails to establish any such causal link here. Nothing in the complaint—or in common experience—suggests that teaching first grade carries a “peculiar” risk of being shot. Parker asserts (Br. 22) that “elementary school teachers are regularly assaulted by their students.” But the incidents to which she alludes involved biting, kicking, and shoving—what one treatise calls “childish depredations,” familiar to many parents.

¹ Thomas A. Robinson, *Larson’s Workers’ Compensation Law* § 8.03[2][c]

(2026). Parker identifies no evidence suggesting that first-grade teachers are at a heightened risk of being shot in the workplace.

The risk of gunshot injury is the relevant consideration, not the risk of bites or kicks. In *Baggett Transportation Co. v. Dillon*, for example, the Supreme Court focused on the risk of “being shot accidentally or intentionally alongside a public highway,” where the relevant injury stemmed from such a shooting. 219 Va. 633, 644 (1978). Similarly, in *Roberson v. Whetsell*, this Court asked whether the “risk of being shot was peculiar to the [victim’s] employment,” where the relevant injury stemmed from a shooting. 21 Va. App. 268, 272 (1995). So too here, whether the Act applies turns on whether the “risk of being shot was peculiar” to Abby’s job as a first-grade teacher. *Id.* It was not.

2. Parker has the burden to show the Act applies, and her failure to come forward with any evidence is reason enough to reject her plea. If more were needed, the available evidence suggests that schoolteachers are at no greater risk of gunshot injury than the average employee.

Indeed, as far as we are aware, Abby is the only elementary school teacher in the history of the United States to be shot by a student under the age of ten. See David Riedman, *First Grader Who Shot Teacher in Virginia is Among the Youngest School Shooters in US History*, The74 (Jan. 10,

2023), perma.cc/K7Y4-4U6K (noting two prior fatal school shootings by a child under the age of ten since the 1970s but explaining that both involved one student shooting another). Federal studies confirm that intentional shootings are an exceptionally rare cause of workplace injury to teachers. *See, e.g.,* Alisha H. Spencer & Ryan P. Farrell, *Putting Violence in Perspective: How Safe Are America’s Educators in the Workplace?*, Monthly Lab. Rev. (Aug. 2016), perma.cc/F8XL-LQZL (reviewing data and observing that educators “were at less risk of both fatal and nonfatal injuries” as compared to other workers). When convenient for her own litigating purposes, even Parker recognizes (Br. 41) that a shooting like this one “had never happened before.”

As further explained below, Parker cannot rely on the apparently unprecedented nature of the shooting to escape the jury’s verdict that she acted grossly negligent on January 6. *Infra* 41. Her conduct must be evaluated in light of the specific information that she learned that day and her responses. But the rarity of what occurred here does undercut any argument that being shot is a “natural incident” of teaching first grade. *Bradshaw*, 170 Va. at 335.

3. Parker alternatively contends (Br. 23–24) that Abby’s injury was a natural incident of her work because of the “heightened environmental risk”

that she faced. But there is no evidence that the environment at Richneck Elementary School was particularly dangerous or carried with it an increased risk of gunshot injury.

That distinguishes this case from Parker’s principal authority (Br. 13, 17, 23), *Lopez v. Intercept Youth Services*. In *Lopez*, a counselor employed at a “residential program for at-risk youth” was killed by an 18-year-old in the program. 300 Va. at 193. The Supreme Court concluded that the counselor’s death “had arisen out of the conditions of her employment,” and that the Workers’ Compensation Act therefore covered her death and precluded a tort suit. *Id.* at 200. But the Court’s conclusion was premised on the especially dangerous conditions of the residential program, in which “approximately 98% of the residents had mental-health diagnoses, and they had all been referred to the program from psychiatric hospitals, group homes, therapeutic foster homes, or regular foster homes.” *Id.* at 193.

Similarly, in *C.K. v. Inova Health Care Services*, the Workers’ Compensation Act was found to apply to the sexual assault of an employee at an adolescent psychiatric ward, serving “mentally unstable and impulsive” patients. 2024 WL 4886007, at *1 (Va. Ct. App. 2024). And in *Colona v. Accomack County School Board*, the Act was found to apply to a teacher’s injury—from being bitten, not from being shot—incurred in a special-needs

classroom serving students with “unusual challenges of mind and body.” 52 Va. Cir. 421, 2000 WL 1528703, at *4 (Accomack Cnty. 2000).

Abby was not working in such a dangerous environment. As the circuit court emphasized, her workplace was a “general classroom setting” in a regular public school. R.275. Parker points (Br. 23) to the complaint’s allegations about J.T.’s own history of acting violently. But the placement of a single troubled youth in Abby’s class did not transform the class into anything like the custodial facility in *Young*, the psychiatric ward in *C.K.*, or the special-needs classroom in *Colona*. As far as the record reveals, Abby’s other students were typical first graders, and the only increased risks of assault inherent to her job were the risks characteristic of teaching young children—perhaps being kicked or bitten, but not being shot.

