

2-12-2015

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### Recommended Citation

Alison Landry, *Whose Best Interest Is It Anyway?: School Administrators' Liability for Student Injury in Virginia*, 64 Cath. U. L. Rev. 209 (2015).

Available at: <http://scholarship.law.edu/lawreview/vol64/iss1/11>

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# Whose Best Interest Is It Anyway?: School Administrators' Liability for Student Injury in Virginia

## **Cover Page Footnote**

J.D. Candidate, May 2015, The Catholic University of America, Columbus School of Law; B.A., 2011, The University of Alabama. The author would like to thank Professor Harvey Schweitzer for his guidance and assistance during the writing process. She would also like to thank all of the staff members and editors of the Catholic University Law Review who helped prepare this Note for publication. Finally, the author would like to thank her parents, John and Julie, for always giving her the support and encouragement she needs to go forward and for reading every draft and edit.

# WHOSE BEST INTEREST IS IT ANYWAY?: SCHOOL ADMINISTRATORS' LIABILITY FOR STUDENT INJURY IN VIRGINIA

*Alison Landry*<sup>+</sup>

If schools are institutions for teaching and learning, why have they become a common arena for violence?<sup>1</sup> School violence negatively impacts students and affects the school's learning environment.<sup>2</sup> Many parents might assume that violence prevention in schools is a top priority for school districts and society as a whole. However, the Supreme Court of Virginia refused to adopt that position when it held that a school principal, who had failed to alert security to a rumored fight, did not violate any duty to control the environment for safety.<sup>3</sup> The court declined to acknowledge a "special relationship"<sup>4</sup> between the principal and the student because it believed that it would be unwise to subject a school official's actions to liability for any resulting harm to students while on school premises.<sup>5</sup>

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1. SIMONE ROBERS ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2012 10 (2013), available at <http://nces.ed.gov/pubs2013/2013036.pdf> ("In 2011, data from the National Crime Victimization Survey showed that more victimizations were committed against students ages 12–18 at school than away from school. This pattern has been consistent since 2001." (footnote omitted)).

2. *Id.* at 2 (citing Stuart Henry, *What Is School Violence? An Integrated Definition*, 567 ANNALS AM. ACAD. POL. & SOC. SCI. 16 (2000)). See also Ross MacMillan & John Hagan, *Violence in the Transition to Adulthood: Adolescent Victimization, Education, and Socioeconomic Attainment in Later Life*, 14 J. RES. ADOLESCENCE 127, 131 (2004) (stating that decreased academic performance and investment often results from teenage experiences with violence); Tonja R. Nansel et al., *Relationships Between Bullying and Violence Among U.S. Youth* 157 ARCHIVES PEDIATRIC & ADOLESCENT MED. 348, 348 (2003) (finding that bullying increases violent behavior among students); Eric A. Storch et al., *Peer Victimization and Social-Psychological Adjustment in Hispanic and African-American Children*, 12 J. CHILD & FAM. STUD. 439, 440 (2003) (indicating that the effects of peer-on-peer violence include feelings of loneliness and depression).

3. *Burns v. Gagnon*, 727 S.E.2d 634, 642–43 (Va. 2012).

4. Special relationships represent an exception to the general rule that an actor does not have a duty to protect a third person from harm. 1 CHARLES E. FRIEND, PERSONAL INJURY LAW IN VIRGINIA § 2.4.1 (3d ed. 2013), available at LexisNexis.

5. *Burns*, 727 S.E.2d at 643. See also *Doe v. Unified Sch. Dist.*, 255 F. Supp. 2d 1251, 1254–55 (D. Kan. 2003) (reserving for a state court the decision of whether a special relationship existed between a school district and a student because of the public policy involved in answering the question); *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992) (explaining that subjecting a public official to liability for all actions committed in his official capacity was not in society's best

By refusing to establish a special relationship between a school administrator and his or her students,<sup>6</sup> Virginia has left its students with only the protection guaranteed by common law negligence.<sup>7</sup> Can Virginia be sure that students will receive effective supervision from the school if an official is not held accountable for the consequences of his or her actions? Perhaps the question should not be whether a public official would be burdened by liability, but whether students, under the care of the official, would be harmed by a lack of liability.

In *Burns v. Gagnon*,<sup>8</sup> a vice principal, W.R. Travis Burns, failed to protect his student, Gregory Gagnon, from a fight that had been reported to him.<sup>9</sup> Burns was informed of the rumored fight after a morning meeting, but he failed to alert security.<sup>10</sup> Later that day, Gagnon was injured in a fight with another student.<sup>11</sup> Subsequently, Gagnon sued Burns, the student who caused his injuries, and another student who encouraged the fight.<sup>12</sup> A jury found each of them liable for Gagnon's injuries and ordered them to pay Gagnon a combined five million dollars in damages.<sup>13</sup>

Burns appealed the circuit court's judgment regarding Gagnon's gross negligence claim against him, and asserted that he did not owe Gagnon a legal duty.<sup>14</sup> Gagnon cross-appealed, asserting that the issue of gross negligence should have been presented to the jury.<sup>15</sup> On hearing the appeals, the Supreme

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interest, thus differentiating between his duty to society at large and his duty in relation to specified third persons).

6. *Burns*, 727 S.E.2d at 643. Virginia agrees with Rhode Island, where courts have stipulated that "[e]ven minimal insight reveals" that subjecting an official to potential liability for all of his or her actions "would lead to hesitation on the part of the state to undertake and perform duties necessary to the functioning of a free society." *Orzechowski v. State*, 485 A.2d 545, 549–50 (R.I. 1984) (refusing to recognize a special duty between the parole board and the general public when a patrolman was shot by a parolee who had been released earlier than statutorily dictated).

7. 67A C.J.S. *Parent and Child* § 370 (West 2014) ("[T]he measure of precaution which must be taken by one having a child in his or her care, who stands in no relation to the child except that he has undertaken to care for it, is that care which a prudent person would exercise under like circumstances."). When a person takes responsibility for a child, however, he or she "is not an insurer of the safety of the child," and is "required only to use reasonable care commensurate with the reasonably foreseeable risks of harm." *Whitney v. S. Farm Bureau Cas. Ins. Co.*, 225 So. 2d 30, 33 (La. Ct. App. 1969).

8. 727 S.E.2d 634 (Va. 2012).

9. *Id.* at 639.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 641.

14. *Id.*

15. *Id.* at 640–41. Gagnon also appealed the circuit court's decision that the defendants were not jointly and severally liable. *Id.* at 641.

Court of Virginia held that no special relationship existed between a vice principal and his students that would have required Burns to prevent the fight.<sup>16</sup>

To establish liability in a negligence action, a plaintiff must approve a breach of an existing legal duty that results in an injury.<sup>17</sup> When the alleged conduct is that of a third party, the general rule states that “a person owes no duty to control the conduct of third persons in order to prevent harm to another.”<sup>18</sup> However, under an exception to the general rule for third party liability, if a court establishes that a special relationship existed between the parties, liability can be imposed on an actor who assumed charge or care over a third person who subsequently harmed another person.<sup>19</sup>

This Note will analyze why the Supreme Court of Virginia decision in *Burns* should have found that a special relationship existed between Burns and Gagnon. First, this Note begins with a discussion of third person tort liability and the special relationship exception. Then, this Note will discuss the relevant laws pertaining to school responsibility and the rights of students. Additionally, this Note will survey the special relationships that courts have recognized or rejected before the *Burns* decision. Next, this Note will review and analyze the argument presented by the *Burns* court. Finally, this Note concludes that the Supreme Court of Virginia erred in the *Burns* decision and will demonstrate how case law and legislation from other jurisdictions support an argument for the existence of a special relationship between Burns and Gagnon.

## I. LIABLE OR NOT LIABLE: LAWS THAT PROTECT INDIVIDUALS FROM HARM BY OTHERS

### A. *Creating the Legal Duty of Care: Negligence Liability*

To establish liability in a negligence action, one must provide evidence of damage resulting from a breach of an existing legal duty.<sup>20</sup> A common law duty of care not to harm another person exists when a sufficient association between

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16. *Id.* at 643.

17. *See e.g.*, *Marshall v. Winston*, 389 S.E.2d 902, 904 (Va. 1990) (finding the jailer and sheriff not negligent or in breach of a duty when a man who should have been in jail killed a widow’s husband); *Fox v. Custis*, 372 S.E.2d 373, 375–76 (Va. 1988) (declining to find a special relationship giving rise to a legal duty between Virginia parole officers and a parolee when the parolee brutally attacked two women subsequent to his release).

18. *Marshall*, 389 S.E.2d at 904 (citing *Fox*, 372 S.E.2d at 375); *Klingbeil Mgmt. Grp. v. Vito*, 357 S.E.2d 200, 201 (Va. 1987); *Gulf Reston, Inc. v. Rogers*, 207 S.E.2d 841, 844 (Va. 1974)). *See* 1 FRIEND, *supra* note 4, § 2.4.1.

19. *Marshall*, 389 S.E.2d at 904 (quoting RESTATEMENT (SECOND) OF TORTS § 315); *Fox*, 372 S.E.2d at 375 (quoting RESTATEMENT (SECOND) OF TORTS § 315 (1965)). *See also* *Dudley v. Offender Aid & Restoration of Richmond Inc.*, 401 S.E.2d 878, 881 (Va. 1991) (holding that an operator of a halfway home had the duty to exercise reasonable care over felons living in the home).

20. *Marshall*, 389 S.E.2d at 904 (citing *Fox*, 373 S.E.2d at 375).

two parties occurs, and one person endangers the other by his or her action or inaction.<sup>21</sup>

In Virginia, one exception to a negligence action is the “public duty” doctrine. Virginia courts apply the “public duty” doctrine when someone files a negligence claim against a public official.<sup>22</sup> The doctrine bars a plaintiff from bringing the negligence action if the public official was performing “a duty owed to the public at large.”<sup>23</sup> Specifically, it differentiates between the general public and specific individuals or groups of people, establishing liability only when there is a violation of a duty owed to a “specifically identifiable person or class of persons.”<sup>24</sup>

In general, when a third person’s conduct is at issue, Virginia law states that “[t]here is no duty to control the conduct of a third person so as to prevent that third person from causing harm to the plaintiff unless a ‘special relation’ exists between (a) the defendant and the third person or (b) the defendant and the plaintiff.”<sup>25</sup> This lack of duty exists because third person conduct, especially criminal conduct, is not reasonably foreseeable by another person.<sup>26</sup> However,

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21. See 1 FRIEND, *supra* note 4, § 1.1.1 (determining the level of association by using “time and space”).

