GEORGE MASON AMERICAN INN OF COURT

SOVEREIGN IMMUNITY IN VIRGINIA: HOW TO SLAY THE GIANT

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I. Introduction

Sovereign immunity in the Commonwealth of Virginia is a legal doctrine that arose out of English crown immunity where the royal sovereign was historically immune from civil suit or criminal prosecution. This concept came down from roman times. Sovereign immunity arose from the "divine right of kings" and was based on the maxim "Rex non potest peccare-the king can do no wrong." The immunity not only protected the sovereign but it extended to agents of the king such as ministers and judges. The Commonwealth of Virginia inherited the doctrine through its adoption of the common law of England.

The principle of absolute immunity has mostly been discarded in modern times. The doctrine has evolved and has been eroded by statutes and court decisions. In the Commonwealth of Virginia, it primarily applies to tort actions. It does not apply to contract claims. See *Bell Atlantic-Virginia v. Arlington County*, 254 Va. 60, 62 (1997). However, numerous exceptions have been established and myriad conditions imposed. Despite this, the Virginia Supreme Court has as recently as 2017 affirmed that "the doctrine of sovereign immunity is 'alive and well' in the Commonwealth." *AGCS Marine Ins. Co. v. Arlington Cty.*, 293 Va. 469 at 484 (2017)(citing *Messina v. Burden*, 228 Va. 301, 307 (1984)). The doctrine has been described as more of a "rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." *Id*. Public service might be obstructed and public safety endangered if the government could be sued at the whim of citizens, and the means for the proper administration of the government controlled. The doctrine serves many purposes: it protects public funds, promotes the smooth operation of government, eliminates inconvenience and danger from officials being afraid to act, eliminates fear of public employment, and prevents improper influence over governmental affairs through the threat or use of vexatious litigation. *Id*.

This presentation is concerned only with tort claims against government actors. Litigators must be aware of the application of the doctrine of sovereign immunity as it may eliminate the existence of a remedy to a client wronged by tortious governmental action. However, because of the numerous exceptions, it may be possible to "slay the giant." There are numerous landmines along the way, including strict notice requirements that may bar the claim. Application of the doctrine is complicated and confusing. In addition to statutory waivers of immunity, there are numerous cases discussing the application of sovereign immunity and establishing circumstances were it does not apply. Some of those cases would seem to be inconsistent. As one judge put it, "the Supreme Court of Virginia has sought to achieve, under the sovereign immunity rubric, a synthesis of common law immunity principles that will be useful for all the 'constantly shifting facts and circumstances' that come before the courts of the Commonwealth." *Burnham v. West*, 681 F. Supp. 1169, 1171 (1988).

In determining whether sovereign immunity applies to a particular case, a litigator must first determine if the actor was an agent of a governmental entity and if so, which one. Then it must be determined if that governmental entity and/or its employee(s) are entitled to immunity. The litigator must then determine if exceptions exist and if the actions fall within one or more of those exceptions. All this must be considered quickly for the litigator must then determine if any required notice has been or can be timely given. The litigator must then provide the necessary notice to the proper person in the prescribed time.

II. <u>Who is entitled to Immunity?</u>

A. The Commonwealth

The Commonwealth and its agencies are entitled to absolute immunity unless that immunity is expressly waived. The Virginia Tort Claims Act (VTCA) provides limited and conditional waivers to the immunity of the Commonwealth. Va. Code § 8.01-195.1, et seq. The VTCA also contains procedures for making claims and time limitations for giving notice of claims. Agencies of the state include departments and divisions, mental health institutions, hospitals, state universities, park authorities, etc.

B. Counties

Counties were created for the administration of state policies, only have the power delegated by the Commonwealth, and are only subject to liability imposed by law. Counties are more than just political subdivisions of the Commonwealth. As governmental agencies, counties enjoy the same immunity as the Commonwealth and are not liable for tortious injuries caused by negligence on the part of its officers, servants and employees. See *Mann v. County Bd. of Arlington County*, 199 Va. 169 (1957), and *Seabolt v. County of Albemarle*, 283 Va. 717 (2012). The VTCA expressly excludes counties from the limited waivers of immunity granted by the Act. Va. Code § 8.01-195.3.

C. Cities and Towns

A municipality, incorporated community, or municipal corporation refers to a city or a town. Va. Code § 15.2-102. Similar to counties, the VTCA expressly excludes cities and towns from the limited waivers of immunity granted by the Act. Va. Code § 8.01-195.3. However, cities and towns are not entitled to the same immunity as the Commonwealth or a county. This is ostensibly because cities and towns are granted proprietary in addition to governmental powers. Compare and contrast Va. Code § 15.2-1100, et seq. (powers granted to Cities and Towns) with § 15.2-1200, et seq. (powers granted to counties). While they are political subdivisions, they are not considered as agencies of the Commonwealth unless they are carrying out "governmental" functions. Cities and towns performing governmental functions are entitled to the same immunity as counties. If they are performing proprietary functions, they are not entitled to immunity.

D. Employees

Governments can only act through people. Therefore sovereign immunity may be extended to government employees. Employees "at the highest levels of the three branches of government. Governors, judges, members of state and local legislative bodies, and other high government officials have generally been accorded absolute immunity. However, general

agreement breaks down the farther one moves away from the highest levels of government." *Messina v. Burden*, 228 Va. 301, 309 (1984). Certain "tests" have been established to determine whether a particular employee is entitled to immunity as set forth below.

III. Exceptions

A. The Commonwealth

The Virginia Tort Claims Act, Va. Code § 8.01-195.1, et seq., is the only exception to the absolute immunity of the Commonwealth against tort claims. It waives immunity up to $100,000.00 in damages or to the extent of applicable insurance coverage, if higher. § 8.01-195.3. It bars pre-judgment interest and punitive damages. It includes Transportation Districts. It does not waive any inherent immunity of counties, cities, school boards, state agencies, and numerous other actors. It limits jurisdiction to state courts. § 8.01-195.4. It also requires a notice of claim to be filed and contains its own statute of limitations.

B. School Boards

Immunity for school boards is waived to the extent of liability insurance for vehicles (school buses) owned or operated by the board, and used to transport students up to the limits of applicable insurance. Va. Code § 22.1-190, et seq. § 22.1-194 states that the "school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of or, in cases set forth in subsection D of § 22.1-190, up to but not beyond the amounts of insurance required under subsection A of § 22.1-190 and the defense of governmental immunity shall not be a bar to action or recovery." Va. Code § 22.1-190(D) states that insurance required by paragraph 190(A) is not required if the School Board has a certification of financial responsibility equal to the insurance coverage required under paragraph (A). The insurance required by subsection A is a minimum of $50,000.00 liability coverage per person for bodily injuries, among other terms. A school board with the certification of financial responsibility therefore may not be liable for more than $50,000.00 for personal injuries per

person. Where the school board did not obtain the certification of self-insurance, the $50,000.00 cap on the waiver does not apply. See *Frederick County Sch. Bd. v. Hannah*, 267 Va. 231 (2004). The driver of the bus is not included in the abrogation of immunity under this statute. However, if the bus was transporting students at the time of the accident, the driver is entitled to sovereign immunity. See *Roach v. Botetourt County Sch. Bd.*, 757 F. Supp. 2d 591 (2010).

C. Employees

"[I]n order to fulfill those purposes the protection afforded by the doctrine [of sovereign immunity] cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed." *Messina v. Burden*, 228 Va. 301 (1984).

1. The Commonwealth and Counties

The *James* Test. Whether an employee of an immune government body enjoys immunity depends on a number of factors. A four pronged inquiry was established in James v. Jane

i. The nature of the function performed by the employee;
ii. The extent of the state's interest and involvement in the function;
iii. The degree of control and direction exercised by the state over the employee; and
iv. Whether the act complained of involved the use of judgment and discretion.

***See Messina v. Burden*, 228 Va. 301 (1984) (articulating the test set forth in *James v. Jane*, 221 Va. 43 (1980); *see also Lentz v. Morris*, 236 Va. 78 (1988) and *Gargiulo v. Ohar*, 239 Va. 209 (1990).**

The list of employees given immunity includes the following:

i. School employees
ii. School board supervisors

iii. **Teachers**
iv. **School superintendents, principals, and coordinators of school grounds**
v. **Employees engaged in engineering and operations**
vi. **County attorneys**
vii. **Sheriffs**
viii. **Police officers**
ix. **Correctional employees**
x. **Medical employees such as physicians, residents, interns, and nurses**
Xi. **Governmental employee who is in an automobile accident**

2. Cities and Towns

Governmental v. Proprietary Function –Test to be applied when a city, town, or subdivision of the municipality or an employee thereof is being sued in tort. Sometimes referred to as the "*Hoggard* test" based on the case of *Hoggard v. City of Richmond*, 172 Va. 145 (1939). "When governmental and proprietary functions coincide, the governmental function is the overriding factor and the doctrine of sovereign immunity will shield the locality from liability." *City of Virginia Beach v. Carmichael Dev. Co.*, 259 Va. 493 (2000).

a. Governmental Function = sovereign immunity applies. Governmental functions are "powers and duties performed exclusively for the public welfare" and "a function is governmental if it entails the exercise of an entity's political, discretionary, or legislative authority." *City of Chesapeake v. Cunningham*, 268 Va. 624 (2004).

Examples of governmental functions:

- **Plan or design of sewer system or other such municipal service. *City of Chesapeake v. Cunningham***
- **Plan and design of a sidewalk. *Maddox v. Commonwealth*, 267 Va. 657 (2004)**

- **Provision of emergency snow removal services. *Bialk v. City of Hampton*, 242 Va. 56 (1991).**
- **Planning, designing, laying out of streets and roads. *Taylor v. City of Charlottesville*, 240 Va. 367 (1990).**
- **Provision of ambulance services. *Edwards v. City of Portsmouth*, 237 Va. 167 (1989).**
- **Regulation of traffic, such as through traffic signals. *Freeman v. City of Norfolk*, 221 Va. 57 (1980); *Transportation Inc. v. City of Falls Church*, 219 Va. 1004 (1979).**
- **Provision of emergency cleanup services. *Fenon v. City of Norfolk*, 203 Va. 551 (1962)**
- **Provision of garbage collection services. *Ashbury v. City of Norfolk*, 152 Va. 278 (1929).**
- **Maintaining a police force. *Hoggard v. City of Richmond*, 172 Va. 145 (1939); *Niese v. City of Alexandria*, 264 Va. 230 (2002) (sovereign immunity of municipality applies even for intentional tort committed by an employee in performance of a governmental function).**
- **Provision of nursing services. *Carter v. Chesterfield County Health Comm'n*, 259 Va. 588 (2000)**
- **By statute, Va. Code § 32.1-111.4:3, sovereign immunity applies to a government contractor, such as volunteer fire and rescue companies, who contracts with a county, city, or town to provide for emergency medical services. *Davis v. Bryson*, 2018 U.S. Dist. LEXIS 69571 (W.D. Va. Apr. 25, 2018); *National R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402 (1991) (operation of a fire truck en route to the scene of a fire is incident to fighting the fire entitling both the volunteer company and the driver to sovereign immunity).**

b. Proprietary Function = sovereign immunity does not apply. "Proprietary functions are performed primarily for the benefit of the municipality" and

"if the function is a ministerial act and involves no discretion, it is proprietary." *City of Chesapeake v. Cunningham*, 268 Va. 624 (2004).

Examples of proprietary functions:

- **Routine maintenance or operation of a municipal service, such as sewer system. *City of Chesapeake v. Cunningham*; *Chalkley v. City of Richmond*, 88 Va. 402 (1891).**
- **Maintenance of sidewalks. *City of Virginia Beach v. Flippen*, 251 Va. 358 (1996).**
- **Routine maintenance of existing streets. *City of Richmond v. Branch*, 205 Va. 424 (1964).**
- **Faulty maintenance or street construction. *City of Norfolk v. Hall*, 175 Va. 545 (1940).**

D. Gross Negligence

Sovereign immunity usually applies only to simple negligence. Immunity generally does not apply to claims of gross negligence. *Colby v. Boyden*, 241 Va. 125, 128 (1991). In the case of *Elliott v. Carter*, 292 Va. 618 (2016), a case involving charitable immunity, the Court cited prior precedent defining the concept as follows:

Gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 487 (2004).

It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important

evidence on the question of gross negligence. *Chapman v. City of Virginia Beach*, 252 Va. 186, 190 (1996) (citations and internal quotation marks omitted).

Gross negligence "requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." *Cowan*, 268 Va. at 487; see also *Thomas v. Snow*, 162 Va. 654, 661 (1934) ("Ordinary and gross negligence differ in degree of inattention"; while "[g]ross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence," "it is something less than . . . willful, wanton, and reckless conduct.").

Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule." *Frazier v. City of Norfolk*, 234 Va. 388, 393, (1987).

It may be difficult to conceive of a case where gross negligence could be established in light of *Elliot*, but see *Chapman v. City of Virginia Beach*, 252, Va. 186 (1996).

E. Willful and Wanton Negligence, Intentional Torts, Criminal Activity

Just as gross negligence removes employees from the protection of sovereign immunity, so do higher levels of culpable behavior. See *Elder v. Holland*, 208 Va. 15, 19 (1967).

F. Scope of Employment

An employee is not entitled to immunity if they are not acting within the scope of their employment. "[T]he immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment,

but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by a party who has suffered injury by their negligence." *Sayers v. Bullar,* 180 Va. 222, 230 (1942).

IV. Notice and Limitations of Action

A. VTCA

The Act requires that any claim against the Commonwealth or its agencies or employee will be barred unless the claimant files "a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable, within one year after such cause of action accrued." The Act further prescribes who the Notice must go to, and that the claimant must prove actual receipt of the Notice. Va. Code § 8.01-195.6. Further, an action can be commenced upon denial of a claim or after six months following the filing of the claim, but no later than 18 months after filing the claim and no more than two years following the accrual of the cause of action. Va. Code § 8.01-195.7.

B. Counties, Cities and Towns

Va. Code § 15.2-209 requires that any city, town or county be provided a "written statement of the nature of the claim" within six (6) months of the date of the incident. The statement must be filed with the county, city, or town attorney or with the chief executive or mayor. Written statements *shall* include notice of the time and place of the claimed injury and may be provided by the claimant, his agent, or his counsel. The failure to adhere to the notice requirement will bar the claim unless "the attorney, chief executive, or mayor of such locality, or any insurer or entity providing coverage or indemnification of the claim, had actual knowledge of the claim, which includes the nature of the claim and the time and place at which the injury is alleged to have occurred,

within six months after such cause of action accrued." The burden is on the claimant to establish that notice was actually received.

This section does not contain any specific limitations period within which an action can or must be filed.

V. How To Slay The Giant

A. The Big Picture

The very nature of sovereign immunity is to deny a remedy to a claimant when properly applied. *Commonwealth v. Luzik*, 259 Va. 198, 208 (2000). It has been argued that the doctrine of sovereign immunity has become so eroded over time, is so complex, and is unfair that it should be done away with. However, the Supreme Court of Virginia has not only refused to do so, but has expanded its protections through its interpretations of the facts. And immunity has been statutorily expanded for certain activities such as for cities and towns in the operation of recreational facilities, Va. Code §15.2-1809, and for cities and towns and park authorities with respect to trails and water activities.

B. Procedure

1. **Identify the tortfeasor as soon as possible and the existence and identity of their employer**
2. **Determine if statutory notice of a claim is required and timely file the proper notice**
3. **Identify any statutes conferring immunity under specific circumstances**
4. **Investigate the circumstances of the tort**
5. **Determine if the tort was simple negligence or otherwise**
6. **Determine if the tort fell within the scope of employment**
7. **Apply the *James* test or the *Hoggard* Test**
8. **Review the case law**
9. **Distinguish your case, argue for an exception**

A decision tree in the Appendix may be a useful place to start the analysis.

C. Uninsured motorist coverage

In motor vehicle accident cases, where the driver is entitled to sovereign immunity, uninsured motorist coverage will apply. Va. Code § 38.2-2206(B)(v) includes in the definition of an uninsured motor vehicle one where "the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States, in which case the provisions of subsection F shall apply and the action shall continue against the insurer."

D. Strategies

1. Complaint

In any suit against a governmental entity or employee, counsel should anticipate a plea of sovereign immunity. It is therefore of extreme importance that counsel plead the case to allege facts sufficient to defeat immunity if possible.

2. Plea

If a plea of sovereign immunity is asserted, discovery can still be had pending resolution of the plea. Rule 4:1(d)(2) of the Rules of the Supreme Court of Virginia. This may allow for the discovery of facts sufficient to defeat the plea. A demand for a trial by jury of any plea should be made immediately upon scheduling any plea for an evidentiary hearing.

3. Discovery

Any and all methods of discovery should be used to obtain job descriptions, internal policies, incident reports, witness identities, and any other evidence pertinent to the application of

immunity to a particular situation. Try to establish that the act was outside the course of employment, that the action was proprietary v. governmental, and/or that the act was more than simple negligence.

APPENDIX

1. **Virginia Tort Claim Act**
2. **School Board Insurance Requirements**
3. **James v. Jane, 221 Va. 43 (1980)**
4. **Hoggard v. City of Richmond, 172 Va. 145 (1939)**
5. **Elliott v. Carter, 292 Va. 618 (2016)**
6. **Sayers v. Bullar, 180 Va. 222 (1942)**
7. **Chapman v. City of Virginia Beach, 252, Va. 186 (1996)**
8. **Frazier v. City of Norfolk, 234 Va. 388 (1987)**
9. **Cowan v. Hospice Support Care, Inc., 268 Va. 482 (2004)**
10. **City of Norfolk v. Hall, 175 Va. 545 (1940)**
11. **Frederick County Sch. Bd. v. Hannah, 267 Va. 231 (2004)**
12. **Bell Atlantic-Virginia v. Arlington County , 254 Va. 60 (1997**
13. **AGCS Marine Ins. Co. v. Arlington County, 293 Va. 469 (2017)**
14. **Messina v. Burden, 228 Va. 301 (1984)**
15. **Jason J. Ham, *Sovereign and Charitable Immunity in the Commonwealth of Virginia,* VADA Journal of Civil Litigation, Vol. X, No.4**

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Code of Virginia
Title 8.01. Civil Remedies and Procedure
Chapter 3. Actions

Article 18.1. Tort Claims Against the Commonwealth of Virginia

§ 8.01-195.1. Short title.

This article shall be known and may be cited as the "Virginia Tort Claims Act."

1981, c. 449.

§ 8.01-195.2. Definitions.

As used in this article:

"Agency" means any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth of Virginia and any transportation district created pursuant to the Transportation District Act of 1964 (§ 33.2-1900 et seq.) of Title 33.2 and Chapter 630 of the 1964 Acts of Assembly.

"Employee" means any officer, employee or agent of any agency, or any person acting on behalf of an agency in an official capacity, temporarily or permanently in the service of the Commonwealth, or any transportation district, whether with or without compensation.

"School boards" as defined in § 22.1-1 are not state agencies nor are employees of school boards state employees.

"Transportation district" shall be limited to any transportation district or districts which have entered into an agreement in which the Northern Virginia Transportation District is a party with any firm or corporation as an agent to provide passenger rail services for such district or districts while such firm or corporation is performing in accordance with such agreement.

1981, c. 449; 1986, cc. 534, 584; 1991, c. 23.

§ 8.01-195.3. Commonwealth, transportation district or locality liable for damages in certain cases.

Subject to the provisions of this article, the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982, and any transportation district shall be liable for claims for money only accruing on or after July 1, 1986, on account of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury or death. However, except to the extent that a transportation district contracts to do so pursuant to § 33.2-1919, neither the Commonwealth nor any transportation district shall be liable for interest prior to judgment or for punitive damages. The amount recoverable by any claimant shall not exceed (i) $25,000 for causes of action accruing prior to July 1, 1988, $75,000 for causes of action accruing on or after July 1, 1988, or $100,000 for causes of action accruing on or after July 1, 1993, or (ii) the maximum limits of any liability policy maintained to insure against such negligence or other tort, if such policy is in force at the time of the act or omission complained of, whichever is greater, exclusive of interest and costs.

Notwithstanding any provision hereof, the individual immunity of judges, the Attorney General, attorneys for the Commonwealth, and other public officers, their agents and employees from tort

claims for damages is hereby preserved to the extent and degree that such persons presently are immunized. Any recovery based on the following claims are hereby excluded from the provisions of this article:

1. Any claim against the Commonwealth based upon an act or omission which occurred prior to July 1, 1982.

1a. Any claim against a transportation district based upon an act or omission which occurred prior to July 1, 1986.

2. Any claim based upon an act or omission of the General Assembly or district commission of any transportation district, or any member or staff thereof acting in his official capacity, or to the legislative function of any agency subject to the provisions of this article.

3. Any claim based upon an act or omission of any court of the Commonwealth, or any member thereof acting in his official capacity, or to the judicial functions of any agency subject to the provisions of this article.

4. Any claim based upon an act or omission of an officer, agent or employee of any agency of government in the execution of a lawful order of any court.

5. Any claim arising in connection with the assessment or collection of taxes.

6. Any claim arising out of the institution or prosecution of any judicial or administrative proceeding, even if without probable cause.

7. Any claim by an inmate of a state correctional facility, as defined in § 53.1-1, unless the claimant verifies under oath, by affidavit, that he has exhausted his remedies under the adult institutional inmate grievance procedures promulgated by the Department of Corrections. The time for filing the notice of tort claim shall be tolled during the pendency of the grievance procedure.

Nothing contained herein shall operate to reduce or limit the extent to which the Commonwealth or any transportation district, agency or employee was deemed liable for negligence as of July 1, 1982, nor shall any provision of this article be applicable to any county, city or town in the Commonwealth or be so construed as to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth.

1981, c. 449; 1982, c. 397; 1986, c. 584; 1988, c. 884; 1989, c. 446; 1993, c. 481; 1998, cc. 203, 820; 2007, c. 250.

§ 8.01-195.4. Jurisdiction of claims under this article; right to jury trial; service on Commonwealth or locality.

The general district courts shall have exclusive original jurisdiction to hear, determine, and render judgment on any claim against the Commonwealth or any transportation district cognizable under this article when the amount of the claim does not exceed $4,500, exclusive of interest and any attorneys' fees. Jurisdiction shall be concurrent with the circuit courts when the amount of the claim exceeds $4,500 but does not exceed $25,000, exclusive of interest and such attorneys' fees. Jurisdiction of claims when the amount exceeds $25,000 shall be limited to the circuit courts of the Commonwealth. The parties to any such action in the circuit courts shall be entitled to a trial by jury.

In all actions against the Commonwealth commenced pursuant to this article, the Commonwealth shall be a proper party defendant, and service of process shall be made on the Attorney General. The notice of claim shall be filed pursuant to § 8.01-195.6 on the Director of the Division of Risk Management or the Attorney General. In all such actions against a transportation district, the district shall be a proper party and service of process and notices shall be made on the chairman of the commission of the transportation district.

1981, c. 449; 1984, c. 698; 1986, c. 584; 1987, cc. 567, 674; 1989, cc. 121, 337; 1991, c. 23; 1992, cc. 111, 796; 2002, c. 645;2005, c. 144;2011, cc. 14, 702.

§ 8.01-195.5. Settlement of certain cases.

The Attorney General shall have authority in accordance with § 2.2-514 to compromise and settle claims against the Commonwealth cognizable under this article.

The chairman of the commission for a transportation district against which a claim was filed pursuant to this article, or such other person as may be designated by the commission, shall have the authority to compromise, settle and discharge the claim provided (i) the proposed settlement and reasons therefor are submitted to the commission in writing and approved by its members or (ii) the settlement is made in accordance with a written policy approved by the transportation district commission for such settlements. The Director of the Division of Risk Management may adjust, compromise and settle claims against the Commonwealth cognizable under this article prior to the commencement of suit unless otherwise directed by the Attorney General.

1981, c. 449; 1986, c. 584; 1991, c. 23; 1992, c. 796.

§ 8.01-195.6. Notice of claim.

A. Every claim cognizable against the Commonwealth or a transportation district shall be forever barred unless the claimant or his agent, attorney or representative has filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable, within one year after such cause of action accrued. Failure to provide such statement shall not bar a claim against the Commonwealth or a transportation district, provided that (i) for claims against the Commonwealth, the Division of Risk Management or any insurer or entity providing coverage or indemnification of the claim or the Attorney General or (ii) for claims against a transportation district, the chairman of the commission of the transportation district, had actual knowledge of the claim, which includes the nature of the claim, the time and place at which the injury is alleged to have occurred, and the agency or agencies alleged to be liable, within one year after such cause of action accrued. However, if the claimant was under a disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply.

B. If the claim is against the Commonwealth, the statement shall be filed with the Director of the Division of Risk Management or the Attorney General, except as otherwise provided herein. If the claim is against a transportation district, the statement shall be filed with the chairman of the commission of the transportation district. If the claim is against the Commonwealth and the agency alleged to be liable is the Department of Transportation, then notice of such claim shall be filed with the Commissioner of Highways. If notice of such claim is filed with the Commissioner of Highways and is outside of any settlement authority delegated to the Department of Transportation by the Attorney General, then the Commissioner of Highways shall promptly deliver the notice of such claim to the Attorney General.

C. The notice is deemed filed when it is received in the office of the official to whom the notice is directed. The notice may be delivered by hand, by any form of United States mail service (including regular, certified, registered or overnight mail), or by commercial delivery service. If notice is to be filed with the Commissioner of Highways, it may also be delivered electronically in a manner prescribed by the Commissioner of Highways.