B. The shooting was personal.

An injury suffered in a workplace assault also does not arise out of the victim’s employment if the assault “is personal to the employee and not directed against him as an employee or because of his employment.” *Hilton*, 275 Va. at 180; *see id.* at 180 n.2 (collecting cases). Here, J.T. shot Abby for his own personal reasons, not because of her employment.

The complaint alleges that, two days before the shooting, J.T. had been suspended from school for grabbing Abby’s phone, refusing to give it back,

and slamming it to the ground. R.5. In that earlier episode, Abby had taken J.T. across the hall to West’s classroom, and the guidance counselor, Rawles, had been called in to remove him. J.T. called the teachers “bitches.” *Id.*

Parker contends (Br. 16) that J.T.’s suspension provided the “only motivation apparent from the complaint” and shows that the shooting was born out of a grievance J.T. had against Abby “for disciplining him ... as his teacher.” But Abby did not suspend J.T., and the cellphone incident shows that he had a personal conflict with her even before his suspension.³ And equally important, J.T. did *not* threaten, much less shoot, the other two authority figures—West and Rawles—that he called “bitches” on January 4.

Parker is therefore wrong to argue (Br. 18) that J.T. must have shot Abby because she had made him “feel the weight of authority.” Parker borrows that phrase from a treatise addressing workplace assaults of a supervisor by a subordinate after the subordinate is fired or disciplined. *See id.* But the facts here are different: the phone-slamming incident shows that J.T. had behaved violently towards Abby *before* the suspension, and he did not assault any other authority figures on January 6, despite having the gun at school for hours. He singled out only Abby, personally.

³ Although not alleged in the complaint, J.T. was suspended by the principal, Briana Newton. R.1369, R.1373.

Parker is also wrong to assert (Br. 25–26) that the shooting must have occurred because of Abby’s employment if she and J.T. only interacted when Abby was in the “line of duty” at school. Many workplace assaults occur between individuals who only interact at work, but the assaults can still be personal. In *Hilton*, for example, an EMT used a cardiac defibrillator to shock another EMT while they were both on duty. 275 Va. at 178–79. The co-worker died, and her estate sued. *Id.* at 179. The Supreme Court held that the Workers’ Compensation Act did not apply, so the tort suit could proceed. *Id.* at 181. As with J.T. and Abby, the assailant and the victim in *Hilton* only encountered each other because of the victim’s work. But the Court nonetheless found that the assault was “purely personal,” explaining that whether it was intended as “flirtatious, merely playful, or as harassment,” the assault was not directed against the victim as an EMT. *Id.* “Therefore, the injury resulting from the assault did not arise out of the employment.” *Id.*

In *Richmond Newspapers*, the Supreme Court held that the Workers’ Compensation Act did not cover the injuries that an employee suffered (and therefore did not prevent him from suing) when “goosed” by his supervisor at work because the goosing was personal in nature. 249 Va. at 375. The Court emphasized that the supervisor targeted only some subordinates and left others alone, which showed that the assaults were “not directed against

the recipients as employees.” *Id.*; see also, e.g., *Reamer v. Nat’l Serv. Indus.*, 237 Va. 466, 471 (1989) (customer’s sexual assault of store employee was “purely personal”); *City of Richmond v. Braxton*, 230 Va. 161, 165 (1985) (supervisor’s sexual assault of a subordinate was personal).

The common thread in all these assault cases is that the assailant singled out the victim for reasons other than the victim’s employment—even if their only interactions occurred in the context of the victim’s employment. The assault here was similarly personal. At a minimum, Parker fails to carry her burden of showing that J.T. assaulted Abby as an employee. And because the burden of persuasion lies with Parker, this Court could affirm even if J.T.’s ultimate motives are “unknowable.” *King*, 69 Va. App. at 716.

C. The gun was not a known hazard of employment.

Parker’s final argument (Br. 19) is that Abby’s injury arose out of her employment because “the employer allegedly failed to protect [her] from a known threat.” That argument fails for at least three reasons.

First, the doctrine invoked by Parker applies only when an *employer* is aware of a hazard in the workplace. As the Supreme Court has explained, “when an employer knows of a hazard to which the employee is subjected,” the employer has a duty to address the hazard. *Plummer v. Landmark Commc’ns, Inc.*, 235 Va. 78, 87 (1988). If the employer fails to do so, the

hazard may be deemed part of “the conditions under which the employer requires the work to be performed” for purposes of the Workers’ Compensation Act. *Id.*; see *Lopez*, 300 Va. at 197 (similar).