22. See *Commonwealth v. Burns*, 639 S.E.2d 276, 278 (Va. 2007) (finding the doctrine unnecessary to apply due to the existence of other defenses); *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992) (refusing to recognize a civil liability under the public duty doctrine); 1 FRIEND, *supra* note 4, § 2.7 (defining Virginia’s interpretation of the doctrine). In *Marshall v. Winston*, the Virginia Supreme Court explained the public duty doctrine, stating that:

[I]n negligence claims against a public official, a distinction must be drawn between a public duty owed by the official to the citizenry at large and a special duty owed to a specific identifiable person or class of persons . . . Only a violation of the latter duty will give rise to civil liability of the official.

*Marshall*, 389 S.E.2d at 905 (citing *Orzechowski v. State*, 485 A.2d 545, 548 (R.I. 1984)).

23. *Marshall*, 389 S.E.2d at 905 (citing *Orzechowski*, 485 A.2d at 549–50 (R.I. 1984)).

24. *Id.* (citing *Orzechowski*, 485 A.2d at 548). The public duty doctrine does not bar every negligence action brought against a public official. See *Burns*, 639 S.E.2d at 279 (“[T]he public duty doctrine does not bar a claim of negligence or gross negligence against employees of the Virginia Department of Transportation.”). See also *Burdette*, 421 S.E.2d at 421 (allowing a negligence action to proceed against a deputy sheriff who had a specific duty to the plaintiff). A special relationship constitutes one exception to the public duty doctrine. 63C AM. JUR. 2D *Public Officers and Employees* § 330 (West 2014).

25. 1 FRIEND, *supra* note 4, § 2.4.1. See also *Marshall*, 389 S.E.2d at 904 (citing *Fox*, 373 S.E.2d at 375) (“Negligence is not actionable unless there is a legal duty, a violation of the duty, and consequent damage.”); *Klingbeil Mgmt. Grp. v. Vito*, 357 S.E.2d 200, 201 (Va. 1987) (noting that unless there is a special relationship which establishes a right of protection, there is no duty to control a third person’s conduct); *Gulf Reston, Inc. v. Rogers*, 207 S.E.2d 841, 844 (Va. 1974) (applying RESTATEMENT (SECOND) OF TORTS § 315 to highlight that a special relationship will give rise to a right of protection from the harmful conduct of a third person).

26. See 1 FRIEND, *supra* note 4, § 2.4.1 (“An essential characteristic of a ‘special relationship’ is that it provides a right of protection to a plaintiff by a defendant from the criminal acts of third persons that can be reasonably foreseen or anticipated.”). See *Burdette* 421 S.E.2d at 420 (citing *Marshall*, 389 S.E.2d at 904) (explaining that in Virginia a person is not typically held liable for

this general rule will not apply if a special relationship exists between the two parties.<sup>27</sup>

To determine if a special relationship exists, one must establish that the acts of the third person were reasonably foreseeable or anticipated by the defendant.<sup>28</sup> A defendant's duty to protect a plaintiff exists only if the defendant knew of or could have reasonably foreseen the danger of injury to the plaintiff from a third person's conduct.<sup>29</sup> Also, a special relationship arises when a defendant assumes charge or care over a third person,<sup>30</sup> who then harms another person, who is a member of a class within the "area of danger."<sup>31</sup> In determining whether a defendant is liable for a third person's conduct, the Virginia courts explore what constitutes "taking charge" over a person.<sup>32</sup> Generally, "an express or implied assumption of responsibility for the custody and control, and therefore the conduct, of the person in question," must occur.<sup>33</sup>

Even in the absence of a special relationship, a defendant can still be held liable if he takes affirmative action to assume a duty to act.<sup>34</sup> This action can

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the criminal acts of a third person because "acts of assaultive criminal behavior . . . cannot reasonably be foreseen").

27. See *Burns*, 639 S.E.2d at 278 (quoting *Burdette*, 421 S.E.2d at 420); *Didato v. Strehler*, 554 S.E.2d 42, 49 (Va. 2001). See also RESTATEMENT (SECOND) TORTS § 315 (1965); 1 FRIEND, *supra* note 4, § 2.6.

28. See *Holles v. Sunrise Terrace, Inc.*, 509 S.E.2d 494, 498 (Va. 1999) (citing *Klingbeil Mgmt. Grp.*, 357 S.E.2d at 201; *Gulf Reston, Inc.*, 207 S.E.2d at 844); *Marshall*, 389 S.E.2d at 904.

29. See *A.H. v. Rockingham Publ'g Co.*, 495 S.E.2d 482, 485–86 (Va. 1998) (ruling a newspaper publisher could not reasonably have foreseen that a newspaper carrier was in danger of sexual assault on his particular route); see also 1 FRIEND, *supra* note 4, § 2.6.

30. See *Marshall*, 389 S.E.2d at 904 (quoting RESTATEMENT (SECOND) OF TORTS § 319 (1965)); *Fox*, 372 S.E.2d at 376 (quoting RESTATEMENT (SECOND) OF TORTS § 319 cmt. c) (noting that a parole officer's duty to supervise and assist does not put the parolee under care and control of the parole officer).

31. *Dudley v. Offender Aid & Restoration of Richmond, Inc.*, 401 S.E.2d 878, 883 (Va. 1991) (quoting RESTATEMENT (SECOND) TORTS § 281(b)) (internal quotation marks omitted). If the plaintiff is outside the area of danger, the duty of care will not exist. *Id.* (determining the area based upon the escaped parolee's travel during his time outside of prison).

32. 1 FRIEND, *supra* note 4, § 2.6 (internal quotation marks omitted). See also *Fox*, 372 S.E.2d at 376 (ruling parole officers did not necessarily take control of parolees because they kept parolees in their custody and the parolees were free to operate their daily lives).

33. 1 FRIEND, *supra* note 4, § 2.6.

34. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

appear in the form of a contract or an action to assist a person in danger.<sup>35</sup> However, because “no common law duty to assist another in peril” exists, an actor who decides to assist another may be protected from liability “under a state’s Good Samaritan Statute.”<sup>36</sup>

*B. Providing an Environment Conducive to Learning: The Principal’s Duty*

Liability may be established by a school official’s action or inaction if he or she “fail[s] to exercise ordinary care in supervising students,” and such behavior “is the proximate cause of a student’s injury.”<sup>37</sup> Liability is often premised on a state’s compulsory education laws<sup>38</sup> and the resultant role to protect the student that the school assumes.<sup>39</sup>

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*Id.* See *Kellermann v. McDonough*, 684 S.E.2d 786, 791 (Va. 2009) (quoting *Didato v. Strehler*, 554 S.E.2d 42, 48 (Va. 2001)) (declaring that a mother who promised to take care of another woman’s daughter had voluntarily assumed a duty to take reasonable care of the daughter).

35. See *e.g.*, RESTATEMENT (SECOND) OF TORTS §§ 321–324A (1965) (laying out various ways in which people can assume duties of care to third persons, including taking charge of a helpless person or behaving in a manner that increases risk of harm to that person). See generally *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS*, § 56, at 378–82 (5th ed. 1984) (providing the history and development of the rule).

36. 13 PETER N. SWISHER, ROBERT E. DRAIM, & DAVID D. HUDGINS, *VIRGINIA PRACTICE SERIES: TORT AND PERSONAL INJURY LAW* § 3:10 (2014 ed. 2014). Virginia’s Good Samaritan Statute can be found in VA. CODE ANN. § 8.01-225 (West 2014), which provides, in short, that a person who acts in good faith to aid another in peril “shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.” *Id.* See *Wheatley v. United States*, No. 98-2658, 1999 WL 1080121, at \*1–2 (4th Cir. Nov. 30, 1999) (*per curiam*) (unpublished table decision) (noting that if the “Good Samaritan” creates the emergency through his actions or inactions, § 8.01-225 will not apply); *Harrison v. Prince William Cnty. Police Dep’t*, 640 F. Supp. 2d 688, 713 (E.D. Va. 2009) (stating that the Good Samaritan Act will not apply if the actor acted in bad faith); *Bowen v. Scott Cnty. Lifesaving & First Aid Crew, Inc.*, No. CL960-119, 1997 WL 33121853, at \*1 (Va. Cir. Ct. Apr. 1, 1997) (discussing § 8.01-225 in relation to emergency medical technicians and stating that “the statute shields the [actor] from any civil damages without restriction as to the seriousness of the wrongful act”).

37. 78 C.J.S. *Schools and School Districts* § 506 (West 2014). See also *Edson v. Barre Supervisory Union No. 61*, 933 A.2d 200, 161 (Vt. 2007) (restricting the duty to one of prevention of reasonable and foreseeable harm).

38. *Marquay v. Eno*, 662 A.2d 272, 279 (N.H. 1995) (citing N.H. REV. STAT. ANN. § 193:1, I (LexisNexis 1994)) (noting that “the compulsory character of school attendance” represents one of the major factors considered in declaring “that a special relationship exists between schools and students”).

