In the

Supreme Court of Virginia

RECORD NO. 200386

JANE DOE, by and through her Father and Next Friend, JACK DOE,

Appellant,

v.

MICHAEL L. BAKER, THOMAS JAMMES, DANIEL KEITH GUNTER, LOWELL ALLEN ROBERSON, MITCHELL B. CORDER, CHURCH OF GOD, and VIRGINIA CHURCH OF GOD,

Appellees.

BRIEF OF *AMICUS CURIAE* VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS IN SUPPORT OF APPELLEES MICHAEL L. BAKER, THOMAS JAMMES, DANIEL KEITH GUNTER, LOWELL ALLEN ROBERSON, MITCHELL B. CORDER, and VIRGINIA CHURCH OF GOD

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The Virginia Association of Defense Attorneys ("VADA") respectfully submits the following brief *amicus curiae*, with the consent of all parties.

INTEREST OF AMICUS

The VADA is a non-profit, statewide bar organization of more than 700 members whose practice is devoted primarily to the defense of civil actions. The VADA seeks to promote fairness and integrity in the civil justice system. It submits briefs *amicus curiae* in appropriate cases involving significant legal issues, which, in the VADA's view, have the potential to upset the "level playing field" which the law of Virginia provides to all civil litigants. The VADA submits this brief because it believes that the expansion of employer liability for the torts of negligent hiring and retention, as advocated by Jane Doe ("Doe"), would hold employers strictly liable for acts of former employees over whom they no longer had control, have a chilling effect on employment in Virginia, and be contrary to the ends of justice.[1]

STATEMENT OF THE CASE

The VADA adopts the Statement of the Case of Michael L. Baker ("Baker"), Thomas Jammes ("Jammes"), Daniel Keith Gunter ("Gunter"), Lowell Allen Roberson ("Roberson"), Mitchell B. Corder ("Corder"), and Virginia Church of God ("VCOG") (collectively "the VCOG Defendants").

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[1] No party's counsel authored this brief, either in whole or in part, and no person other than the VADA provided any funding for the preparation of this brief.

STATEMENT OF FACTS

The VADA adopts the VCOG Defendants' Statement of Facts.

ARGUMENT

I. Standard of Review

The decision to sustain a demurrer is a question of law that is reviewed *de novo* on appeal. *Squire v. Va. Hous. Dev. Auth.*, 287 Va. 507 (2014). The Court accepts as true all factual allegations in the operative complaint and interprets them in the light most favorable to the plaintiff. *Parker v. Carilion Clinic*, 296 Va. 319, 330 (2018). "The purpose of a demurrer is to determine whether the pleading . . . state[s] a cause of action upon which relief can be given." *Steward v. Holland Family Properties, LLC*, 284 Va. 282, 286 (2012). The Complaint must set forth sufficient facts, not merely conclusions of law, to constitute a foundation in law for the judgment sought. *See Kitchen v. City of Newport News*, 275 Va. 378, 385 (2008); *Moore v. Jefferson Hosp., Inc.*, 208 Va. 438, 440 (1967). *See also*, *e.g.*, *Squire*, 287 Va. at 514 ("To survive a challenge by demurrer, a pleading must be made with 'sufficient definiteness to enable the court to find the existence of a legal basis for its judgment'" (citation omitted)); *A.H. v. Church of God in Christ*, 297 Va. 604, 613 n.1 (2019) ("The 'sufficient definiteness' requirement has long anchored our application of notice pleading principles." (citations omitted)). A plaintiff is not entitled to the assumption that her legal conclusions or theories are correct and a demurrer does not admit the correctness of those allegations. *Fuste v.*

Riverside Healthcare Ass'n, Inc., 265 Va. 127, 131-32 (2003); *see also Terry v. Irish Fleet, Inc.*, 296 Va. 129, 133 (2018) (The Court is "not bound, however, by the 'conclusory allegations' set forth in the amended complaint.").

The Trial Court's denial of leave to amend is reviewed for an abuse of discretion. *Kimble v. Carey*, 279 Va. 652, 662 (2010) (citing *Ogunde v. Prison Health Servs., Inc.*, 274 Va. 55, 67 (2007)).

II. The Trial Court did not err in dismissing the negligent hiring and retention claims (Counts VI and VII) – Assignments of Error 3 and 4.

The torts of negligent hiring and negligent retention "involve claims of direct, not indirect, liability and are separate from respondeat superior claims." *A.H.,* 297 Va. at 627. They seek to hold an employer directly liable for the acts of its employees. Because Jonathan Eugene King ("King") was not an employee of the VCOG Defendants at the time of the alleged assault, the Amended Complaint did not state a claim for negligent hiring or negligent retention. The Trial Court did not err in sustaining the Demurrer.