Abby was employed by the Newport News School Board. R.4. Nothing in the complaint suggests that the School Board (her employer) was aware that a gun was present in Abby’s classroom on January 6, let alone that the Board knowingly tolerated that hazard as part of her working conditions. Parker asserts (Br. 20) that Abby’s tort claims presuppose that “her employer knew” about the gun, but that is incorrect. Abby’s claims presuppose that *Parker* assumed a duty to address the gun threat. But Parker’s failings on January 6 do not transform this case into one in which the *employer* knowingly tolerated a dangerous working condition.

Second, the cases on which Parker relies (Br. 19–20) are distinguishable because they involved known and obvious hazards. In *Lynchburg Steam Bakery v. Garrett*, for example, the employer was aware that the 12-year-old son of a plant employee was on the premises with a “gravel-shooter”; the employer allowed the boy to stay there with the device, in violation of plant rules; and the boy later shot a paperclip into the eye of another employee, blinding him. 161 Va. 517, 520 (1933).⁴ The injured

⁴ Parker refers (Br. 20) to the device as a “gun,” but a gravel-shooter is

employee sought workers' compensation, and the Supreme Court upheld his claim for that compensation. *Id.* at 523. The Court emphasized that the foreman of the plant was aware of the hazard and had chosen to tolerate it. *Id.* at 521–22. Here, by contrast, neither Parker nor the School Board knew for sure that J.T. had a gun before the shooting, so neither could have deliberately chosen to tolerate the presence of the gun.

Third, the known-hazard doctrine is “inapposite” when an employee suffers an injury from “an assault personal to the employee.” *Richmond Newspapers*, 249 Va. at 375 n.4 (distinguishing *Lynchburg* on that basis). As demonstrated above, the shooting here was personal.

II. The jury's verdict should be affirmed.

The jury found Parker liable for her grossly negligent conduct, which led directly to Abby suffering life-threatening gunshot injuries from which she will never fully recover. Equipped with a jury verdict that has already been sustained by the trial court, Abby “occupies the most favored position known to the law.” *Ravenswood Towers, Inc. v. Woodyard*, 244 Va. 51, 57 (1992). The judgment must be “presumed to be correct.” *Id.* Parker fails to overcome that presumption. The judgment below should be affirmed.

a slingshot. *Gravel-shooter*, *Dictionary of American Regional English* (2013), perma.cc/9683-GWNR.

A. The jury reasonably found that Parker assumed a duty of care.

1. As the circuit court recognized, Virginia has adopted “the common-law principle of assumption of a duty.” R.2193 (quoting *Burns v. Gagnon*, 283 Va. 657, 672 (2012)). Under that “ancient” doctrine, a person who “assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully.” *Nolde Bros., Inc. v. Wray*, 221 Va. 25, 28 (1980). For example, a motorist generally has no duty to signal to another driver about whether that other driver can safely pull into oncoming traffic. But if a motorist gratuitously chooses to give such a signal, the motorist can be held liable for signaling negligently. *See id.*

This case implicates a specific branch of the doctrine involving harms to third parties, the principles of which are set forth in *Restatement* § 324A. *See Burns*, 283 Va. at 672 (endorsing section 324A). Section 324A provides that, when a defendant “undertakes ... to render services to another which [the defendant] should recognize as necessary for the protection of a third person,” the defendant “is subject to liability to the third person for physical harm” resulting from the defendant’s negligence if any of three conditions apply. *Restatement* § 324A. Two conditions are relevant here: The defendant is liable if her “failure to exercise reasonable care increase[d] the risk” of

harm to the injured third party, or if the third party suffered harm “because of reliance” on the defendant’s undertaking. *Restatement* § 324A(a) and (c).

The facts of *Burns* are illustrative. There, the plaintiff was a high-school student who was injured in a fight on school grounds. *Burns*, 283 Va. at 663. On the morning of the fight, another student told the assistant principal that the fight was going to occur later that day, and the assistant principal said that he would “alert ... security” and “take[] care” of the situation—yet he did nothing. *Id.* at 664. The Supreme Court determined that the assistant principal could be held liable for the plaintiff’s injury if the jury found the elements of section 324A satisfied, including by finding that the assistant principal “undertook to investigate [the] report and notify school security about the fight.” *Id.* at 673. The Court stressed that whether the assistant principal “by his conduct assumed a duty” to investigate and alert security was “a question for the fact-finder.” *Id.* at 672.

Here, the jury had ample evidence to find that Parker assumed a duty to investigate and address the threat that J.T. brought a gun to school. The jury was also entitled to find that Parker’s gross negligence in carrying out that undertaking “increase[d] the risk” of harm to Abby and that Abby suffered harm because of her “reliance ... upon [Parker’s] undertaking.” *Burns*, 283 Va. at 672.