39. See *Williams v. Ky. Dep’t of Educ.*, 113 S.W.3d 145, 148 (Ky. 2003) (citing *Yanero v. Davis*, 65 S.W.3d 510, 529 (Ky. 2001) (holding school officials liable for damages sustained by students in a drunk driving accident after leaving a school); *Lunsford v. Bd. of Educ. of Prince George’s Cnty.*, 374 A.2d 1162, 1168 (Md. 1977) (recognizing that a school’s duty could be analogous to a parent’s duty). This role arises from the school standing in place of the parent while a student is in the charge of the school. DAN B. DOBBS, *THE LAW OF TORTS* § 328 (West Group 2000). See also *Jennifer C. v. L.A. Unified Sch. Dist.*, 168 Cal. App. 4th 1320, 1327-28 (Cal. Dist. Ct. App. 2008) (finding that a school violated a duty of ordinary care to protect a student molested by another student on school property); *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 255 P.2d 360,

In the Virginia school system, the principal has a duty to “provide instructional leadership,” as well as manage the administration and “operation . . . of the school . . . and [its] property.”<sup>40</sup> Virginia children are required to attend school,<sup>41</sup> and school officials have the responsibility of providing students with “a safe, nondisruptive environment for effective teaching and learning.”<sup>42</sup> Thus, a principal has a duty to supervise and care for a student and may be held liable for harm if he fails to carry out these duties in the manner of a reasonably prudent person under similar circumstances.<sup>43</sup>

### C. Establishing the Special Relationship

The Restatement (Second) of Torts<sup>44</sup> lists four commonly accepted special relationships that give rise to a duty of reasonable care: “[a] carrier [and] its passenger[,] . . . [a]n innkeeper [and] his guests,” a landowner and his invitee, and a bailee and bailor.”<sup>45</sup> According to the drafters of the Restatement, the list is not “exclusive” and other circumstances may create similar special relationships.<sup>46</sup> Those relationships that have been rejected in some states include: landlords and tenants,<sup>47</sup> a gun manufacturer and the victim of criminal

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362 (Wash. 1953) (en banc) (“[T]he protective custody of teachers is mandatorily substituted for that of the parent.”); RESTATEMENT (SECOND) OF TORTS § 320 cmt. b (1965).

40. VA. CODE ANN. § 22.1-293(B) (West 2014). A principal’s duties are set by the rules and regulations of the school board and are supervised by the division superintendent. *Id.* at (A).

41. Virginia’s compulsory education law states:

[E]very parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational, or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent, or provide for home instruction of such child . . . .

VA. CODE ANN. § 22.1-254(A).

42. VA. CODE ANN. § 22.1-279.6(B); *See* Brief In Opposition and In Support of Assignments of Cross-Error of Appellee/Cross-Appellant, Gregory Joseph Gagnon at 4, *Burns v. Gagnon*, 727 S.E.2d 634 (Va. 2012) (No. 110754), 2011 WL 9694387, at \*4 (asserting that a school administrator has a responsibility to ensure that students “could . . . have an education in an atmosphere conducive to learning free of disruption and threat to person” (alteration in original) (internal quotation marks omitted)).

43. *See* VA. CODE ANN. § 22.1-279.6(B) (pointing out the school district’s agreement to assume care of the child); *Kellermann v. McDonough*, 684 S.E.2d 786, 790 (Va. 2009) (holding that an adult must act with reasonable care when performing the duty to supervise and care for a child granted to him or her by the parent).

44. RESTATEMENT (SECOND) OF TORTS § 314A (1965).

45. *Id.* Comment a adds an employer and his employee as another example. *Id.* at cmt. a.

46. *Id.* at cmt. b.

47. *See* *Klingbeil Mgmt. Grp. v. Vito*, 357 S.E.2d 200, 201 (Va. 1987) (citing *Gulf Reston, Inc. v. Rogers*, 207 S.E.2d 841, 844 (Va. 1974)) (finding a landlord not responsible for a tenant’s

misuse of that gun,<sup>48</sup> a scouting organization and a scout,<sup>49</sup> a school and a student injured at a time when the school did not have charge over him,<sup>50</sup> and a social host and a guest.<sup>51</sup>

### 1. *Virginia and Special Relationships in Tort Liability*

The Virginia courts have hesitated to recognize special relationships for third person tort liability.<sup>52</sup> The Supreme Court of Virginia's 1988 decision in *Fox v. Custis*<sup>53</sup> articulated the factors that the court considers when determining whether or not a special relationship exists.<sup>54</sup> The court found that no special relationship existed between a corrections department and parties injured by a parolee in its system because the injured plaintiffs "were simply members of the general public, living in the free society, and having no special custodial or other relationship with the state."<sup>55</sup> Further, the court noted that the corrections department never took charge or exercised control over the parolee, but, rather, it operated as a supervisor and assistant in the parole process.<sup>56</sup>

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rape committed by a third person who had entered her apartment). *But see* *Miller v. Whitworth*, 455 S.E.2d 821, 827 (W. Va. 1995) (noting that circumstances do exist which would give rise to a duty to protect a tenant from harm from a third person when the "landlord's affirmative actions or omissions" create the risk of injury).

48. *See* *Delahanty v. Hinckley*, 564 A.2d 758, 762 (D.C. 1989) (reasoning that gun manufacturers have no method of controlling or screening who receives the gun).

49. *See* *Doe v. Goff*, 716 N.E.2d 323, 326 (Ill. App. Ct. 1999) (holding that no special relationship existed because the molestation of the scout by a volunteer was not foreseeable).

50. *See* *Martin v. Twin Falls Sch. Dist. No. 411*, 59 P.3d 317, 318, 321 (Idaho 2002) (holding that because the students were two blocks from the school, and therefore out of the school's custody, the school district did not have a duty to protect the students from third-party harm). *See also* *Young v. Salt Lake City Sch. Dist.*, 52 P.3d 1230, 1233–34 (Utah 2002) (ruling that the school had no common law duty to the student because he had been discharged to his parent's care and was not participating in an extracurricular activity).

51. *See* *Gilger v. Hernandez*, 997 P.2d 305, 310–11 (Utah 2000) (holding no duty is imposed on a social host to protect or control guests when one guest has threatened to injure another).

52. *See* *Kellermann v. McDonough*, 684 S.E.2d 786, 793 (Va. 2009); *Marshall v. Winston*, 389 S.E.2d 902, 904–05 (Va. 1990); *Fox v. Custis*, 372 S.E.2d 373, 377 (Va. 1988).

53. 372 S.E.2d 373 (Va. 1988). *Fox* involved a mentally unstable parolee who committed fraud, drank alcohol, and exhibited inappropriate sexual behavior towards women while on parole. *Id.* at 374. Despite these parole violations, the corrections department parole officer suggested that the parolee remain on parole. *Id.* Shortly after, the parolee intentionally set fire to a home, attacked and set fire to a woman, and subsequently attacked another female. *Id.*

54. *Id.* at 375–77.

55. *Id.* at 376 (quoting *Fox v. Custis*, 712 F.2d 84, 88 (4th Cir. 1983)) (internal quotation marks omitted).

56. *Id.* Under the statute, a parole officer "must [s]upervise and assist all person within his territory released on parole." *Id.* (alteration in original) (quoting VA. CODE ANN. § 53.1-145(3) (West 2014)) (internal quotation marks omitted). *See also* *Small v. McKennan Hosp.*, 403 N.W.2d 410, 414–15 (S.D. 1987) (holding that a parole officer was not liable for the abduction, rape, and murder of the victim because his required bimonthly visits did not constitute control over the parolee who committed the crime); *Lamb v. Hopkins*, 492 A.2d 1297, 1302 (Md. 1985) (finding

Two years later, the Supreme Court of Virginia decided *Marshall v. Winston*<sup>57</sup> and once again declined to recognize a special relationship.<sup>58</sup> The court considered whether or not “a sheriff and a jailer owed a special duty of care to protect a member of the general public from harm by a third person.”<sup>59</sup> In determining the existence of this duty, the court looked to Restatement (Second) Torts §§ 315(a) and 319.<sup>60</sup> Read together, these sections of the Restatement indicate that a special relationship will be recognized only when a third person, who the defendant has “take[n] charge”<sup>61</sup> over, and who the defendant “kn[e]w or should [have] know[n] [could] . . . cause bodily harm to others,”<sup>62</sup> causes such injury to another.<sup>63</sup> The court held that the plaintiff failed to allege sufficient facts to prove that the defendants should have anticipated such harm and noted that the sheriff and jailer defendants could not have foreseen that the man they released would cause bodily harm to others.<sup>64</sup>

In a 2009 case, *Kellermann v. McDonough*,<sup>65</sup> the Supreme Court of Virginia considered whether an adult couple that agreed to watch over and care for another’s child owed the child a duty to act with reasonable care and

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that a probation officer did not have a duty to the parents of a child injured in a car accident because he did not “tak[e] charge of the probationer”).

57. 389 S.E.2d 902 (Va. 1990).

58. *Id.* at 905.

59. *Id.* at 903. This case arose from the murder committed by a man who was out of prison illegally after being released by the defendants. *Id.* The plaintiff brought this action claiming negligence and violation of her decedent’s rights under 42 U.S.C. § 1983 and the 14th Amendment. *Id.* at 904.

60. *Id.*

61. RESTATEMENT (SECOND) OF TORTS § 319 (1965).

62. *Id.*

63. *See id.* §§ 315(a), 319. Section 315(a) states that the duty to control a third person’s conduct so as to prevent injury to another person does not exist unless “a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct.” *Id.* § 315(a). Section 319 provides that a person who does take charge of a third person is “under a duty to exercise reasonable care to control the third person” to stop him from harming another when that person “knows or should [have] know[n]” that the third person would “be likely to cause bodily harm to others.” *Id.* § 319. *See Nasser v. Parker*, 455 S.E.2d 502, 505–06 (Va. 1995) (holding that a special relationship could not be based on a doctor-patient or hospital-patient relationship alone, but that the plaintiff needed to present facts sufficient to show the defendant’s control or charge over the third person within the meaning of Restatement (Second) of Torts § 319). *See also Delk v. Columbia/HCA Healthcare Corp.*, 523 S.E.2d 826, 830–32 (Va. 2000) (holding that a special relationship existed between a psychiatric hospital and its patient because the psychiatric hospital had taken charge of the third person-patient who injured the plaintiff and the hospital knew she was at high risk of hurting others and was in need of 24-hour care).

64. *Marshall*, 389 S.E.2d at 904–05. The court further noted that the decedent was not a member of an identifiable group, but rather only a member of the general public, and thus was not “owed a duty distinguishable from the duty [the sheriff] owed to the citizenry at large.” *Id.* at 905.