A. An employer does not owe a legal duty to a person harmed by a former employee through the torts of negligent hiring or retention.

"Negligence . . . is not actionable unless there is a legal duty, a violation of the duty, and consequent damage." *Burns v. Gagnon*, 283 Va. 657, 668 (2012); *Blue Ridge Serv. Corp. of Va. v. Saxon Shoes, Inc.*, 271 Va. 206, 218 (2006). "[W]hether a legal duty in tort exists is a pure question of law." *Volpe v. City of*

Lexington, 281 Va. 630, 636 (2011) (internal quotation omitted). The "finding of a legal duty" is a "prerequisite to a finding of negligence." *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 149 (1998). "Without a legal duty there can be no cause of action for an injury." *Id.* at 147. "An allegation of duty is only a conclusion of law." *Va. & N.C. Wheel Co. v. Harris*, 103 Va. 708, 713 (1905).

The cases in which this Court has analyzed the torts of negligent hiring and retention involve an employer's liability to an injured party for the acts of a current employee or agent. *See, e.g., A.H.*, 297 Va. 604; *Niese v. City of Alexandria*, 264 Va. 230 (2002); *Interim Personnel of Cent. Va., Inc. v. Messer*, 263 Va. 435 (2002); *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521 (2000); *Southeast Apts. Mgmt., Inc. v. Jackman*, 257 Va. 256 (1999); *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206 (1988). This Court has never held that an employer owes a duty of care in hiring and retention to an injured party for harm inflicted by a former employee. Nor should it.

With respect to the tort of negligent hiring,

> Liability is predicated on the negligence of an employer in **placing a person** with known propensities, or propensities which should have been discovered by reasonable investigation, **in an employment position which, because of the circumstances of the employment, it should have been foreseeable** that the hired individual posed a **threat of injury to others**.

Jackman, 257 Va. at 260 (citing *Ponticas v. K.M.S. Invs.*, 331 N.W. 2d 907, 911 (Minn. 1983)) (emphasis added).

For the tort of negligent retention, liability arises from the employer's negligence in retaining an employee that the employer knew or should have known was dangerous and likely to cause harm. *Id.* at 260-61 (citing *Mallory v. O'Neil*, 69 So. 2d 313, 315 (Fla. 1954); *Svacek v. Shelley*, 359 P.2d 127, 131 (Alaska 1961)).

> [T]he negligent retention tort . . . requires a showing that **the risk of future harm was so grave that discharging the dangerous employee would have been the only reasonable response.** . . . [A] prima facie case of negligent retention requires an amplified showing that both the nature and the gravity of the risk render unreasonable any mitigating response short of termination.

A.H., 297 Va. at 629. The employer must have been negligent in failing to terminate. *Id.* (citing *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 401 (1988)).

This Court's explanation of the torts of negligent hiring and retention demonstrates that an ongoing employment relationship is required for a duty to exist. One tort addresses the situation in which a negligently hired employee causes tortious injury while working for the employer, while the other addresses the situation in which a negligently retained employee causes injury during the employment relationship. Without an ongoing employment relationship between the employer and wrongdoer, an employer does not owe a duty to an injured party. To find such a duty would place liability on employers when they have no control or supervision over the wrongful actor. The difference between the torts of negligent hiring and retention and the doctrine of *respondeat superior* liability is

that for the former, the employee need not be acting within the scope of his employment for the employer to be liable. *Victory Tabernacle Baptist Church*, 236 Va. at 211 (quoting Note, *Minnesota Developments—Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: Ponticas v. K.M.S. Investments*, 68 Minn. L. Rev. 1303, 1306-07 (1984)). Negligent hiring and retention seek to hold employers liable for the foreseeable acts of their employees even though those acts may be outside the scope of employment. They are not intended to hold employers liable for acts (foreseeable or not) of former employees.

Courts in other jurisdictions have held that "an employer does **not** owe a plaintiff a duty of care in a negligent hiring and retention action for injury or other harm inflicted by a **former** employee on the plaintiff even though that former employee . . . initially met the plaintiff while employed by the employer." *Phillips v. TLC Plumbing, Inc.*, 91 Cal. Rptr. 3d 864, 8772 (Cal. Ct. App. 2009) (emphasis in original). *See also Hutchison v. Luddy*, 742 A.2d 1052, 1057 (Pa. 1999) (suggesting that terminating an individual's employment shields an employer from liability in negligent hiring and retention case); *Rehm v. Lenz*, 547 N.W.2d 560 (S.D. 1996) (no duty for negligent hiring, supervision, or retention after the employment relationship ended); *Ledbetter v. United American Ins. Co.*, 624 So. 2d 1371, 1373-74 (Ala. 1993) (no duty owed to the plaintiff at the time of the

alleged harm because the bad actors were no longer insurance agents for the defendant company); *Janssen v. Am. Haw. Cruises, Inc.*, 731 P.2d 163 (Haw. 1987) (finding no duty owed to the plaintiff who was assaulted by a former coworker and former employee of defendant employer); *Abrams v. Worthington*, 861 N.E.2d 920, 924 (Ohio Ct. App. 2006) (holding that absent an employment relationship between the defendant and the criminal actor at the time of the injury, the defendant did not owe a duty to the plaintiffs under theories of negligent hiring or retention). The holdings of these cases are consistent with the Restatement.