D. In any action contesting the filing of the notice of claim, the burden of proof shall be on the claimant to establish receipt of the notice in conformity with this section. A signed United States mail return receipt indicating the date of delivery, or any other form of signed and dated acknowledgment of delivery given by authorized personnel in the office of the official with whom the statement is filed, shall be prima facie evidence of filing of the notice under this section.

E. Claims against the Commonwealth involving medical malpractice shall be subject to the provisions of this article and to the provisions of Chapter 21.1 (§ 8.01-581.1 et seq.). However, the recovery in such a claim involving medical malpractice shall not exceed the limits imposed by § 8.01-195.3.

1981, c. 449; 1984, cc. 638, 698; 1986, c. 584; 1991, c. 23; 1992, c. 796; 2002, c. 207;2007, c. 368; 2016, cc. 760, 772.

§ 8.01-195.7. Statute of limitations.

Every claim cognizable against the Commonwealth or a transportation district under this article shall be forever barred, unless within one year after the cause of action accrues to the claimant the notice of claim required by § 8.01-195.6 is properly filed. An action may be commenced pursuant to § 8.01-195.4 (i) upon denial of the claim by the Attorney General or the Director of the Division of Risk Management or, in the case of a transportation district, by the chairman of the commission of that district or (ii) after the expiration of six months from the date of filing the notice of claim unless, within that period, the claim has been compromised and discharged pursuant to § 8.01-195.5. All claims against the Commonwealth or a transportation district under this article shall be forever barred unless such action is commenced within 18 months of the filing of the notice of claim, or within two years after the cause of action accrues.

The limitations periods prescribed by this section and § 8.01-195.6 shall be subject to the tolling provision of § 8.01-229 and the pleading provision of § 8.01-235. Additionally, claims involving medical malpractice in which the notice required by this section and § 8.01-195.6 has been given shall be subject to the provisions of § 8.01-581.9. Notwithstanding the provisions of this section, if notice of claim against the Commonwealth was filed prior to July 1, 1984, any claimant so filing shall have two years from the date such notice was filed within which to commence an action pursuant to § 8.01-195.4.

1981, c. 449; 1984, cc. 638, 698; 1985, c. 514; 1986, c. 584; 1988, cc. 778, 801; 1992, c. 796; 2016, c. 772.

§ 8.01-195.8. Release of further claims.

Notwithstanding any provision of this article, the liability for any claim or judgment cognizable under this article shall be conditioned upon the execution by the claimant of a release of all claims against the Commonwealth, its political subdivisions, agencies, and instrumentalities or against the transportation district, and against any officer or employee of the Commonwealth or the transportation district in connection with, or arising out of, the occurrence complained of.

1981, c. 449; 1986, c. 584; 1991, c. 23.

§ 8.01-195.9. Claims evaluation program.

The Division of Risk Management of the Department of the Treasury and the Attorney General shall develop cooperatively an actuarially sound program for identifying, evaluating and setting reserves for the payment of claims cognizable under this article.

1988, c. 644; 2000, cc. 618, 632.

Code of Virginia
Title 22.1. Education
Chapter 12. Pupil Transportation

Article 2. Insurance Provisions

§ 22.1-188. Definitions.

As used in this article:

1. "Vehicle" means any vehicle owned or operated by, or owned or operated by any person under contract with, a county, city, town or school board in which any school pupils or personnel are transported at public expense to or from any public school.

2. "School pupils and personnel" includes school bus patrolmen when performing duties either in or outside a vehicle as prescribed by the Board of Education.

1980, c. 559.

§ 22.1-189. Compliance with article prerequisite to receiving state school funds.

No school division in which any school pupils or personnel are transported at public expense to or from any public school in any vehicle shall receive any state school funds unless it complies with all applicable requirements of this article and submits satisfactory evidence to the Superintendent of Public Instruction of the effectuation of all requisite insurance.

Code 1950, § 22-284; 1980, c. 559.

§ 22.1-190. When insurance required and amount thereof.

A. Every vehicle shall be covered in a policy of liability and property damage insurance issued by an insurance carrier authorized to transact business in this Commonwealth, in the amounts of at least $50,000 for injury, including death, to one person; $500,000 for injury, including death, to all persons injured in any one accident; and $50,000 for damage, including destruction, to the property of any person, other than the insured. In addition, the policy of insurance shall provide coverage for loss or damage caused by an uninsured motorist in accordance with the provisions of § 38.2-2206 and in the amounts required by this section. The policy shall also provide for medical expense payment coverage in the minimum amount of $5,000 for each person injured. Taxicabs providing transportation of students under contract with a school division shall be covered by policies providing coverage of at least $50,000 for injury, including death, to one person; $200,000 for injury, including death, to all persons injured in any one accident; $10,000 for damage, including destruction, to the property of any person other than the insured; and medical expense payment coverage in the minimum amount of $1,000 for each person injured, or in such higher amounts as the contract with the school division or a local ordinance may prescribe.

B. The insurance so effected shall be subject to all laws of this Commonwealth regulating insurance.

C. This insurance shall not be required in cases when pupils are transported on a common carrier if such carrier is covered by a policy of insurance affording substantially the protection required by this article.

D. This insurance shall not be required in cases where pupils are transported in vehicles which are owned or operated by a county, city, town or school board which has qualified for and

received a certificate of self-insurance from the Commissioner of the Department of Motor Vehicles, following a certification of financial responsibility equal to that required under subsection A of this section. The Commissioner of the Department of Motor Vehicles may require posting of a bond by a locality or school board as a condition to issuance of a certificate of financial responsibility pursuant to this subsection.

Code 1950, § 22-285; 1958, c. 301; 1970, c. 681; 1976, c. 224; 1980, c. 559; 2012, c. 593.

§ 22.1-191. When Superintendent of Public Instruction to obtain insurance.

In every case in which a locality or its school board fails to obtain, or to require vehicles operated under contract with it to be covered by, the requisite insurance by the twentieth of July of any year or fails to notify the Superintendent of Public Instruction of the effectuation of requisite insurance on or before the first of August, it shall be the duty of the Superintendent of Public Instruction, on or before the first of September, to obtain insurance complying with the requirements of this article on all vehicles, as far as known to or reasonably ascertainable by him, to be used in the school division for school pupil and personnel transportation in the ensuing session and to expend for this purpose the requisite amount out of any state school funds otherwise distributable, or becoming distributable, to the school division so in default.

Code 1950, § 22-287; 1980, c. 559.

§ 22.1-192. Injury and damage covered by policy.

Every policy of insurance issued in pursuance of the provisions of this article, in addition to compliance with other requirements of this article and with the requirements of other applicable laws, shall cover:

1. Injury, including death, to school pupils and personnel, except the driver when not a pupil, riding as passengers on any of the vehicles so insured when used to transport such persons at public expense;

2. Injury, including death, to any persons not passengers on any such vehicle;

3. Damage, including destruction, to property of any person other than the insured.

Code 1950, § 22-288; 1962, c. 181; 1980, c. 559.

§ 22.1-193. Sufficiency of proof in action on policy; guest doctrine not applicable.

In case any school pupil or personnel, except the driver when not a pupil, whether riding in a vehicle or not, or any other person suffers injury, including death, or property damage, including destruction, through the ownership, maintenance, use or operation of a vehicle, it shall be sufficient, in an action for recovery upon the policy, to prove such facts and circumstances as are required to be shown in order to recover damages for death or injury to person or property caused by the negligent operation of privately owned motor vehicles in Virginia; provided that such pupils and personnel shall not be considered as guests, and § 8.01-63 shall not apply to them.

Code 1950, § 22-289; 1980, c. 559.

§ 22.1-194. Liability of locality or school board owning or operating vehicle.

In case the locality or the school board is the owner, or operator through medium of a driver, of, or otherwise is the insured under the policy upon, a vehicle involved in an accident, the locality or school board shall be subject to action up to, but not beyond, the limits of valid and collectible

insurance in force to cover the injury complained of or, in cases set forth in subsection D of § 22.1-190, up to but not beyond the amounts of insurance required under subsection A of § 22.1-190 and the defense of governmental immunity shall not be a bar to action or recovery. In case of several claims for damages arising out of a single accident involving a vehicle, the claims of pupils and school personnel, excluding driver when not a pupil, shall be first satisfied. In no event, except where approved self-insurance has been provided pursuant to subsection D of § 22.1-190, shall school funds be used to pay any claim or judgment or any person for any injury arising out of the operation of any such vehicle. The locality or school board may be sued alone or jointly with the driver, provided that in no case shall any member of a school board be liable personally in the capacity of school board member solely.

Code 1950, § 22-290; 1976, c. 224; 1980, c. 559.

§ 22.1-195. Recovery where vehicle operated under contract.

In case a vehicle involved in an accident is not owned by the county, city, town or school board but is operated under contract with the locality or school board, recovery may be had as provided for in § 22.1-193.

Code 1950, § 22-291; 1980, c. 559.

§ 22.1-196. Lapsed insurance.

If insurance is obtained but lapses while a vehicle is still being used or is proposed to be used to transport school pupils or personnel, no school funds remaining to be distributed to the school board so in default shall be distributed to it until the terms of this article in this regard have been fully complied with.

Code 1950, § 22-292; 1980, c. 559.

§ 22.1-197. Distribution of funds when Superintendent effects insurance.

When the Superintendent of Public Instruction effects insurance as required by this article, he shall nevertheless not make any distribution of state school aid funds to the school board so in default until he has been furnished with satisfactory assurances that all vehicles required by this article to be covered by insurance have been duly insured.

Code 1950, § 22-293; 1980, c. 559.

§ 22.1-198. Applicability of article not dependent upon approval of vehicles or allocability of state aid.

The provisions of this article apply to all vehicles whether or not the regulations of the Board of Education established pursuant to § 22.1-177 have been complied with and irrespective of whether or not any state aid for transporting school pupils and personnel in the particular vehicle has been, is, or will be allocable.

Code 1950, § 22-294; 1980, c. 559.

James v. Jane

Supreme Court of Virginia

June 6, 1980

Record Nos. 780413, 780450

Reporter
221 Va. 43 *; 282 S.E.2d 864 **; 1980 Va. LEXIS 214 ***

Paul S. James v. John A. Jane, M.D. and Hans O. Riddervold, M.D.; David L. Lawrence v. Michael W. Hakala, Jr., M.D.

Prior History: [***1] Appeals from judgments of the Circuit Court of Albemarle County. Hon. David F. Berry, judge presiding.

Disposition: *Reversed and remanded.* (Record No. 780413).

Reversed and remanded. (Record No. 780450).

Core Terms

patient, immunity, staff, medical school, attending physician, employees, faculty member, private patient, state employee, attending, duties, intern, residents, sovereign, salaries, patient care, bills, teach, reasonable care, involvement, services, faculty, discretionary, treating, surgery, budget

Case Summary

Procedural Posture
Plaintiff patients sought review of a decision from the Circuit Court of Albemarle County (Virginia), which sustained a plea for immunity by defendant doctors in the patients' malpractice actions.

Overview
The doctors were full-time faculty members at a State university teaching hospital. Defendants were paid yearly salaries by the hospital that were not dependent on the number of patients that each treated. The doctors had broad discretion in selecting methods by which to care for patients. The patients filed malpractice actions against the doctors. The trial court sustained the doctors' plea for immunity, holding that they were agents of the State and therefore entitled to sovereign immunity. The court reversed the trial court's decision, making a distinction between the State, whose immunity was absolute unless waived, and employees of the State, whose immunity was qualified depending on the function they performed and the manner of performance. When the doctors treated the patients, the relationship was a personal, confidential one between doctor and patient, not State and patient. The patients had the right to expect the same care and attention from the doctors that they would receive at a private hospital. Thus, the doctors, despite being employees of the State, were answerable for their own acts of simple negligence.

Outcome
The court reversed the trial court's decision sustaining the doctors' plea for immunity in the patients' malpractice actions and remanded the matter.

LexisNexis® Headnotes

Education Law > Departments of Education > State Departments of Education > Authority of Departments of Education

Education Law > Immunities From Liability > General Overview

HN1[] **State Departments of Education, Authority of Departments of Education**

The University of Virginia is controlled by the Rector and Visitors of the University of Virginia, a public corporation created for that purpose. Va. Code Ann. § 23-69.

Governments > Local Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > Sovereign Immunity

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > General Overview

HN2[] **Local Governments, Employees & Officials**

Courts make a distinction between the sovereign Commonwealth of Virginia and its employees, and local governmental agencies and their employees. The latter do not enjoy governmental immunity and are answerable for their own acts of simple negligence.

Civil Procedure > ... > Capacity of Parties > Representative Capacity > Agents

Torts > Public Entity Liability > Immunities > General Overview

Civil Procedure > Parties > Capacity of Parties > General Overview

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity Liability > Liability > General Overview

HN3[] **Representative Capacity, Agents**

A state employee may be liable for his conduct while performing work for the state if his conduct is wrongful or if his performance is so negligent as to take him outside the protection of his employment.

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN4[] **State & Territorial Governments, Employees & Officials**

A state employee may be held liable for an intentional tort.

Constitutional Law > State Sovereign Immunity > Waiver > General Overview

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Absolute Immunity

Constitutional Law > State Sovereign Immunity > General Overview

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > General Overview

HN5[] **State Sovereign Immunity, Waiver**

It is proper that a distinction be made between the state, whose immunity is absolute unless waived, and the employees and officials of the state, whose immunity is qualified, depending upon the function they perform and the manner of performance.

Torts > Negligence > Gross Negligence

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

Governments > State & Territorial
Governments > Employees & Officials

Torts > Public Entity Liability > Immunities > General Overview

Torts > Public Entity Liability > Immunities > Qualified Immunity

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN6[] **Negligence, Gross Negligence**

A state employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected by qualified immunity. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually.

Governments > State & Territorial
Governments > Employees & Officials

Torts > Malpractice & Professional Liability > Healthcare Providers

HN7[] **State & Territorial Governments, Employees & Officials**

An intern is prohibited by statute, Va. Code Ann. § 54-276.7, from rendering medical services except under the supervision of a licensed member of the hospital staff to whom he is responsible and accountable at all times.

Criminal Law & Procedure > ... > Abuse of Public Office > Neglect of Office > General Overview

Governments > State & Territorial
Governments > Claims By & Against

Governments > State & Territorial
Governments > Employees & Officials

Torts > ... > Duty > Affirmative Duty to Act > Failure to Act

Torts > Public Entity Liability > Liability > General Overview

HN8[] **Abuse of Public Office, Neglect of Office**

There is no statute which authorizes the officers or agents of the State of Virginia to commit wrongful acts. On the contrary, they are under the legal obligation and duty to confine their acts to those which they are authorized by law to perform. If they exceed their authority, or violate their duty, they act at their own risk, and the State is not responsible or liable therefor.

Headnotes/Summary

Headnotes

(1) Doctor and Patient -- Physicians Employed by University of Virginia -- Personal and Confidential Nature of Doctor-Patient Relationship -- Lack of State Control.

(2) University of Virginia -- Rector and Visitors of the University of Virginia a Public Corporation and Agency of the Commonwealth (Code § 23-69).

(3) Sovereign Immunity -- Distinction Between Immunity of Employees of Commonwealth and Employees of Local Governmental Agencies -- Argument that Physicians Employed by Rector and Visitors of University of Virginia Employees of Commonwealth Accepted for Purpose of Opinion.

(4) Sovereign Immunity -- Distinction Between Immunity of State and of Officials and Employees of State -- Function Performed and Manner of Performance Critical for Officials and Employees.

(5) Sovereign Immunity -- Governor, State Officials, Judges and Others Exercise Broad Discretionary Powers and Enjoy Immunity in the Performance of their Duties.

(6) Sovereign Immunity -- State Employees -- When Employee Acts Beyond Scope of Employment, Wantonly, etc.

(7) Sovereign Immunity -- State Employees -- Simple Negligence -- Tests for Immunity for.

(8) Sovereign Immunity -- Physician Employed by Agency of Commonwealth and Practicing in Hospital Operated by Agency -- Lacks Immunity for Failure to Exercise Reasonable Care.

Plaintiffs sought to recover from three full-time members of the medical faculty of the University of Virginia Medical School for alleged negligence in their treatment. The faculty members are licensed physicians in Virginia. Defendants argued they were employees and agents of the Commonwealth and entitled to immunity for the alleged negligence. The Trial Court sustained the pleas of immunity and the cases were consolidated for appeal.

1. When the physician agrees to treat or operate on a certain patient, although his employment by the University of Virginia makes this possible, the relationship between the physician and the patient becomes the personal and confidential one of doctor and patient. The physician owes his best professional efforts on behalf of the patient and the patient has the right to expect the same care and attention from the physician he would receive if he were in a private hospital. The exercise by the attending physician of his professional skill and judgment in treating his patient and the means and methods used from the very nature of things are not subject to the control and direction of others.

2. The University of Virginia is controlled by "the Rector and Visitors of the University of Virginia," a public corporation created for that purpose. It is not a party defendant and no

one questions that this agency of the Commonwealth is entitled to the immunity of the state.

3. There is a distinction between the sovereign Commonwealth of Virginia and its employees on the one hand and local governmental agencies and their employees on the other, the employees of local governmental agencies not enjoying governmental immunity and being answerable for their acts of simple negligence. The Court accepts for the purpose of this opinion defendants' arguments that they are employees of the Commonwealth of Virginia.

4. The Commonwealth of Virginia functions only through its elected and appointed officials and its employees. If because of the threat of litigation, or for any other reason, they cannot act, or refuse to act, then the state also ceases to act. But it is proper that a distinction be made between the state, which has immunity unless waived, and officials and employees of the state whose immunity is qualified depending upon the function they perform and the manner of performance.

5. Certain state officials and state employees must of necessity enjoy immunity in the performance of their duties. These include, but are not limited to, the Governor, state officials and judges. They are required by the Constitution and by general law to exercise broad discretionary powers which often involve both the determination and implementation of state policy.

6. No single all-inclusive rule can be enunciated or applied in determining the entitlement of other state employees to sovereign immunity. An employee who acts beyond the scope of his employment (who exceeds his authority or discretion), or who acts individually is not protected. Nor is a state employee protected who acts wantonly or in a culpable or grossly negligent manner.

7. When a state employee is charged with simple negligence, a failure to use ordinary or reasonable care in the performance of some duty, and then claims the immunity of the state, the Court will examine the function the employee was performing and the extent of the state's interest and involvement in that function. Whether the use of judgment or discretion is involved is a consideration but is not always determinative. Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved. *Sayers v. Butler, 180 Va. 222, 22 S.E.2d 9 (1942); Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973) discussed.*

8. The paramount interest of the Commonwealth in the instant case is that the University of Virginia operate a good medical school and that it be staffed with efficient and competent administrators and professors. While the state is concerned that patients treated at the University of Virginia Hospital receive proper medical care, the state's interest in and control over the treatment of a specific patient by an attending licensed physician at the University of Virginia Hospital are slight. The state is interested in the probable increase of the cost of medical malpractice insurance if the immunity is denied, but this is not such a compelling interest as to justify the denial of a patient's right to assert a claim against a physician for negligent treatment. Thus a physician employed by an agency of the Commonwealth and practicing in a hospital operated by such an agency is not immune from an action for his negligence in failing to exercise reasonable care in attending a patient.

Syllabus

Licensed physicians on University of Virginia medical faculty not entitled to immunity for alleged negligence in treatment of patients at Medical Center.

Counsel: *Thomas E. Albro (Tremblay & Smith*, on briefs), for appellant. (Record No. 780413).

Thomas E. Albro (J. T. Camblos; Tremblay & Smith, on brief), for appellant. (Record No. 780450).

Jack B. Russell (Kimberly T. Henry; Browder, Russell, Little, Morris & Butcher, on brief), for appellees. (Records Nos. 780413 and 780450).

Amicus Curiae: The Association of Trial Lawyers of America. (James A. Eichner, on brief), for appellants. (Records Nos. 780413 and 780450).

Judges: I'Anson, C.J., Carrico, Harrison, Cochran, Poff and Compton, JJ. Harrison, J., delivered the opinion of the Court. Cochran, J., concurring. Poff, J., joins in the concurring opinion.

Opinion by: HARRISON

Opinion

[*45] [864]** Paul S. James sought to recover from Dr.

John A. Jane and Dr. Hans O. Riddervold [***2] damages for personal injuries resulting from the alleged negligent acts of the defendants in connection with a myelogram performed on plaintiff while he was under their care during 1974.

David L. Lawrence sought to recover from Dr. Michael W. Hakala, Jr., damages for personal injuries resulting from the alleged negligent acts of the defendant in connection with an operation performed on him while he was under the care of Dr. Hakala during 1975.

[*46] All defendants filed pleas of immunity in response to the respective motions for judgment filed by James and Lawrence. The court below sustained the plea in each case. The plaintiffs have been awarded appeals, and the cases have been consolidated, the issues involved being identical.

The defendants are licensed to practice medicine, and each is a full-time member of the faculty of the Medical School of the University of Virginia. Dr. Jane was Chairman of the Department of Neurosurgery at the Medical School and Chief of Neurosurgery at the University of Virginia Hospital during the time of the alleged negligence. Dr. Riddervold was an Associate Professor of Radiology at the Medical School and a member of the hospital staff [***3] in the Radiology Department. Dr. Hakala [**865] was an Assistant Professor of Orthopedic Surgery and Rehabilitation, an Assistant Professor of Pediatrics in the Medical School, and an attending staff physician at the hospital.

The Medical School is one part of the University's Medical Center, which is composed of the Hospital, the Medical School and the Nursing School. The Center is under the supervision of the Vice President for Health Sciences, who in turn is under the authority of the President of the University. The President of the University has ultimate responsibility to the Rector and Board of Visitors, an agency of the Commonwealth of Virginia. Admittedly, the Medical Center, and in turn the Hospital, are agencies of the Commonwealth of Virginia.

The basic responsibilities of faculty members of the Medical School are teaching, research, and patient care. Dr. Jane, as a department chairman, has the additional administrative responsibility of that office. All faculty members are members of the hospital staff, whose teaching responsibility includes supervision of residents, medical students, and nursing students. The defendants, as full-time faculty members, were [***4] not permitted to engage in the practice of medicine individually or outside the Medical Center unless it was done during their one month vacation period. The defendants' only compensation as faculty members was a fixed annual salary which covered their teaching responsibility and services rendered in patient care as Medical Center physicians. The compensation received by any particular physician was determined by the Dean of the Medical School upon recommendation of the chairman of the department to which the attending physician and faculty member was assigned. The ceiling for salaries of faculty members in the Medical Center is fixed by the [*47] Governor of Virginia and is determined by the academic rank of the individual.

The budget of the Medical School is approved by the Vice President for Health Sciences, by the President of the University of Virginia, and ultimately by the Rector and Board of Visitors. The salaries of faculty members are paid from the Medical School's budget which is prepared by the Dean and encompasses the entire operation of the Medical School as well as compensation for faculty members. The three defendants involved here receive no compensation [***5] for patient care other than their respective salaries from the University of Virginia. The amount of a faculty member's salary is determined at the beginning of each year, and this sum is paid to the faculty member involved regardless of the amount of money this physician earns for his particular department, or the amount of money earned by his department through fees for patient care.

The Medical Center's funds are derived largely from state appropriations made by the General Assembly, training and research grants, and revenue received from the professional care rendered patients by the faculty attending staff physicians. To facilitate the handling of revenues from patient care, the Clinic-Private Division (CPD) unit of the Medical Center was created. When a patient enters the hospital, a determination is made as to his financial responsibility. If a patient has insurance, or is otherwise financially able to pay, he is classified as a private patient. If he has no insurance and is unable to pay, he enters the hospital as a "staff patient." The state has established indigency standards, and those who do not meet that standard are admitted as private patients, charged directly [***6] for professional services rendered by a member of the attending staff, and billed through the CPD rather than through the hospital.

Witnesses testified that once a patient is admitted to the hospital, whether private or staff, the patient receives identical treatment and services. No member of the medical staff may refuse to see a patient because of his classification. Dr. Hakala testified that there was no difference in the treatment of private patients and staff patients, and that a staff patient has the right to request and receive the care of a particular attending physician. It was also testified, [**866] however, that the attending physicians have the privilege to select the patients they will treat and are under no obligation to accept

any individual or class of persons as patients. Residents and interns in training do not enjoy this privilege. Rather, they have the duty to treat any patient who is assigned to them for treatment.

[*48] While all attending physicians are required and encouraged to follow certain guidelines to the end that their professional services constitute "good medical practice," the attending physicians of patients exercise broad discretion [***7] in selecting the methods by which they care for them. Although an attending physician may consult with colleagues, the final decisions as to diagnosis and treatment are his or her own.

The classification of patients appears to be utilized primarily as a billing device. Almost every patient is taken care of by a member of the house staff, as well as by an attending physician, and this is true whether a patient is staff or private. Dr. Jane testified with reference to surgical duties and said that such duties are divided between the residents and the attending staff physicians. Specifically he said that the division was such that one month he might have the primary responsibility for doing the surgery with the help of his senior resident, and the next month the surgery would be done by the senior resident with his help. He said the rule applied to both staff and private patients.