65. 684 S.E.2d 786 (Va. 2009).

supervision.<sup>66</sup> The court decided that “when a parent relinquishes the supervision and care of a child to an adult who agrees to supervise and care for that child, the supervising adult must discharge that duty with reasonable care.”<sup>67</sup> When confronted with the possibility of finding a special relationship, the court again declined to extend the label to adults who agree to care for and supervise a minor.<sup>68</sup>

## 2. *Special Relationships Established by the Virginia Court*

Despite Virginia’s general refusal to acknowledge or establish special relationships, Virginia courts recognize that some circumstances permit a “special” designation.<sup>69</sup> The first of these circumstances comes from a 1992 Supreme Court of Virginia case, *Burdette v. Marks*,<sup>70</sup> which recognized a special relationship between a sheriff deputy and a motorist.<sup>71</sup> In *Burdette*, the defendant sheriff deputy, who was at the scene of a traffic accident, did not act to protect the plaintiff as he was being attacked by a third person.<sup>72</sup> Despite the defendant’s ability to see the plaintiff’s distress and serious injuries, the sheriff

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66. *Id.* at 788. An adult couple allowed a minor child, whom they had agreed to take care of, to get in the car with a known reckless, teenage male driver. *Id.* at 789. The parents of the minor child had explicitly stated that their daughter was not allowed in a car driven by any inexperienced drivers, especially males. *Id.* While in the car, the child became nervous and uncomfortable by the teen boy’s speed and texted her dad and another friend that she feared for her life. *Id.* Shortly after, the male driver lost control of the car and the back passenger side where the minor was sitting swerved into a tree. *Id.* The minor died the next day as a result of the accident. *Id.*

67. *Id.* at 790. The court noted that this duty does not make the supervisor, in this case an adult couple, the “insurer of the child’s safety,” but imposes the duty to act as a “reasonably prudent person” would. *Id.* The “reasonably prudent person,” also known as the “ordinary prudent person,” is “a personification of a community ideal of reasonable behavior, determined by the jury’s social judgment.” 1 FRIEND, *supra* note 4, § 2.2.1(A) (citing KEETON ET AL., *supra*, note 35, § 32, at 175). The court’s finding in *Kellermann* is consistent with that of other jurisdictions. *See e.g.*, *Putney v. Keith*, 98 Ill. App. 285, 291 (Ill. App. Ct. 1901) (addressing the level of care owed to a child compared to that of an adult, the court stated that “ordinary care as respects adults, may not be as regards children; nevertheless, as regards children as well as adults, the care of persons having no special relation to them, required by law, is that which prudent people exercise under like circumstances”); *Zalak v. Carroll*, 205 N.E.2d 313, 313 (N.Y. 1965) (finding the defendants liable for an infant’s injury because “[t]hey were required to use reasonable care to protect the infant plaintiff from injury”).

68. *Kellermann*, 684 S.E.2d at 793. The court thereafter looked to see if proximate cause was established to hold the supervising adults liable under the existence of an assumed duty or a duty of ordinary care. *Id.*

69. *See Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 434 (Va. 2006); *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992).

70. 421 S.E.2d 419 (Va. 1992).

71. *Id.* at 419–21.

72. *Id.* at 419–20.

deputy ignored the cries of help and did not render any assistance.<sup>73</sup> The court noted that in order to hold the defendant liable for plaintiff's injuries inflicted by a third person, the plaintiff must establish that there was a special relationship giving rise to such a duty.<sup>74</sup> The court then focused on whether or not the defendant could have foreseen that he would be expected to take action.<sup>75</sup> The court found that the sheriff should have known that he would be expected to act because he was an on duty, uniformed officer, with the ability to protect the plaintiff without severe injury to himself.<sup>76</sup> Therefore, the court held that "a special relationship existed . . . which imposed a duty upon [the sheriff deputy] to render assistance to [the plaintiff]."<sup>77</sup>

The Supreme Court of Virginia recognized another special relationship in a 2006 case, *Taboada v. Daly Seven, Inc.*<sup>78</sup> *Taboada* involved an attack by a third person on a guest at a Holiday Inn Express.<sup>79</sup> Many factors were considered in the court's decision to find that a special relationship existed between the hotel employee-defendant and the hotel guest-plaintiff.<sup>80</sup> The court first noted a deep-rooted recognition in common law of a special relationship between an innkeeper and his guests.<sup>81</sup> The court then went on to state that even though a special relationship existed, "there [was] no liability when the defendant neither kn[ew] of the danger of an injury to a plaintiff from the criminal conduct of a third party nor ha[d] reason to foresee that danger."<sup>82</sup> In *Taboada*, however, it was clearly established that the defendant could have foreseen the injury because he had been "advised by police that '[the hotel's] guests were at a specific imminent risk for harm to their persons from uninvited persons coming into or

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73. *Id.* at 420 (pointing out that the defendant personally knew both the plaintiff and the attacker, and knew the third-party's disposition to violent behavior).

74. *Id.* at 420–21. *See* *Marshall v. Winston*, 389 S.E.2d 902, 905 (Va. 1990); *Fox v. Custis*, 372 S.E.2d 373, 375 (Va. 1988); *Klingbeil Mgmt. Grp. v. Vito*, 357 S.E.2d 200, 201 (Va. 1987).

75. *Burdette*, 421 S.E.2d at 421. *See also* RESTATEMENT (SECOND) OF TORTS § 319 (1965).

76. *Burdette*, 421 S.E.2d at 421 (finding the defendant's weapon and training indicative of his ability to avoid substantial injury). The court noted that the plaintiff even asked for help from defendant. *Id.*

77. *Id.* The court noted that the case was not about the "special relation between the defendant and the third party . . . because the defendant was not charged with the custody or control of the third party." *Id.* at 421 n.2.

78. 626 S.E.2d 428 (Va. 2006).

79. *Id.* at 430. The plaintiff was mugged and shot, sustaining severe bodily injury, while in the parking lot of the defendant's hotel. *Id.*

80. *Id.* at 431–32. The court noted that, in light of the narrow exception to the general rule for liability of injuries caused by a third-party, the application of the exception "is always fact specific and, thus, not amenable to a bright-line rule for resolution." *Id.* (quoting *Yuzefovsky v. St. John's Wood Apartments*, 540 S.E.2d 134, 139 (Va. 2001)).

81. *Id.* at 432 (citations omitted) (citing *Yuzefovsky*, 540 S.E.2d at 140). *See e.g.*, *Holles v. Sunrise Terrace, Inc.*, 509 S.E.2d 494, 497–98 (Va. 1990) (declining to extend the innkeeper-guest relationship to a grounds manager).

82. *Taboada*, 626 S.E.2d at 433.

upon its property.”<sup>83</sup> As such, the court found that the defendant could have reasonably foreseen an attack on the plaintiff, who was a guest.<sup>84</sup>

#### *D. Exploring a New Kind of Relationship in the School*

Although Virginia has not recognized the existence of a special relationship between school officials and students,<sup>85</sup> some jurisdictions outside of Virginia have accepted the school-student special relationship.<sup>86</sup>

In 1995, New Hampshire embraced a special relationship between one school’s officials and the school’s students in *Marquay v. Eno*.<sup>87</sup> The New Hampshire Supreme Court held that “schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision.”<sup>88</sup> The court based the scope of that duty on foreseeability.<sup>89</sup> When determining the existence of a special relationship, the court considered many factors, including compulsory education requirements, parents’ expectations of a safe school environment for students, and society’s interest in schools providing education to students.<sup>90</sup>

The court clarified that the “duty falls upon those school employees who have supervisory responsibility over students,” but that the “duty is limited to those

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83. *Id.* at 435. The court also took into consideration that the defendant’s staff had called the police ninety-six times within a three-year period, reporting “robberies, malicious woundings, shootings and other criminally assaultive acts.” *Id.*

84. *Id.* (reversing the trial court’s dismissal of the plaintiff’s claim based on negligence).

85. *See Burns v. Gagnon*, 727 S.E.2d 634, 643 (Va. 2012) (noting that no case exists establishing a principal-student relationship in the common law or in the Virginia court). *But see Schieszler v. Ferrum College*, 236 F. Supp. 2d 602, 609 (W.D. Va. 2002) (applying Virginia law and holding that a college and its students shared a special relationship after the college required a student to sign a statement promising not to harm himself and he later committed suicide).

86. *See e.g., J. H. v. L.A.* Unified Sch. Dist., 107 Cal. Rptr. 3d 182, 193–97 (Cal. Ct. App. 2010) (exploring the case law on special relationships between schools and students and finding that one exists where the lack of ordinary care may be the proximate cause of a child’s injury); *M. W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 517 (Cal. Ct. App. 2003) (“A special relationship is formed between a school district and its students resulting in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students.”); *Marquay v. Eno*, 662 A.2d 272, 279 (N.H. 1995) (finding that a special relationship stems from the students’ separation from their parents, and the students’ diminished abilities to protect themselves while in school, while also highlighting that principals will only have a duty to protect a student if there is a known or reasonably foreseeable threat to a particular student).

87. *Marquay*, 662 A.2d at 280. The plaintiffs in *Marquay* were three female former students in the Mascoma Valley Regional School District. *Id.* at 275. The plaintiffs each “allege[d] that she was exploited, harassed, assaulted, and sexually abused by one or more employees of the school district.” *Id.* The complaints further “allege[d] that . . . school employees . . . were aware or should have been aware of the sexual abuse[s]” that occurred. *Id.*

88. *Id.* at 279.