> A master is under a duty to exercise reasonable care **so to control his servant** while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if . . . (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317 (1965) (emphasis added). "A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising or otherwise controlling the agent." Restatement (Third) of Agency § 7.05 (2006).

The cases upon which Doe relies do not alter this analysis. For example, in *Marquay v. Eno*, 662 A.2d 272, 275 (N.H. 1995), the allegations were that **current employees** of the school division sexually abused the student plaintiffs. Thus,

Marquay stands only for the proposition that "[a] school may be liable for abuse of a student by a school employee outside of school hours where there is a causal connection between the particular injury and the fact of employment." *Id.* at 281.

Similarly, in *Welsh Manufacturing Division of Textron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 437 (R.I. 1984), a client sued its security company after three thefts were facilitated by the security company's employee. The security guard was employed during two of the three thefts, and provided information learned by virtue of his employment to the criminal actors to accomplish the third. *Id.* at 444.

The cases in which courts have recognized a duty to a person harmed by a former employee generally involve situations in which the employee entered the person's home during the course of the employment and returned post-termination to cause harm. *See, e.g. Underberg v. S. Alarm, Inc.*, 643 S.E.2d 374 (Ga. App. 2007) (the plaintiff was kidnaped at gunpoint by a former promotions representative for a security company who visited her home on three prior occasions in an attempt to sell security services);[2] *McGuire v. Ariz. Prot. Agency*, 609 P.2d 1080 (Ariz. 1980) (holding that because of the sensitive nature of the work and attendant temptations and opportunity, the defendant security company owed a duty to its customer and could be liable when the former employee

[2] According to the *Underberg* court, the law in Georgia is that the existence of a duty is a question of fact, *Underberg*, 643 S.E.2d at 377, whereas the law in Virginia is that the existence of a duty is a question of law, *Volpe v. City of Lexington*, 281 Va. at 636. Therefore, this case is of little persuasive value.

returned to the plaintiff's home, disarmed the security system, and robbed the plaintiff); *Coath v. Jones*, 419 A.2d 1249 (Pa. 1980) (negligent hiring claim existed where the criminal actor visited the plaintiff's home in the scope of his employment on several occasions and returned post-termination and sexually assaulted the plaintiff—court held that the employer may be required to give notice or a warning that the employee was no longer employed and would, thus, have no reason to be at her home).[3]

The issue is not, as framed by Doe, whether the Amended Complaint adequately alleged that the VCOG Defendants' conduct proximately caused her injury.[4] The issue is whether the facts as alleged in the Amended Complaint establish as a matter of law that the VCOG Defendants owed her a duty of

[3] The two other cases Doe cites involve unique issues of fiduciary liability and contractual relationships that render them inapposite to this analysis. (Opening Br. 25-26 (citing *Prymak v. Contemporary Fin. Solutions*, No. 07-c-00103, 2017 WL 4250020, at *16 (D. Colo. Nov. 20, 2007); *Horbirn, Inc. v. Aerotek, Inc.*, No. 10-61144-civ, 2012 WL 13005347, at *6 (S.D. Fla. July 25, 2012)).

[4] Assignment of Error 3 argues that the Trial Court erred in deciding as a matter of law that the VCOG Defendants' alleged conduct was not a proximate cause of Doe's alleged injuries. (Opening Br. 10.) The Trial Court's letter opinion did not state that the decision was based on proximate cause. (J.A. 76.) "To find liability against any of the above-named Defendants, the Court would have to find that liability was based solely on the fact that Plaintiff was introduced to Jonathan Eugene King when she and her family chose to attend the Waynesboro Celebration Church of God. The Court is of the view that the cause of action for negligent hiring, retention and failure to warn does not extend that far, many years after the individuals [sic] employment ended." (*Id.*) While Doe interprets this ruling as referring to proximate causation, it could just as readily be referring to a lack of duty.

reasonable care as it relates to the hiring and retention of King. As a matter of law, there can be no duty of reasonable care for hiring and retention after the employment relationship has ended.