In particular, Parker assumed a duty of care when she took charge of the school's response to the gun threat. R.7508. Consistent with the school's written policies, the teachers and staff had been reporting each new piece of information about the gun threat up the chain of command to Parker throughout the day, and they expected her to decide on the appropriate next steps. R.6024–25, R.6916, R.7445–50, R.7548, R.7589–95. Parker, believing that J.T. had “little pockets,” R.7593, decided against searching J.T.'s person before his mother arrived to pick him up. R.7508. Parker affirmatively assured her staff that J.T.'s bag had already been searched and instructed them to “hold off” on searching J.T.'s person. R.7507–08. Rawles communicated Parker's instructions to Abby. R.7437, R.7508, R.7526.

The jury was entitled to conclude on those facts that Parker assumed a duty of care, just as the *Burns* Court indicated that the assistant principal in that case could be found to have assumed a duty to investigate the rumored fight. The jury was likewise entitled to conclude that Parker's chosen course of conduct—tolerating J.T.'s continued presence in Abby's classroom until his mother's arrival—increased the risk of harm to Abby. And the jury was entitled to find that Abby was relying on Parker to decide on the appropriate next steps in response to the gun threat. That is exactly what teachers had been trained to do under the circumstances. R.6021–25.

Parker insists (Br. 33) that she can't have assumed a duty of care if she merely "did nothing." But she did worse than nothing. At a critical moment, she assumed the mantle of leadership for responding to the gun threat, consistent with the teachers' expectations and the school's written policies. And when she undertook to address the threat, she assumed a duty not to do so in a grossly negligent manner that caused harm to Abby.

2. Parker contends (Br. 28) that she cannot have assumed a duty unless she "expressly communicated that she was volunteering to protect Zwerner." She relies (Br. 28–29) principally on *Terry v. Irish Fleet*, 296 Va. 129 (2018), for that supposed requirement. But *Terry* addresses assumption-of-duty liability for failing to protect a victim "against an act of *criminal* assault by a third party." *Id.* at 136 (emphasis added). J.T.'s actions here were not criminal in nature because he was only six at the time, and this case therefore comes with the ordinary assumption-of-duty principles embodied in section 324A and discussed in *Burns v. Gagnon*.

In *Terry*, the victim was a taxi driver who was shot and killed by a passenger, and the question was whether the taxi dispatch company could be held liable for having implicitly assumed a duty to screen for dangerous passengers and to warn drivers about them. *See Terry*, 296 Va. at 133–35. The Supreme Court confirmed that, under its precedent, "a duty that does

not otherwise exist may be impliedly assumed from the defendant's conduct." *Id.* at 138 (citing motorist cases); *see also Fruiterman v. Granata*, 276 Va. 629, 645–46 (2008) (physician can impliedly assume a duty of care through "an affirmative act"). But the Court determined that those precedents were not controlling in the context of "criminal act[s] by a third party." *Terry*, 296 Va. at 138–39. Instead, the Court held that an "express undertaking" is required before a defendant can be held to have assumed a duty to protect a victim from a third party's "criminal assault." *Id.* at 141.

Terry makes clear that the "express undertaking" requirement applies only to criminal assaults. The majority in *Terry* phrased its holding in precisely those terms: "[W]e believe the recognition of a voluntarily assumed duty to warn or protect against the danger of criminal assault by a third person should be confined to express undertakings." *Id.* The majority stressed that it was addressing "criminal assault," *id.* at 139–41, using that phrase more than a dozen times. The dissenting justices in the case likewise understood the majority to have "fashioned a rule, unique to Virginia, under which an assumption of a duty to warn of or protect against a crime must be an express undertaking." *Id.* at 141 (McCullough, J., dissenting).

The Supreme Court was also addressing third-party criminal conduct in *A.H. v. Church of God in Christ*, 297 Va. 604 (2019) (cited at Parker Br.

30), when it held that a church had not expressly assumed a duty to protect the plaintiff from sexual assault by the church's pastor. *Id.* at 617, 624.

This case does not involve any threat of criminal assault. J.T. was only six-years old at the time of the shooting. As a matter of law, he was not criminally responsible for his conduct. *See* Code § 16.1-269.1 (minimum age of 14 to be charged with a felony); *Law v. Commonwealth*, 75 Va. 885, 888 (1881) (child under the age of seven “is conclusively presumed to be incapable of crime”). And because this case does not involve failing to prevent harm from a third party's criminal assault, the special “express undertaking” requirement that Parker invokes is inapplicable.

Drawing a firm line at criminal assaults makes good sense. As the Supreme Court explained in *Terry*, tort law generally imposes “no duty to warn or protect against acts of criminal assault by third parties” because “acts of assaultive criminal behavior by third persons cannot reasonably be foreseen.” 296 Va. at 135. Put differently, tort law generally starts from the baseline assumption that it is reasonable to assume that “no one will violate the criminal law,” *Restatement* § 302B cmt. d, given the harsh penalties that can be meted out for criminal violations of law.