89. *Id.*

90. *Id.* (citing *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993); N.H. REV. STAT. ANN. 193:1, I (LexisNexis 1994)).

periods when parental protection is compromised.”<sup>91</sup> The court noted that, although the principal and superintendent were not always the primary supervisors, they were still “charged with overseeing all aspects of the school’s operation” and, therefore, owed a duty of ordinary care to a student when a known or reasonably ascertainable threat to the student arises.<sup>92</sup>

In California, a special relationship between a school and its students has also been recognized. In *M. W. v. Panama Buena Vista Union School District*,<sup>93</sup> the California Court of Appeals held a school district liable for the sexual assault of an intellectually disabled student.<sup>94</sup> The court acknowledged that “[a] special relationship is formed between a school district and its students [that] result[s] in the imposition of an affirmative duty on the school district to take all reasonable steps to protect its students.”<sup>95</sup>

Similar to New Hampshire, California schools aim to provide students with an environment conducive to their education and well-being.<sup>96</sup> Therefore, California holds school districts responsible for a student’s injuries if a school

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91. *Marquay*, 662 A.2d at 279.

92. *Id.* at 280. Not all school employees “shoulder[] a personal duty simply by virtue of receiving a paycheck from the school district.” *Id.* at 279. Rather, the court placed the “duty . . . upon . . . school employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy.” *Id.* When an employee that meets this relationship “acquire[s] actual knowledge of abuse or . . . learn[s] of facts [that] would lead a reasonable person to conclude a student is being abused[,]” the employee may be liable if his or her unreasonable supervision was a proximate cause to the student’s injury. *Id.*

93. 110 Cal. App. 4th 508 (Cal. Ct. App. 2003).

94. *Id.* at 520–21. The plaintiff in this case was a fifteen-year-old student enrolled in special education classes at Earl Warren Junior High School. *Id.* at 512–13. The school provided “general” supervision to students who arrived on campus between 7:00 and 7:45 a.m., which gave “every adult on campus . . . the broad responsibility of supervising the students.” *Id.* at 512 (internal quotation marks omitted). However, no adults were specifically assigned locations to monitor and “[n]o one maintained visual contact over the students who arrived early.” *Id.* Even areas marked as “trouble spots”—because they were not easy to see—were not monitored consistently. *Id.* (internal quotation marks omitted). The plaintiff was among the few students who arrived early to school, and he “generally stayed near the school office.” *Id.* at 513. On the morning of May 21, 1997, another special education student, who had multiple disciplinary infractions, tricked the plaintiff into going to the boy’s restroom where he sodomized the plaintiff. *Id.* at 513–14. The same student had sexually assaulted the plaintiff previously that same year, but the plaintiff had been too afraid to report the incident. *Id.* at 514. The plaintiff sued the school district after the second incident, and the trial court returned a judgment in favor of the plaintiff. *Id.* at 515–16.

95. *Id.* at 517. The California court recognized this affirmative duty in part because of the state’s compulsory education law. *See Rodriguez v. Inglewood Unified Sch. Dist.*, 186 Cal. App. 3d 707, 714 (Cal. Ct. App. 1986) (quoting CAL. CONST. art. I, § 28(f)(1) (West, Westlaw through November 2008 amendments); CAL. EDUC. CODE § 48200 (West 2014) (mandating full-time education for children between the ages of six and eighteen)).

96. *M. W.*, 110 Cal. App. 4th at 517 (quoting *In re William G.*, 709 P.2d 1287, 1295 (en banc) (Cal. 1985)) (“Teaching and learning cannot take place without the physical and mental well-being of the students. The school premises, in short, must be safe and welcoming.”).

official's failure to act with ordinary care caused the injuries.<sup>97</sup> This standard of care is defined by the behavior of a reasonably prudent person "under the same circumstances" and can be breached by either "a total lack of supervision or ineffective supervision."<sup>98</sup> However, as other cases have noted, liability will not be established unless the harm to the student was foreseeable.<sup>99</sup>

The court in *M. W.* held that it was "reasonably foreseeable that . . . the lack of direct supervision in the early morning hours" could lead to a "risk for a sexual or other physical assault" on a student.<sup>100</sup> It recognized that a special relationship existed between the school and the student and noted that school districts have a "minimal burden . . . to ensure adequate supervision for any students they permit on their campuses."<sup>101</sup>

State courts are not the only ones to recognize the school-student special relationship. In 2012, the Restatement (Third) of Torts took the step of adding "a school with its students" to the list of recognized special relationships.<sup>102</sup> The addition, one of three new additions, was in response to the relationship's "substantial acceptance among courts."<sup>103</sup>

## II. BURNS V. GAGNON: EXAMINING THE DUTY OWED BY A VICE PRINCIPAL TO HIS STUDENTS

Virginia has taken a different view on school liability, as evidenced by the state's Supreme Court decision in *Burns v. Gagnon*.<sup>104</sup>

### A. *The Report of a Potential Fight Set Aside for a Later Time*

On the morning of December 14, 2006, high school student Shannon H. Diaz was called into the principal's office to discuss a prior disciplinary offense.<sup>105</sup> After Diaz had a discussion with Principal Layton H. Beverage and Vice Principal W.R. Travis Burns, the meeting between the three concluded.<sup>106</sup> Diaz

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97. *Id.* (citations omitted) (quoting *Taylor v. Oakland Scavenger Co.*, 110 P.2d 1044, 1048 (Cal. 1941)); see CAL. EDUC. CODE § 44807.

98. *Id.* at 518 (citations omitted) (quoting *Dailey v. L.A. Unified Sch. Dist.*, 470 P.2d 360, 363 (1970) (en banc)).

99. See *id.* (quoting *Taylor*, 110 P.2d at 1048) (citing *Leger*, 249 Cal. Rptr. at 694). See also *Leger*, 249 Cal. Rptr. at 694 (holding that the risk of attack on a student in an unsupervised locker room is reasonably foreseeable to school officials because school officials must act on threats of violence). Foreseeability focuses on whether it was reasonably foreseeable that the negligent conduct would result in a "particular kind of harm." *Id.* (quoting *Weiner v. Southcoast Childcare Ctrs., Inc.*, 132 Cal. Rptr. 2d 883, 885 (Cal. Ct. App. 2003)) (internal quotation marks omitted).

100. *M. W.*, 110 Cal. App. 4th at 520.

101. *Id.* at 521.

102. RESTATEMENT (THIRD) OF TORTS § 40(b)(5) (2012).

103. *Id.* at cmt. *l.*

104. 727 S.E.2d 634, 643 (Va. 2012).

105. *Id.* at 639.

106. *Id.*

then informed Burns about a fight allegedly going to take place between two students.<sup>107</sup> Diaz stated that his information was based on online conversations via MySpace and that the student “Gregory J. Gagnon was going to get into a fight with another student sometime that day.”<sup>108</sup>

Diaz could not provide Burns with the name of the second student, or identify a time or place that the fight would occur other than at some time that day.<sup>109</sup> Burns assured Diaz that security would be informed, and the problem resolved.<sup>110</sup> About two hours later, the fight occurred without Burns ever having related Diaz’s information to anyone.<sup>111</sup>

### *B. Injury and a Lawsuit: The Results of Peer-on-Peer Violence*

Before the incident, James S. Newsome, Jr., and his sister Christine D. Newsome had approached Gagnon and “exchanged words” before Christine encouraged her brother to “either . . . hit Gagnon or walk away.”<sup>112</sup> James Newsome hit Gagnon in the face one time, “knocking [Gagnon’s] head back into a brick pillar.”<sup>113</sup> Gagnon suffered permanent brain damage from the blow, and, subsequently, filed a complaint alleging negligence, assault, and battery.<sup>114</sup>

In his claim against Vice Principal Burns, Gagnon alleged simple and gross negligence based on Burns’ legal breaches of duties owed to him, including “(1) failing to implement necessary policies and procedures to ‘rein[] [in] student-on-student fights’ at the school; (2) taking no action in response to Diaz’ report; and (3) failing to protect him from Newsome’s conduct.”<sup>115</sup> Gagnon further sought joint and several liability of all defendants for “present and future brain injury” suffered as a result of their “intentional and negligent acts.”<sup>116</sup> In response, Burns argued that he did not owe a legal duty to Gagnon and, even if he did, both Virginia’s statutes and common law provided him with immunity from a gross negligence claim.<sup>117</sup>

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107. *Id.*

108. *Id.* at 639.

109. *Id.* at 646.

110. *Id.* at 639.

111. *Id.*

112. *Id.* (alteration in original) (internal quotation marks omitted).

113. *Id.*

114. *Id.* Gagnon brought assault and battery claims against Newsome and an aiding and abetting assault and battery claim against Christine. *Id.* The negligence claim brought against Burns asserted breaches of various duties of care. *Id.*

115. *Id.* (alteration in original).

116. *Id.* (internal quotation marks omitted).

117. *Id.* See VA. CODE ANN. § 8.01-220.1:2(A) (West 2014) (providing immunity to teachers for actions done in good faith). See also *Friday-Spivey v. Collier*, 601 S.E.2d 591, 593 n.4 (Va. 2004) (citing *James v. Jane*, 282 S.E.2d 684, 869 (Va. 1980); *Messina v. Burden*, 321 S.E.2d 657, 663 (Va. 1984)) (enumerating the four-factor test for determining if an individual is entitled to sovereign immunity).

The trial court concluded that Burns owed a legal duty to Gagnon and that he was not entitled to statutory or common law sovereign immunity.<sup>118</sup> The court further concluded that Burns' actions did not amount to gross negligence and refused to instruct the jury on the issue.<sup>119</sup> At the end of the nine-day trial, the jury returned a verdict against the defendants and awarded Gagnon five million dollars in damages.<sup>120</sup>

### C. A Question of First Impression

Both Burns and Gagnon appealed the circuit court's decision.<sup>121</sup> Burns challenged the finding that he had a legal duty to protect Gagnon and the court's denial of sovereign immunity.<sup>122</sup> On cross-appeal, Gagnon challenged the court's refusal to instruct the jury on gross negligence.<sup>123</sup> Thus, the Supreme Court of Virginia began its opinion with a discussion of legal duty, addressing the elevated duty of care, the common law duty of ordinary care, and the assumed duty to investigate and notify.<sup>124</sup>

#### 1. Elevated Duty of Care

In assessing whether Burns owed Gagnon a heightened duty of care, the Supreme Court of Virginia faced a matter of first impression: "[w]hether a special relationship exists between a principal and a student."<sup>125</sup> The court noted the importance of distinguishing between an "official's public duty owed to the citizenry at large," and, if one exists, their "special duty owed to a specific, identifiable person or class of persons."<sup>126</sup> According to the court, an official can only be held liable in a negligence claim if a special duty exists.<sup>127</sup>

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118. *Burns*, 727 S.E.2d at 640. The circuit court did not specify what "legal duties" Burns owed Gagnon. *Id.* (internal quotation marks omitted). Burns was not granted immunity because the court ruled that his actions were ministerial rather than discretionary. *Id.* (citing *B.M.H. v. Sch. Bd. of City of Chesapeake*, 883 F. Supp. 560, 571 (E.D. Va. 1993)).