It appears that although treatment received by staff and private patients is identical, private patients receive two bills, one from the hospital and one from the attending physician through the CPD billing system, whereas staff patients only receive a bill from the hospital. The money received from [***8] bills sent by the hospital is turned over to the Bursar of the University and is used to fund the hospital. The money received through the CPD bills from private patients is applied to payment of the total operating expenses of the Medical School. While the records of the Bursar reflect the amount of money generated by each of the CPD departments, and the individual physician's charges, receipts, and receivables, none of the funds received from the patients come directly back to any individual faculty member or to his respective department. The budget of the CPD is operated entirely from the fees received from private patients. In 1974, five and one-half percent (5 1/2%) was withheld to fund the CPD budget. Ten percent (10%) of total collections each month is allocated to a fund used in partial support of the attending physicians' (faculty members) retirement program in which the physicians become entitled to participate. The remaining CPD funds become a part of the Medical School's general budget which includes salaries for faculty physicians and staff members, supplies, and miscellaneous operating expenses. The amount of time spent in patient care by a faculty member varies greatly, [***9] and some physician-faculty members participate [*49] little in patient care, a fact which does not affect the amount of their compensation from the University.

Each department in the CPD formulates a schedule of fees for the various procedures performed by its attending physicians, and this is approved by a policy committee made up of elected department representatives. While the attending physicians seldom are involved in the collection process, in some instances when the fees are not paid, they are asked to recommend or decide on the final disposition of collection, and are privileged to compromise their bills or forgive them. All bills are sent in the name of the attending physician. It is noted that the physicians at the University of Virginia Clinic-Private Division are not required to purchase local revenue licenses in connection with their practices.

The respective allegations of negligence made in their motions for judgment by plaintiffs James and Lawrence are not important to our decision here. It suffices to say that James was referred to Dr. Jane by his family physician in Waynesboro, Virginia, for diagnosis and treatment of cervical spinal pain, and he was accepted [***10] as a private patient in the Department of Neurosurgery at the University of Virginia Clinic-Private [**867] Division, where a myelogram was performed on him by Dr. Riddervold. Lawrence, also a private patient, suffered a knee injury. He was taken to the emergency room of the University Hospital where he was first seen by the residents then on duty. Dr. Hakala, the staff physician on call at the time, talked on the phone with the residents on duty and concluded that Lawrence's injury required surgery. Lawrence was admitted to the University Hospital as a private patient in the Department of Orthopedic Surgery at the University of Virginia Clinic-Private Division, and was operated on the following morning by another doctor, with Dr. Hakala present.

The position of the plaintiffs is that as fully licensed physicians, Doctors Jane and Riddervold and Dr. Hakala are independent contractors who select the manner in which they treat their own patients. They argue that the physicians do not act as agents or servants of the Commonwealth under instructions from superiors. Rather, they say the physicians act individually and under their own responsibility and that under such circumstances [***11] the doctrine of sovereign immunity does not insulate them from liability for their own negligence.

The defendants respond that at the time they treated James and Lawrence they were members of the faculty of the University of Virginia Medical School and physicians on the attending staff of its hospital, and thus were employees and

agents of the Commonwealth [*50] of Virginia, their employer and principal. They contend that in treating James and Lawrence they were performing a discretionary act within the scope of their employment and that because the General Assembly has not consented to this action in tort against the state, they, as state employees, are entitled to the protection of the immunity of the state.

Defendants also argue that they are salaried employees of a state medical school and that as a part of their duties they attend and treat patients in a state hospital. They rely strongly upon the fact that they do not receive compensation from the patients they treat. And they also point to the chain of command of the Medical Center and contend that they are under the control of, answerable to, and directed by their "superiors," who are also state employees.

The [***12] University Hospital is an integral and essential part of the University's Medical Center. A medical school could not operate without a hospital as an adjunct thereto. Students learn in the classrooms and laboratories and by observing and assisting in the care and treatment of patients. Most certainly it is contemplated by both parties that a physician employed by the University to teach in the Medical School will also practice his specialty as an attending physician in, and as a member of the staff of, the University Hospital. His duties are two-fold. He will teach, and he will also attend patients, usually in the presence of and assisted by students, interns, and residents in the University Hospital. The University provides the administration staff, the physical facilities, operating rooms, interns, residents, and nurses. It places him in a hospital where numerous patients come for medical and surgical attention with the knowledge that the physician will see and attend both private and staff patients. Implicit in this arrangement is the understanding that the physician will use reasonable care in the performance of his duties as such an attending physician.

[1] At the point [***13] when the physician agrees to treat or operate on a certain patient, although his employment by the University makes possible the arrangement, the relationship becomes the personal and confidential one of doctor and patient, not the Commonwealth of Virginia and patient. The physician owes his best professional efforts on behalf of the patient, and the patient expects, and has a right to expect, the same care and attention from the physician that he would receive if he were in a private hospital and the physician in private practice. The exercise by the attending physician of his professional skill and judgment in treating his patient, and the means [*51] and methods used, from the very nature of things, are not subject to the control and [**868] direction of others. The fact that the physician may follow certain prescribed guidelines and consult with colleagues, or that a review may be conducted when a patient is injured, or when a patient dies, does not alter the professional status of the attending physician or his relationship with and obligation to his patient.

[2] *HN1*[↑] The University [***14] of Virginia is controlled by "the Rector and Visitors of the University of Virginia," a public corporation created for that purpose. Code § 23-69. It is not a party defendant, and no one questions the fact that this agency of the Commonwealth of Virginia is entitled to the protection of the immunity of the state. The issue here is whether the defendants are entitled to claim the same immunity in an action in tort against them for their alleged failure to exercise reasonable care in treating the plaintiffs.

[3] *HN2*[↑] We make a distinction between the sovereign Commonwealth of Virginia and its employees, and local governmental agencies and their employees. And we have specifically held that the latter do not enjoy governmental immunity and are answerable for their own acts of simple negligence. *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*, *Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968)*, and *Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960)*. For the purpose of this [***15] opinion we accept the defendants' contention that they are employees of the Commonwealth.

In *Savers v. Butler, 180 Va. 222, 22 S.E.2d 9 (1942)*, we were called upon for the first time to pass judgment upon a case where employees of the state were sued for a tort arising from work being done by them for the state. There, an action was brought by a landowner to recover damages sustained as a result of explosives set off by two employees of the state during the construction of a pipeline for the state and on the state's property. The plaintiff claimed that as a result a spring on his property ceased to flow. The court found that the acts of the defendants were the acts of the state and that there were no facts alleged that the employees had stepped beyond the course of their employment, had exceeded their authority or directions given them, were guilty of any wrongful conduct or acted wantonly or negligently, or were acting individually or on their own responsibility. We found that the defendants were acting "solely in their representative capacity as lawful and proper agents of the State and not in their own individual right." *Id. at 229, 22 S.E.2d at 12*. [***16] We further observed that"[i]t would be an unwise policy to permit agents and employees of the State to be sued in their [*52] personal capacity for acts done by them at the express direction of the State, unless they depart from that direction." *Id.* And we recognized that *HN3*[↑] a state employee may be liable for his conduct while performing work for the state if his conduct is wrongful or if his performance is so negligent as to take him outside the protection of his employment.

In *Elder v. Holland, 208 Va. 15, 155 S.E.2d 369 (1967)*, Elder brought an action for common law defamation and under the insulting-words statute. Holland filed a plea asserting his immunity from liability for the defamatory words he allegedly spoke, claiming that he spoke them in the scope of his official duties as a member of the Virginia Department of State Police, and that as an agent of the state he was protected by the state's immunity from tort liability. We reviewed the several cases in which we have held or recognized that a state employee may be liable for his conduct while performing [***17] work for the state if his conduct is wrongful. Consistent with these cases, and having concluded that under certain conditions a state employee may be held liable for his negligent conduct, we held *HN4*[↑] a state employee may be held liable for an intentional tort. We found Holland was therefore not immune from liability for defamatory words spoken while performing his duties as a state police officer.

In *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*, we held that the chief administrator and the assistant administrator of the University of Virginia Hospital, and Pulito, the surgical intern involved, were entitled to the sovereign immunity enjoyed by the Commonwealth of Virginia. The administrators were exercising discretionary [**869] powers in the performance of their duties. The intern was a salaried employee of the University of Virginia and subject to the direction and control of his employer. We noted that the intern also exercised discretionary judgment in treating those persons who presented themselves as patients at the emergency room, had no contractual [***18] relationship with the hospital's patients, received no compensation from the patients for his services performed within the scope of his employment, and did not act independently as far as any patient was concerned or involved.

[4-5] The Commonwealth of Virginia functions only through its elected and appointed officials and its employees. If because of the threat of litigation, or for any other reason, they cannot act, or refuse to act, the state also ceases to act. Although a valid reason exists for state employee immunity, the argument for such immunity does not have the same strength it had in past years. This is because [*53] of the intrusion of government into areas formerly private, and because of the thousand-fold increase in the number of government employees. We find no justification for treating a present day government employee as absolutely immune from tort liability, just as if he were an employee of an eighteenth century sovereign. *HN5*[↑] It is proper that a distinction be made between the state, whose immunity is absolute unless waived, and the employees and officials of the state, whose immunity is qualified, depending upon the function they perform and the manner [***19] of performance. Certain state officials and state employees must of necessity enjoy immunity in the performance of their duties. These officers are inclusive of, but not limited to, the Governor, state officials, and judges. They are required by the Constitution and by general law to exercise broad discretionary powers, often involving both the determination and implementation of state policy.

[6] Admittedly, no single all-inclusive rule can be enunciated or applied in determining entitlement to sovereign immunity. In *Elder v. Holland, supra*, there was a wanton and intentional deviation by a state employee from his assigned duties and therefore a loss by him of his qualified immunity. In *Sayers v. Butler, supra*, there was no such wrongful deviation and no loss. *HN6*[↑] A state employee who acts wantonly, or in a culpable or grossly negligent manner, is not protected. And neither is the employee who acts beyond the scope of his employment, who exceeds his authority and discretion, and who acts individually.

[7] The difficulty in application comes [***20] when a state employee is charged with simple negligence, a failure to use ordinary or reasonable care in the performance of some duty, and then claims the immunity of the state. Under such circumstances we examine the function this employee was performing and the extent of the state's interest and involvement in that function. Whether the act performed involves the use of judgment and discretion is a consideration, but it is not always determinative. Virtually every act performed by a person involves the exercise of some discretion. Of equal importance is the degree of control and direction exercised by the state over the employee whose negligence is involved. In *Sayers* the control by the employer was absolute, and the discretion by the employees was minimal. In *Lawhorne* the state's interest and involvement were great, and all defendants were afforded immunity, but for widely divergent reasons. The administrators were executive officers charged with the operation of a vast hospital complex. The state's interest demanded [*54] that they exercise wide discretionary powers and be accorded immunity. The intern, although equally as essential to the operation of the [***21] hospital as the administrators, was, because of his inexperience, closely controlled, supervised, and directed by his employer. Indeed, *HN7*[↑] an intern is prohibited by statute, Code § 54-276.7, from rendering medical services except under the supervision of a licensed member of the hospital staff to whom he is responsible and accountable at all times. The state's interest and the circumstances and conditions of the intern's employment required that he be afforded immunity.

[**870] [8] In the case under review the paramount interest of the Commonwealth of Virginia is that the University of

Virginia operate a good medical school and that it be staffed with efficient and competent administrators and professors. The state is of course interested and concerned that patients who are treated at the University Hospital receive proper medical care. However, the state has this same concern for every patient who is treated in any private hospital or by any doctor throughout the Commonwealth. This is evidenced by the numerous statutes enacted by the General Assembly [***22] of Virginia designed to assure adequate medical care and medical facilities for the people of the state. The state's interest and the state's involvement, in its sovereign capacity, in the treatment of a specific patient by an attending physician in the University Hospital are slight; equally slight is the control exercised by the state over the physician in the treatment accorded that patient. This interest and involvement is not of such moment and value to the Commonwealth as to entitle Doctors Jane, Riddervold, and Hakala to the immunity enjoyed by the state.

While there may have been a time when a physician was attracted to teach in a state medical school, and to serve as an attending physician on the staff of its hospital, because of the cloak of immunity afforded him as an employee of the sovereign state, we think that time is past. We cannot conceive of any physician, regardless of his status, practicing medicine in this era without the protection of liability insurance, which he purchases for himself or which is provided for him by his employer. Realistically, the only interest the state has in affording immunity to the physicians practicing in state hospitals is the probability [***23] of an increase in the cost of medical malpractice insurance if such immunity is denied. We do not find this to be such a compelling state interest as to justify the denial of a patient the right to assert a claim against a physician for negligent treatment.

[*55] The only issue we decide here is whether a physician, employed by an agency of the Commonwealth of Virginia and practicing in a hospital operated by such an agency, should be immune from an action for his negligence, *i.e.*, for his failure to exercise reasonable care in attending a patient. In *Eriksen v. Anderson, 195 Va. 655, 660-61, 79 S.E.2d 597, 600 (1954)*, we said: *HN8*[↑] "There is no statute which authorizes the officers or agents of the State to commit wrongful acts. On the contrary, they are under the legal obligation and duty to confine their acts to those which they are authorized by law to perform. If they exceed their authority, or violate their duty, they act at their own risk, . . . and the State is not responsible or liable therefor." As we have heretofore observed, implicit in the employment [***24] by the University of Virginia of physicians to teach in its Medical School and to attend patients in its Hospital, is the understanding that they will use reasonable care in the performance of their duties. A failure to use such care in the treatment of patients is a violation of their duty to the patients and a departure from a condition of their employment. A physician who fails to use reasonable care in the treatment of a patient acts at his own risk, and is not entitled to invoke the doctrine of sovereign immunity.

For the reasons assigned, we hold that the court below erred in sustaining the pleas of immunity filed by the defendants.

Reversed and remanded.

Concur by: COCHRAN

Concur

COCHRAN, J., concurring.

I agree with the result reached by the majority opinion. However, for reasons expressed in my dissent in *Lawhorne v. Harlan, 214 Va. 405, 408-09, 200 S.E.2d 569, 572-73 (1973)*, I believe that *Lawhorne* is inconsistent with *Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968)*, is unsound, and should be forth-rightly overruled rather than distinguished to extinction.

The majority opinion attempts, unsuccessfully [***25] in my view, to distinguish between full-time members of the faculty of the [**871] University of Virginia Medical School, held not to be immune from liability for negligence in the present case, and the hospital administrators and the surgical intern of the same institution, held to be immune in *Lawhorne*. Negligence is negligence -- want of such care and caution as an ordinarily prudent and reasonable man would have exercised under the same circumstances. Agents and employees of an immune employer who fail to meet the reasonable man test are negligent [*56] and should be held liable for their negligent acts that proximately cause injury to others.

Therefore, I would overrule *Lawhorne*, so that the judiciary and the bar will understand that the principles approved in *Crabbe* will be followed in Virginia as they are in the majority of other jurisdictions. The uncertainty arising from hair-splitting distinctions will then give way to a sound, logical, and certain rule of general application.

End of Document

Hoggard v. Richmond

Supreme Court of Virginia

January 9, 1939

Record No. 2004

Reporter
172 Va. 145 *; 200 S.E. 610 **; 1939 Va. LEXIS 226 ***; 120 A.L.R. 1368

VIOLA ***HOGGARD v. CITY OF RICHMOND***, VIRGINIA

Prior History: [***1] Error to a judgment of the Circuit Court of the city of Richmond. Hon. Julien Gunn, judge presiding.

Disposition: *Reversed and remanded.*

Core Terms

municipality, municipal corporation, proprietary, cases, governmental function, swimming pool, activities, immunity, courts, powers, principles, decisions, bathing, inhabitants, playgrounds, streets, governmental capacity, majority opinion, common good, erecting, swimming, damages, duties

Case Summary

Procedural Posture
Plaintiff invitee challenged an order the Circuit Court of the City of Richmond (Virginia), which sustained defendant city's demurrer in the guest's negligence action regarding an accident at a swimming pool that the city owned and operated.

Overview
The trial court sustained the city's demurrer in the invitee's negligence action as to an accident at a city owned and operated swimming pool, finding that the pool's operation constituted a governmental function. The court reversed that judgment on appeal and remanded the case. The court reasoned that the invitee stated a cause of action and that the city's right to offer any defense that a private corporation would have had under the same circumstances sufficiently safeguarded the municipality and tended to induce greater caution in maintaining swimming pools. The court also held that the city was liable when it caused an injury regardless of if the city was acting in a governmental or a proprietary capacity. The court further determined that, under the circumstances of the case, the swimming pool's operation was a ministerial act and that the city was as liable as any private corporation even though it did not derive pecuniary advantage from that activity.

Outcome
The court reversed an order that sustained the city's demurrer in the invitee's tort suit regarding an accident at a public swimming pool, holding that the pool's operation was not a governmental function for which the city had immunity.

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Local Governments > Claims By & Against

Torts > Public Entity Liability > Liability > General Overview

Torts > Public Entity Liability > Immunities > General Overview

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN1[] **Defenses, Demurrers & Objections, Affirmative Defenses**

The general law, as interpreted by the courts in all but two states (South Carolina and Florida), is that a municipality is clothed with two-fold functions; one governmental, and the other private or proprietary. In the performance of a governmental function, the municipality acts as an agency of the state to enable it to better govern that portion of its people residing within its corporate limits. To this end there is delegated to, or imposed upon, a municipality, by the charter

of its creation, powers and duties to be performed exclusively for the public. In the exercise of these governmental powers a municipal corporation is held to be exempt from liability for its failure to exercise them, and for the exercise of them in a negligent or improper manner. This immunity is based on the theory that the sovereign can not be sued without its consent, and that a designated agency of the sovereign is likewise immune.

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Governments > Local Governments > Claims By & Against

Torts > Public Entity Liability > Liability > General Overview

Torts > Public Entity Liability > Immunities > General Overview

HN2[] **Defenses, Demurrers & Objections, Affirmative Defenses**

There are granted to a municipal corporation, in its corporate and proprietary character, privileges and powers that are exercised for its private advantage. In the performance of these duties the general public can derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation. For an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages in the same manner as an individual or private corporation.

Governments > Local Governments > Claims By & Against

Torts > Public Entity Liability > Liability > General Overview

HN3[] **Local Governments, Claims By & Against**

It is borne in mind that it is as much the duty of a municipal corporation to take due and proper precautions for the health and welfare of its citizens as it is to keep its streets and all parts of them in reasonably safe condition for public travel, and the principles of law fixing the liability or non-liability of the city in damages, where an injury on the streets is sued for, and where the suit is for neglect of duty in the protection of health and general welfare, are the same and apply alike in both cases.

Governments > Local Governments > Charters

Torts > Public Entity Liability > Liability > General Overview

Governments > Local Governments > Claims By & Against

Torts > ... > Types of Premises > Recreational Facilities > Swimming Areas

HN4[] **Local Governments, Charters**

The operation of a swimming and bathing pool by a municipality under the provisions of its charter, or the general law, is a ministerial act, and that where a wrongful act causing injury is committed by the servants of a municipality in the performance of a purely ministerial act, the municipal corporation is liable as any other private corporation, even though it does not derive any pecuniary advantage from such activity.

Headnotes/Summary

Headnotes

1. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Two-Fold Functions of Municipality.* -- A municipality is clothed with two-fold functions; one governmental, and the other private or proprietary.

2. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Municipality Acts as Agency of State in Performance of Governmental Function.* -- In the performance of a governmental function, a municipality acts as an agency of the state to enable it to better govern that portion of its people residing within its corporate limits. To this end there is delegated to, or imposed upon a municipality, by the charter of its creation, powers and duties to be performed exclusively for the public.

3. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Exempt from Liability in Exercise of Governmental Powers.* -- In the exercise of governmental powers a municipal corporation is exempt from liability for its failure to exercise them, and for the exercise of them in a negligent or improper manner. This immunity is based on the theory that the sovereign can not be sued **[***2]** without its consent, and that a designated agency of the sovereign is likewise immune.

4. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Liable for Negligence in Exercise of Proprietary Powers.* -- There are granted to a municipal corporation, in its corporate and proprietary character, privileges and powers to be exercised for its private advantage. In the performance of these duties the general public may derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation. For an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages in the same manner as an individual or private corporation.

5. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Test to Determine Whether Function Governmental or Proprietary.* -- The underlying test in determining whether a municipality is functioning in a governmental or ministerial capacity is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit.

6. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Operation of Swimming Pool Is Ministerial Act.* -- The operation of a swimming **[***3]** and bathing pool by a municipality under the provisions of its charter, or the general law, is a ministerial act.

7. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Liability for Wrongful Act Committed in Performance of Ministerial Act.* -- Where a wrongful act causing injury is committed by the servants of a municipality in the performance of a purely ministerial act, the municipal corporation is liable as any other private corporation, even though it does not derive any pecuniary advantage from such activity.

8. MUNICIPAL CORPORATIONS -- *Municipal Torts -- Liability for Negligence in Maintaining Swimming Pool -- Case at Bar.* -- In the instant case, an action for damages against a municipal corporation, plaintiff charged the city with negligence in maintaining a swimming pool, and with misfeasance in erecting a barbed-wire fence above and under the waters of the pool, thereby creating a dangerous place to which plaintiff and other inhabitants of the city were invited. The trial court sustained the city's demurrer to the notice of motion, on the ground that the city in maintaining the bathing and swimming resort was engaged in the exercise of a governmental function.

[*4]** *Held:* That plaintiff's notice of motion stated a cause of action, and that the municipal corporation had a right to offer any and all defenses that a private corporation would have under the same circumstances.

Syllabus

The opinion states the case.

Counsel: *M. Haley Shelton* and *Thomas I. Talley,* for the plaintiff in error.

Horace H. Edwards and *John P. McGuire, Jr.,* for the defendant in error.

Judges: Present, All the Justices.

Opinion by: HUDGINS

Opinion

[*146] **[**611]** HUDGINS, J., delivered the opinion of the court.

[*147] This is an action to recover $5,000, alleged to be due plaintiff for injuries sustained when her left hand struck a barbed-wire fence while bathing in Shield's Lake, a swimming pool owned and operated by the city of Richmond. In the first count of the notice of motion, defendant is charged with non-feasance -- that is, negligence in maintaining the resort. In the second count, defendant is charged with misfeasance in erecting a barbed-wire fence above and under the waters of the lake, thereby creating a dangerous place to which plaintiff and other inhabitants of the city were invited. The trial court sustained the city's demurrer to **[***5]** the motion, on the ground that the city "in maintaining and operating the bathing and swimming resort, known as Shield's Lake, was engaged in the exercise of a governmental function."

The question of plaintiff's contributory negligence is negatived in her notice of motion. Hence the single question presented is whether the municipality is liable for negligence in the maintenance of a bathing resort, or negligence in erecting an unsafe and dangerous instrumentality at a place designated for the use of bathers and swimmers.

[1-3] HN1[↑] The general law, as interpreted by the courts in all but two states (South Carolina and Florida), is that a municipality is clothed with two-fold functions; one governmental, and the other private or proprietary. In the performance of a governmental function, the municipality acts as an agency of the state to enable it to better govern that portion of its people residing within its corporate limits. To

this end there is delegated to, or imposed upon, a municipality, by the charter of its creation, powers and duties to be performed exclusively for the public. In the exercise of these governmental powers a municipal corporation is held to be exempt [***6] from liability for its failure to exercise them, and for the exercise of them in a negligent or improper manner. This immunity is based on the theory that the sovereign can not be sued without its consent, and that a designated agency of the sovereign is likewise immune.

[*148] [4] HN2[↑] There are granted to a municipal corporation, in its corporate and proprietary character, privileges and powers to be exercised for its private advantage. In the performance of these duties the general public may derive a common benefit, but they are granted and assumed primarily for the benefit of the corporation. For an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages in the same manner as an individual or private corporation. For Virginia and West Virginia cases, see 7 Michie's Digest 571 and 2 Va.L.Reg.(N.S.) 36. See also, 43 C.J., p. 920, et seq., and 19 R.C.L., p. 1109.

While this distinction is generally recognized, the difficulty arises in the application of the rule to various municipal activities.

This court has held that a municipal corporation acts in its governmental capacity in operating a hospital [***7] (*City of Richmond* v. *Long's Adm'rs,* 17 Gratt. (58 Va.) 375, 94 Am. Dec. 461); in regulating the use of sidewalks and streets (*Terry v. City of Richmond, 94 Va. 537, 27 S.E. 429, 38 L.R.A. 834*; *Jones v. City of Williamsburg, 97 Va. 722, 34 S.E. 883, 47 L.R.A. 294*); in maintaining a jail (*Franklin v. Richlands, 161 Va. 156, 170 S.E. 718*); and in maintaining a police force (*Burch* v. *Hardwicke,* 30 Gratt. (71 Va.) 24, 33, 34, 32 Am.Rep. 640; *Lambert v. Barrett, 115 Va. 136, 140, 78 S.E. 586*, Ann. Cas. 1914D, 1226; *City of Winchester v. Redmond, 93 Va. 711, 716, 25 S.E. 1001, 57 Am. St. Rep. 822*).

In *Maia's Adm'r v. Eastern State Hospital, 97 Va. 507, 34 S.E. 617, 618, 47 L.R.A. 577*, it was held that the Eastern State Hospital was a public corporation, governed and controlled by the state, and acted exclusively as an agency of the state for the protection of society, and for the promotion of the best interests of the unfortunate citizens, hence it was not liable in damages for personal injuries inflicted on one of its inmates in consequence of the negligence or misconduct of the persons administering the powers, or their agents [***8] or employees.