No such rationale applies here, where J.T. did not and could not commit a crime. And it is J.T.'s lack of criminal capacity that matters,

regardless of whether his mother may have committed a crime by failing to secure the gun. *Contra* Parker Br. 32 n.4. His mother’s criminal culpability was not at issue before this jury and has nothing to do with whether Parker assumed a duty of care after J.T. brought the gun to school.

As a fallback, Parker asserts (Br. 31) that *Terry* should be extended to all “intentional violent acts,” even non-criminal acts. But *Terry* said no such thing, and Parker does not identify any prior instance in which a Virginia court has adopted an “express communication” requirement in an assumption-of-duty case *outside* the context of criminal assaults by third parties. The only other case that Parker cites (Br. 31) is *Kellerman v. McDonough*, 278 Va. 478 (2009). The allegations in that case happened to involve an expressly communicated promise to “take good care” of the victim, *id.* at 490, but the Supreme Court nowhere suggested that an express undertaking was invariably required in all assumption-of-duty cases.

Parker’s reliance (Br. 31) on section 315 of the *Restatement* is also misplaced. This case is governed by section 324A, *see supra* 32–33, which nowhere requires an “express” undertaking before a party may be found to have assumed a duty of care. That special requirement comes only from *Terry* and applies only to criminal assaults.

3. Finally, even if *Terry* applied here, a reasonable jury could have found that Parker expressly assumed a duty of care when she took charge of the situation and told Rawles to “hold off” on searching J.T.’s person until his mother arrived—a decision that Rawles then expressly conveyed to Abby. R.7508. Parker points (Br. 32–33) to Abby’s testimony that Parker never “explicitly promise[d] or agree[d] to protect [her] from an assault by J.T.” R.6263. But that level of exquisite specificity is not required, even in criminal-assault cases. *Terry* merely distinguished between “implied” and “express” undertakings. 296 Va. at 140. A reasonable jury could have found that Parker’s undertaking was express, not implied, where she expressly directed her staff to hold off on searching J.T.

To the extent that Parker argues that she cannot be held liable unless she made a promise (1) directly to Abby and (2) expressly concerning J.T., Parker’s own cases show otherwise. In *Burns*, the assistant principal wasn’t talking to the victim when he told another student that he would “take care” of the rumored fight. *Burns*, 283 Va. at 672. And in *Kellerman*, the defendant told the victim’s father that she would “take good care of” the victim, without any mention of the specific teenager whose negligent driving ultimately injured the victim. *Kellerman*, 278 Va. at 490. Parker appears to accept

(Br. 30) both cases as examples of sufficiently “express” undertakings. Her statements were at least as explicit.

B. The jury also reasonably concluded that Parker was grossly negligent.

1. Gross negligence is “a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety” of another person that would “shock fair-minded persons, although demonstrating something less than willful recklessness.” *Doe v. Baker*, 299 Va. 628, 652 (2021). “Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another’s safety.” *Chapman v. City of Virginia Beach*, 252 Va. 186, 190 (1996). And “[o]rdinarily, the question whether gross negligence has been established is matter of fact to be decided by the jury.” *Burns*, 283 Va. at 678.

The jury reasonably resolved that factual question in Abby’s favor at trial. Indeed, Parker’s own expert conceded on cross-examination that Parker knew for hours that there was a risk of a gun on campus. R.6429–30. And yet, in contravention of professional norms and the school’s own policies, Parker did not take the gun threat seriously. She did not investigate, she did not search J.T., she did not order that he be isolated, and she did not

call the police. *Supra* 7–12. For an excruciating period, she apparently just sat at her desk, preoccupied by other matters. And when Rawles asked for permission to search J.T.’s person, Parker ordered him to “hold off.” R.7508.

Parker emphasizes (Br. 39–40) that Kovac thought that J.T. might have a “toy gun,” R.7618, and that Rawles didn’t think that J.T. posed a “credible threat,” R.7523. But unlike Parker, both Kovac and Rawles took steps to try to get to the bottom of the matter, and Rawles considered the threat serious enough to ask for permission to search J.T.’s person.

Parker also makes too much (Br. 41) of the “sheer fact that what happened [here] had never happened before.” Even if the risk of a first-grader bringing a gun to school was low in the abstract, the calculus changed on January 6 as Parker learned more and more information throughout the course of the day. The jury was entitled to find that she acted grossly negligently when faced with that new information. The jury was also entitled to credit the opinion of Abby’s school-safety expert about the standard of care for school administrators when faced with the threat of a gun on campus, which Parker breached multiple times. R.6924. The jury thus had more than enough evidence to find gross negligence.