119. *Id.* at 640-41. Gagnon had requested that an instruction on gross negligence be given to the jury, but the court did not find that Gagnon had stated the facts necessary to set out a case of gross negligence. *Id.*

120. *Id.* at 641.

121. *Id.* at 639.

122. *Id.*

123. *Id.* at 641.

124. *Id.* at 641-43.

125. *Id.* at 642.

126. *Id.* (quoting *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992)) (internal quotation marks omitted).

127. *Id.* (quoting *Burdette*, 421 S.E.2d at 421) (internal quotation marks omitted) (explaining that it would not be in "society's best interest" to hold a public official liable for acts resulting from a public duty, because it puts the official in a situation of "potential liability for every action undertaken" (quoting *Burdette*, 421 S.E.2d at 421) (internal quotation marks omitted)).

The court first looked at whether or not Burns “reasonably could have foreseen that he would be expected to take affirmative action to protect [Gagnon] from harm.”<sup>128</sup> The court reasoned that because Burns only had the name of one student who would be in the fight, and had no facts regarding the fight’s time or location, the case could be distinguished from *Burdette*.<sup>129</sup>

In *Burdette*, the deputy sheriff witnessed an attack on a motorist after arriving at the scene of a car crash, but did nothing to stop the attack.<sup>130</sup> The facts established that the sheriff “knew or should have known that Burdette was in great danger of serious bodily injury or death.”<sup>131</sup> The court distinguished the facts in *Burns* from those in *Burdette* based on Burns’ partial knowledge about the potential fight, which limited his ability to foresee that Gagnon “was in great danger of serious bodily injury or death.”<sup>132</sup> Also, unlike the sheriff, Burns was not present at the fight to “step in and stop” it.<sup>133</sup>

The court next distinguished *Burns* from *Taboada*, which Gagnon had used to support his argument.<sup>134</sup> *Taboada* held that an innkeeper had a special relationship with his guest by relying on the medieval notion that “a host owed to his guest the duty, not only of hospitality, but also of protection.”<sup>135</sup> Gagnon argued that a school principal was entrusted not only with the students’ safety, but also charged with ensuring that the school was a safe environment, similar to an innkeeper’s responsibility for ensuring his guests’ safety.<sup>136</sup>

The court rejected Gagnon’s argument for an analogous special relationship between a principal and his students for two reasons.<sup>137</sup> First, there was no “deep-rooted” history of a principal-student relationship in common law, whereas the history of the innkeeper-guest relationship “dates back to the Middle Ages.”<sup>138</sup> Second, burdening a public official with potential liability for all acts performed in his official capacity would contradict society’s best interest.<sup>139</sup>

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128. *Id.* (alteration in original) (quoting *Burdette*, 421 S.E.2d. at 421) (internal quotation marks omitted).

129. *Id.* (citing *Burdette*, 421 S.E.2d. at 421).

130. *Burdette*, 421 S.E.2d at 420.

131. *Id.* at 421.

132. *Id.*

133. *Burns*, 727 S.E.2d at 642.

134. *Id.*

135. *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 432 n.4 (Va. 2006) (quoting *Kveragas v. Scottish Inns, Inc.*, 733 F.2d 409, 412 (6th Cir. 1984)) (recognizing the deep rooted history of the innkeeper-guest relationship).

136. *Burns*, 727 S.E.2d at 642. Gagnon also argued that “the student, like the guest, has little ability to control his environment and thus relies on the principal to make the school safe, just as the guest relies on the innkeeper to make the inn safe.” *Id.* at 643.

137. *Id.* at 643 (citations omitted).

138. *Id.* The court also noted that Gagnon himself could not point to any such history. *Id.*

139. *Id.* (quoting *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992)).

### 2. *The Common Law Duty of Ordinary Care*

After deciding that no special relationship existed between Burns and Gagnon, the Supreme Court of Virginia next addressed whether Burns owed Gagnon a common law duty of ordinary care.<sup>140</sup> The court relied on its 2009 decision in *Kellermann v. McDonough* to determine that Burns actually owed Gagnon a common law duty of care.<sup>141</sup> *Kellermann* established that an adult who agreed to supervise another adult's child must exercise reasonable care when carrying out that duty.<sup>142</sup> The court was careful to note, however, that the agreement to supervise a child does not mean that the supervisor absolutely becomes the "insurer of the child's safety."<sup>143</sup> Rather, it means that he needed to "discharge his . . . duties as a reasonably prudent person would under similar circumstances."<sup>144</sup>

Comparing *Kellerman* and *Burns*, the court found that Burns owed Gagnon a common law duty to supervise and care because Gagnon's parents were required by law to send Gagnon to school.<sup>145</sup> As vice principal, Burns was responsible for supervising and ensuring a safe learning environment.<sup>146</sup> Consequently, the court concluded, as it did in *Kellermann*, that Burns could be "liable if he failed to 'discharge his . . . duties as a reasonably prudent person would under similar circumstances.'"<sup>147</sup>

### 3. *Assumed Duty to Investigate and Report*

Finally, the court addressed whether Burns had an assumed duty to act based on his conversation with Diaz, when he told Diaz he would inform security about the fight.<sup>148</sup> Although the court briefly discussed the assumed duty to investigate, it did not rule on the matter because neither party had raised the issue in the court below.<sup>149</sup> However, the court stated that liability stemming from the

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140. *Id.*

141. *Id.* "By law, Gagnon's parents had to send Gagnon to school, where it was the responsibility of Burns and other school officials to supervise and ensure that students could . . . have an education in an atmosphere conducive to learning, free of disruption, and threat to person." *Id.* (alteration in original) (internal quotation marks omitted).

142. *Kellermann v. McDonough*, 684 S.E.2d 786, 790 (Va. 2009).

143. *Burns*, 727 S.E.2d at 643 (quoting *Kellermann*, 684 S.E.2d at 790) (internal quotation marks omitted).

144. *Id.* (quoting *Kellermann*, 684 S.E.2d at 790) (internal quotation marks omitted).

145. *Id.* See VA. CODE ANN. § 22.1-254 (West 2014).

146. *Burns*, 727 S.E.2d at 643.

147. *Id.* (quoting *Kellermann*, 684 S.E.2d at 790). The Virginia Supreme Court refused to answer whether or not Burns could be found liable. *Id.* at 644.

148. *Id.*

149. *Id.*

assumption of a duty arises when a person does not perform his or her duties with reasonable care and, as a result, harms a third party.<sup>150</sup>

In addressing whether liability exists to that third party, the court referred to the Restatement (Second) of Torts § 324A.<sup>151</sup> This provision states that an undertaker will be held liable to a third party when he should have recognized that it was necessary for the safety and protection of the third person “to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or . . . (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.”<sup>152</sup>

### III. BALANCING INTERESTS: SAFE SCHOOLS VERSUS PROTECTED OFFICIALS

#### A. *What the Burns Decision Says About the Virginia Supreme Court*

Through its refusal to acknowledge a special relationship between a principal and a student in *Burns*,<sup>153</sup> the Supreme Court of Virginia chose to protect officials rather than students. The court reached this decision by balancing Burns’ ability to foresee that harm would occur,<sup>154</sup> his ability to prevent the fight,<sup>155</sup> the lack of both evidence and case law to support the establishment of a special relationship between a principal and a student, and the impact a principal-student special relationship would have on public officials.<sup>156</sup>

##### 1. *Foreseeability*

The foreseeability of a negligent action rests largely on the duty assumed and the level of risk to the third party.<sup>157</sup> In its discussion, the court emphasized that

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150. *Id.* at 643–44.

151. *Id.* at 644.

152. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

153. *Burns*, 727 S.E.2d at 643 (holding that there are potentially detrimental public policy implications that could stem from holding public officials liable for any and all actions).

154. *Id.* at 642 (quoting *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992)).

155. *Id.* (pointing out the lack of information Burns had in regard to the fight).

156. *Id.* at 642–43.

157. RESTATEMENT (SECOND) OF TORTS § 302B (“An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.”). The explanatory comments in the applicable Restatement section provide:

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

Burns' knowledge about the potential fight was insufficient to establish foreseeability.<sup>158</sup> However, in California, the *M. W.* court satisfied the foreseeability analysis in regard to student harm based solely on the fact that the school district should have known that, without supervision, a student with an intellectual disability would be at risk for assault in the early morning.<sup>159</sup> Therefore, the information that Burns had regarding the potential fight—Gagnon's involvement and that the fight would occur that day—should have been sufficient to establish foreseeability.<sup>160</sup>

Virginia law, according to *Burns*, suggests that a defendant must know all of the parties involved in a potential fight, along with its specific time and place in order to declare that he or she knew or should have known that the plaintiff was in danger of harm.<sup>161</sup> This policy results in leniency towards the school officials, and drastically reduces their responsibility for student safety, simply because the officials do not have all the facts.

## 2. Ability to Prevent the Fight

The *Burns* court also discussed the issue of Burns' absence from the fight and his inability to prevent it.<sup>162</sup> The court reasoned that "Burns was not in a position to step in and stop the fight,"<sup>163</sup> without considering the fact that Burns could have stepped in *before* it even occurred.<sup>164</sup> In fact, Burns admitted that Diaz's

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A. Where, by contract or otherwise, the actor has undertaken a duty to protect the other against such misconduct. Normally such a duty arises out of a contract between the parties, in which such protection is an express or an implied term of the agreement.