The Amended Complaint alleges that via letter dated March 12, 2011, King informed Corder of "his intention to retire," and that in April 2011, "King voluntarily stepped down from his role as pastor at Waynesboro Celebration . . . ." (J.A. 10-11, at ¶¶ 40, 43-44.) The Amended Complaint proceeds to refer to King's "former employment and role as a pastor for the Church of God at Waynesboro Celebration," as well as King's "former congregants" and refers to King as "the former pastor or Waynesboro Celebration". (J.A. 11, 15, at ¶¶ 47, 81.) While the Amended Complaint alleges that Doe and her family only had a relationship with King by virtue of his role as pastor at Waynesboro Celebration and that the relationship continued after his position as pastor ceased, there are no facts in the Amended Complaint to suggest that the VCOG Defendants maintained an employment relationship with King after April 2011.[5] Therefore, the Court did not err in dismissing Counts VI and VII of the Amended Complaint.

[5] Doe argues that "Defendants continued to hold King out as an ordained minister of the COG." (Opening Br. 20 (citing J.A. 10-11, at ¶¶ 37, 47).) However, the allegations in the Amended Complaint to which Doe cites do not support that argument. The Amended Complaint alleges that Doe and her parents "met and developed a relationship" with King through his role as pastor and that he continued to serve as a spiritual advisor and/or leader to his former congregants. (J.A. 10-11, at ¶¶ 37, 47.) It does not allege that the VCOG Defendants took any

B. Even if there was a duty, the Amended Complaint did not allege sufficient facts to state a claim for negligent hiring or retention.

Even if an employer could owe a duty to an injured party for the actions of a former employee, the facts alleged in the Amended Complaint are insufficient to state a claim for negligent hiring or retention in light of the Court's holding in *A.H.*

In *A.H.*, the Court upheld the trial court's sustaining of a demurrer to claims for negligent hiring and retention in a case involving a church employee who sexually assaulted a minor, despite the church's alleged knowledge of another report of sexual abuse against the employee during his employment. *A.H.*, 297 Va. at 627-30. The plaintiff in that case alleged that a deacon, youth leader, and drill team coach employed by the church sexually assaulted her and others from 2006-2010, "at his home in the course of performing duties that were within the scope of his employment and/or agency with the church." *Id*. at 616. The complaint further alleged that in 2003, a 13-year-old girl reported that the employee had abused her the year before, that the church became aware of this allegation as the result of a criminal and/or social services investigation, and that it took no action with respect to the employee's employment. *Id*.

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action to hold King out as a continued agent or employee after his April 2011 retirement. Furthermore, Doe's allegations of continued agency, (J.A. 31-32, at ¶¶ 149, 157), are legal conclusions that are not accepted as true for the purposes of a demurrer. *See Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 101 (2019).

The Court affirmed the trial court's sustaining of the church's demurrer to the claim for negligent hiring because the complaint failed to allege the church knew or should have known of the employee's dangerous propensities before he was hired. *Id.* at 628. The Court then affirmed the trial court's sustaining of the church's demurrer to the claim for negligent retention because:

> [T]he prior [sexual abuse] allegation, given its vague description in the amended complaint and the absence of any assertion that the responsible authorities had verified it, was [not] enough, standing alone, to trigger a legal duty to terminate [the employee] from any employment or agency relationship that he had with the church defendants.

Id. at 630.

The Amended Complaint in this case alleges that King was hired to serve as pastor at Waynesboro Celebration in August 1995. (J.A. 5, at ¶ 17.) It then alleges that,

> Upon information and belief, Pastor King had been involved in inappropriate behavior with women and/or young girls prior to being hired at Waynesboro Celebration, including an inappropriate relationship with a young girl when he was a pastor in Marion, Virginia . . . and inappropriate behavior toward women while he served as a Church of God pastor in Charlottesville, Virginia.

(*Id.* at ¶ 19.) The Amended Complaint alleges that "upon information and belief" VCOG knew about King's "prior history of inappropriate behavior toward young women" or failed to adequately investigate his "history of inappropriate behavior toward young women." (J.A. 6, at ¶ 20.)

First, allegations based upon "information and belief" are not allegations of fact accepted as true for the purposes of a demurrer. *See Walsh v. Walsh*, 177 Va. 174, 190 (1941); *Newman v. Freeman Homes, Inc.*, 89 Va. Cir. 377, 381 (Norfolk Cir. Ct. 2014) (citing Va. Sup. Ct. R. 1:4(d)).