2. The jury was entitled to find that Parker was grossly negligent even if, as she claims (Br. 35), she exercised “some degree of care.” Parker’s contrary view rests on a misunderstanding of Virginia law.

Parker seizes (Br. 35) on the Supreme Court’s passing statement in *Elliot v. Carter* that “a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care.” 292 Va. 618, 622 (2016). But as the rest of that sentence in *Elliot* makes clear, the Court was merely emphasizing the distinction between “indifference” and “inadequacy.” *Id.* Gross negligence requires “indifference to another” amounting to “complete neglect” of the person’s safety. *Id.* The evidence in *Elliot* showed, however, that the defendant had tried to save the victim from drowning. *See id.* at 623. The defendant’s efforts proved to be “inadequate or ineffectual,” but they were “not so insufficient as to constitute the indifference” required for a finding of gross negligence. *Id.*

Those observations do not amount to a categorical rule that exercising any degree of care at all automatically precludes a finding of gross negligence. Indeed, *Elliot* itself recognized that cumulative acts of simple negligence can amount to gross negligence. *Id.* at 622. Parker observes (Br. 37–38) that the defendant’s own individual acts did not amount to gross negligence in *Elliot*, but that is a non sequitur. The point is legal, not factual:

Multiple acts of simple negligence can together amount to gross negligence, even though simple negligence can involve exercising some degree of care. *Cf. Chapman*, 252 Va. at 190. The jury was instructed on the cumulative-acts point here, and Parker’s multiple acts of simple negligence are sufficient to sustain the jury’s verdict.

Other cases before and after *Elliot* confirm that a finding of gross negligence can be warranted despite evidence of some care. *See, e.g., Howard v. Harris*, 80 Va. App. 365, 382–83 (2024) (reasonable jury could find that police officer acted grossly negligently in response to new evidence of a “heightened level of threat,” despite exercising some care earlier), *rev’d on other grounds*, 304 Va. 177, 187 n.5 (2025); *Green v. Ingram*, 269 Va. 281, 285, 290–91 (2005) (reasonable jury could find that police officer acted grossly negligently in firing shotgun to breach locked door, even though he fired at a downward angle designed to minimize the risk of injury to persons behind the door). Those cases accord with common sense. A person who allows a young child to drive her car on a busy highway is acting grossly negligently, even if she exercises “some degree of care” by insisting on using turn signals. Some minimal precautions are not enough to overcome overwhelming other evidence of indifference to the risks involved.

3. In any event, Parker would not be entitled to judgment in her favor even under her proposed rule because a reasonable jury could have found that she did not, in fact, exercise “some degree of care.” Parker relies (Br. 39–40) on evidence that she vaguely assented to Kovac’s plan to search J.T.’s bag. But Parker was later confronted with new information: the bag was empty, Abby saw J.T. transfer something to his pockets, and R. reported that J.T. showed him a gun and bullets at recess. In response to that “heightened level of threat,” *Howard*, 80 Va. App. at 383, Parker was utterly indifferent to Abby’s safety, and to the safety of the other students and staff.

C. Parker’s complaints about the jury instructions are unavailing.

1. Parker contends (Br. 34) that the jury should have been instructed that she cannot be held liable for assuming a duty of care unless she “expressly assumed a legal duty to protect Ms. Zwerner from criminal harm by J.T.” For the reasons discussed above (at 35–38), Virginia law does not require an “express undertaking” in assumption-of-duty cases except in the special instance of failing to protect a victim from a third party’s criminal assault. The proposed instructions were therefore legally erroneous, and the circuit court did not abuse its discretion in declining to give them. *See, e.g.,*

Under Wild Skies, Inc. v. Nat’l Rifle Ass’n, 304 Va. 310, 320 (2025) (no error in refusing instruction that “was not an accurate statement of Virginia law”).

Additionally, Parker’s proposed instructions were replete with irrelevant references to “criminal” harm. *See* R.4717 (proposing that the jury be instructed to decide whether Parker “expressly assume[d] a legal duty to protect the Plaintiff, Abigail Zwerner, from criminal harm by J.T.”); R.4720 (similar proposal using the phrase “criminal harm” five times).

Abby objected to those instructions not only because no such express-undertaking requirement applies, but also because the instructions invited the jury to make a finding about “criminal harm,” even though the jury was not otherwise going to be instructed about criminal responsibility. *See* R.6531–32 (counsel’s objection that “criminal harm is littered throughout the instruction”). The circuit court agreed that the instructions were “inapplicable to this case,” R.6535–36, and Parker never proposed any other version that would have required a finding of an “express” undertaking shorn of all the confusing references to criminality.