*Id.* at cmt. e(A).

158. *Burns*, 727 S.E.2d at 642.

159. *M. W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 520 (Cal. Ct. App. 2003).

160. See Kimberly Miller, Note, *Arkansas Civil Rights Act—School Districts' Liability for Peer Abuse: Arkansas Supreme Court Holds School Districts Have No Duty to Protect Students from Each Other*. *Rudd v. Pulaski County Special School District*, 341 Ark. 794, 20 S.W.3d 310 (2000), 23 U. ARK. LITTLE ROCK L. REV. 977, 985–87 (2001). Not all states allow a tort suit to be brought against a school district. *Id.* at 984. (pointing out that some states grant absolute immunity to school districts). Those that do allow tort claims must show there was an affirmative duty of protection owed to the student based on the school's reasonable foreseeability that a person's "negligent act might injure the particular plaintiff." *Id.* at 986. The Supreme Court of Washington applied this idea, holding that a school district could have reasonably foreseen that an unlocked room in the school gym could be used to "engage in sexual misconduct." *Id.* at 986 (citing *Meleod v. Grant Cnty. Sch. Dist. No. 128*, 255 P.2d 360, 363–65 (Wash. 1953) (en banc) (discussing whether a rape was within a field of danger that a school district could have reasonably foreseen)).

161. See *Burns*, 727 S.E.2d at 642.

162. *Id.* (distinguishing Burns from the sheriff in *Burdette v. Marks*).

163. *Id.*

164. *Id.* at 640. A deputy assigned to the high school testified in regard to the fight that Burns admitted that he had "screwed up." *Id.* (internal quotation marks omitted) Further, Gagnon's parents testified that Burns had apologized to them for "dropp[ing] the ball." *Id.* (internal quotation marks omitted).

report of the fight presented a pressing matter and that “he could have located Gagnon that morning . . . or asked one of the school’s security guards to remove Gagnon from class, and could have had Gagnon brought to the office.”<sup>165</sup> However, rather than taking any of these actions, “Burns said that he had other priorities to attend to that morning.”<sup>166</sup>

Despite Burns’ absence from the fight, the court could have found that a fight, especially when a student reports its likely occurrence, is not always a “random, spontaneous act[.]”<sup>167</sup> For example, courts in Arizona<sup>168</sup>, Maryland<sup>169</sup>, and California<sup>170</sup> have all recognized a need for schools to protect their students “when a school is aware of the likelihood of student injury.”<sup>171</sup> Courts that recognize a duty to protect often analyze “the degree of certainty that injury will occur, the specificity of notice to the school of the probable injury, the prior occurrence of similar events, and the impact that action by the school would have had on the likelihood of injury.”<sup>172</sup> The court in *Burns* could have applied this analysis, which other states utilize, to examine a school’s duty to protect. Under this analysis, Burns likely had breached this duty because: (1) injury was likely to occur, (2) Burns was specifically informed of the name of a student to be involved and the day it would occur, and (3) Burns’ failure to act increased the likelihood that the fight would occur and a student would be injured.<sup>173</sup>

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165. *Id.* (referencing the school’s computer system that could have been used to find Gagnon’s classroom schedule).

166. *Id.*

167. See Melissa L. Gilbert, Comment, “Time-Out” for Student Threats?: Imposing a Duty to Protect on School Officials, 49 UCLA L. REV. 917, 922–23 (2002) (arguing that schools should not be held responsible for random acts by students due to the lack of foreseeability).

168. See *Jesik v. Maricopa Cnty. Cmty. Coll. Dist.*, 611 P.2d 547, 551 (Ariz. 1980) (en banc) (holding that where school personnel “had specific and repeated notice” of potential harm and the person involved, there was a “specific duty to exercise reasonable care to protect” the student).

169. See *Eisel v. Bd. of Educ. of Montgomery Cnty.*, 597 A.2d 447, 452–54 (Md. 1991) (holding that the decedent’s suicide was foreseeable because the defendant-student counselors “had direct evidence of [the student’s] intent to commit suicide”).

170. See *Leger v. Stockton Unified Sch. Dist.*, 249 Cal. Rptr. 688, 694 (Cal. Ct. App. 1988) (“[S]chool authorities who know of threats of violence that they believe are well-founded may not refrain from taking reasonable preventive measures simply because violence has yet to occur.”).

171. See Gilbert, *supra* note 167, at 923.

172. *Id.* (footnotes omitted).

173. *Burns v. Gagnon*, 727 S.E. 2d 634, 639–40, 642 (Va. 2012) (listing the facts that Burns knew about the pending fight). The court did not discuss any of the facts relating to whether Gagnon had been in fights previously or if student fights were common at the school. Thus, prior disciplinary infractions did not factor into the court’s analysis. *But see* *Small v. McKennan Hosp.*, 403 N.W.2d 410, 413 (S.D. 1987) (refusing to take into account prior issues with a hospital security ramp when determining the hospital’s accountability for the kidnapping and murder of an employee because “strict adherence to the ‘prior similar acts’ rule [was] unduly restrictive and place[d] too great a burden on the plaintiff”).

### 3. *The History of Special Relationships*

Admittedly, the history of special relationships between principals and students is not as “deep-rooted” as the innkeeper and guest special relationship.<sup>174</sup> Nonetheless, other jurisdictions have not shied away from upholding its existence.<sup>175</sup> The Virginia court’s easy dismissal of a special relationship based on the lack of a “deep-rooted” history highlights Virginia’s hostility towards recognizing new special relationships, even in the face of obvious harm to the safety of children in schools.<sup>176</sup>

Had the Supreme Court of Virginia been able to apply the Restatement (Third) of Torts, rather than the Second, it would have found that section 40 specifically recognizes the special relationship between a school and its students.<sup>177</sup> Unfortunately, the relevant section of the Restatement (Third) was not yet published at the time of the *Burns* case.<sup>178</sup> The question now becomes: would the Supreme Court of Virginia have decided differently if the Third Restatement’s information had been available?

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174. *Burns*, 727 S.E.2d at 643. See also *Taboada v. Daly Seven, Inc.*, 626 S.E.2d 428, 432 (Va. 2006).

175. See *Marquay v. Eno*, 662 A.2d 272, 279 (N.H. 1995) (citing *Chavez v. Tolleson Elementary Sch. Dist.*, 595 P.2d 1017, 1020 (Ariz. Ct. App. 1979) (noting that the duty of ordinary care between students and teachers was established by statute); *Hoyem v. Manhattan Beach City Sch. Dist.*, 585 P.2d 851, 853 (Cal. 1978) (declaring the duty of care between teachers and students as a “uniform standard”); *District of Columbia v. Doe*, 524 A.2d 30, 32 (D.C.1987); *Pratt v. Robinson*, 349 N.E.2d 849, 852 (N.Y. 1976) (comparing the relationship between students and teacher, only when teachers have control over the students, to the innkeeper-guest relationship); *Fazzolari v. Portland Sch. Dist. No. 1J*, 734 P.2d 1326, 1337 (en banc) (Or. 1987) (pointing to the uniqueness of an educator’s role to find a special relationship requiring a heightened duty of care); *Wagenblast v. Odessa Sch. Dist. No. 105-157-166J*, 758 P.2d 968, 973 (Wash. 1988) (en banc) (recognizing a duty of ordinary care between coaches and student-athletes based on the supervisory role taken on by the coach); *McLeod v. Grant Cnty. Sch. Dist. No. 128*, 255 P.2d 360, 362 (Wash. 1953) (en banc) (finding the basis for the duty of care a teacher owes a student in the statutory requirement for children to attend school)).

176. *Burns*, 727 S.E.2d at 643.

177. RESTATEMENT (THIRD) OF TORTS §40(b)(5) (2012) (stipulating that “a duty of reasonable care with regard to risks that arise within the scope of the relationship” exist between “a school [and] its students”); Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. MARSHALL L. REV. 319, 325 (2011) (naming the new special relationship listed in the Restatement).

178. See Press Release, The American Law Institute, New Restatement on the Law of Torts Published by The American Law Institute (Nov. 28, 2012), available at [http://www.ali.org/index.cfm?fuseaction=news.prelease\\_11282012](http://www.ali.org/index.cfm?fuseaction=news.prelease_11282012). (declaring the publication date of Third Restatement of Torts as November 28, 2012). *Burns* was decided in April 2012. *Burns*, 727 S.E.2d at 634.

The Supreme Court of Virginia allowed its adherence to old law to dictate its decision when it denied that Burns had a special relationship with Gagnon.<sup>179</sup> Although the court looked into many factors, it failed to adequately consider one of the most important ones: school safety.<sup>180</sup>

#### 4. Society's Best Interest

Lastly, the court in *Burns* used the public policy argument against special relationships, holding that “it [was] not in society’s best interest to subject public officials to potential liability for every action undertaken.”<sup>181</sup> However, the California court pointed out in *M. W.* that a special relationship puts only a “minimal burden on school districts to ensure adequate supervision for any students” at school.<sup>182</sup> The Virginia court, concerned with protecting officials, failed to consider the appropriate quality of supervision that students deserve and the best interest of the child.<sup>183</sup>

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179. *Burns*, 727 S.E.2d at 643 (noting Virginia’s long-standing reluctance to recognize special relationships between students and school districts or officials). RESTATEMENT (THIRD) OF TORTS §40(b)(5) (2012). Comment I provides that:

Despite the Second Restatement’s limited treatment of affirmative duties of schools, such a duty has enjoyed substantial acceptance among courts since the Second Restatement’s publication. As with the other duties imposed by this Section, it is only applicable to risks that occur while the student is at school or otherwise engaged in school activities.

*Id.* at cmt. 1.