Second, even if such allegations were accepted as true, they are insufficient to state a claim for negligent hiring. The allegations in the Amended Complaint are that King had an "inappropriate relationship with a young girl" and exhibited "inappropriate behavior toward women" while serving as a pastor at other churches. (J.A. 5, at ¶ 19.) There are no allegations that King previously committed assault, had inappropriate interactions with minors, or that any complaints had been made about his purported conduct prior to his employment at Waynesboro Celebration. The allegations in the Amended Complaint would not, as a matter of law, put the VCOG Defendants on notice that King would assault a 13-year-old girl—much less that he would do so five years after retiring during a social visit at his home. Therefore, the Amended Complaint does not state a claim for negligent hiring and the Trial Court did not err in dismissing Count VI.

To support the negligent retention claim, the Amended Complaint alleges that the VCOG Defendants received seven letters from various individuals between December 1996 and April 2005 regarding King's alleged "inappropriate behavior", "inappropriate communications", "inappropriate conduct", and "unwanted and

inappropriate advances." (J.A. 6-9, at ¶¶ 21-32.) The Amended Complaint refers to "young girls" and women, but at no time alleges that King was accused of assaulting anyone, much less a minor.

The vague allegations of inappropriate behavior in the Amended Compliant are similar to those that the Court found insufficient to state a claim for negligent retention in *A.H. A.H.*, 297 Va. at 629. If an allegation of child sexual abuse being investigated by criminal authorities/social services was insufficient to state a claim for negligent retention of a church employee, then the vague allegations of inappropriate behavior (none of which was alleged to have been directed at a minor) seemingly unreported to authorities for investigation or criminal action is also insufficient as a matter of law. Moreover, the alleged assault came after King's employment ended, which by its very nature negates a claim for negligent retention. *A.H.*, 297 Va. at 629 ("A prima facie case of negligent retention requires an amplified showing that both the nature and gravity of the risk render unreasonable any mitigating response short of termination."). Therefore, the Amended Complaint does not state a claim for negligent retention and the Trial Court did not err in dismissing Count VII.

C. The individual defendants cannot be liable for negligent hiring or negligent retention.

Even if an employer could owe a duty to an injured party for the actions of a former employee, there is no cause of action for negligent hiring or retention

against the Individual Defendants. The tort of negligent hiring is "based on the principle that one who conducts an activity through employees is subject to liability for harm resulting from the employer's [sic] conduct if the employer is negligent in the hiring of an improper person in work involving an unreasonable risk of harm to others." *Jackman*, 257 Va. at 260. Under the distinct tort of negligent retention, an employer is subject to liability for harm resulting from negligence in retaining a dangerous employee whom the employer knew or should have known was dangerous and likely to harm others. *Id*. at 260-61. Virginia law recognizes the employer—not supervisors or managers—as the proper subject of negligent hiring and retention claims. *See Matthews v. Fairfax Trucking, Inc.*, No. 1:14-cv-01219-GBL-IDD, 2015 WL 1906073, at *6 (E.D. Va. Apr. 13, 2015) (citing *Victory Tabernacle Baptist Church*, 236 Va. at 211) (granting motion to dismiss because the defendant was a supervisor manager and not an employer).

The Amended Complaint alleges that Baker, Corder, and Gunter were State Overseers for VCOG and that Jammes and Roberson were District Overseers for VCOG. (J.A. 3-4, at ¶¶ 5-8.) The Amended Complaint does not, nor could it, allege that these Individual Defendants were King's employer. Therefore, the Amended Complaint does not state a claim against them for negligent hiring or retention and the Trial Court correctly sustained the Demurrer.

III. The Trial Court did not err in dismissing the failure to warn and protect claims (Counts VIII and IX) – Assignment of Error 3 and 4.

This Court has consistently held that "'[a]s a general rule, there is no duty to warn or protect against acts of criminal assault by third parties.'" *A.H.*, 297 Va. at 618 (quoting *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 135 (2018)); *Burns v. Gagnon*, 283 Va. 657, 668 (2012); *Didato v. Strehler*, 262 Va. 617, 628-29 (2001).

"'In only rare circumstances has [the Court] determined that the duty to protect against harm from a third party criminal acts exists." *A.H.* 297 Va. at 618 (quoting *Terry*, 296 Va. at 135). There are two recognized exceptions to this general rule. First, where a defendant expressly assumes a duty to protect another from criminal harm. *Terry*, 296 Va. at 137. Second, where "a special relation exists '(1) between the defendant and the third person which imposes a duty upon the defendant to control the third person's conduct, or (2) between the defendant and the plaintiff which gives a right to protection to the plaintiff.'" *A.H.*, 297 Va. at 619 (quoting *Brown v. Jacobs*, 289 Va. 209, 215 (2015)). The duty to protect when a special relationship exists is not absolute, but only exists when the defendant could have foreseen the need to take affirmative action to prevent the plaintiff from harm. *Id.* at 620.