By failing to propose another instruction, Parker waived any argument that the jury should have been instructed on an express-undertaking requirement for assuming a duty to protect a victim from non-criminal intentional harm. *See Honsinger v. Egan*, 266 Va. 269, 275 (2003)

(explaining that a trial court is not required to “correct or amend” a party’s flawed instruction “rather than refusing to grant it”); *cf. Va. Elec. & Power Co. v. Dungee*, 258 Va. 235, 254–55 (1999) (no reversible error where proponent of an instruction “adamantly objected to any changes” to its flawed proposal and failed to offer a proper alternative).

2. Parker further contends (Br. 42–43) that the jury should have been instructed on her theory that a “claim for gross negligence fails as a matter of law when the evidence shows that the defendant exercised at least some degree of care.” The circuit court correctly refused to give that instruction because, as explained above, evidence of “some degree of care” does not always or automatically preclude a finding of gross negligence. Parker acknowledges (Br. 42) that the circuit court instead used the model Virginia instruction on gross negligence. Using the instructions prescribed by the Supreme Court was not an abuse of discretion.

D. The jury reasonably rejected Parker’s theory of contributory negligence.

Whether a plaintiff was contributorily negligent “is a factual issue for resolution by the jury.” *Ravenswood Towers*, 244 Va. at 57. The issue was submitted to the jury here, and the jury’s verdict necessarily means that the jury rejected Parker’s theory of contributory negligence.

Parker identifies no basis for overturning that judgment. She emphasizes (Br. 44–45) what Abby did *not* do on January 6—for example, Abby did not try to disarm J.T. at recess. But the jury heard from multiple witnesses that Abby and the other teachers did exactly what they were trained and expected to do under the school’s written policies: report the gun threat immediately to an administrator. *See supra* 8–9.

Abby was not acting negligently when she reported the gun threat up the chain of command and then reasonably relied on school administrators to do their part. As the jury was instructed, a person accused of contributory negligence “has a right to assume that the defendant will exercise ordinary care until she realizes, or in the exercise of ordinary care should realize[,] that the defendant is not going to do so.” R.6684; *see* Va. Model Jury Instructions—Civil, Instruction No. 6.060 (2025–2026).

Parker has waived or forfeited any argument that Abby’s reliance was unreasonable on these facts. *See, e.g., Farmer v. Commonwealth*, 62 Va. App. 285, 295 (2013) (argument not raised in the opening brief is “abandoned”). Even if she hadn’t waived the argument, Parker falls far short of showing that the evidence was so one-sided that the jury was compelled to find in her favor on contributory negligence.

III. The circuit court did not abuse its discretion in declining to grant any further continuance of the civil trial.

Parker lastly contends (Br. 46–50) that she is entitled to a retrial because it was unfair to require her to go to trial in this civil case before the resolution of her separate criminal case. As she concedes (Br. 12), however, the decision whether to grant a continuance in a civil case is “reviewed for abuse of discretion,” and reversal is unwarranted absent a showing of prejudice. Parker fails to show any abuse of discretion or prejudice here.

The gravamen of Parker’s theory (Br. 47) is that she was unable to offer the jury her own “explanation of her thoughts and actions on the day of the shooting” at the civil trial because of the looming criminal trial. That theory makes no sense. Nothing prevented Parker from taking the stand in this case and explaining what she was thinking or doing on January 6.

Parker implies (Br. 46–47) that the sequencing of the two trials prejudiced her “Fifth Amendment rights.” But the Fifth Amendment is a privilege only against “compelled” self-incrimination. U.S. Const. amend. V. If Abby had sought to subpoena Parker to testify at the civil trial, the Fifth Amendment might have come into play—although Parker would have been required to assert the privilege on a question-by-question basis, *see N. Am. Mortg. Invs. v. Pomponio*, 219 Va. 914, 918 (1979) (no “blanket” assertions

in a civil case). But the Fifth Amendment was no barrier to Parker choosing to take the stand if she so desired. Her decision to remain silent was a strategic choice, not one compelled by the sequencing of the two trials.

Parker concedes (Br. 47) that no binding precedent obligated the trial court to postpone the civil trial. Even her out-of-state decisions (Br. 47–48) do not recognize any automatic entitlement to a continuance. *See, e.g., Ex parte Antonucci*, 917 So. 2d 825, 828–29 (Ala. 2005) (trial court has “discretion to stay”); *People ex rel. Burns v. Woods*, 103 Cal. App. 5th 700, 712 (Cal. Ct. App. 2024) (“no absolute obligation to stay”); *Britt v. Int’l Bus Servs.*, 255 A.D.2d 143, 144 (N.Y. App. Div. 1998) (similar). And here, the court had already granted one continuance of the trial date at the time Parker requested a further delay. *Supra* 16. The court, appropriately mindful of the interests of the plaintiff, was not required to postpone the civil trial again.