[*149] Judge Buchanan, in delivering the opinion, referred to *City of Richmond v. Long's Adm'r, supra,* and said [page 618]: "In that case the distinction was drawn between powers and duties which are [**612] granted to or imposed upon a public body as an agency of government to be exercised and performed exclusively for public, governmental purposes, and those powers and privileges which are exercised by the corporation or body for its own private advantage, and are for public purposes in no other sense than that the public derives a common benefit from a proper discharge of the duties arising from the grant."

In the case of *Ashbury v. Norfolk, 152 Va. 278, 147 S.E. 223, 224*, it was held that a municipality, in removing garbage, acted in a governmental capacity. Judge Prentis, speaking for the court, said: "There is some conflict in the cases, but the weight of authority quite certainly is to the effect that the removal of garbage by a municipality is a governmental function, which is designed primarily to promote public health and comfort, and hence that the municipality is not liable therefor in tort when the negligence which is charged [***9] occurred in the performance of that particular function, and no nuisance is thereby created."

In *City of Lynchburg v. Peters, 156 Va. 40, 157 S.E. 769, 772*, Justice Holt said: "The city, in the establishment of this park and playground, was acting in its governmental capacity and committed no legal wrong. It does not contend that it has the right to convert this lawful undertaking into a center of disorder and so it is not necessary for us to follow the doctrine of municipal immunity in governmental undertakings further."

The following are a few of the cases in which this court held that a municipal corporation, while engaged in the construction, repair, improvement or maintenance of its streets and sidewalks, in the operation of a wharf, in changing the grade of its street level, and in controlling surface water, acts in a private or proprietary capacity, and is liable to the individual for injuries resulting from the negligence of its officers or servants employed in the activities enumerated: [*150] *City of Petersburg* v. *Applegarth's Adm'r,* 28 Gratt. (69 Va.) 321, 26 Am.Rep. 357; *Noble* v. *City of Richmond,* 31 Gratt. (72 Va.) 271, 280, 31 Am.Rep. [***10] 726; *Smith* v. *City Council of Alexandria,* 33 Gratt. (74 Va.) 208, 36 Am.Rep. 788; *Orme and wife* v. *City of Richmond, 79 Va. 86*; *Stearns v. City of Richmond, 88 Va. 992, 14 S.E. 847, 29 Am. St. Rep. 758* ; *Jones' Adm'r v. City of Richmond, 118 Va. 612, 88 S.E. 82*; *City of Radford v. Calhoun, 165 Va. 24, 181 S.E. 345, 100 A.L.R. 1378*; *Richmond Bridge Corp. v. Priddy, 167 Va. 114, 187 S.E. 518*; *Tyler v. Richmond, 168 Va. 308, 191 S.E. 625*.

The same rule applies to the activity of a municipality in conducting public utilities, such as water, sewerage systems, gas, light, etc. *Chalkley v. City of Richmond, 88 Va. 402, 14*

S.E. 339, 29 Am. St. Rep. 730 ; Richmond v. Warehouse Corp., 148 Va. 60, 138 S.E. 503, 54 A.L.R. 1485, and City of Richmond v. James, 170 Va. 553, 197 S.E. 416, 116 A.L.R. 967.

[5] This general line of demarcation between immunity and liability of a municipal corporation for torts has been followed with more or less consistency in this jurisdiction for more than a century. Judge Prentis, in the case of Ashbury v. Norfolk, supra, realized the difficulty in applying the general **[***11]** rule to specific facts, and deciding whether the specific activity was governmental or proprietary. He quoted Chief Justice Rugg, in Bolster v. City of Lawrence, 225 Mass. 387, 390, 114 N.E. 722, L.R.A. 1917B, 1285, as follows: "The difficulty lies not in the statement of the governing principles of law, but in their application to particular facts. The underlying test is whether the act is for the common good of all without the element of special corporate benefit, or pecuniary profit. If it is, there is no liability, if it is not, there may be liability. That it may be undertaken voluntarily not under compulsion of statute is not of consequence."

Near the conclusion of the opinion, Judge Prentis said: "In a modern instance (*Scibilia* v. *Philadelphia, supra* 279 Pa. 549, 124 A. 273, 32 A.L.R. 981), it has been suggested **[*151]** that, as local governments are so constantly assuming or being vested with new duties, the distinction between purely public functions which are certainly within the police power, and those private business enterprises which are not, is becoming increasingly difficult to maintain. This may be true, but if so it is doubtless because **[***12]** of our bad habit of counting cases instead of adhering to fundamental rules."

Notwithstanding the reference to fundamental rules, the decision of this court in that case was in direct conflict with the following statement of Judge Cardwell in Portsmouth v. Lee, 112 Va. 419, 71 S.E. [**613] 630, 632: HN3[↑] "It is to be borne in mind that it is as much the duty of a municipal corporation to take due and proper precautions for the health and welfare of its citizens as it is to keep its streets and all parts of them in reasonably safe condition for public travel, and the principles of law fixing the liability or non-liability of the city in damages, where an injury on the streets is sued for, and where the suit is for neglect of duty in the protection of health and general welfare, are the same and apply alike in both cases."

These quotations from the opinions delivered or prepared by two members of this court, show the inconsistency of the application of the rule, and illustrate the difficulty of basing the distinction of the two functions on any logical reasoning. The same inconsistent and illogical holding of courts from other jurisdictions is apparent from a study of the **[***13]** cases. See Autrey v. City Council of Augusta, 33 Ga. App. 757, 127 S.E. 796; Hodgins v. Bay City, 156 Mich. 687, 121 N.W. 274, 132 Am. St. Rep. 546 ; Pleasants v. City of Greensboro, 192 N.C. 820, 135 S.E. 321; McLeod v. Duluth, 174 Minn. 184, 218 N.W. 892, 60 A.L.R. 96; Byrnes v. City of Jackson, 140 Miss. 656, 105 So. 861, 42 A.L.R. 254; Scibilia v. Philadelphia, 279 Pa. 549, 124 A. 273, 32 A.L.R. 981; City of Mangum v. Brownlee, 181 Okl. 515, 75 P.2d 174 ; Stevens v. Pittsburgh, 329 Pa. 496, 198 A. 655; Warden v. Grafton, 99 W.Va. 249, 128 S.E. 375, 42 A.L.R. 259; Hagerman v. Seattle, 189 Wash. 694, 66 P.2d 1152, 110 A.L.R. 1110, and note; Allas v. Rumson, 115 N.J.L. 593, [*152] 181 A. 175, 102 A.L.R. 648, and note; and Emmons v. Virginia, 152 Minn. 295, 188 N.W. 561, 29 A.L.R. 860, and note.

The Connecticut court, in 1927, held that the city of Waterbury was acting in a governmental capacity in maintaining a swimming pool, and hence the city was not liable for negligence in maintaining a locker room at the pool. Hannon v. Waterbury, 106 Conn. 13, 136 A. 876, 57 A.L.R. [***14] 402. The same court, some four years later, in Hoffman v. City of Bristol, 113 Conn. 386, 155 A. 499, 75 A.L.R. 1191, held that the city of Bristol was guilty of maintaining a nuisance in that it erected a diving board four feet above the surface of the water which was only three feet deep at that point, and that the city was liable to plaintiff, who was injured in diving off the board into shallow water. See Johnston v. City of Galva, 316 Ill. 598, 147 N.E. 453, 38 A.L.R. 1384, and Miller v. City of Woodburn, 134 Ore. 536, 294 P. 349. Sometimes recovery under the nuisance doctrine is restricted to property damage to the exclusion of liability for personal injuries. City of Louisville v. Hehemann, 161 Ky. 523, 171 S.W. 165, L.R.A. 1915C, 747; Hines v. Rocky Mount, 162 N.C. 409, 78 S.E. 510, L.R.A. 1915C, 751, Ann. Cas. 1915A, 132. But see Virovatz v. City of Cudahy, 211 Wis. 357, 247 N.W. 341.

South Carolina recognized the confusion in its own jurisdiction and the confusion in other jurisdictions, and finally held that a municipality, in the absence of statute, was not liable for tort in any event. Irvine v. Town of Greenwood, [***15] 89 S.C. 511, 72 S.E. 228, 36 L.R.A.(N.S.) 363.

In Fowler v. City of Cleveland, 100 Ohio St. 158, 126 N.E. 72, 9 A.L.R. 131, the Ohio court held that the doctrine of *respondeat superior* applied to a municipality, even though the injury was committed by the negligent operation of a fire truck. However, the doctrine therein announced was repudiated, and the old doctrine of immunity was reinstated in the case of Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164, 27 A.L.R. 1497; but not, **[*153]** however,

without a vigorous dissent from Judge Wanamaker, who participated in both decisions.

The Florida court, in *Kaufman v. Tallahassee, 84 Fla. 634, 94 So. 697, 30 A.L.R. 471*, adopted the principles stated by the Ohio court in the *Fowler Case,* and still adheres to these principles. See *City of Tallahassee v. Kaufman, 87 Fla. 119, 100 So. 150*; *City of West Palm Beach v. Grimmett, 102 Fla. 680, 136 So. 320, 137 So. 385*; and *Wolfe v. Miami, 103 Fla. 774, 134 So. 539, 137 So. 892.*

The same inconsistency seems to exist in Georgia. Compare *City of Macon v. Roy, 34 Ga. App. 603, 130 S.E. 700*, with *City of Warrenton [***16] v. Smith, 149 Ga. 567, 101 S.E. 681*.

The A.L.R. annotator, in 75 A.L.R. 1196, among other criticisms, said: "It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim, 'the King can do no wrong,' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the **[**614]** wrongful acts of the government should be imposed upon the single individual who suffers the injury, rather than distributed among the entire community constituting the government, where it could be borne without hardship upon any individual, and where it justly belongs.

"* * *. The doctrine has been severely criticized by recent writers, and the courts have frequently been revolted by the hardships resulting therefrom in individual cases, and have introduced 'fictions, artificial distinctions and concessions to expediency,' in order to avoid the full rigor of the 'legal anachronism canonized as a legal maxim.'"

Mr. Justice Butler, speaking for the Supreme Court of the United States, in *Trenton v. New Jersey, [***17] 262 U.S. 182, 43 S. Ct. 534, 538, 67 L. Ed. 937, 29 A.L.R. 1471*, said: "The distinction between the municipality as an agent of the state for governmental purposes and as an organization to care for local needs in a private or proprietary capacity has been applied in various branches of the law of municipal corporations. The most numerous illustrations are found in **[*154]** cases involving the question of liability for negligent acts or omissions of its officers and agents. See *Harris v. District of Columbia, 256 U.S. 650, 41 S. Ct. 610, 65 L. Ed. 1146, 14 A.L.R. 1471*, and cases cited. It has been held that municipalities are not liable for such acts and omissions in the exercise of the police power, or in the performance of such municipal faculties as the erection and maintenance of a city hall and courthouse, the protection of the city's inhabitants against disease and unsanitary conditions, the care of the sick, the operation of fire departments, the inspection of steam boilers, the promotion of education and the administration of public charities. On the other hand, they have been held liable when such acts or omissions occur in the exercise of the power to build **[***18]** and maintain bridges, streets and highways, and waterworks, construct sewers, collect refuse and care for the dump where it is deposited. Recovery is denied where the act or omission occurs in the exercise of what are deemed to be governmental powers, and is permitted if it occurs in a proprietary capacity. The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations."

Nothing so promotes public health as a supply of pure water for domestic use to all citizens. The same, to a more limited extent, may be said of water furnished by the city for the purpose of public swimming and bathing. This form of recreation strengthens the body and promotes health and happiness, especially of the youth of the municipality. The expense of owning and maintaining a municipal water system or a public swimming pool is borne by the community group. A different method may be adopted in **[***19]** collecting the necessary funds to defray the expense of conducting the two activities. Usually the expense of operating the water system is met by a tax upon the amount of water used by each **[*155]** householder. Frequently, the expense of erecting and maintaining a swimming pool is paid out of the general municipal tax fund. To say that one activity is governmental and the other private or proprietary is arbitrary. Such classification of the two activities is not based on sound, logical reasoning. However, it is quite generally held that a municipal corporation is exercising a proprietary function when it acquires and operates a water works system for the benefit of its inhabitants. On the other hand, the courts are hopelessly divided as to whether the establishment and operation of a swimming resort is a governmental or a proprietary function. *Crone v. City of El Cajon, 133 Cal. App. 624, 24 P.2d 846* ; *City of Longmont v. Swearingen, 81 Colo. 246, 254 P. 1000*; *Hendricks v. Urbana Park District, 265 Ill. App. 102* ; *Mocha v. City of Cedar Rapids, 204 Iowa 51, 214 N.W. 587* ; *Gilliland v. City of Topeka, 124 Kan. 726, 262 P. 493*; *Mayor* **[***20]** *and City Council of Baltimore City v. State, 173 Md. 267, 195 A. 571*; *Mayor and City Council of Baltimore v. State, 168 Md. 619, 179 A. 169, 99 A.L.R. 680*; *Heino v. City of Grand Rapids, 202 Mich. 363, 168 N.W. 512*, L.R.A. 1918F, 528; *Nation v. St. Joseph (Mo. App.), 5 S.W.2d 1106* ; *Thayer v. St. Joseph, 227 Mo. App. 623, 54 S.W.2d 442* ; *Cunningham v. City of Niagara Falls, 242 A.D. 39, 272 N.Y.S. 720*; *Glirbas v. City of Sioux Falls, 64 S.D. 45, 264 N.W. 196*; *Hannon v. Waterbury, 106 Conn. 13, 136 A. 876,*

57 A.L.R. 402, and note; and Burton v. Salt Lake City, 69 Utah 186, [**615] 253 P. 443, 51 A.L.R. 364, and note.

The Supreme Court, in applying the Federal income tax law, declined to follow the rule in the majority of states that conducting a municipal water system was a proprietary function. Brush v. Commissioner of Internal Revenue, 300 U.S. 352, 57 S. Ct. 495, 81 L. Ed. 691, 108 A.L.R. 1428, held that the chief engineer of the bureau of water supply, of the city of New York, as supervisor of the water system, was engaged in a governmental function, hence his salary, paid by the municipality, [***21] was exempt from the imposition of a Federal income tax. Mr. Justice Sutherland, in delivering [*156] the opinion of court, said [page 496]: "There probably is no topic of the law in respect of which the decisions of the state courts are in greater conflict and confusion than that which deals with the differentiation between the governmental and corporate powers of municipal corporations. This condition of conflict and confusion is confined in the main to decisions relating to liability in tort for the negligence of officers and agents of the municipality. In that field, no definite rule can be extracted from the decisions. It is true that in most of the state courts, including those in the State of New York, it is held that the operation of water works falls within the category of corporate activities; and the city's liability is affirmed in tort actions arising from negligence in such operation. But the rule in respect of such cases, as we pointed out in Trenton v. New Jersey, 262 U.S. 182, 192, 43 S. Ct. 534, 538, 67 L. Ed. 937, 943, 29 A.L.R. 1471, has been 'applied to escape difficulties, in order that injustice may not result from the recognition of technical [***22] defenses based upon the governmental character of such corporations;' and the rule is hopelessly indefinite, probably for that very reason."

Confronted as we are by inconsistent statements in our own decisions as to what is and what is not a governmental function, and a sharp conflict in the decisions of other jurisdictions, we feel free to decide the question of tort arising from the activity of the municipality in maintaining an artificial swimming pool, as one of first impression.

Furnishing water to the inhabitants of a municipality for domestic purposes, and furnishing water to inhabitants to be used for the purpose of public swimming and bathing, are closely allied activities. Each activity tends to promote the health and happiness of its inhabitants. To hold a municipality liable for tort when engaged in one of these activities, and immune from liability when engaged in the other, is obviously unsound. This illogical distinction, with the harsh results inflicted upon the individual who has suffered personal injury through the negligence of the municipality or its servants, by which these activities are conducted, [*157] has been severely criticized. See 19 Va.L.R. [***23] 97; 23 Mich.L.R. 325; 34 Mich.L.R. 1250; 34 Yale L.R. 129, 143, 229; 36 Yale L.R. 759, 1039; 28 Col.L.R. 577, 734; and note, 75 A.L.R. 1196.

When the Commonwealth or a municipal corporation, whether acting in its governmental or proprietary capacity, seizes or damages the property of a citizen for public good, compensation, under a constitutional mandate (Const., secs. 6 and 58), must be made to the owner. Common justice demands that the right to be safe in life and limb should be as sacred to the citizen as his property rights. The rule that results in this unfairness of the community group to the individual citizen has become apparent to many courts, hence the tendency of all recent decisions is not to extend the immunity of municipalities. Canada, Minnesota, California, New York, Washington and other states have recognized the evils mentioned, and have, by statute, to some extent at least, enlarged the liability of both the municipality and the state for the wrongful conduct of their officers and agents acting within the scope of their employment.

[6, 7] Under the circumstances stated, we hold that HN4[↑] the operation of a swimming and bathing pool by a municipality under the [***24] provisions of its charter, or the general law, is a ministerial act, and that where a wrongful act causing injury is committed by the servants of a municipality in the performance of a purely ministerial act, the municipal corporation is liable as any other private corporation, even though it does not derive any pecuniary advantage from such activity.

[8] Applying these principles to the facts alleged in plaintiff's notice of motion, we hold that it states a cause of action, and that the municipal corporation has a right to offer any and all defenses that a private corporation would have under [**616] the same circumstances. The application of these rules for the determination of liability will sufficiently safeguard the municipality and will have a tendency to induce greater caution in the maintenance of swimming pools for the safety of invited guests.

[*158] For the reasons stated, the judgment of the trial court is reversed, and the case remanded for further proceedings in accord with the principles herein announced.

Reversed and remanded.

Dissent by: EGGLESTON

Dissent

EGGLESTON. J., dissenting.

The majority opinion holds that the operation by a municipality **[***25]** of a swimming pool for the free use of its citizens is a ministerial and not a governmental function, and that consequently the municipality is liable in damages for the tortious acts of its servants and employees in such operation.

It is true, as the majority opinion states, that there is a division of authority on the question, but I think the great weight of authority, as well as the better reasoning, favors the view that the operation of such a facility for the gratuitous use of its citizens is a governmental function, and that therefore the municipality is immune from liability in connection with such operation.

It is a matter of common knowledge that all branches of the government -- national, state, and local -- now engage in many functions for the common good of the people which only a short time ago were undreamed of. In this State we have beautiful parks and playgrounds maintained by the national, state, and municipal governments for the common enjoyment of our citizens. No one questions the view that in establishing and operating these recreational centers the respective branches of the government are acting in a governmental capacity. See *City of Lynchburg [***26] v. Peters, 156 Va. 40, 48, 157 S.E. 769*; *Rudacille v. State Commission, etc., 155 Va. 808, 814, 156 S.E. 829*. Why is the same not true of a swimming pool operated without profit by a city as a part of one of its public playgrounds?

We had thought that these things, so obviously for the common good, should be encouraged, but the majority opinion is notice to the cities of this State that such playgrounds and parks are to be henceforth established and maintained at their peril. If the majority view is to prevail, **[*159]** then every municipal playground will henceforth be a fruitful source of both litigation and liability.

Moreover, the majority opinion is contrary to the principles heretofore laid down by this court.

In *Ashbury v. Norfolk, 152 Va. 278, 147 S.E. 223*, we held that the collection of garbage, being for the common good and without the element of pecuniary profit, is a governmental function. To my mind, the operation of free parks or playgrounds and swimming pools for the recreation and upbuilding of the health of our children is just as essential to the common good as the collection of garbage.

But that is not all. In the *Ashbury Case* **[***27]** we cited with approval the reasoning of the court in *Bolster v. City of Lawrence, 225 Mass. 387, 390, 114 N.E. 722*, L.R.A. 1917B, 1285, in which it was expressly held that the operation of a bath house for the free use of the public was a governmental function. Other cases to this same effect will be found in the annotations in 51 A.L.R. 370 and 57 A.L.R. 406.

For these reasons I cannot agree with the majority opinion.

CAMPBELL, C.J., and HOLT, J., concur in this dissent.

End of Document

Elliott v. Carter

Supreme Court of Virginia

October 27, 2016, Decided

Record No. 160224

Reporter
292 Va. 618 *; 791 S.E.2d 730 **; 2016 Va. LEXIS 151 ***

CHANCY M. ELLIOTT, ADMINISTRATOR OF THE ESTATE OF CALEB MCKINLEY SMITH, DECEASED v. TREVOR CARTER

Prior History: [***1] FROM THE CIRCUIT COURT OF RICHMOND COUNTY. Harry T. Taliaferro, III, Judge.

Elliott v. Jones, 2014 Va. Cir. LEXIS 169 (Va. Cir. Ct. Dec. 23, 2014)

Disposition: Affirmed.

Core Terms

gross negligence, river, swim, sandbar, walk, summary judgment, circuit court, leaders, material fact, matter of law, undisputed, rescue

Case Summary

Overview
HOLDINGS: [1]-A circuit court did not err in granting a Boy Scout peer leader summary judgment on a mother's gross negligence claim following the drowning death of her son where there was no allegation that the peer leader was aware of any hidden danger posed by the sandbar, the river, or its current, the peer leader instructed the son to walk back to shore along the same route he had taken out into the river and there was no evidence that conditions had changed, the peer leader had tried to swim back and assist the son when he fell into the river, and thus, there was evidence that the leader had exercised some degree of diligence and care.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Summary Judgment Review > Standards of Review

HN1[] **Summary Judgment Review, Standards of Review**

In an appeal from a circuit court's decision to grant or deny summary judgment, the Supreme Court of Virginia reviews the application of law to undisputed facts de novo.

Torts > Negligence > Gross Negligence

HN2[] **Negligence, Gross Negligence**

Gross negligence is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important evidence on the question of gross negligence.

Torts > Negligence > Gross Negligence

HN3[] **Negligence, Gross Negligence**

Gross negligence requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > Negligence > Gross Negligence

HN4[] **Jury Trials, Province of Court & Jury**

Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule. Because the standard for gross negligence in Virginia is one of indifference, not inadequacy, a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care.

Counsel: David R. Simonsen, Jr. (Keith B. Marcus; ParisBlank, on briefs), for appellant.

W.F. Drewry Gallalee (Harold E. Johnson; Williams Mullen, on brief), for appellee.

Judges: OPINION BY JUSTICE S. BERNARD GOODWYN. JUSTICE McCULLOUGH, with whom JUSTICE MIMS joins, dissenting.

Opinion by: S. BERNARD GOODWYN

Opinion

[*620] [731]** PRESENT: All the Justices.

OPINION BY JUSTICE S. BERNARD GOODWYN

In this appeal, we consider the evidence required to submit a question of gross negligence to a jury.

BACKGROUND

This matter arises from a wrongful death suit brought by Chancy M. Elliott (Elliott) on behalf of the estate of Caleb McKinley Smith (Caleb), alleging gross negligence on the part of Trevor Carter (Carter), the peer leader of Caleb's Boy Scout troop, after Caleb drowned on a Scout camping trip. The material facts are not in dispute.

On June 25, 2011, Caleb was a 13-year-old Boy Scout on an overnight camping trip with his troop along the Rappahannock River near Sharps, Virginia. Carter, then 16 years old, was the Senior Patrol Leader, the troop's peer leader. Caleb had been taking lessons to learn how to swim—he had had one from Carter that morning—but he could **[***2]** not yet swim.

At about 11:00 a.m., Carter led Caleb and two other Boy Scouts into the river along a partially submerged sandbar. One of the other two Scouts could swim (Scott), and the other could not (Elijah).

When they were approximately 150 yards into the river, Carter and Scott decided to swim back to shore. Carter told Caleb and Elijah to walk back to shore the way they had come, along the sandbar. As Caleb and Elijah walked back to shore along the sandbar, they both fell into deeper water. Caleb yelled to Carter for help and Carter attempted to swim back and rescue him. Although **[*621]** Elijah was rescued, neither Carter nor three adult Scout leaders, who attempted to assist, were able to save Caleb.

Elliott filed a wrongful death action in the Circuit Court of Richmond County against Carter, four adult Scout leaders, the Boy Scouts of America, and the affiliated Heart of Virginia Council, Inc. (collectively, Defendants), **[**732]** alleging that they had failed to adequately supervise Caleb. The court granted the Defendants' demurrer asserting charitable immunity.

Elliott amended her complaint to allege both gross and willful and wanton negligence by Carter and gross negligence by the four adult Scout **[***3]** leaders, and demanded a jury trial.* Defendants filed a motion for summary judgment arguing that, based upon undisputed material facts, there was no gross negligence because there was no complete lack of care alleged and the danger of drowning was open and obvious. Defendants relied upon Elliott's responses to requests for admission and allegations in the amended complaint in establishing the undisputed material facts.

Following a hearing and supplemental briefing, the court granted the motion for summary judgment as to all Defendants. It found that, while the undisputed material facts would be sufficient to submit the question regarding a claim of simple negligence to a jury, the facts did not support a claim for gross negligence, because in Virginia, "there is not gross negligence as a matter of law where there is even the slightest bit of care regardless of how insufficient or ineffective it may have been," and there was evidence that Carter did try to save Caleb.

Elliott appeals the ruling of the circuit court only as to Carter. On appeal, she argues that the circuit court erred **[***4]** in granting summary judgment and in concluding that, as a

* Elliott non-suited the actions against the Boy Scouts of America and the Heart of Virginia Council, Inc.

matter of law, a jury could not find Carter's actions constituted gross negligence.