"[A]an employer has no general duty to supervise one employee to protect another employee from intentional or negligent acts[, and i]t seems incongruent that an employer would owe a duty to third parties that he does not owe his own

employees." *A.H.*, 297 Va. at 622. While there is no special relationship duty on the part of an employer to control an employee so as to prevent him from harming third parties, Virginia law does recognize a special relationship between a vulnerable individual in a custodial relationship and her custodian, which imposes a duty of reasonable care upon the custodian to protect the vulnerable individual. *Id.* Finding a special relationship is a threshold requirement. *Terry*, 296 Va. at 136 (citing *Brown*, 289 Va. at 214).

The facts alleged in the Amended Complaint do not establish a special relationship. Instead, Doe baldly asserts the legal conclusion that there was a "special relationship between [Doe] and the Church of God and/or the Virginia COG from 2002 through on about the end of July 2016, as [Doe] was a minor and a member of the congregation at Waynesboro Celebration, part of the Church of God." (J.A. 11, 17, 19, 21-23, 26, at ¶¶ 45, 93, 102, 108, 115, 129.) Yet, the facts do not suggest that Doe was in a custodial relationship with the Church that would give rise to a special relationship.[6] Where a plaintiff does not allege facts sufficient to establish a special relationship, she does not establish the threshold

[6] The facts in the Amended Complaint stand in contrast with those in *A.H.* that the Court determined were sufficient to allege a special relationship. *See A.H.*, 297 Va. at 625-26. Notably, in *A.H.*, the plaintiff was assaulted by the defendant's employee while visiting his home for church functions and activities. *Id.* at 616-17. Justice McClanahan's concurring and dissenting opinion in *A.H.* is even more applicable to the record in this case given the dearth of facts. *See id.* at 639-41.

requirement necessary to show that the defendant owed a duty to warn or protect. *Brown*, 289 Va. at 217.

Furthermore, the existence of a special relationship is not dispositive of the issue of whether the defendant owed a duty to protect. *Terry*, 296 Va. at 136 n.3. "[T]he court must also conclude that defendant knows of the danger of an injury or has reason to foresee that danger before a duty to warn or protect against third party criminal act will be imposed." *Id.* "[T]he question becomes whether, as a matter of law, under the facts and circumstances of this case, the [defendants] had a duty to warn [the plaintiff] about the potential for third party criminal acts." *Commonwealth v. Peterson*, 286 Va. 307, 57 (2013). Some special relationships impose a duty to warn when the danger of third party criminal acts is known or reasonably foreseeable, and others impose a duty only where there is an imminent probability of injury. *Id.*

The facts alleged in the Amended Complaint do not establish that it was reasonably foreseeable that King would assault Doe five years after he retired as the pastor at Waynesboro Celebration and eleven years after the last complaint of "inappropriate behavior". *See id.* at 358-59. Therefore, the Trial Court did not err in sustaining the demurrer and dismissing Counts VIII and IX.[7]

[7] It appears that Doe has conceded that the Amended Complaint did not state a claim for failure to protect or warn, thus abandoning her appeal as to Counts VIII and IX. (Opening Br. 45 n.6.) To the extent the Court deems it necessary to

IV. The Trial Court did not err in dismissing the vicarious liability and apparent authority claims (Counts XIV and XV) – Assignment of Error 1[8] and 2.

Doe argues that the Trial Court erred in dismissing the vicarious liability and apparent authority claims because those claims were not the subject of the VCOG Defendants' Demurrer and because the Amended Complaint sufficiently alleged that King was an agent or employee at the time of the alleged assault. (Opening Br. 41-43.)

A. The trial court properly dismissed Counts XIV and XV.

Counts XIV and XV were not explicitly the subject of VCOG's Demurrer. They were, however, the subject of VCOG's Motion for Summary Judgment. (J.A. 69-74.) The Demurrer and Motion for Summary Judgment (along with the Motion to Dismiss and/or Special Plea for Lack of Subject matter jurisdiction) were heard together on June 21, 2019. (J.A. 86-228.) The Court received evidence on the Motion to Dismiss and/or Special Plea and heard oral argument on the Motion to Dismiss and/or Special Plea, Demurrer, and Motion for Summary Judgment. (*Id.*) The Court then permitted the parties to submit additional briefing. (J.A. 208-09.) The Court issued a letter opinion on August 5, 2019, that did not

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address those claims, it should determine that the Trial Court correctly dismissed Counts VIII and IX for the reasons stated herein.

[8] Assignment of Error 1 appears to be directed at COG and not VCOG. To the extent that the Court interprets Assignment of Error 1 as applying to VCOG, it is addressed herein.

specifically mention the Motion for Summary Judgment, but dismissed the Amended Complaint against all the moving defendants with prejudice. (J.A. 75-77.) An order to that effect was subsequently entered, to which Doe noted her objections, including that she "has pleaded viable causes of action, including those arising under vicarious liability . . . ." (J.A. 78-82.) During the hearing, counsel for Doe acknowledged that the Demurrer and Motion for Summary Judgment were being combined and considered together.