Parker also fails to show any prejudice. Her reliance (Br. 47) on the Fifth Amendment implies that she chose not to take the stand in the civil trial for fear of saying something that could then be used against her at the criminal trial. But if her version of events was self-incriminating, she fails to explain why putting that version of events before the civil jury would have helped her. And if her testimony was not self-incriminating, then she had no legitimate Fifth Amendment concern.

Nor does counsel's mention of the Fifth Amendment in summation suggest any unfair prejudice. *Contra* Parker Br. 49–50. After Parker objected, the trial court gave a curative instruction forbidding the jury from drawing any inference against Parker based on her decision not to testify. R.6773, R.6788. “A jury is presumed to follow its instructions.” *Riverside Hosp., Inc. v. Johnson*, 272 Va. 518, 537 (2006). The jury must therefore be presumed to have not held Parker's silence against her.

IV. Alternatively, the circuit court erred in granting summary judgment to Parker on Count III.

For all the foregoing reasons, this Court should affirm the judgment against Parker on Count I (assumed duty of care). If, however, the Court vacates or reverses the current judgment, then the Court should also consider Abby's additional assignment of error regarding Count III (special relationship). The circuit court entered summary judgment before trial on Count III, depriving the jury of any opportunity to consider that alternative basis for imposing liability. Doing so was reversible error.

Virginia law “recognizes a duty to protect when a special relationship exists ... between the defendant and the plaintiff which gives a right of protection to the plaintiff.” *A.H.*, 297 Va. at 619. The Supreme Court has found that such a special relationship exists as a matter of law for certain

relationships, such as “innkeeper-guest.” *Kellerman*, 278 Va. at 492. But the Court has made clear that those categories are “not exhaustive,” *id.*, and that a special relationship may also be recognized “because of the particular factual circumstances of a given case,” *Thompson ex rel. Thompson v. Skate Am., Inc.*, 261 Va. 121, 129 (2001).

In *Burdette v. Marks*, the Supreme Court found that a special relationship existed between an on-duty sheriff’s deputy and the plaintiff, who was assaulted by a third party in the deputy’s presence while the deputy was responding to the scene of a traffic accident. 244 Va. 309, 310–12 (1992). The Court acknowledged that a public official generally “cannot be held civilly liable” for not protecting a member of the public from harm. *Id.* at 312. But the Court distinguished between the duties a public official may owe “to the citizenry at large” and the official’s “special duty owed to a specific, identifiable person or class of persons.” *Id.* And on the “particular facts alleged” in *Burdette*, the Court found that “a special relation existed” between the plaintiff and the deputy, who “knew or should have known that [the plaintiff] was in great danger of serious bodily injury or death.” *Id.*

The same logic applies here. Parker was a public official confronted with a risk of harm to “a specific, identifiable person.” *Id.* Parker knew or should have should have known that Abby was in “great danger of serious

bodily injury or death” from the gun that J.T. brought to school. *Id.* And Parker presumably was familiar with the school’s written policies, under which school administrators had primary responsibility for responding to the threat of a gun. Thus, like the deputy in *Burdette*, Parker “reasonably could have foreseen that [she] would be expected to take affirmative action to protect [Abby] from harm.” *Id.*

The circuit court erred in concluding otherwise. R.2190–91. The court observed that, in *Burns v. Gagnon*, the Supreme Court had declined “expand the special relationship jurisprudence to include the principal-student relationship.” R.2192. The court reasoned from *Burns* that “if there is not a special relationship in a school setting between an assistant principal and a student,” then “one cannot exist” between an “an assistant principal[] and a teacher,” who are “merely coworkers” rather than employer-employee. *Id.*

Those observations are beside the point. Abby’s theory of liability for Count III does not depend on recognizing a new *categorical* special relationship between all assistant principals and all teachers. Abby instead contends that, as in *Burdette*, the “particular facts alleged” here support recognizing that a special relationship existed between these parties on January 6. *Burdette*, 244 Va. at 312; see R.1504–05, R.6101–06, R.6572,

R.6843–48 (preserving that argument before, during, and after trial).
Nothing in *Burns* forecloses that theory.

If the current judgment is not simply affirmed, then the circuit court’s summary judgment on Count III should be vacated and the case remanded so that Count III can be tried to a jury.

CONCLUSION

The judgment should be affirmed. Alternatively, if this Court vacates or reverses the judgment on Count I, the Court should also vacate the judgment on Count III and remand for additional proceedings.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

1. I certify that on September 11, 2026, I filed the forgoing brief with this Court through VACES.
2. The parties to this action are:
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 - b. Appellee/Plaintiff: Abigail Zwerner
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4. Appellee requests oral argument.

5. I certify that this document complies with the requirements of the Rules of the Supreme Court of Virginia and with Rule 5A:19's word count limit because this answering brief does not exceed the longer of 50 pages or 12,300 words.

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