ANALYSIS

HN1[↑] "In an appeal from a circuit court's decision to grant or deny summary judgment, this Court reviews the application of law to undisputed facts de novo." St. Joe Co. v. Norfolk Redev't & Hous. Auth., 283 Va. 403, 407, 722 S.E.2d 622, 625 (2012).

[*622] HN2[↑] Gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." Cowan v. Hospice Support Care, Inc., 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004).

> It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important evidence on the question of gross negligence.

Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 800-01 (1996) (citations and internal quotation marks omitted). HN3[↑] Gross negligence "requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness." Cowan, 268 Va. at 487, 603 S.E.2d at 918; *see also* Thomas v. Snow, 162 Va. 654, 661, 174 S.E. 837, 839 (1934) ("Ordinary and gross negligence differ in degree of inattention"; [***5] while "[g]ross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence," "it is something less than . . . willful, wanton, and reckless conduct.").

HN4[↑] "Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule." Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691, 4 Va. Law Rep. 1220 (1987). Because "the standard for gross negligence [in Virginia] is one of indifference, not inadequacy," a claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care. Kuykendall v. Young Life, 261 Fed. Appx. 480, 491 (4th Cir. 2008) (relying on Frazier, 234 Va. at 392, 362 S.E.2d at 690-91, Chapman, 252 Va. at 190, 475 S.E.2d at 801, and Cowan, 268 Va. at 486-87, 603 S.E.2d at 918 to interpret Virginia [**733] law); *see, [*623] e.g.*, Colby v. Boyden, 241 Va. 125, 133, 400 S.E.2d 184, 189, 7 Va. Law Rep. 1368 (1991) (affirming the circuit court's ruling that the plaintiff failed to establish a prima facie case of gross negligence when the evidence showed that the defendant "'did exercise some degree of diligence and care' and, therefore, as a matter of law, his acts could not show 'utter disregard of prudence amounting to complete neglect of the safety of another'").

Here, even viewing the evidence in the [***6] light most favorable to Elliott, the non-moving party, as required in considering a motion for summary judgment, Commercial Business Systems v. Bellsouth Services, 249 Va. 39, 41-42, 453 S.E.2d 261, 264 (1995), the undisputed material facts support the conclusion that Carter exercised some degree of care in supervising Caleb. Therefore, his conduct did not constitute gross negligence.

First, it is not alleged that Caleb had any difficulty walking out along the sandbar with Carter. Second, there is no allegation that Carter was aware of any hidden danger posed by the sandbar, the river or its current. Third, Carter instructed Caleb to walk back to shore along the same route he had taken out into the river, and there was no evidence that conditions changed such that doing so would have been different or more dangerous than initially walking out, which was done without difficulty. Finally, Carter tried to swim back and assist Caleb once Caleb slipped off the sandbar, which is indicative that Carter was close enough to attempt to render assistance when Caleb fell into the water, and that Carter did attempt to render such assistance. Thus, although Carter's efforts may have been inadequate or ineffectual, they were not so insufficient as to constitute the indifference and utter disregard [***7] of prudence that would amount to a complete neglect for Caleb's safety, which is required to establish gross negligence.

Because a claim of gross negligence must fail as a matter of law when there is evidence that the defendant exercised some degree of diligence and care, the circuit court did not err in finding that no reasonable jurist could find that Carter did nothing at all for Caleb's care. As such, there was no question for the jury, and the circuit court properly granted Carter's motion for summary judgment.

Accordingly, the judgment of the circuit court will be affirmed.

Affirmed.

Dissent by: McCULLOUGH

Dissent

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[*624] JUSTICE McCULLOUGH, with whom JUSTICE MIMS joins, dissenting.

Ordinarily, whether gross negligence has been established is a matter of fact to be decided by a jury. *Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691, 4 Va. Law Rep. 1220 (1987)*. Of course, when "persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule." *Id.* In my view, the facts presented in this tragic case were sufficient to present a jury question. Accordingly, I respectfully dissent.

Here, Caleb could not swim, a fact that was known to the defendants. He did not walk out on his own into the river. Rather, he was **[***8]** led, without a life jacket or other safety equipment, over a partially submerged sandbar far into the river. The complaint alleges that "the Rappahannock River . . . is a major river with a strong current." Caleb was then abandoned on a sandbar in the middle of the river and told to walk back. A partially submerged sandbar in the middle of a river with a strong current is a very dangerous place to be, particularly for a non-swimmer without a life vest. Ever-shifting sandbars, obviously, are not stable structures. They can easily dissipate. A major river with strong currents like the Rappahannock presents a different situation than a tranquil pond. Carter then swam away too far to effectuate a rescue should Caleb slip and fall into the river. In my view, "reasonable persons could differ upon whether the cumulative effect of these circumstances constitutes a form of recklessness or a total disregard of all precautions, an absence of diligence, or lack of even slight care." *Chapman v. City of Virginia Beach, 252 Va. 186, 191, 475 S.E.2d 798, 801 (1996)*.

I would also find that the purported acts of slight care, separated in time and place from the gross negligence at issue, do not take the issue away from the jury. The only two acts of slight care the defendants identify **[***9]** are the **[**734]** fact that Caleb was given a swimming lesson before he drowned — but there is no indication that Caleb could swim — and that Carter, after swimming too far away to make any rescue effectual, tried to swim back to save Caleb *after he had fallen into the river*. Significantly, Carter led Caleb into danger in the first place. When the defendant has led the plaintiff into danger, an ineffectual and doomed to fail rescue attempt does not in my **[*625]** judgment take away from the jury the question of gross negligence. Accordingly, I would reverse and remand the case for a trial by jury.

Sayers v. Bullar

Supreme Court of Virginia

October 12, 1942

Record No. 2578

Reporter
180 Va. 222 *; 22 S.E.2d 9 **; 1942 Va. LEXIS 161 ***

JOHN G. SAYERS v. G. W. BULLAR AND DIXIE SHUMATE

Prior History: [***1] Error to a judgment of the Circuit Court of Smyth county. Hon. Walter H. Robertson, judge presiding.

Disposition: *Affirmed.*

Core Terms

employees, pipeline, blasts, spring, explosives, declaration, individually, rock, special plea, tort action, damaged

Case Summary

Procedural Posture
Plaintiff landowner sought review of an order from the Circuit Court of Smyth County (Virginia), which dismissed his amended declaration against defendant state employees that sought to recover damages alleged to have been sustained as a result of certain explosions set off by the state employees in the construction of a water pipeline for the state. The circuit court held that there were no proper allegations of negligence.

Overview
The landowner brought this action alleging that the explosions set off by the state employees caused a spring located on his property to cease to flow. The landowner admitted the facts alleged by the state employees in a special plea, which stated that the acts complained of were done by the state through it duly constituted officers, agents, and employees and that the state employees, insofar as they did such acts as were alleged, did them only as agents of the state. The landowner excepted to the special plea and moved to strike it out. However, the trial court overruled the motion and exception and dismissed the action. The landowner filed an amended declaration, which was also dismissed. On appeal, the court held that the immunity of the state from actions for tort extended to the state employees where they were acting legally and within the scope of their employment, but if they exceeded their authority and went beyond the sphere of their employment, or if they stepped aside from it, they would not enjoy such immunity when they were sued by a party who had suffered injury by their negligence. Here, the state employees were acting within the scope of their employment.

Outcome
The court affirmed the trial court's judgment, which dismissed the landowner's action against the state employees.

LexisNexis® Headnotes

Governments > State & Territorial
Governments > Claims By & Against

HN1[] **State & Territorial Governments, Claims By & Against**

A state cannot be sued except by its permission, and even if the suit, in form, be against the officers and agents of the state, yet if, in effect, it be against the state, it is not maintainable. Va. Code Ann. §§ 2578 to 2583 provide the only cases and the procedure in which actions may be maintained against the state. There is no statute, which gives a right to anyone to sue the state for tort.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

HN2[] **Separation of Powers, Legislative Controls**

The duty of establishing and operating state fish hatcheries is placed by Va. Code Ann. § 3305(4), upon a commission.

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > General Overview

Governments > State & Territorial
Governments > Employees & Officials

HN3[] **State & Territorial Governments, Claims By & Against**

The immunity of the state from actions for tort extends to state agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by a party who has suffered injury by their negligence.

Headnotes/Summary

Headnotes

1. STATE -- *Suits against State -- Cannot Be Sued Except by Permission.* -- A State cannot be sued except by its permission, and even if the suit, in form, be against the officers and agents of the State, yet if, in effect, it be against the State, it is not maintainable.

2. STATE -- *Suits against State -- Code Sections 2578-2583.* -- Sections 2578 to 2583 of the Code of 1936 provide the only cases and the procedure in which actions may be maintained against the State.

3. STATE -- *Suits against State -- No Statute Giving Right to Sue for Tort.* -- There is no statute which gives a right to anyone to sue the State for tort.

4. STATE -- *Can Be Guilty of No Wrong.* -- The State can be guilty of no wrong.

5. STATE -- *Suits against State -- When Agents Act for State -- When Conduct Chargeable to Them Alone.* -- The State acts only through its agents and as long as those agents act legally and within the scope of their employment, they act for the State, but if they act wrongfully their conduct is chargeable to them alone.

6. **[***2]** STATE -- *Suits against State -- State Agencies and Officers -- Essential Allegation and Proof.* -- In a tort action against an employee of the State, allegation and proof of some act done by the employee outside the scope of his authority, or of some act within the scope of authority but performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment are required.

7. STATE -- *Suits against State -- State Agencies and Officers -- Damage to Spring in Laying Pipe Line -- Case at Bar.* -- In the instant case, an action to recover damages sustained as a result of explosives set off by defendants in the construction of a pipe line for the State, it was alleged that the explosives caused a spring on plaintiff's property to cease to flow. Defendants filed a special plea setting forth that the acts complained of were done by the Commonwealth and that the defendants acted as agents and employees of the Commonwealth. The pleadings disclosed that defendants were engaged in laying a pipe line from a spring belonging to the Commonwealth over the Commonwealth's land to a fish hatchery; that the line was being laid **[***3]** through limestone rock making it necessary to blast; that plaintiff warned defendants that the blasts would likely injure his spring and told them the pipe line could be laid elsewhere without the use of explosives, but that the warning and suggestion of plaintiff were not heeded. There were no facts alleged to show that defendants were guilty of any wrongful conduct or acted wantonly or negligently, nor were any facts alleged to show that they exceeded their authority or that they were acting individually and on their own responsibility.

Held: That in the absence of some proper allegation charging defendants with individual negligence, the action could not be sustained.

8. STATE -- *Suits against State -- State Agencies and Officers -- Rule as to Immunity from Actions for Tort.* -- The immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by a party who has suffered injury by their negligence.

Syllabus

The opinion **[***4]** states the case.

Counsel: *L. P. Summers* and *L. P. Summers, III,* for the plaintiff in error.

B. L. Dickinson, for the defendants in error.

Judges: Present, Campbell, C.J., and Holt, Hudgins, Gregory and Spratley, JJ.

Opinion by: GREGORY

Opinion

[*223] [**10] GREGORY, J., delivered the opinion of the court.

The plaintiff in error, who was the plaintiff below, instituted his action by declaration against G. W. Bullar and Dixie Shumate to recover damages alleged to have been sustained as a result of certain explosions set off by them in [*224] the construction of a water pipe line for the State of Virginia. It was alleged that the explosions caused a valuable spring, located on plaintiff's property, to cease to flow.

The defendants filed a special plea and a plea of the general issue. The special plea, in substance, sets forth that the acts complained of were done by the Commonwealth of Virginia through its duly constituted officers, agents and employees and that the defendants, insofar as they did such acts as were alleged, did them only as agents and employees of the Commonwealth.

The plaintiff admitted the facts alleged in the special plea but excepted thereto [***5] upon the ground that it stated no defense to the action. He moved the court to strike it out. The exception and motion were overruled by the court and the action was dismissed, with leave granted the plaintiff to amend his declaration and make sufficient allegations of negligence against the defendants.

The plaintiff filed an amended declaration, to which the defendants demurred, and the court sustained the demurrer and dismissed the action because there was no proper allegation of negligence.

The court, in its first written opinion, in effect held that the action amounted to one against the State because the acts charged against the employees admittedly were the acts of the State and it could not be sued without its consent. The State was not a party.

The pleadings disclose that the plaintiff was the owner of a farm and home and upon the farm were the usual outbuildings. A bold spring was located on the land from which the necessary water for his home and general farm use was provided. The Commonwealth of Virginia had established a fish hatchery near by, and in order to secure the necessary water to operate it, the defendants, who were the agents of the Commonwealth, [***6] were engaged in laying a pipe line from another spring, which belonged to the Commonwealth, over its land to the fish hatchery. This pipe line was to be laid at one point just across the road from the plaintiff's spring and within 30 feet of it. It was being laid [*225] through limestone rock and it became necessary to blast the rock with explosives to lay the pipe. Before the blasts were put off, the plaintiff warned the defendants that the blasts in limestone rock would likely be detrimental to his (plaintiff's) spring. He told them that the pipe line could be laid elsewhere without the use of explosives. The warning and suggestion of the plaintiff were not heeded, the blasts were put off and the plaintiff's spring ceased to flow. Damages for the loss of the spring is the subject matter of this litigation.

The single question to be decided is whether or not the action in effect is an action for tort against the State. If it is, as was held by the lower court, then we must affirm the judgment, but if it is not and only amounts to an action for tort against the defendants individually, we must reverse the judgment.

[1-3] *HN1*[↑] A State cannot be sued except by its permission, [***7] and even if the suit, in form, be against the officers and agents of the State, yet if, in effect, it be against the State, it is not maintainable. Sections 2578 to 2583 of the Virginia Code (Michie) provide the only cases and the procedure in which actions may be maintained against the State. There is no statute which gives a right to anyone to sue the State for tort. *Commonwealth v. Chilton Malting Co., 154 Va. 28, 152 S.E. 336.* See also Digest of Virginia and West Virginia Reports, Vol. 9, pp. 14 and 15, where the cases are collected and digested.

In *Board of Public Works v. Gannt, 76 Va. 455*, it was held that agents of a government in possession of specific property under a void title may be proceeded against for its recovery by the true owner and that it is no defense for them to assert that the State has an interest in the property.

This court has never been called upon before to pass judgment upon a case where employees of the State are sued for tort arising from work being done by them for the State. Such is the case at bar.

We expressly withheld decision on the point in *Commonwealth v. Chilton Malting Co., 154 Va. 28, 152 S.E. 336*, [***8] [*226] *supra,* where the court held that a tort action could not be maintained against the Commonwealth, but as to the agents who committed the alleged wrong the court reserved decision because those agents were not parties.

[**11] In *Wilson v. State Highway Commissioner, 174 Va. 82, 4 S.E.2d 746*, the individuals who committed the alleged

tort had been dismissed as parties in the lower court, and, of course, were not before us when we commented upon *Commonwealth v. Chilton Matting Co., 154 Va. 28, 152 S.E. 336*, in these words: "It is clearly seen that this court recognized that the wrongdoers might be sued individually for their torts but decried the notion that the Commonwealth could be sued therefor." This observation was beyond the necessities of the *Wilson case* and not necessarily a correct comment upon what we actually held in the *Chilton case*. The State agents or employees were not present as parties in either case, and, of course, nothing said by the court could be considered as an adjudication that State agents and employees could be sued for tort.

In West Virginia the point has been decided. In *Mahone v. State Road Commission, [***9] 99 W. Va. 397, 129 S.E. 320*, action was instituted against the State Road Commission and C. E. Price, the contractor, for damages resulting from the negligent performance of work on the highway. A demurrer to the declaration was interposed and sustained as to the State Road Commission but overruled as to Price, the effect of which was to hold that Price might be liable as a wrongdoer but the State Road Commission could not be.

Again the West Virginia court in *Downs v. Lazzelle, 102 W. Va. 663, 136 S.E. 195*, held that if agents of the State go beyond their lawful rights and commit unlawful acts, the State is not liable because it can do no wrong. It cannot be sued for tort. But such agents cannot claim the protection of the State against a suit for their wrongdoing. They, in their individual capacities, are liable.

The Georgia court likewise has spoken on the subject. See *Cannon v. Montgomery, 184 Ga. 588, 192 S.E. 206*.

[*227] In 25 R.C.L., States, par. 50, this is said: "The immunity of the State from suit does not relieve officers of the State from responsibility for illegal trespasses or torts on the rights of an individual, even though they act **[***10]** or assume to act under the authority and pursuant to the directions of the State; * * *."

To like effect is 59 Corpus Juris, States, Par. 465(b) p. 310.

Many cases are cited by both text-writers to sustain the proposition. For example, the interesting case of *United States v. Lee, 106 U.S. 196, 1 S. Ct. 240, 27 L. Ed. 171*, where Arlington, the historic home place of General Robert E. Lee, was involved. George Washington Parke Custis had devised this estate to Mrs. Lee, the wife of General Lee, for life, with remainder to the plaintiff, George W. P. C. Lee. The question was whether Kaufman and Strong, holding the property as commissioners of the United States under an invalid tax sale, could be proceeded against in ejectment for the recovery of the estate by the lawful owner. The majority of the court were of opinion that the action was maintainable and that the public agents could not defend under the void title of the government. It was not a suit against the government.

Another case of interest is *Poindexter v. Greenhow, 114 U.S. 270, 5 S. Ct. 903, 29 L. Ed. 185*. There, a tax collector was enjoined from selling property under an unconstitutional law. **[***11]** This, likewise, was held not to be a suit against the government.

See also annotation, 43 A.L.R. 408.

[4, 5] The pleadings, which alone we can consider, disclose that this is not, in form, an action for tort against the State. It is not a party and has no direct pecuniary interest that will be affected by this litigation. None of its property will be molested and it will not be required to pay any part of a judgment, if one is recovered. The State can be guilty of no wrong. It acts only through its agents and as long as those agents act legally and within the scope **[*228]** of their employment, they act for the State, but if they act wrongfully the conduct is chargeable to them alone.

The State's right to lay the pipe line on its own property could no more be questioned than its right to construct a highway upon its land acquired for that purpose. The construction of a pipe line or a highway can only be accomplished by the State through its officers, agents and employees. If it is necessary to use explosives to build either, the State would have the right to use them. Of course the State's right to lay the pipe and to use the explosives could be exercised only **[***12]** by the State through its agents and employees. If the State had been using explosives to build a road instead **[**12]** of building the pipe line, and a blast had caused an adjoining land owner's spring to cease to flow, no one would contend that the State's agents in blasting, without more, would have been individually liable. The acts of the State and those of the agents in this situation would be inseparable. The acts of the agents would be the acts of the State.

Likewise the mere allegation that agents of the State set off blasts on State property to lay a pipe line for the State is not a charge of negligence. It is not suggested that these agents and employees failed in their duty and used too much explosive, or that they failed to take necessary precautions and as a result of such failure the plaintiff was damaged. The case alleged is simply that plaintiff was damaged when the employees of the State blasted limestone rock on State property to lay a pipe line for the State.

There was no allegation that the defendants had stepped

beyond the course of their employment. There were no facts alleged (as distinguished from the pleader's conclusion) to show that they were [***13] guilty of any wrongful conduct or acted wantonly or negligently. No facts were alleged to show that they exceeded the authority or directions given them. No facts were alleged to show that they were acting individually and on their own responsibility. On the other hand, it is quite clear from the allegations and the averments of the special plea admitted to be true by the plaintiff, that [*229] they were acting solely in their representative capacity as lawful and proper agents of the State and not in their own individual right.

The special plea set forth the simple fact that the defendants, agents and employees of the State were acting solely for the State and their acts were the acts of the State.

These facts were admitted to be true by the plaintiff. In this situation only a question of law was presented. The alleged act of the defendants was the act of the State. Their conduct cannot be separated, under the allegations, from the conduct of the State. The State cannot be liable, therefore the defendants cannot be liable.

It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the [***14] express direction of the State, unless they depart from that direction.

[6] In the brief for the defendants this is said: "The true rule would seem to be to require proof (and allegation) of some act done by the employee outside the scope of his authority, or of some act within the scope of authority but performed so negligently that it can be said that its negligent performance takes him who did it outside the protection of his employment."

With this statement we are in accord.

And the trial court in its opinion stated: "It seems from the amended declaration that all of the facts complained of were committed by the defendants as agents of the State and not as individuals in their own right and of their own and independent volition. The pipe line was laid where it was and as it was by the State. If a wrong was committed it was committed by the State. No separate wrongdoing by the defendants themselves is pointed out in the declaration. The State, or the Commonwealth, is not a party. I think the demurrer is good and that the action must be dismissed."

This statement seems conclusive of the question.

Finally, it was alleged in the amended declaration that the pipe [***15] line could have been laid without blasting the rock [*230] by placing it elsewhere. It was also alleged that the plaintiff warned the defendants not to blast the rock because it would likely damage plaintiff's spring.

HN2[↑] The duty of establishing and operating State fish hatcheries is placed by Code, Section 3305(4), upon a commission. It is common knowledge that fish hatcheries must be supplied with water and unless they are placed in the bed of a stream, the water must be transported to them either by pipe, ditch or some other means. The commission is a State agency created by statute. It must of necessity exercise judgment and discretion in carrying on its work. It makes its own plans and exercises *quasi* judicial functions in ascertaining necessary facts and forming its conclusions. The defendants were simply carrying out instructions given them by this State agency. The location of the pipe line involved judgment and discretion, and simply because some one thought it ought to be placed elsewhere would be no reason to hold the employees liable personally for failure to heed such outside suggestions.

[**13] [7] It is not alleged that the defendants were not [***16] acting under the order of the commission or that they were not acting in a purely ministerial capacity. In the absence of some proper allegation charging them with individual negligence, the action cannot be sustained. See *Cooper v. O'Connor, 69 App. D.C. 100, 99 F.2d 135, 118 A.L.R. 1440*.

[8] Our conclusion is that *HN3*[↑] the immunity of the State from actions for tort extends to State agents and employees where they are acting legally and within the scope of their employment, but if they exceed their authority and go beyond the sphere of their employment, or if they step aside from it, they do not enjoy such immunity when they are sued by a party who has suffered injury by their negligence.

The judgment is affirmed.

Affirmed.

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Chapman v. City of Virginia Beach

Supreme Court of Virginia

September 13, 1996, Decided

Record No. 951969

Reporter
252 Va. 186 *; 475 S.E.2d 798 **; 1996 Va. LEXIS 86 ***

LINDA CHAPMAN, ET AL. v. CITY OF VIRGINIA BEACH

Prior History: [***1] FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH. Thomas S. Shadrick, Judge.

Disposition: *Reversed and remanded.*

Core Terms

gate, nuisance, boardwalk, trial court, gross negligence, recreation facility, beach, jury verdict, assign, contributory negligence, cause of action, hotel, foreseeable

Case Summary

Procedural Posture
Appellant father challenged the decision of the trial court (Virginia), which set aside a jury verdict and entered judgment in favor of appellee city in appellant's wrongful death action.

Overview
Appellant parents brought an action for wrongful death after their daughter died while playing on a gate owned by appellee city. After the jury returned a $ 300,000 verdict in favor of appellant father and $ 18,618.79 for funeral expenses and medical bills, the trial court granted appellee's motion to set aside the jury verdict. Appellants sought review claiming, inter alia, the trial court erred in holding as a matter of law that the evidence was insufficient to prove gross negligence, in failing to set aside the verdict because it did not compensate all the statutory beneficiaries, and in granting the contributory negligence instruction regarding appellant mother. The court held that the trial court erred in holding that the nuisance count actually was a negligence cause of action. Negligence and nuisance were distinct concepts. Negligence was only one of the two alternative prerequisites required to impose liability on a municipality in a nuisance cause of action. Reliance on negligent acts did not transform the nuisance cause of action into a negligence cause of action. Appellant mother did not have an absolute duty to stand next to her eight-year-old daughter every moment.

Outcome
The judgment setting aside a jury verdict in a wrongful death action was reversed. Reliance on negligent acts did not transform the nuisance cause of action into a negligence cause of action. Appellant mother did not have an absolute duty to stand next to her eight-year-old daughter every moment.

LexisNexis® Headnotes

Torts > ... > Types of Premises > Recreational Facilities > Playgrounds

Torts > ... > Types of Premises > Recreational Facilities > Sports Facilities

Torts > ... > Types of Premises > Recreational Facilities > Swimming Areas

Torts > Public Entity Liability > Liability > General Overview

HN1[] **Recreational Facilities, Playgrounds**

See Va. Code Ann. § 15.1-291.

Torts > Negligence > Proof > General Overview

Torts > Negligence > General Overview

Torts > Negligence > Gross Negligence

HN2[] **Negligence, Proof**

Gross negligence has been described as the utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care. Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. Deliberate conduct is important evidence on the question of gross negligence. Whether gross negligence has been established is usually a matter of fact to be decided by a jury.

Real Property Law > ... > Nuisance > Types of Nuisances > Public Nuisances

Torts > Negligence

Real Property Law > Torts > Nuisance > General Overview

HN3[] **Types of Nuisances, Public Nuisances**

Negligence and nuisance are distinct legal concepts. A cause of action for public nuisance is based on a claim of injury resulting from a condition which is dangerous to the public. While negligent acts may give rise to the dangerous condition, the acts themselves do not constitute a nuisance.

Governments > Local Governments > Claims By & Against

Real Property Law > ... > Remedies > Damages > General Overview

Torts > Public Entity Liability > Liability > General Overview

Real Property Law > Torts > Nuisance > General Overview

HN4[] **Local Governments, Claims By & Against**

A finding of negligence is one of the two alternative prerequisites required to impose liability on a city in a nuisance cause of action. Cities can be held liable for damages resulting from a nuisance only if the condition claimed to be a nuisance was not authorized by law or the act creating or maintaining the nuisance was negligently performed.