MR. FRANKLIN: Thank you, Your Honor.

> Just as a matter of procedure, in cleaning things up a little bit, Mr. Cooley started, he mentioned there are nine separate counts against the Church of God defendants. That's accurate. The demurrer was filed by Church of God and Virginia Church of God were only to the first seven counts against them.
>
> Then Mr. Cooley filed a motion for summary judgment as to the last two counts, the vicarious liability counts. Mr. Cooley argued all nine of them just now. So I think we are combining the motion for summary judgment and the vicarious-liability counts, and then the demurrer as to the other seven counts. Just so we're clear.

THE COURT: Does Counsel agree with that?

MR. COOLEY: Yes, Your Honor.

> And the motion for summary judgment is based on—to the extent to which the demurrer may not have addressed it, I thought it did, but I just wanted

> to make sure. So I did the motion for summary judgment based on the pleadings.
>
> * * *
>
> MR. FRANKLIN: I just wanted to make sure we're all on the same page, that we're knocking everything out now with these arguments.

(J.A. 185-86.) Counsel for Doe did not oppose the Court proceeding on the motion for summary judgment and did not argue that there were material facts in dispute. Instead, he acknowledged that he addressed the motion based on the pleadings and argued that the motion was premature. (J.A. 197-97.)

Doe now argues that there is a genuine issue of material fact regarding the existence of an agency relationship such that it was improper for the trial court to rule on the VCOG Defendants' Motion for Summary Judgment. (Opening Br. 43.) This argument misstates the law.

Once a plaintiff establishes an employer-employee relationship existed at the time of an injury, there is a rebuttable presumption that the tortious act occurred within the scope of employment. *Majorana*, 260 Va. at 526 (citing *McNeill v. Spindler*, 191 Va. 685, 694-95 (1950)). The employer then bears the burden of rebutting the presumption by proving that the employee was not acting within the scope of employment. *Id.* (citing *Kensington Assoc. v. West*, 234 Va. 430, 432-33 (1987)). "If the evidence leaves in doubt the question whether the employee acted within the scope of the employment, the issue is to be decided by the jury and not as a matter of law by the trial court." *Id.* (citing *West*, 234 Va. at 432-33).

Here, as a matter of law, the facts in the Amended Complaint do not establish that an employment relationship existed at the time of the alleged assault. Therefore, there is no rebuttable presumption that King was acting within the scope of his employment, and there is no question of fact for a jury. The trial court did not err in dismissing Counts XIV and XV.

B. The Amended Complaint does not state a claim against VCOG for vicarious liability or apparent authority.

"[U]nder the traditional doctrine of respondeat superior, an employer is liable for the tortious act of his employee if the employee was performing his employer's business and acting with the scope of his employment. *Parker*, 296 Va. at 335 (internal citations and quotations omitted).

> By definition, respondeat superior is wholly vicarious in nature. And vicarious liability is liability for the tort of another person. It necessarily follows that a claimant cannot make out a vicarious liability claim against an employer without first proving that the **employee committed a tort within the scope of his employment**. That requirement explains why, if an employee is exonerated on the merits, his employer can have no vicarious liability as a matter of law. This principle applies to intentional tort cases as well as to negligence cases.

Id. at 332 n.3 (emphasis added).

While Doe argues that the Amended Complaint sufficiently alleged that King was employed by VCOG at the time of the assault, the record does not support that position. As explained *supra*, the Amended Complaint alleges:

- King sent a March 12, 2011 letter informing Corder of "his intention to **retire**";

- In April 2011 "King **voluntarily stepped down** from his role as pastor";

- Doe's relationship with King existed "solely by virtue of Pastor King's **former employment** and role as a pastor and/or Pastor King's continued role as a spiritual advisor and/or leader to his **former congregants**"

(J.A. 10-11, at ¶¶ 40, 43-44, 47 (emphasis added).) Absent factual support, Doe baldly asserts that "[a]t all material times Pastor King was an agent, volunteer, and/or employee of the Church of God and/or Virginia COG, or was otherwise acting under the direction of the Church of God and/or Virginia COG." (J.A. 31, at ¶¶ 149-53.) She also alleges that King "was or held himself out to be an agent, volunteer and/or employee of the Church of God and/or Virginia COG, and was acting within the apparent scope and course of his authority as an agent with the Church of God and/or Virginia COG . . ." and that VCOG was "aware of the apparent scope of Pastor King's authority as an agent for the Church of God and/or Virginia COG . . . ." (J.A. 32, at ¶¶ 157-58.) These allegations of continued agency are legal conclusions that are not accepted as true for the purposes of a demurrer. *See Tingler*, 298 Va. at 101.