180. *Burns*, 727 S.E.2d at 642–43 (addressing the school’s overall safety only for purposes of comparing to the innkeeper-guest relationship). The Virginia Supreme Court still stubbornly refuses to hold schools accountable for third-party action. For example, on October 31, 2013, the court held that the Commonwealth did not have a duty to protect the students on the Virginia Tech campus from the “third party criminal acts” that resulted in the mass shooting on campus on April 16, 2007. *Commonwealth v. Peterson*, 749 S.E.2d 307, 311 (Va. 2013). The court reasoned that the limited information provided to the Commonwealth (the shooter’s unknown identity, the beliefs that the shooter had left campus, and that the first shooting was an isolated incident) could not have lead it to reasonably foresee that the students in a particular hall would be victims of criminal harm. *Id.* at 313. In its opinion, the court evaded the question of whether a special relationship existed by “[a]ssuming *without deciding* that a special relationship existed.” *Id.* (emphasis added). Even so, an assumed special relationship does not sufficiently establish liability without the foreseeability element. *Id.*

181. *Burns*, 727 S.E.2d at 643 (Va. 2012) (quoting *Burdette v. Marks*, 421 S.E.2d 419, 421 (Va. 1992)) (internal quotation marks omitted). Virginia has referred to “the best interests of society” as “the preservation of home and family, the foundation of all society.” *Offield v. Davis*, 40 S.E. 910, 913 (Va. 1902).

182. *M. W. v. Panama Buena Vista Union Sch. Dist.*, 110 Cal. App. 4th 508, 521 (Cal. Ct. App. 2003).

183. Although the “best interest of the child” is not an easily defined term, one scholar notes that in family law, “[t]hese interests may be different from those of the parent or the state.” Bridget A. Blinn, *Focusing on Children: Providing Counsel to Children in Expedited Proceedings to Terminate Parental Rights*, 61 WASH. & LEE L. REV. 789, 826 (2004). This scholar further states that when parents are accused of abuse, one of the children’s interests includes “freedom from severe physical abuse or impending death.” *Id.* Given that schools in Virginia have been said to

Requiring a school official to act on reports of suspected acts of violence, and therefore requiring the principal—or teacher, counselor, or other school official—to “protect students from actual harm” creates a safer environment for students.<sup>184</sup> This duty does not require the official to expend all possible avenues to prevent the violence, but merely requires *some* action.<sup>185</sup> A quick call to security, for example, could fulfill this duty. This requirement would likely lead to an environment in which students may learn without the fear of violence.<sup>186</sup>

*B. Virginia’s Questionable Policy: Choosing to Protect Officials Over Students*

The role of the principal and the vice principal, in the Virginia school system is to “provide instructional leadership[,] . . . be responsible for the administration of” the school, and to “supervise the operation and management of the school or schools and property to which he has been assigned.”<sup>187</sup> As vice principal, it was also Burns’ responsibility to receive reports concerning disciplinary offenses, a function placing him in a supervisory position.<sup>188</sup> This supervisory position, which would establish a special relationship in California and New Hampshire, is addressed under § 314A(4) of the Restatement (Second) of Torts.<sup>189</sup> According to the Restatement, a supervisory position is established when “[o]ne who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection.”<sup>190</sup>

The Supreme Court of Virginia’s decision in *Burns* addresses the burden on public officials, but it does not take into account the needs of students and teachers.<sup>191</sup> Had the court balanced the potential burden on public officials with

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assume the role of parents, this interest may be imputed to school systems while students are under their care. See *Marquay v. Eno*, 662 A.2d 272, 279 (N.H. 1995) (protecting a student’s interest to safe schools and finding that “the duty falls upon those school employees . . . who thus have stepped into the role of parental proxy”).

184. Alison Bethel, Note/Comment, *Keeping Schools Safe: Why Schools Should Have an Affirmative Duty to Protect Students from Harm by Other Students*, 2 PIERCE L. REV. 183, 185 (2004).

185. *Id.*

186. See *id.* (citing JILL F. DEVOE ET AL., INDICATORS OF SCHOOL CRIME AND SAFETY: 2003 36 (2003), available at <http://nces.ed.gov/pubs2004/2004004.pdf>).

187. VA. CODE ANN. § 22.1-293(B) (1950). The school board sets a principal’s duties, with supervision by the division superintendent. *Id.*

188. *Burns v. Gagnon*, 727 S.E.2d 634, 639 (Va. 2012).

189. RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965).

190. *Id.*

191. *Burns*, 727 S.E.2d at 634 (addressing the case law and comparable relationships that constitute special relationships without reaching the needs of students in particular).

the safety of the school, the court may have been more willing to accept a special relationship for a vice principal and his students.<sup>192</sup>

Violence in schools is a serious matter for both parents and society as a whole. While the incident in *Burns* involved two students, there are other acts of violence against teachers or administrators.<sup>193</sup> Where should the line be drawn regarding what deserves attention and what does not? If a threat to school safety must be looked into, should officials then be allowed to set aside a threat of a potential fight between students because there are other matters they must attend to first? However, an official must prioritize student safety on school grounds with his or her other responsibilities because an official is rarely concerned with school safety alone.

The problem that may emerge from the Virginia Supreme Court's decision in *Burns* is that school officials would not feel required to act.<sup>194</sup> Perhaps the leniency that has been afforded to students has allowed them to believe that violent behavior is inevitable; or maybe school officials are so concerned with a school's good reputation that they let small acts of violence fly under the radar.<sup>195</sup> Whatever the reason, it is a matter that needs to be dealt with appropriately.<sup>196</sup> A school official's job dictates that he or she watch over students and enforce the rules; students cannot be expected to discipline themselves.

Virginia's decision, however, grants officials a free pass to ignore the smaller forms of violence. Admitting that a vice principal slacked in his duty and

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192. See Bethel, *supra* note 184, at 201 (2004) (pointing out the duty that school officials should be held accountable if he or she is "aware or should reasonably be aware[] that students are harming other students").

193. See e.g., Carolyn Thompson, *Violence Against Teachers Often Ignored, Task Force Says*, THE CHRISTIAN SCI. MONITOR (Nov. 18, 2013), <http://www.csmonitor.com/The-Culture/Family/2013/1118/Violence-against-teachers-often-ignored-task-force-says> (finding that almost half of teachers experience physical violence from students and recounting instances of violence that led to teachers needing emergency care and years of therapy).

194. See *Morrow v. Balaski*, 719 F.3d 160, 185 (3rd Cir. 2013) (Ambro, J., concurring in part and dissenting in part) (agreeing with the dissenting judge's "concern that failing to hold a school accountable for violence done to students creates an incentive for school administrators to pursue inaction when they are uniquely situated to prevent harm to their students").

195. See Ben Axelson, *Your Comments on School Violence Forum: 'The Powers Can No Longer Hide Their Heads in the Sand'*, SYRACUSE.COM (Feb. 15, 2014, 4:40 PM), [http://www.syracuse.com/news/index.ssf/2014/02/your\\_comments\\_on\\_school\\_violence\\_forum\\_the\\_powers\\_can\\_no\\_longer\\_hide\\_their\\_heads.html](http://www.syracuse.com/news/index.ssf/2014/02/your_comments_on_school_violence_forum_the_powers_can_no_longer_hide_their_heads.html) (quoting an anonymous teacher stating that officials are reluctant to address violence because they do not want to have too many documented incidents of violent student behavior).

196. Educating the nation's youth is an important task that cannot be accomplished without safe schools. See Andy McNeil, *Officials Address Safety Concerns of Camden Students*, COURIER-POST (Feb. 28, 2014, 12:18 AM), <http://www.courierpostonline.com/story/news/2014/02/28/Officials-address-safety-concerns-of-Camden-students/5876961> (noting that many students do not feel safe at school and are therefore unable to focus in class).

allowed a student to be severely injured would not have impacted the current operation of many schools. It is an understandable concern that greater liability for officials will be a burden;<sup>197</sup> concerns other than teenage squabbles may surely take precedence at times. However, if officials are not held to a duty of care sufficient to prompt them to act when potential violence is reported, violence in schools will only grow worse.

#### IV. CONCLUSION

School safety should be a top priority for parents, school officials, and society. It is not unreasonable to expect school officials to maintain a certain level of legal protection from negligence claims in exchange for healthy and safe students. Virginia has failed to do this and, instead, has put students at risk of negligent supervision. The law in other states clearly allow for the existence of a special relationship between schools and students. How severe will an act of violence need to be for Virginia to join those states?

Protection of students is becoming more important as peer-on-peer bullying becomes an increasing problem. If leniency in punishment and a lack of deterrence is allowed to continue, the learning environment, and therefore, the students, will suffer. This is a risk Virginia failed to assess; a risk that may become a reality if Virginia does not soon change its mind. Choosing to protect officials and denying the special relationship that exists between schools and their students will not grant Virginia students the level of safety or education they deserve.<sup>198</sup>

Adequate protection by officials is only the starting point for safer schools. The parents of students will also have to play a role in assuring that negative consequences of violent behavior are enforced in the home as well.<sup>199</sup> While a state cannot force a parent to raise their child in a certain manner, it can certainly impose a duty on school officials to act in a manner that is in the best interest of the child. Thus, the state must step up and make the first move towards safety. With a special relationship established between schools and students, violence can be stopped before it occurs and the focus can be turned back to educating students, not policing them.

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197. See Paul Riede, *Syracuse Teachers Gather to Speak Out on School Violence, Disruptions*, SYRACUSE.COM (Feb. 14, 2014, 9:19 AM), [http://www.syracuse.com/news/index.ssf/2014/02/syracuse\\_teachers\\_gather\\_to\\_speak\\_out\\_on\\_school\\_violence\\_disruptions.html](http://www.syracuse.com/news/index.ssf/2014/02/syracuse_teachers_gather_to_speak_out_on_school_violence_disruptions.html) (noting the concern that hesitation to stop a fight in progress can occur because teachers do not want to be punished for being too forceful with students).

198. See *supra* notes 181–86 and accompanying text (establishing that a heightened level of care on officials would not be as burdensome as the *Burns* court believed and would increase the safety provided to students).

199. See NAT'L ASS'N OF SCH. PSYCHOLOGISTS, *FAIR AND EFFECTIVE DISCIPLINE FOR ALL STUDENTS* (2002), available at <http://www.nasponline.org/communications/spawareness/effdiscipfs.pdf> (declaring that research shows the most successful school disciplinary methods are those that can also be implemented by families).