Family Law > Parental Duties & Rights > Duties > Care & Control of Children

Torts > ... > Defenses > Contributory Negligence > General Overview

Torts > Negligence > General Overview

HN5[] **Duties, Care & Control of Children**

A parent has a duty to exercise ordinary care for the child's safety, but this duty does not impose an absolute requirement that a parent oversee and guide a child's activities every moment.

Judges: Present: All the Justices. OPINION BY JUSTICE ELIZABETH B. LACY.

Opinion by: ELIZABETH B. LACY

Opinion

[799]** **[*187]** OPINION BY JUSTICE ELIZABETH B. LACY

In determining whether the trial court properly set aside a jury verdict and entered judgment in favor of the City of Virginia Beach in this wrongful death action, we consider issues relating to public nuisance, operation of a recreational facility, admission of expert testimony, gross negligence, and contributory negligence.

[*188] On December 15, 1991, Linda Chapman took her three children to the oceanfront Breakers Hotel in the City of Virginia Beach to visit relatives who were renting an apartment in the Hotel. Eight-year-old Missy and her three-year-old sister, Carolyn, went unaccompanied down to the boardwalk to play. Mrs. Chapman watched Missy and Carolyn from a window in the apartment. She saw Carolyn sitting on top of a section of a gate mounted on the boardwalk railing. Missy was pushing the gate section so that it would swing while Carolyn sat on it.

The gate was constructed by the City to allow maintenance vehicles to access the beach **[***2]** from the boardwalk. In its normal condition, the gate consisted of two sections, each hinged on one end to the boardwalk railing and fastened together on the other end with a metal latch. Each gate section had two nearly horizontal metal bars which tapered from their widest point at the boardwalk railing to the middle where the

sections met. Sometime prior to October 1991, one section of the gate, the south section, had broken from its hinges and lay in the sand [**800] below the boardwalk. The other section of the gate, the north section, remained secured at one end to the boardwalk railing. Missy was pushing Carolyn on the north section of the gate as it swung from the boardwalk over the sand.

At some point, Missy's head became entrapped between the two metal bars in the north section of the gate. When the gate swung out over the sand, Missy's feet could not touch the ground and she was left hanging by her neck. A jogger discovered Missy and notified a nearby hotel clerk. The hotel clerk attempted to resuscitate Missy, and the rescue squad was called. Missy was transported to the hospital but had suffered severe brain damage. Two days later, on December 17, 1991, Missy was pronounced dead.

[***3] Missy's parents, Linda and Donald Chapman, as co-administrators of Missy's estate, filed a wrongful death action against the City, alleging simple negligence, gross negligence, and nuisance. The trial court struck the nuisance count and held that, pursuant to Code § 15.1-291, the City was only liable for gross negligence. The trial court also granted the City's contributory negligence instruction with regard to Linda Chapman.

The jury returned a $ 300,000 verdict in favor of Missy's father only and $ 18,618.79 for funeral expenses and medical bills. The City filed a motion to set aside the jury verdict, arguing that, as a matter of law, the evidence was insufficient to establish gross negligence. [*189] The trial court granted the City's motion and entered judgment in favor of the City.

The Chapmans appealed, assigning error to the trial court's actions in striking the nuisance count, holding that the boardwalk was a recreational facility requiring a showing of gross negligence to impose liability on the City under § 15.1-291, holding as a matter of law that the evidence was insufficient to prove gross negligence, failing to set aside the verdict because it did not compensate all the [***4] statutory beneficiaries, and granting the contributory negligence instruction regarding Linda Chapman. The City assigned cross-error to the admission of certain expert testimony. We awarded an appeal on all assignments of error and the assignment of cross-error.

I. RECREATIONAL FACILITY

The trial court held that the boardwalk is a recreational facility and therefore, pursuant to § 15.1-291, [1] the City could only be liable for acts which constituted gross negligence. The Chapmans assert that this was error because the boardwalk is a street or a sidewalk, not a recreational facility. We disagree with the Chapmans.

[***5] The boardwalk is an area which stretches along a considerable portion of the City's beach. It is designed for recreational use, whether to access the beach itself or as a promenade for walking along the beach. Neither assigning the maintenance responsibility to the City's department of highways nor allowing vehicles to drive on the boardwalk to perform their maintenance functions transforms the nature of the facility from a place of recreation to a street. Accordingly, we will affirm the trial court's holding that the boardwalk is a recreational facility as that term is used in § 15.1-291.

[*190] II. GROSS NEGLIGENCE

The Chapmans next complain that the trial court erred in setting aside the jury verdict based on its holding that, as a matter of law, the actions of the City did not constitute gross negligence. *HN2*[] Gross negligence has been described as the "utter disregard of [**801] prudence amounting to complete neglect of the safety of another." *Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987)*. "It is a heedless and palpable violation of legal duty respecting the rights of others" which amounts to the "absence of slight diligence, or the want of even scant care." [***6] *Town of Big Stone Gap v. Johnson, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945)* (citations omitted). Several acts of negligence which separately may not amount to gross negligence, when combined may have a cumulative effect showing a form of reckless or total disregard for another's safety. *Kennedy v. McElroy, 195 Va. 1078, 1082, 81 S.E.2d 436, 439 (1954)*. Deliberate conduct is "important evidence on the question of gross negligence." *Id.* Whether gross negligence has been established is usually a matter of fact to be decided by a jury.

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[1] *HN1*[] Section 15.1-291 states:

> No city or town which shall operate any bathing beach, swimming pool, park, playground, skateboard facility, or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility.
>
> The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

[2] *Frazier, 234 Va. at 393, 362 S.E.2d at 691*.

[***7] In reviewing the action of the trial court here, the Chapmans, having received a favorable jury verdict, are entitled to the benefit of all substantial conflicts in the evidence and all fair inferences which can be drawn from the evidence. *Mann v. Hinton, 249 Va. 555, 557, 457 S.E.2d 22, 23 (1995)*. The jury verdict should be reinstated if there is any credible evidence to support it. *Id.*

The record in this case shows that all the gates on the boardwalk, like the gate in issue, were supposed to be kept closed except when city personnel opened them to perform maintenance tasks. William Lonnie Gregory, supervisor of the city department in charge of maintaining the gate, was informed on at least three occasions prior to Missy's accident that the gate was broken. These reports were made by Wayne Lee Creef, the employee charged with inspecting and reporting maintenance problems in the resort area of the City. The first report followed an event called the Neptune Festival, an event held at the end of September. A second oral report was made in [*191] October. In the early or middle part of November, Creef again reported the broken gate. He put this report in writing, "assuming that it [***8] was going to be a work order put into effect."

Gregory had the authority to schedule and initiate repair of the gate but did not direct that any immediate action be taken in response to Creef's reports. Gregory made a deliberate decision not to order that the gate be repaired or that the north section be secured at the time the reports were made because "most of the maintenance work that [the City does] on the boardwalk is done in the spring prior to the tourist season."

Based on this record, we conclude that the trial court erred in setting aside the jury verdict. The accident occurred in an area constructed and maintained by the City as a recreational facility. The purpose of such an area is to attract visitors of all ages to come to and enjoy the facility, in this case, the beach and boardwalk. Under the City's own operating procedures, the gates were to be closed unless City employees were performing maintenance functions. Despite repeated notices by its own employee, the City did not take any action. The decision not to take any action was deliberate. On this record, reasonable persons could differ upon whether the cumulative effect of these circumstances constitutes a form [***9] of recklessness or a total disregard of all precautions, an absence of diligence, or lack of even slight care. Accordingly, the issue was properly submitted to the jury, there was credible evidence to support the jury verdict, and the trial court erred in setting aside the jury verdict. This determination does not end the matter, however; we next consider the City's assignment of cross-error.

III. EXPERT TESTIMONY

The City contends that the trial court erred when it admitted the expert opinion testimony of Shelly Deppa. Deppa was offered as a "human factors psychologist" and testified that the physical properties, configuration, and unsecured condition of the gate section created a hazard and that it was [**802] reasonably foreseeable that a child's head could become entrapped in the gate section. The City maintains that this testimony did not assist the trier of fact and should not have been admitted as expert opinion testimony. We agree.

It was within the common knowledge of the jury that the area was a recreational area that attracted children and the evidence introduced at trial showed the size of the opening between the two metal bars in the gate section. Whether the condition of [***10] the gate section [*192] created a dangerous condition and whether it was reasonably foreseeable that an injury could occur as a result of the gate's condition were issues within the range of common experience. The admission of expert testimony is inappropriate for matters of common experience. *Board of Supervisors v. Lake Servs., Inc., 247 Va. 293, 297, 440 S.E.2d 600, 602 (1994)*.

In light of this holding, the case must be remanded for a new trial. While it is not necessary to address whether the verdict incorrectly was limited to recovery by the father, two other issues raised by the Chapmans may arise on remand and, therefore, we will address those assignments of error.

IV. NUISANCE

Count IV of the Chapmans' motion for judgment asserted a cause of action based on nuisance. Following conclusion of the evidence, the trial court struck this count, and submitted the case to the jury solely on the negligence count. The trial court concluded that the failure to properly maintain the gate, the basis for the negligence count, also was the basis for the nuisance count. Thus, the trial court held, the nuisance count actually was a negligence cause of action. The Chapmans assert that this was [***11] error and we agree.

HN3[↑] Negligence and nuisance are distinct legal concepts. A cause of action for public nuisance is based on a claim of

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[2] The City also argues that it cannot be held liable because the injury was not foreseeable and it had no duty to keep the gate closed. These arguments are unpersuasive in this case. No foreseeability instruction was offered and the City raised no objection and, the City need not foresee the precise nature of the injury, only that some injury might probably result. *See Ponousos v. Allen, 245 Va. 60, 66, 425 S.E.2d 496, 499-500 (1993)*.

injury resulting from a condition which is dangerous to the public. Taylor v. City of Charlottesville, 240 Va. 367, 372, 397 S.E.2d 832, 835 (1990). [3] While negligent acts may give rise to the dangerous condition, the acts themselves do not constitute a nuisance.

Contrary to the trial court's conclusion that the reliance on negligent acts defeated the nuisance count, we conclude that HN4[↑] a finding of negligence is one of the two alternative prerequisites required to impose liability on a city in a nuisance cause of action. Cities can be held liable for damages resulting from a nuisance only **[***12]** if the condition claimed to be a nuisance was not authorized by law or the act creating or maintaining the nuisance was negligently performed. Taylor, 240 Va. at 373, 397 S.E.2d at 836; City of Virginia Beach v. Virginia Beach Steel Fishing Pier, Inc., 212 Va. 425, 427, 184 S.E.2d **[*193]** 749, 750-51 (1971). Reliance on negligent acts under these circumstances does not transform the nuisance cause of action into a negligence cause of action. Accordingly, the trial court erred in striking the Chapmans' nuisance count on the ground that the alleged negligence precluded a nuisance count.

The City also argue that § 15.1-291 applies to any negligence associated with the maintenance or operation of a recreational facility and thus is applicable to actions for nuisance. The trial court did not expressly rule on this issue. Under these circumstances, the issue is not ripe for resolution in this appeal, and we decline to address the Chapmans' argument in this regard.

V. CONTRIBUTORY NEGLIGENCE

Finally, the Chapmans assign error to a jury instruction regarding contributory negligence. The City argues that it was entitled to the instruction because Mrs. Chapman was negligent when **[***13]** she allowed the children to play unsupervised without protection or any means of rescuing them from harm. She saw her children swinging on the gate and neither attempted to stop them nor to secure the gate. Therefore, the City concludes that, based on this evidence, the jury was entitled to determine whether **[**803]** Mrs. Chapman was contributorily negligent. We disagree.

HN5[↑] A parent has a duty to exercise ordinary care for the child's safety, City of Danville v. Howard, 156 Va. 32, 36, 157 S.E. 733, 735 (1931), but this duty does not impose an absolute requirement that a parent oversee and guide a child's activities every moment. Thus, in a case in which a seven-year-old child was killed darting across a highway to his mother after a school bus passed, we rejected "out of hand" the contention that a contributory negligence instruction was supported by the evidence, stating that "the law does not impose upon parents the absolute duty to provide children . . . with escort service to and from a school bus stop." Bickley v. Farmer, 215 Va. 484, 488, 211 S.E.2d 66, 69 (1975). Similarly, we rejected a claim that a mother was contributorily negligent when her eleven-year-old son was struck **[***14]** by a truck unloading coal, because she failed to keep the boy in the house during the unloading of the coal. P.L. Farmer, Inc. v. Cimino, 185 Va. 965, 971, 41 S.E.2d 1, 4 (1947).

The evidence in this case is also insufficient to support an instruction on contributory negligence. The record shows that the Chapmans were frequent visitors to the Breakers. Mrs. Chapman's aunt and uncle had lived in an apartment in the Breakers from September **[*194]** through April each year for a number of years. Mrs. Chapman went there "at least two or three times a week" to prepare meals and visit and took her children with her. During these visits, Missy and Carolyn often played on the boardwalk and were familiar with it.

The record also reflects that on the day of the accident, Mrs. Chapman was watching her daughters from a window of the apartment. She saw them feeding the sea gulls and saw Missy pushing Carolyn on the gate. She turned away for "just a couple of minutes" and, when she looked back, she saw a man, the hotel clerk, standing with Missy. Fearing that Missy would be kidnapped or otherwise harmed, Mrs. Chapman screamed and ran out of the building to the boardwalk. The jogger who found Missy **[***15]** testified that only a "couple of minutes" passed between the time she saw Missy and returned to the gate with the hotel clerk.

Mrs. Chapman did not have an absolute duty to stand next to her eight-year-old daughter every moment. Missy was familiar with the area and Mrs. Chapman's supervision of her was reasonable under the circumstances. Accordingly, we find that the evidence does not support a contributory negligence instruction.

For the foregoing reasons, we will reverse the judgment of the trial court and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

[3] Although the City argued that the gate was not "dangerous and hazardous in itself" and that the gate "simply" was not a nuisance, it did not assign error to the trial court's failure to dismiss the nuisance count because, as a matter of law, the gate did not constitute a public nuisance.

End of Document

Frazier v. City of Norfolk

Supreme Court of Virginia

November 25, 1987

Record No. 841357

Reporter
234 Va. 388 *; 362 S.E.2d 688 **; 1987 Va. LEXIS 268 ***; 4 Va. Law Rep. 1220

David G. Frazier, a minor, etc., et al. v. City of Norfolk

Prior History: [***1] Appeal from a judgment of the Circuit Court of the City of Norfolk. Hon. Robert W. Stewart, judge presiding.

Disposition: *Affirmed.*

Core Terms

gross negligence, pit, recreation facility, orchestra pit, activities, recreation, trial court, guardrails, barriers, platform, pool, gap

Case Summary

Procedural Posture
Plaintiff injured person filed an action against defendant city seeking to recover for personal injuries and medical expenses. The Circuit Court of the City of Norfolk (Virginia) held that the city's building was a recreational facility pursuant to Va. Code Ann. § 15.1-291; therefore, the injured person's failure to show that the city was grossly negligent made the city immune from liability. The injured person appealed.

Overview
The injured person sustained his injuries when he fell from the stage in the city's building while playing the drums in a church group's choir. Section 15.1-291 provided that the city was immune from liability with respect to the use of its recreational facilities, except where the city had been grossly or wantonly negligent. The court determined that § 15.1-291 did not condition the city's liability on whether an activity in its recreational facility was for profit, free public use, or a highly participatory activity. The court found that the adjective "recreational," and the noun "recreation," had settled meanings, and were commonly understood as means of getting diversion or entertainment. The city's building was a recreational facility because it was used as a place for citizens' diversion and entertainment similar to a bathing beach, swimming pool, park, or playground, where members of the public were entertained and diverted, either by their own activities or by the activities of others. The city was not grossly negligent when the edge of the stage was open and obvious, and at most the city's failure to install protective devices, or post warnings was ordinary negligence.

Outcome
The court affirmed.

LexisNexis® Headnotes

Torts > ... > Types of Damages > Property Damages > General Overview

Governments > Local Governments > Claims By & Against

Torts > Negligence > Gross Negligence

Torts > ... > Types of Premises > Recreational Facilities > Playgrounds

Torts > ... > Types of Premises > Recreational Facilities > Sports Facilities

Torts > ... > Types of Premises > Recreational Facilities > Swimming Areas

Torts > Public Entity Liability > Immunities > General Overview

HN1[] **Types of Damages, Property Damages**

Va. Code Ann. § 15.1-291 provides: No city or town which shall operate any bathing beach, swimming pool, park, playground or other recreational facility shall be liable in any civil action or proceeding for damages resulting from any

injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility. The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute.

Governments > Legislation > Interpretation

HN2[] **Legislation, Interpretation**

When a statute is clear and unambiguous, the general rules for construction of statutory language of doubtful meaning do not apply.

Civil Procedure > Appeals > Standards of Review > General Overview

HN3[] **Appeals, Standards of Review**

On the issue of gross negligence, the court will summarize the pertinent evidence in the light most favorable to the plaintiff, in accord with settled rules of appellate review.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Torts > Negligence > Gross Negligence

Torts > Negligence > General Overview

HN4[] **Trials, Judgment as Matter of Law**

Ordinarily, the question whether gross negligence is established is a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence is not established, it is the court's duty to so rule.

Torts > Negligence > Gross Negligence

Torts > Negligence > General Overview

HN5[] **Negligence, Gross Negligence**

"Gross negligence" is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of others. Gross negligence amounts to the absence of slight diligence, or the want of even scant care.

Headnotes/Summary

Headnotes

Torts -- Negligence -- Civil Liability -- Cities, Counties and Towns -- Statutory Limitation of Liability (Code § 15.1-291) -- Recreational Facilities -- Gross Negligence -- Prima Facie Case -- Duty of Care

Plaintiff was a 13 year old boy who performed with a church choir at a convention held in a publicly owned hall. While playing the drums, his stool tipped over and he fell off the edge of the platform and into the basement below and was injured. The trial court ruled that the city owned building was a "recreational facility" within the meaning of Code § 15.1-291, which limits the liability of a municipality to damages for gross or wanton negligence. The court ruled that the evidence was insufficient as a matter of law to establish gross negligence. Plaintiff appeals.

1. In enacting Code § 15.1-291, the General Assembly intended to limit the civil liability of municipalities in the maintenance and operation of *any* recreational facilities to cases of gross or wanton negligence.

2. The statute is clear and unambiguous **[***2]** and thus the general rules for construction of statutory language of doubtful meaning do not apply; the plain meaning and intent of the enactment will be ascribed to it.

3. The use of the city owned hall for public entertainment qualifies the building as a "recreational facility" within the meaning of Code § 15.1-291, and the trial court correctly so held.

4. Ordinarily, the question whether gross negligence has been established is a matter of fact to be decided by a jury, but when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule.

5. Gross negligence is that degree of negligence that shows utter disregard of prudence amounting to complete neglect of

the safety of another. It amounts to the absence of slight diligence, or the want of even scant care.

6. The trial court correctly ruled that the plaintiff failed to establish a prima facie case of gross negligence on the part of the city, whose acts of omission did not rise to that degree of egregious conduct which can be classified as a heedless, palpable violation of rights showing an utter disregard for prudence.

Syllabus

[***3]

The trial court correctly ruled that the plaintiff in a tort action failed to establish a prima facie case of gross negligence against a city for failure to install protective devices at a platform edge in a city owned building, which it ruled was a "recreational facility" within the meaning of Code § 15.1-291.

Counsel: *Mona B. Schapiro (Richard H. Matthews; Steingold, Glanzer & Matthews*, on briefs), for appellants.

George J. Dancigers (Mary G. Commander; Heilig, McKenry & Fraim, on brief), for appellee.

Judges: Compton, J., delivered the opinion of the Court. Thomas, J., concurring in part and dissenting in part. Stephenson, J., joins.

Opinion by: COMPTON

Opinion

[*389] [**689] In this tort action against a municipality, we consider whether a particular city-owned building is a "recreational facility," within the meaning of Code § 15.1-291, and, if so, whether the plaintiff failed as a matter of law to establish a prima facie case of gross negligence.

HN1[ ] The statute in issue provides,

> "No city or town which shall operate any bathing beach, swimming pool, park, playground or other recreational facility shall be liable in any civil action or proceeding [***4] for damages resulting from any injury to the person or property of any person caused by any act or omission constituting simple or ordinary negligence on the part of any officer or agent of such city or town in the maintenance or operation of any such recreational facility. Every such city or town shall, however, be liable in damages for the gross or wanton negligence of any of its officers or agents in the maintenance or operation of any such recreational facility.
>
> "The immunity created by this section is hereby conferred upon counties in addition to, and not limiting on, other immunity existing at common law or by statute."

[*390] In 1979, appellant David G. Frazier, a minor, fell while attending a religious convention at Chrysler Hall in Norfolk. Frazier and his parents (collectively, the plaintiff) brought this action against appellee the City of Norfolk seeking recovery for personal injuries and associated medical expenses.

After a pretrial hearing, the court below ruled that Chrysler Hall was a "recreational facility" under the foregoing statute. Accordingly, the court required the plaintiff to establish that the city was guilty of gross negligence, in [***5] support of his allegations that the city permitted a dangerous condition to exist on the premises. Subsequently, at the conclusion of the plaintiff's evidence in a jury trial, the court sustained the city's motion to strike and ruled the plaintiff had failed to prove that the city was grossly negligent. We awarded the plaintiff this appeal from the June 1984 order in which the court entered judgment for the city.

The threshold issue, of course, deals with the utilization of the building. The testimony shows that among the activities conducted in Chrysler Hall were, "Broadway shows, three school musical groups a year[,] . . . [travelogue], Norfolk forum, many beauty contests, Nutcracker Suite which includes a lot of children, . . . religious groups frequently, whether they are professional or church groups, [speeches, and] a broad cross section of events." A symphony orchestra performed regularly in the building.

At the time of the plaintiff's injury, the city had leased the building to a church group for the purpose of holding a convention over a two-day period. The lease provided that the city retained control over the management and operation of the premises.

The [***6] plaintiff contends the trial court erred in ruling that Chrysler Hall was a recreational facility within the meaning of § 15.1-291. He argues that the statute should apply only "to such things as parks, playgrounds and pools and not an auditorium rented for profit." The plaintiff contends that Chrysler Hall should have been treated "merely as a building owned by the defendant and used as a part of the defendant's proprietary function" and that simple or ordinary

negligence should have been the standard of proof.

He says that the statute should be limited to those facilities maintained for the public's free use which involve "highly participatory" activities such as swimming pools or parks, where horseback riding and biking occur, and should not apply to buildings operated by the municipality for profit, such as auditoriums, **[*391]** theatres, or music halls, where more sedentary activities occur. The plaintiff contends that the activities conducted in the latter facilities "are normally highly supervised and are not generally associated with the dangers involved in participatory activities."

[690]** Because the city is engaged in a profit-making function, the plaintiff **[***7]** argues, it is in a position similar to a privately owned business, should bear the responsibilities of a business, and "should not be afforded the luxury of a limitation of its liability under § 15.1-291." Also, the plaintiff relies on techniques of statutory construction which provide that where general language follows specific words, the meaning of the general may be confined to matters of the same kind as the specific. *See* Martin v. Commonwealth, 224 Va. 295, 301-02, 295 S.E.2d 890, 892-93 (1982). We reject the plaintiff's contentions.

The statute under consideration was enacted in 1940 and since then has undergone only a few minor changes not relevant here. The legislative title was, "An ACT to amend the Code of Virginia by adding thereto a new section numbered 3032-a, limiting the civil liability on the part of cities and towns in the maintenance or operation of recreational facilities to cases of gross or wanton negligence." Acts 1940, ch. 153. The statute was enacted shortly after this Court decided Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939). There, in a 4-3 decision imposing tort liability upon a city, the Court held that a municipality **[***8]** acted in a ministerial and not governmental capacity when operating a bathing and swimming pool, although it did not derive any pecuniary advantage from the activity. 172 Va. at 157, 200 S.E.2d at 615.

[1] Considering the title of the act along with its substantive provisions, we conclude that the General Assembly intended to limit the civil liability of municipalities in the maintenance and operation of *any* recreational facilities to cases of gross or wanton negligence. That is what the legislature said in plain terms. Contrary to the plaintiff's argument, there is no necessity to resort to maxims of statutory construction or to employ other devices to ascertain legislative intent. And, the statute's application is not conditioned on profit, free public use, or "highly participatory" activity.

[2] HN2[↑] This statute is clear and unambiguous. Thus, general rules for construction of statutory language of doubtful meaning do not apply. Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985). Under these circumstances, there is no need for interpretation **[*392]** by the court; the plain meaning and intent of the enactment will be ascribed to it. *Id.*

[*9]** The adjective "recreational" and the noun "recreation" have settled meanings which are too plain to be misunderstood. The words are not difficult to comprehend. "Recreational" means "of or relating to recreation." Webster's Third New International Dictionary 1899. "Recreation" is commonly understood as "a means of getting diversion or entertainment." *Id.*

[3] The record plainly shows that Chrysler Hall is used as a place for citizens' diversion and entertainment. It is a place, like a bathing beach, swimming pool, park, or playground, where members of the public are entertained and diverted, either by their own activities or by the activities of others. Obviously, stage shows, forums, the symphony, beauty contests, travelogues, the ballet, and many meetings and speeches are forms of recreation. Therefore, the use of Chrysler Hall for these functions qualifies the building as a "recreational facility" within the meaning of the statute, and the trial court correctly so held.