Because there are no facts in the Amended Complaint to suggest that VCOG maintained an employment or agency or apparent agency relationship with King after April 2011, it does not state a claim for vicarious liability or apparent

authority arising out of the July 8, 2016 alleged assault in King's home. The trial court did not err in dismissing Counts XIV and XV.

V. The Trial Court did not err in denying Doe leave to amend – Assignment of Error 5.

Doe argues that the Trial Court abused its discretion in denying her leave to amend. (Opening Br. 44-45.) It is not an abuse of discretion for a trial court to deny leave to amend where the amendment would be futile. *See, e.g. AGCS Marine Ins. Co. v. Arlington County*, 293 Va. 469, 487 (2017); *Holtzman Oil Corp. v. Green Project, LLC*, No. 141863, 2016 WL 3208943, at *5 (Va. Apr. 21, 2016); *Hechler Chevrolet, Inc. v. General Motors Corp.*, 230 Va. 396, 403 (1985).

As explained herein, the negligent hiring and retention claims fail as a matter of law because the VCOG Defendants did not owe a duty of reasonable care to Doe for the alleged hiring and retention of King. Therefore, there is no amendment that could cure the deficiency in the pleading and leave to amend would be futile. Similarly, the vicarious liability and apparent agency claims could not be revived through an amendment, as the underlying facts would remain the same.

Doe now argues that she should be granted leave to amend because the *A.H.* decision was issued after her Amended Complaint was filed and after the Trial Court's decision. (Opening Br. 45 n.6.) The Trial Court's letter opinion was dated August 5, 2019, and the *A.H.* opinion was released on August 15, 2019. (J.A. 75; *A.H.*, 297 Va. 604.) The Trial Court's order, however, was not entered until

November 12, 2019. (J.A. 78-82.) At no time did Doe move for reconsideration of the Trial Court's decision based on the new case. She cannot use the case, which was not brought to the Trial Court's attention, as a basis for arguing that the Trial Court abused its discretion in denying leave to amend.

VI. Public policy requires that the decision of the Trial Court be affirmed.

At its core, the Amended Complaint in this case seeks to hold the VCOG Defendants liable for failing to protect Doe from King. This Court has recognized, however, that there is no special relationship between an employer and an employee giving rise to a duty to control the employee and protect third parties from harm. *A.H.*, 297 Va. at 622. If there is no such relationship between an employer and employee, there is certainly no such relationship and corresponding duty as it relates to an employer and **former** employee.

Searching for another source of a legal duty, Doe argues that the torts of negligent hiring and retention apply despite the fact that King was no longer an employee at the time of the alleged assault, had not been an employee (if he ever was) for at least five years, and the incident took place at King's home during a social visit. This is an end-run around the special relationship doctrine and an attempt to recast a duty to protect and warn.

To recognize a cause of action for negligent hiring and retention under the facts alleged in the Amended Complaint would result in an unprecedented

expansion of employer liability in Virginia. Finding that employers owe a duty to a person harmed by the tortious actions of a former employee would render employers strictly liable for the unforeseeable actions of their former employees no matter how short the period of employment or how long the gap between employment and the tortious act.

Practically speaking, where would the duty end? Would employers have a duty to monitor and control every former employee outside of the employment context who potentially poses a risk to an individual because that person met the former employee during the course of the employment relationship? Would employers owe this duty even when they terminate the employment relationship so as not to be liable under a negligent retention theory? Defendant employers who have long since parted ways with the former employee will be at a distinct disadvantage as records are purged pursuant to document retention policies, memories fade, and employees retire. How is an employer to defend a claim when the relationship with the alleged wrongdoer is so remote?

Expanding tort liability of employers in this fashion would also have a chilling effect on employment in Virginia. Employers would be reluctant to hire any employee with a past offense for fear that the employee may commit a tortious act at some unknown point in the future for which the employer would be

potentially be liable, regardless of whether there was an active employment relationship. This is not, and should not become, the law of the Commonwealth.

CONCLUSION

For all of the foregoing reasons, the VADA respectfully submits that this Court should hold that the duty of care for the hiring and retention of employees does not extend past the end of the employment relationship and affirm the decision of the Trial Court sustaining the demurrer and motion for summary judgment of the VCOG Defendants.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that this brief *amicus curiae* complies with Rule 5:26 and that true copies of this brief, in Portable Document Format (PDF) format, were filed with the Clerk of this Court and served on counsel for all parties, as well as amicus curiae Virginia Trial Lawyers Association, named below on November 30, 2020:

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