HN3[↑] Turning to the issue of gross negligence, we will summarize the pertinent evidence in the light most favorable to the plaintiff, in accord with settled rules of appellate review. The injured party, **[***10]** age 13, was attending the convention at Chrysler Hall and was asked to perform with a church choir by playing the drums. He took his place on a stool at a drum set which previously had been placed at the rear of the orchestra pit.

The pit was in front of the main stage and was a platform that could be positioned level with or below the stage. At the time, the pit had been lowered so that a gap existed between the rear of the pit and the front of the stage. No barriers or railings **[**691]** were in place on the rear perimeter of the pit platform.

During the performance, the plaintiff dropped a drumstick. The stick fell behind him and, when the performance ended, he reached to the rear "blindly," groping for the stick. In the process, the plaintiff leaned backward on the stool and lost his balance. The stool "went over" and the plaintiff was injured when he fell from the pit platform through the gap approximately 18 feet into the basement of the building.

The plaintiff introduced expert testimony that the city was in violation of its own building code because railings were not in place on the pit platform. The evidence further showed that the city possessed barriers specifically **[***11]** designed to

provide protection [*393] against falls through the gap created on the stage side of the pit when the pit was in a lowered position. Also, the plaintiff produced evidence that, two years prior to this incident, a child six years of age fell from the orchestra pit into the basement when pit barriers were in place.

The plaintiff contends the trial court erred in ruling that the evidence was insufficient as a matter of law to establish gross negligence. He argues that a jury issue was created by the following facts: The city retained the right to control the leased premises and hence had the duty to eliminate the dangerous condition created by the position of the orchestra pit; the city was in violation of its building code for failure to have barriers in place around the pit; barriers available for safety purposes were not in use in spite of the fact that a child had fallen there two years earlier; and the city knew children would be present at the convention thereby creating a higher duty of care than would have been required for adults. We disagree with the plaintiff's argument.

[4] *HN4*[↑] Ordinarily, the question whether gross negligence has been established is [***12] a matter of fact to be decided by a jury. Nevertheless, when persons of reasonable minds could not differ upon the conclusion that such negligence has not been established, it is the court's duty to so rule. *Community Bus Co. v. Windley, 224 Va. 687, 689, 299 S.E.2d 367, 369 (1983)*.

[5] *HN5*[↑] "Gross negligence" is that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of another. "It is a heedless and palpable violation of legal duty respecting the rights of others." *Town of Big Stone Gap v. Johnson, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945)*. Gross negligence amounts to the absence of slight diligence, or the want of even scant care. *Id.*

[6] We hold the trial court correctly ruled that the plaintiff failed to establish a prima facie case of gross negligence. The city's failure to install protective devices or to post warnings for children at a platform edge which was open and obvious amounts, at the most, to ordinary negligence and a failure to exercise reasonable care. Such acts of omission do not rise to that degree of egregious conduct which can be classified as a heedless, palpable violation of [***13] rights showing an utter disregard of prudence.

For these reasons, the judgment of the trial court will be

Affirmed.

Concur by: THOMAS (In Part)

Dissent by: THOMAS (In Part)

Dissent

[*394] THOMAS, J., concurring in part and dissenting in part.

I concur with all of the majority opinion except the conclusion that the plaintiff failed to raise a jury question as to gross negligence.

Plaintiff's evidence was struck at the close of plaintiff's case. In order to decide whether a jury question existed with regard to gross negligence, this Court was bound to consider the evidence and all reasonable inferences arising therefrom in the light most favorable to the plaintiff. Once the evidence is thus considered, the question becomes whether reasonable men [**692] could differ as to the existence of gross negligence on the part of the City.

In my opinion, the facts, viewed as described above, make clear that a jury question existed. The legal test for gross negligence is whether the defendant acted in a way that amounted to "a heedless and palpable violation of legal duty respecting the rights of others." *Town of Big Stone Gap v. Johnson, 184 Va. 375, 378, 35 S.E.2d 71, 73 [***14] (1945)*.

Here, the City had exclusive control of the facility. It leased to a church organization which it knew would bring children to the facility. A child had previously fallen from the same orchestra pit and sustained injuries despite the use of specially designed guardrails. Though armed with the knowledge that a child could fall from the orchestra pit even with guardrails in place, the City failed to install the guardrails prior to the instant accident. In this case, the evidence was that had the guardrails been installed, the fall would have been prevented. Moreover, use of the guardrails was required by the City's own building code. The distance from the floor of the orchestra pit to the concrete floor beneath the orchestra pit was eighteen feet. Thus, the City knew that the drop was dangerous. Yet it gave no warning to the child who was sitting in the orchestra pit and it failed to take the simple precautions which would have prevented the fall. In my opinion, on this evidence, a jury could believe that the City acted in "heedless and palpable violation" of this infant's rights.

End of Document

Cowan v. Hospice Support Care, Inc.

Supreme Court of Virginia

November 5, 2004, Decided

Record No. 032758

Reporter
268 Va. 482 *; 603 S.E.2d 916 **; 2004 Va. LEXIS 155 ***

INGRID H. ***COWAN v. HOSPICE*** SUPPORT CARE, INC.

Prior History: [***1] FROM THE CIRCUIT COURT OF THE CITY OF FREDERICKSBURG. John W. Scott, Jr., Judge.

Disposition: Reversed and remanded.

Core Terms

gross negligence, charities, willful, wanton negligence, charitable immunity, Hospice, simple negligence, decedent, immunity, volunteer, activities, omissions, shield, circuit court, leg

Case Summary

Procedural Posture
Appellant daughter sued appellee charity in the Circuit Court of the City of Fredericksburg, Virginia, alleging claims of gross negligence and willful and wanton negligence. Among other things, the trial court concluded that the charitable immunity doctrine barred recovery for acts or omissions of gross negligence and willful and wanton negligence. The daughter appealed.

Overview

The daughter had temporarily placed her mother in the charity's non-profit, non-medical volunteer hospice support facility. During her stay, the mother fractured her leg as an aide was attempting to remove her from her bed. The charity provided the mother with morphine for the pain, but did not seek any further medical attention. The mother later died from complications of the fracture. The daughter sued the charity, but the trial court determined that the charitable immunity doctrine barred recovery for acts or omissions of gross negligence and willful and wanton negligence. The supreme court initially noted that Va. Code Ann. § 8.01-226.4 provided civil immunity for the acts or omissions of hospice volunteers who rendered care to terminally ill patients, provided that the volunteers acted in good faith and in the absence of gross negligence or willful misconduct. The supreme court held that Virginia's public policy in favor of promoting the activities of charitable organizations had been employed to shield charities from liability for their acts of simple negligence; however, the rationale did not apply to conduct involving gross negligence and willful and wanton negligence.

Outcome
The judgment of the trial court was reversed and remanded.

LexisNexis® Headnotes

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Governments > State & Territorial Governments > Claims By & Against

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

Torts > Negligence > Defenses > General Overview

HN1[] **Business & Corporate Law, Nonprofit Corporations & Organizations**

Under the doctrine of limited immunity applied to charities in the Commonwealth of Virginia, a charitable institution is immune from liability to its beneficiaries for negligence caused by acts or omissions of its servants and agents, provided that the charity has exercised due care in their selection and retention. While this immunity shields a charity from claims made by its beneficiaries, the immunity does not extend to protect the charity from claims made by persons who have no beneficial relationship to the charity but are merely invitees or strangers.

Healthcare Law > ... > Actions Against Facilities > Governmental & Nonprofit Liability > General Overview

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

Torts > Negligence > Defenses > General Overview

HN2[] **Actions Against Facilities, Governmental & Nonprofit Liability**

The Virginia Supreme Court adopted the doctrine of limited charitable immunity based on public policy considerations. These considerations rest on the premise that the services charities extend to their beneficiaries also benefit the public by alleviating a public burden. When charities are required to expend funds to litigate negligence claims, the charities' ability to perform services for their beneficiaries is restricted.

Torts > ... > Standards of Care > Appropriate Standard > General Overview

Torts > Negligence > General Overview

Torts > Negligence > Gross Negligence

Torts > ... > Duty > Standards of Care > General Overview

Torts > ... > Standards of Care > Reasonable Care > Reasonable Person

HN3[] **Standards of Care, Appropriate Standard**

There are three levels of negligence. The first level, simple negligence, involves the failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another. The second level, gross negligence, is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness. The third level of negligent conduct is willful and wanton negligence. This conduct is defined as acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably would cause injury to another.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Torts > Negligence > Gross Negligence

Torts > Negligence > General Overview

HN4[] **Business & Corporate Law, Nonprofit Corporations & Organizations**

Acts or omissions of simple negligence may occur routinely in the performance of the activities of any charitable organization. Employees or volunteers, in carrying out their duties, may fail to understand or to adequately follow instructions of a supervisor, may exercise poor judgment, or may have a lapse in attention to an assigned task. While serious consequences may result from these deficiencies in performance, they ordinarily do not involve an extreme departure from the charity's routine actions in conducting its activities. In contrast, gross negligence involves conduct that shocks fair-minded people, and willful and wanton negligence involves such recklessness that the actor is aware that his conduct probably would cause injury to another. Thus, unlike simple negligence, these two levels of negligence are characterized by conduct that represents an unusual and marked departure from the routine performance of a charity's activities.

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

Torts > Negligence > General Overview

Torts > Negligence > Defenses > General Overview

Torts > Negligence > Gross Negligence

HN5[] **Business & Corporate Law, Nonprofit Corporations & Organizations**

As a practical matter, a charity's performance of its mission may be thwarted by litigation directed at the charity's failure to perform its activities in accordance with standards of ordinary care. For this reason, Virginia's public policy in favor of promoting the activities of charitable organizations

has been employed to shield charities from liability for their acts of simple negligence. This rationale, however, is inapplicable to conduct involving gross negligence and willful and wanton negligence. Unlike acts or omissions giving rise to claims of simple negligence, such conduct can never be characterized as an attempt, albeit ineffectual, to carry out the mission of the charity to serve its beneficiaries. Therefore, the public policy rationale that shields a charity from liability for acts of simple negligence does not extend to acts of gross negligence and willful and wanton negligence.

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Torts > ... > Defenses > Specific Immunities > Charitable Immunity

Torts > Negligence > Defenses > General Overview

Torts > Negligence > Gross Negligence

HN6[] **Relief From Judgments, Altering & Amending Judgments**

Va. Code Ann. § 8.01-226.4 provides civil immunity for the acts or omissions of hospice volunteers who render care to terminally ill patients, provided that the volunteers act in good faith and in the absence of gross negligence or willful misconduct. In enacting this section, the general assembly has expressed a clear preference for excluding from the protection of charitable immunity acts or omissions of gross negligence and willful misconduct.

Counsel: *Leila H. Kilgore* (*Kilgore & Smith*, on briefs), for appellant.

Christine A. Williams (*Bruce M. Marshall*; *DurretteBradshaw*, on brief), for appellee.

Amicus Curiae: The Virginia Trial Lawyers Association (Roger T. Creager; Hunt H. Whitehead; Marks & Harrison, on brief), in support of appellant.

Judges: Present: Hassell, C.J., Lacy, Keenan, Koontz, Lemons, and Agee, JJ., and Carrico, S.J. OPINION BY JUSTICE BARBARA MILANO KEENAN.

Opinion by: BARBARA MILANO KEENAN

Opinion

[917] [*484]** OPINION BY JUSTICE BARBARA MILANO KEENAN

In this appeal, we consider whether a plaintiff's claims of gross negligence and willful and wanton negligence against a charity are barred by the doctrine of charitable immunity.

For purposes of this appeal, the facts relevant to this issue of law and question of first impression are not in dispute. On July 9, 2001, the plaintiff, Ingrid H. Cowan, placed her mother, Ruth D. Hazelwood (the decedent), in Harbor House, a residential facility that provides temporary care for very ill persons when their primary caregiver seeks respite. Harbor House is operated by the defendant, Hospice Support Care, Inc. (Hospice), "a non-profit, non-medical volunteer hospice support corporation."

The decedent was bedridden and required the assistance of two persons to move her from her bed to a bedside commode. During the decedent's first night at Harbor House, a single volunteer lifted her from **[***2]** the bed. When the decedent's right leg became "caught" in the bed, the volunteer heard a loud "popping-cracking" noise in the leg. That evening, and for the remainder of the decedent's week-long stay at Harbor House, the decedent received morphine for pain in her leg, but she was not provided any other medical treatment.

Cowan returned to Harbor House on July 16, 2001. After she and her mother left the facility, Cowan discovered that the decedent's leg was swollen and that she appeared to be in pain. As a result, Cowan took the decedent to a nearby hospital emergency room. The decedent was diagnosed as having a shattered right femur, which required amputation of her leg above the knee. The decedent died four days later from complications resulting from the surgery.

Cowan filed an amended motion for judgment in the circuit court against Hospice alleging wrongful death of the decedent based on **[*485]** claims of simple negligence, gross negligence, willful and wanton negligence, and negligent hiring and retention. Upon consent of the parties, the circuit court dismissed the simple negligence count. Hospice filed a plea in bar of charitable immunity to the counts of gross negligence and willful **[***3]** and wanton negligence, and a demurrer to the negligent hiring and retention count. The circuit court sustained the plea in bar and demurrer and dismissed these remaining counts with [[prejudice]] [1]. Among other things, the circuit court concluded that the charitable

[1] Cowan did not assign error to the trial court's decisionsustaining the demurrer to the negligent hiring and retention claim.

immunity doctrine barred recovery for acts or omissions of gross negligence and willful and wanton negligence. Cowan appeals.

On appeal, Cowan argues that this Court has not applied the charitable immunity doctrine to shield a charity from liability for acts of gross negligence or willful and wanton negligence. She asserts that because gross negligence and willful and wanton negligence are different in degree and kind from simple negligence, the charitable immunity doctrine should not be defined as including immunity for those more extreme acts. Cowan also contends that the charitable immunity doctrine should not be **[***4]** applied to acts of gross negligence or willful and wanton negligence because, in instances of such extreme conduct, the public's interest in encouraging charitable activities is outweighed by the need to deter such acts of "reckless and harmful behavior."

In response, Hospice argues that charities should be immune from liability for all degrees of negligence because the absence of **[**918]** such immunity would discourage them from performing their beneficial activities. Hospice asserts that this Court, in its prior decisions, has discussed charitable immunity from liability for negligence without specifically limiting that immunity to claims of simple negligence. Thus, Hospice contends, because gross negligence and willful and wanton negligence are simply different degrees of negligence, charitable immunity extends to shield charities from liability for those categories of negligent conduct as well.

Hospice also asserts that *Code § 8.01-226.4*, which effectively subjects hospice volunteers to liability for acts of gross negligence and willful and wanton negligence, is evidence of the General Assembly's intent to shield charities from similar liability by providing **[***5]** **[*486]** a remedy against the individuals who actually commit such acts. [2] We disagree with Hospice's arguments.

HN1[↑] Under the doctrine of limited immunity applied to charities in this Commonwealth, a charitable institution is immune from liability to its beneficiaries for negligence caused by acts or omissions of its servants and agents, provided that the charity has exercised due care in their selection and retention. *Stralev v. Urbanna Chamber of Commerce, 243 Va. 32, 35, 413 S.E.2d 47, 49, 8 Va. Law Rep. 1714 (1992)*; *Thrasher v. Winand, 239 Va. 338, 340, 389 S.E.2d 699, 701, 6 Va. Law Rep. 1543 (1990)*. While this immunity shields a charity from **[***6]** claims made by its beneficiaries, the immunity does not extend to protect the charity from claims made by persons who have no beneficial relationship to the charity but are merely invitees or strangers. *Stralev, 243 Va. at 36-37, 413 S.E.2d at 49*; *Thrasher, 239 Va. at 340-41, 389 S.E.2d at 701*.

HN2[↑] We adopted this doctrine of limited charitable immunity based on public policy considerations. *Moore v. Warren, 250 Va. 421, 424, 463 S.E.2d 459, 460 (1995)*; *Hill v. Leigh Mem'l Hosp., 204 Va. 501, 504-05, 132 S.E.2d 411, 414 (1963)*; *Weston v. Hospital of St. Vincent, 131 Va. 587, 609-10, 107 S.E. 785, 792 (1921)*. These considerations rest on the premise that the services charities extend to their beneficiaries also benefit the public by alleviating a public burden. *See Hill, 204 Va. at 507, 132 S.E.2d at 415*. When charities are required to expend funds to litigate negligence claims, the charities' ability to perform services for their beneficiaries is restricted. *See Moore, 250 Va. at 423, 463 S.E.2d at 460*; *Hill, 204 Va. at 507, 132 S.E.2d at 415*; *see also* **[***7]** *Egerton v. R.E. Lee Mem'l Church, 395 F.2d 381, 382 (4th Cir. 1968)*.

These public policy considerations provide the framework for resolving the issue before us. In deciding this question, we focus on the nature of the conduct involved in the differing degrees of negligence and the extent to which each type of conduct deviates from the role of charities and their contribution to the public welfare.

As our decisions have recognized, *HN3*[↑] there are three levels of negligence. The first level, simple negligence, involves the failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another. *Gossett v. [*487] Jackson, 249 Va. 549, 554, 457 S.E.2d 97, 100 (1995)*; *Griffin v. Shively, 227 Va. 317, 321, 315 S.E.2d 210, 212-13 (1984)*. The second level, gross negligence, is a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person. This requires a degree of negligence that would shock fair-minded persons, although demonstrating something less than willful recklessness. *Koffman v. Garnett, 265 Va. 12, 15, 574 S.E.2d 258, 260 (2003)*; **[***8]** *Griffin, 227 Va. at 321, 315 S.E.2d at 213*; *Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971)*.

The third level of negligent conduct is willful and wanton negligence. This conduct **[**919]** is defined as "acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with the defendant aware, from his knowledge of existing circumstances and conditions, that his conduct probably

[2] Hospice additionally argues that even if it can be suedfor gross negligence or willful and wanton negligence, Cowan hasfailed to plead sufficient facts to state a claim for either.However, we do not consider this argument because the circuitcourt did not rule on the sufficiency of the facts pleaded inthe amended motion for judgment. Thus, the issue is not beforeus in this appeal.

would cause injury to another." *Etherton v. [[Doe]], 268 Va. 209, 213-14, 597 S.E.2d 87, 90 (2004)*(quoting *Griffin, 227 Va. at 321, 315 S.E.2d at 213*); *see also Alfonso v. Robinson, 257 Va. 540, 545, 514 S.E.2d 615, 618 (1999)*.

As these definitions illustrate, there are fundamental distinctions separating acts or omissions of simple negligence from those of gross negligence and willful and wanton negligence. When we consider these distinctions in the context of the charitable immunity doctrine, their differing applications to the doctrine become apparent.

HN4[↑] Acts or omissions of simple negligence may occur routinely in the performance of the activities of any **[***9]** charitable organization. Employees or volunteers, in carrying out their duties, may fail to understand or to adequately follow instructions of a supervisor, may exercise poor judgment, or may have a lapse in attention to an assigned task. While serious consequences may result from these deficiencies in performance, they ordinarily do not involve an extreme departure from the charity's routine actions in conducting its activities.

In contrast, gross negligence involves conduct that "shocks fair-minded people," and willful and wanton negligence involves such recklessness that the actor is aware that his conduct probably would cause injury to another. *Etherton, 268 Va. at 213-14, 597 S.E.2d at 90*; *Wilby v. Gostel, 265 Va. 437, 446, 578 S.E.2d 796, 801 (2003)*; *Griffin, 227 Va. at 321, 315 S.E.2d at 213*. Thus, unlike simple negligence, these two levels of negligence are characterized by conduct **[*488]** that represents an unusual and marked departure from the routine performance of a charity's activities.

HN5[↑] As a practical matter, a charity's performance of its mission may be thwarted by litigation directed at the charity's failure to perform its **[***10]** activities in accordance with standards of ordinary care. For this reason, our Commonwealth's public policy in favor of promoting the activities of charitable organizations has been employed to shield charities from liability for their acts of simple negligence.

This rationale, however, is inapplicable to conduct involving gross negligence and willful and wanton negligence. Unlike acts or omissions giving rise to claims of simple negligence, such conduct can never be characterized as an attempt, albeit ineffectual, to carry out the mission of the charity to serve its beneficiaries. Therefore, we conclude that the public policy rationale that shields a charity from liability for acts of simple negligence does not extend to acts of gross negligence and willful and wanton negligence.

This conclusion does not represent a departure from our often-stated preference for legislative rather than judicial action to "abolish or relax" the charitable immunity doctrine. *See, e.g., Moore, 250 Va. at 424, 463 S.E.2d at 460*; *Roanoke [[Hosp. Ass'n v. Hayes]], 204 Va. 703, 709, 133 S.E.2d 559, 563 (1963)*; *Hill, 204 Va. at 504, 132 S.E.2d at 413-14*. **[***11]** Instead, our present holding, like several of our earlier decisions, serves to define the contours of the doctrine with regard to a subject we have not previously addressed. *See, e.g., Moore, 250 Va. at 424, 463 S.E.2d at 460-61* (volunteer of charity is immune from liability to charity's beneficiaries while engaged in performance of charity's work); *Straley, 243 Va. at 37, 413 S.E.2d at 50-51* (community member only generally served by charity is not beneficiary); *Weston, 131 Va. at 610, 105 S.E. at 792* (one who pays for charity's services can be beneficiary of charity).

We also observe that our holding today is consistent with the General Assembly's enactment of *Code § 8.01-226.4*. That statute *HN6*[↑] provides civil immunity for the acts or omissions of hospice volunteers who render care to terminally ill patients, provided that the volunteers act in good faith and in the absence of gross negligence or willful misconduct. In enacting this section, the General Assembly has expressed a clear preference for excluding from the protection of charitable immunity acts or omissions of gross negligence and willful **[***12]** misconduct.

[920]** For these reasons, we conclude that the circuit court erred in sustaining the defendant's plea of charitable immunity to Counts II **[*489]** and III of Cowan's amended motion for judgment. We will reverse the circuit court's judgment and remand the case for further proceedings consistent with the principles expressed in this opinion.

Reversed and remanded.

End of Document

Norfolk v. Hall

Supreme Court of Virginia

June 10, 1940

Record No. 2243

Reporter
175 Va. 545 *; 9 S.E.2d 356 **; 1940 Va. LEXIS 199 ***

CITY OF NORFOLK, A MUNICIPAL CORPORATION v. MATTYE S. HALL

Prior History: [***1] Error to a judgment of the Circuit Court of the city of Norfolk. Hon. Allan R. Hanckel, judge presiding.

Disposition: *Affirmed.*

Core Terms

street, drains, municipality, gutters, speed, intersection, safe condition, depressions, injuries, repairs, surface, bounce, driven, plans

Case Summary

Procedural Posture
Plaintiff filed an action in the trial court (Virginia), seeking damages for personal injuries allegedly caused by defendant city's negligence in maintaining drains in a city street. The jury entered a verdict for plaintiff and awarded damages. The city assigned error to the trial court's refusal of to strike plaintiff's evidence at the conclusion of all the evidence, and to set the verdict aside and enter judgment for the city.

Overview
The city contended that if street drains jolted the car in which plaintiff was a passenger, no negligence could be charged against the city because the drains were necessary, and were constructed according to reasonable plans adopted by the city in its governmental capacity. The evidence showed no negligence in the adoption of the plan of construction or in the actual construction, and plaintiff's case rested upon proof of the negligent failure of the city to maintain its street in a reasonably safe condition for travel. The court noted that the jury evidently believed that the car in which the plaintiff was riding was being driven at a lawful speed and with reasonable care and that the gutters had become so shaped or worn that they were in a dangerous condition, and in need of repair. The jury found that that the city had notice of this dangerous condition before the accident failed to make necessary repairs and that the sole cause of plaintiff's injuries was the negligent failure of the city to keep its street in a reasonably safe condition. The court found that there was sufficient evidence to support the verdict. Accordingly, the judgment of the trial court was affirmed.

Outcome
The court affirmed the judgment.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Appeals, Standards of Review**

If evidence is credible and sufficient to sustain a verdict, it is not to be discredited merely because of contradictions. The contradictions have been resolved by the jury, the sole judges of the credibility of the witnesses, against the unsuccessful party.

Governments > Local Governments > Claims By & Against

Real Property Law > Torts > Construction Defects

Torts > Public Entity Liability > Liability > General Overview

Torts > Public Entity Liability > Immunities > General Overview

HN2[] **Local Governments, Claims By & Against**

A municipal corporation is not liable for injuries resulting from its adoption of a defective plan for a street or highway when the defects in such plan are due to mere error of judgment, but give that rule no application to the defective or negligent construction of its streets under an adopted plan or to their negligent maintenance.

Governments > Public Improvements > Bridges & Roads

Transportation Law > Bridges & Roads > General Overview

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

Torts > Public Entity Liability > Liability > General Overview

HN3[] **Public Improvements, Bridges & Roads**

A municipality in selecting and adopting a plan for the construction of its public streets and drains acts in a governmental capacity; but in caring for and maintaining such public works after their completion it acts merely in a ministerial capacity. It is the duty of a city to keep and maintain its streets in repair and in a safe condition for travel, free from defects and obstructions. Although it is not an insurer against accidents on its streets, a city is liable for injuries sustained by reason of its failure to keep them in a reasonably safe condition for persons who exercise ordinary care and prudence for their own safety.

Governments > Local Governments > Duties & Powers

Torts > Public Entity Liability > Liability > General Overview

HN4[] **Local Governments, Duties & Powers**

Whether a city has notice of a defective condition in a street, whether due and proper care was exercised by it in keeping that street in a reasonably safe condition and whether the failure to exercise such care was the proximate cause of the injury inflicted upon persons traveling thereover are, ordinarily, questions for the jury, depending upon the circumstances of the particular case.

Headnotes/Summary

Headnotes

1. APPEAL AND ERROR -- *Evidence -- How Considered.* -- When a jury's verdict has been approved by the trial court, the question whether or not there was sufficient evidence to justify a finding is answered by considering only so much of the evidence as is favorable to the prevailing party. If that evidence is credible and sufficient to sustain the verdict, it is not to be discredited merely because of contradictions. The contradictions have been resolved by the jury, the sole judges of the credibility of the witnesses, against the unsuccessful party.

2. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets -- Adoption of Defective Plan Due to Error of Judgment.* -- A municipal corporation is not liable for injuries resulting from its adoption of a defective plan for a street or highway when the defects in such plan are due to mere error of judgment, but the rule does not apply to the defective or negligent construction of its streets under an adopted plan or to their negligent maintenance.

3. STREETS AND HIGHWAYS -- *Liability for Unsafe* **[***2]** *Streets -- When Municipality Acts in Governmental and When in Ministerial Capacity.* -- A municipality in selecting and adopting a plan for the construction of its public streets and drains acts in a governmental capacity; but in caring for and maintaining such public works after their completion it acts merely in a ministerial capacity.

4. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets -- Duty of City to Keep Streets in Safe Condition.* -- It is the duty of a city to keep and maintain its streets in repair and in a safe condition for travel, free from defects and obstructions.

5. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets -- City Not an Insurer -- Failure to Keep Streets in Reasonably Safe Condition.* -- Although it is not an insurer against accidents on its streets, a city is liable for injuries sustained by reason of its failure to keep them in a reasonably safe condition for persons who exercise ordinary care and prudence for their own safety.

6. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets -- Action Based Not on Negligence in Plan of Construction but in Construction and Maintenance -- Case at Bar.* -- In the instant case, an action **[***3]** for injuries

alleged to have been caused by the negligence of a municipal corporation in improperly constructing one of its streets and in knowingly permitting it to remain in an unsafe condition, two drains or depressions across a street caused the car in which plaintiff was riding at the time of the accident to bounce, throwing plaintiff off the back seat to the floor of the car. Prior to the accident other cars had been bounced so severely as to break springs, and the operator of a near-by service station had reported the condition of the street to the office of the city manager. The city contended that negligence could not be charged against it, because the drains were necessary under existing conditions and were constructed according to reasonable plans adopted by the city in its governmental capacity.

Held: That there was no merit in the contention of defendant, since the negligence upon which plaintiff based her right of recovery was not negligence in the adoption of the underlying plan of construction, but rather negligence in the actual construction and in the faulty maintenance of the construction after its dangerous condition had been made known to the city.

[*4]** 7. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets Sufficiency of Evidence to Support Verdict -- Case at Bar.* -- In the instant case, an action for injuries alleged to have been caused by the negligence of a municipal corporation in improperly constructing one of its streets and in knowingly permitting it to remain in an unsafe condition, two drains or depressions across a street caused the car in which plaintiff was riding at the time of the accident to bounce, throwing plaintiff off the back seat to the floor of the car. Prior to the accident other cars had been bounced so severely as to break springs, and the operator of a near-by service station had reported the condition of the street to the office of the city manager. The jury returned a verdict for plaintiff.

Held: That there was evidence to support the verdict.

8. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets -- Questions for Jury.* -- Whether a city has notice of a defective condition in a street, whether due and proper care was exercised by it in keeping that street in a reasonably safe condition, and whether the failure to exercise such care was the proximate cause of the injury inflicted **[***5]** upon persons traveling thereover are, ordinarily, questions for the jury, depending upon the circumstances of the particular case.

9. APPEAL AND ERROR -- *Rule XXII of the Supreme Court of Appeals -- Exception to Refusal to Give Instructions Not Complying with Rule.* -- In the instant case, an action for injuries alleged to have been caused by the negligence of a municipal corporation in improperly constructing one of its streets and in knowingly permitting it to remain in an unsafe condition, defendant assigned as error the refusal of the trial court to give certain instructions, but the ground of exception simply stated that the instructions should have been granted because they were supported by the law and the facts of the case.

Held: That the assignment of error did not comply with Rule XXII of the Supreme Court of Appeals, requiring a statement of the grounds of objection.

10. STREETS AND HIGHWAYS -- *Liability for Unsafe Streets -- Instructions -- Case at Bar.* -- In the instant case, an action for injuries alleged to have been caused by the negligence of a municipal corporation in improperly constructing one of its streets and in knowingly permitting it to **[***6]** remain in an unsafe condition, defendant assigned as error the refusal of the trial court to give certain instructions. The jury was told that there was no liability on the city for the exercise of its governmental discretion in adopting plans for the grading and paving of its streets, and that if they believed the gutters in question were considered by the engineering department of the city as adequate and reasonably safe for proper travel thereover, and the street was smoothly paved in accordance with the adopted plans, and properly maintained in that condition, the city was not liable.

Held: That the jury was instructed on all phases of the case, in error. were not unfavorable to the city.

Syllabus

The opinion states the case.

Counsel: *Alfred Anderson* and *Jonathan W. Old, Jr.,* for the plaintiff error.

James G. Martin & Son, for the defendant in error.

Judges: Present, All the Justices.

Opinion by: SPRATLEY

Opinion

[*547] **[**358]** SPRATLEY, J., delivered the opinion of the court.

[*548] This is an action by notice of motion for damages for personal injuries suffered by Mrs. Mattye S. Hall, and alleged to have been caused by the negligence of the city of Norfolk, [***7] a municipal corporation, in improperly constructing one of its streets, and in knowingly permitting it to remain in an unsafe condition, by reason of which Mrs. Hall was injured while being driven thereover in an automobile.

Mrs. Hall was awarded the sum of $2,500 by a jury. The amount of the award is not in question.

The trial court refused to set aside the verdict as being contrary to the law and the evidence.

The city assigns error to the refusal of the trial court to strike the plaintiff's evidence at the conclusion of all the evidence, to its refusal to set the verdict aside and enter judgment for the city and to the granting and refusing of certain instructions.

The answer to the principal question, whether or not there was sufficient evidence to justify a finding that the city was guilty of negligence in the maintenance of its street, is decisive of this case.

[1] Under our familiar and well established rule, when a jury's verdict has been approved by a trial court, this question is answered by considering only so much of the evidence as is favorable to the prevailing party. HN1[] If that evidence is credible and sufficient to sustain the verdict, it is not to be [***8] discredited merely because of contradictions. The contradictions have been resolved by the jury, the sole judges of the credibility of the witnesses, against the unsuccessful party. Considered from this viewpoint, the evidence showed the following facts:

On June 29, 1938, in the daytime, Mrs. Hall, M. I. Hall, her husband, and Mr. and Mrs. Louhoff were passing through Norfolk, in an automobile on their way from Danville, Virginia, to Virginia Beach, Virginia. Mr. Hall, who was not familiar with the streets of Norfolk, was driving his Packard sedan northwardly on Bank street at a speed estimated at eighteen to twenty miles an hour. At the time they crossed Charlotte street, which runs east and west and [*549] intersects Bank street at right angles, the car bounced severely due to two depressions or dips, which had been built into the pavement to facilitate the drainage of surface water. The first depression or drain started the car bouncing and the second one increased its violence. These depressions or dips, described as being "V" shaped, crossed the southerly and northerly lines of the intersection of Bank street with Charlotte street, and were the continuation of the [***9] surface drains or gutters, adjacent to and following the course of the southerly and northerly curb lines of Charlotte street.

Mrs. Hall was thrown upward and off the back seat to the floor of the car, and suffered a fracture of her spinal column. Mrs. Louhoff, who was also riding in the back seat, suffered a severe bump on her head.

Before this accident, the two drains across Bank street had caused other cars to bounce severely and, in several instances, to break springs. This was evident enough to cause the operator of a near-by service station to report the condition of the street to the office of the city manager of Norfolk. Sometime after this accident, the paving at the intersection was altered and the depth of these depressions was reduced.

Mr. Hall and Mr. Louhoff drove over this intersection twice after the date of their accident for the purpose of determining the condition of the drains and the extent of the bounce of a car at a given speed.

The first test was made prior to the time the city made the alteration to the surface of the street, and, at that time, they found that a person would be thrown from the back seat of a car driven at a speed of approximately [***10] fifteen miles per hour. In the test made after the alteration, they found that the bouncing motion of the car was materially reduced.

Although the asphalt surface was not broken, Mr. Louhoff described the condition of the dip or depression on the right-hand side of Bank street, adjacent to the northeast corner of the intersection, as being "to an extent" a hole [*550] "which was hollowed out," or "rounded out," but which did not extend entirely across Bank street.

The jury was taken to the scene of the accident and viewed the premises.

[**359] The defendant showed that the general topography of the city of Norfolk and its nearness to sea level had made surface drainage the most satisfactory system of street drainage; that its city engineer, in constructing these drains, sometimes called "valley gutters," had followed a standard, uniform plan of construction and had, originally, properly designed and completed them; and that the bottom of the southerly gutter crossing Bank street was four and one-quarter inches lower than the center line of the street, and the bottom of the northerly gutter five inches lower.

The evidence presented by the defendant in respect to [***11] the condition of the street and the contour of the gutter on the day of the accident, the effect on cars driven across the intersection at certain speeds, the knowledge of the city of any previous accidents at this point, repairs made to the street or need of repairs, and the rate of speed permissible in the district wherein the accident occurred, was in direct conflict with that of the plaintiff.

The city first contends that the sole proximate cause of the injuries to the plaintiff was the rate of speed at which the automobile in which she was riding was being driven over the drains. This contention was answered adversely to the city by the jury.

The city also contends that if the jolts to the automobile were caused by the drains across the street no negligence can be charged against the city therefor, because the drains were necessary under existing conditions and were constructed according to reasonable plans adopted by the city in its governmental capacity. In support of this position, it cites and relies upon numerous cases which hold that a municipal corporation, in the adoption of a plan for improvements of its streets, acts in its legislative capacity for governmental **[***12]** purposes, and is not liable for errors committed in the exercise of its discretion in that capacity. *Blackwelder [*551] v. City of Concord, 205 N.C. 792, 172 S.E. 392, 90 A.L.R. 1495*, and cases cited in Annotation on 'Liability of municipality for injury to person or property due to improper plan for or defects in original construction of street or highway," 90 A.L.R. 1502.

[2] *HN2*[↑] The courts have enunciated the general rule that a municipal corporation is not liable for injuries resulting from its adoption of a defective plan for a street or highway when the defects in such plan are due to mere error of judgment, but give that rule no application to the defective or negligent construction of its streets under an adopted plan or to their negligent maintenance. *Blackwelder v. City of Concord, supra;* 90 A.L.R. Annotation, *supra,* 1511 *et seq.*

"As we have seen, the municipality in devising plans and systems for supplying the public with water, sewerage and the like, exercises legislative duties involving the use of judgment and discretion, and it ought not to be held liable to civil actions for defects or want of efficiency of plans, at least during **[***13]** the formative or experimental stage of the enterprise; yet, after the work has been completed, and experience has demonstrated that the system is inadequate and insufficient to meet requirements or to effect the objects for which it was intended, there can be no reason to exempt the municipality from damage suffered by an individual from its continued use." *Stansbury v. City of Richmond, 116 Va. 205, 81 S.E. 26, 51 L.R.A. (N.S.) 984.*

The distinction between the negligent exercise of governmental and discretionary functions, for which a city is not liable, and the negligent performance of ministerial duties, for which it is liable, has been clearly pointed out by Judge Riely in *Jones v. City of Williamsburg, 97 Va. 722, 34 S.E. 883, 47 L.R.A. 294*, and by Justice Hudgins in *Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610, 120 A.L.R. 1368*.

[3] *HN3*[↑] A municipality in selecting and adopting a plan for the construction of its public streets and drains acts in a governmental capacity; but in caring for and maintaining **[*552]** such public works after their completion it acts merely in a ministerial capacity.

[4] It has long been well settled in this **[***14]** state that it is the duty of a city to keep and maintain its streets in repair and in a safe condition for travel, free from defects and obstructions.

[5] Although it is not an insurer against accidents on its streets, a city is liable for injuries sustained by reason of its failure to keep them in a reasonably safe condition for persons who exercise ordinary care and prudence for their own safety. *Noble* v. *City of Richmond,* 31 Gratt. (72 Va.) 271, 31 Am. Rep. 726; *Clarke v. City of Richmond, 83 Va. 355, 5 S.E. 369, 5 Am. [**360] St. Rep. 281*; *Gordon v. City of Richmond, 83 Va. 436, 2 S.E. 727*; *Moore v. City of Richmond, 85 Va. 538, 8 S.E. 387*; *City of Portsmouth v. Lee, 112 Va. 419, 71 S.E. 630*; *City of Radford v. Calhoun, 165 Va. 24, 181 S.E. 345, 100 A.L.R. 1378*; 9 Michie's Digest of Virginia and West Virginia Reports, page 250, and many cases cited; 7 McQuillan, Municipal Corporations (2d Ed.) pages 32-35.

[6] The rule relied upon by the city and the cases cited in support of that rule are not controlling here, since the negligence upon which the plaintiff bases her right of recovery is not negligence in the adoption **[***15]** of the underlying plan of construction, but rather negligence in the actual construction and in the faulty maintenance of the construction after its dangerous condition had been made known to the city.

The evidence shows no negligence in the adoption of the plan of construction or in the actual construction. The plaintiff's case rests upon proof of the negligent failure of the city to maintain its street in a reasonably safe condition for travel in the usual modes.

The jury might have decided this case either way, -- for the plaintiff, if they believed her evidence, or for the defendant if they believed its evidence.

The jury evidently believed that the car in which the plaintiff was riding was being driven at a lawful speed and **[*553]** with reasonable care; that the gutters had become so shaped or worn that they were in a dangerous condition and in need of repair; that the city had notice of this dangerous condition before the accident and failed to make necessary repairs; and that the sole cause of her injuries was the negligent failure of

the city to keep its street in a reasonably safe condition.

[7] The jury saw and heard the witnesses and viewed the scene of [***16] the accident, and their verdict has been approved by the trial judge. There was evidence to support the verdict, and nothing to justify a conclusion that it was unworthy of belief, or that the jury acted as prejudiced, unfair or unreasonable men in accepting it.

[8] *HN4*[↑] Whether a city has notice of a defective condition in a street, whether due and proper care was exercised by it in keeping that street in a reasonably safe condition and whether the failure to exercise such care was the proximate cause of the injury inflicted upon persons traveling thereover are, ordinarily, questions for the jury, depending upon the circumstances of the particular case. *City of Radford v. Calhoun, supra.*

[9] The assignment of error with reference to two instructions fails to comply with Rule of Court XXII as to the necessity of stating grounds of objection. The ground of exception to the refusal to give the instructions simply states that they should have been granted because they were supported by the law and the facts of the case. *Norfolk Southern Railroad Co. v. Lewis, 149 Va. 318, 323, 141 S.E. 228.*

[10] Suffice it to say, the jury was instructed on all phases of [***17] the issue, and the instructions, as a whole, were not unfavorable to the city. The jury was told that there was no liability on the city for the exercise of its governmental discretion in adopting plans for the grading and paving of its street, and that if they believed the gutters in question were considered by the engineering department of the city as adequate and reasonably safe for proper travel thereover, and the street was smoothly paved in accordance [*554] with the adopted plans, and properly maintained in that condition, the city was not liable.

We find no reversible error in the proceedings nor in the final judgment complained of. The judgment of the trial court is affirmed.

Affirmed.

BROWNING, J., dissenting.

End of Document

Frederick County Sch. Bd. v. Hannah

Supreme Court of Virginia

January 16, 2004, Decided

Record No. 022984

Reporter
267 Va. 231 *; 590 S.E.2d 567 **; 2004 Va. LEXIS 20 ***

FREDERICK COUNTY SCHOOL BOARD v. JOHN HARRIS HANNAH, JR., ETC., ET AL.

Prior History: [***1] FROM THE CIRCUIT COURT OF FREDERICK COUNTY. Jay T. Swett, Judge Pro Tempore.

Disposition: Affirmed.

Core Terms

school board, self-insurance, Pool, certificate, political subdivision, motor vehicle, requirements, collectible insurance, coverage, trial court, limits, immunity, damages, exempts, funds, limitation of liability, transportation, Plaintiffs', insured, argues, damnum

Case Summary

Procedural Posture

Plaintiffs, a minor and his mother, filed suit against defendant Frederick County (Virginia) School Board, seeking compensation for injuries the minor sustained in a school bus accident. The Circuit Court of Frederick County (Virginia) denied the Board's motion to reduce damages to $ 50,000, pursuant to Va. Code Ann. § 22.1-194, and entered judgment awarding the minor $ 74,500 and his mother $ 4,510. The Board appealed.

Overview

A minor was injured in a school bus accident, and he and his mother sued the Frederick County School Board. The Board admitted liability, but contended that its liability was limited to $ 50,000, pursuant to Va. Code Ann. § 22.1-194, and that, if its liability was not limited, the minor's and mother's right to recover damages was barred by the doctrine of sovereign immunity. The trial court rejected both arguments, and the Board appealed. The state supreme court held that (1) the Board was not entitled to take advantage of the $ 50,000 liability limit provided by Va. Code Ann. § 22.1-190(A), as derived through Va. Code Ann. § 22.1-194, because it had not obtained a certificate of self-insurance from the Commissioner of the Virginia Department of Motor Vehicles, as required by Va. Code Ann. § 22.1-190(D); (2) Va. Code Ann. § 22.1-194 abrogated the Board's sovereign immunity up to the limits of coverage it had under a self-insurance pool operated by the Virginia School Board Association; and (3) the trial court properly denied the Board's motion to reduce its damages to $ 50,000, and also properly rejected the Board's claim that the minor's and mother's claims were barred.

Outcome
The trial court's judgment was affirmed.

LexisNexis® Headnotes

Education Law > Administration & Operation > Student Transportation

Insurance Law > ... > Coverage > Compulsory Coverage > General Overview

HN1[] **Administration & Operation, Student Transportation**

See Va. Code Ann. § 22.1-190(A) and (D).

Education Law > Civil Liability > Negligence

Education Law > Administration & Operation > Student Transportation

HN2[] **Civil Liability, Negligence**

See Va. Code Ann. § 22.1-194.

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > General Overview

Insurance Law > ... > Motor Vehicle Insurance > Coverage > General Overview

Insurance Law > ... > Coverage > Compulsory Coverage > Self Insurance

HN3[] **Alternative Risk Transfers, Self Insurance**

See *Va. Code Ann. § 15.2-2704*.

Administrative Law > Sovereign Immunity

Education Law > Immunities From Liability > General Overview

Insurance Law > Claim, Contract & Practice Issues > Estoppel & Waiver > Policy Coverage Issues

Education Law > Administration & Operation > Student Transportation

Education Law > Civil Liability > Negligence

HN4[] **Administrative Law, Sovereign Immunity**

Pursuant to *Va. Code Ann. § 22.1-194*, a school board is subject to a limited waiver of sovereign immunity when its vehicle is involved in an accident. Immunity is waived either to the limits of valid and collectible insurance in force to cover the injury or the coverage set by *Va. Code Ann. § 22.1-190(A)* when a certificate of self-insurance under *Va. Code Ann. § 22.1-190(D)* has been obtained.

Governments > Legislation > Interpretation

HN5[] **Legislation, Interpretation**

When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails.

Governments > Local Governments > Claims By & Against

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > Governmental Agencies

HN6[] **Local Governments, Claims By & Against**

Va. Code Ann. § 15.2-2703 authorizes a variety of designated political subdivisions to join self-insurance pools while *Va. Code Ann. § 15.2-2704* establishes the powers of those pools. *Section 15.2-2704* exempts all covered political subdivisions in such self-insurance pools from obtaining a certificate of self-insurance under *Va. Code Ann. § 46.2-368*. Neither the self-insurance pool statutes nor *Va. Code Ann. § 46.2-368* reference the self-insurance certificate requirement set out in *Va. Code Ann. § 22.1-190(D)*.

Governments > Local Governments > Claims By & Against

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > General Overview

HN7[] **Local Governments, Claims By & Against**

"Political subdivision," for purposes of *Va. Code Ann. § 15.2-2703*, means any county, city, or town, school board, transportation district commission, or any other local governmental authority or local agency or public service corporation owned, operated, or controlled by a locality or local government authority, with power to enter into contractual undertakings. *Va. Code Ann. § 15.2-2701*.

Education Law > Administration & Operation > Student Transportation

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > Governmental Agencies

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > General Overview

HN8[] **Administration & Operation, Student Transportation**

A certificate of self-insurance under *Va. Code Ann. § 46.2-368* refers to Va. Code Ann. tit. 46.2, ch. 3, but does not address the particular requirements of insurance coverage for specific categories or functions of political subdivisions. By contrast, *Va. Code Ann. §§ 22.1-190* and *§ 22.1-194* are

located Va. Code Ann. tit. 22.1, ch. 12, art. 2, which deals specifically with insurance provisions for pupil transportation.

Education Law > Administration & Operation > Student Transportation

Insurance Law > ... > Coverage > Compulsory Coverage > Self Insurance

HN9[] **Administration & Operation, Student Transportation**

Va. Code Ann. § 22.1-190 sets forth insurance requirements, specific only to school boards, that must be met with respect to vehicles used in the transportation of students. One of these requirements is that a school board obtain a certificate of self-insurance from the Virginia Department of Motor Vehicles, set out in *§ 22.1-190(D)*, in order to benefit from the lower statutory liability limits available in *Va. Code Ann. § 22.1-194*.

Education Law > Administration & Operation > Student Transportation

Insurance Law > ... > Coverage > Uninsured Motorists > Mandatory Coverage

Insurance Law > ... > Coverage > Uninsured Motorists > General Overview

HN10[] **Administration & Operation, Student Transportation**

Noteworthy evidence exists demonstrating the Virginia General Assembly's intent to differentiate between the use of insurance pools by political subdivisions generally and by school boards specifically. For example, *Va. Code Ann. § 15.2-2704* exempts the insurance pool operated by the Virginia School Board Association from providing uninsured motorist coverage otherwise mandated by *Va. Code Ann. § 38.2-2206*. In comparison, *Va. Code Ann. § 22.1-190(A)* sets a minimum required liability coverage of $ 50,000 for school boards and mandates that the policy of insurance shall provide coverage for loss or damage caused by an uninsured motorist.

Education Law > Administration & Operation > Student Transportation

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > Governmental Agencies

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > General Overview

Insurance Law > Types of Insurance > Motor Vehicle Insurance > General Overview

Insurance Law > ... > Coverage > Compulsory Coverage > Self Insurance

HN11[] **Administration & Operation, Student Transportation**

The Virginia General Assembly has specifically required school boards to meet different requirements regarding motor vehicle insurance than other political subdivisions. Among those requirements is obtaining a certificate of self-insurance where the liability limit of *Va. Code Ann. § 22.1-194* is to be claimed by reference to *Va. Code Ann. § 22.1-190*.

Administrative Law > Sovereign Immunity

Education Law > Administration & Operation > Student Transportation

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > Governmental Agencies

HN12[] **Administrative Law, Sovereign Immunity**

School boards that wish to join self-insurance pools and take advantage of the liability limit under *Va. Code Ann. § 22.1-194* need only apply for a certificate of self-insurance from the Virginia Commissioner of the Department of Motor Vehicles, as mandated by the plain language of *Va. Code Ann. § 22.1-190(D)*.

Education Law > Civil Liability > Negligence

Education Law > Administration & Operation > Student Transportation

HN13[] **Civil Liability, Negligence**

The plain reading of *Va. Code Ann. § 22.1-194* reflects that a school board is subject to action up to the limits of valid and collectible insurance in force in two circumstances. The first instance is where the school board is the owner of a vehicle involved in an accident. The second instance is where the school board otherwise is the insured under the policy on a

vehicle involved in an accident. By writing the statute in the disjunctive, the Virginia General Assembly has clearly provided that a school board, solely by virtue of its ownership of a vehicle involved in an accident is liable up to the limits of valid and collectible insurance. While a school board may also be liable when it otherwise is an insured under the policy, that circumstance is not a condition precedent for the school board's liability when it owns a vehicle involved in an accident.

Administrative Law > Sovereign Immunity

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Insurance Law > ... > Alternative Risk Transfers > Self Insurance > General Overview

Education Law > Administration & Operation > Student Transportation

Education Law > Civil Liability > Negligence

Insurance Law > ... > Coverage > Compulsory Coverage > Judgments

HN14[] **Administrative Law, Sovereign Immunity**

Requiring a school board, via payment by the insurance pool operated by the Virginia School Board Association, to pay a judgment entered in favor of a student who is injured in a school bus accident does not violate *Va. Code Ann. § 22.1-194*'s prohibition against using school funds to satisfy motor vehicle claims. Payments from the assets of the pool are not school funds, but are pool funds. To hold otherwise would be tantamount to holding that a school board's insurance premiums paid to an insurance company constitute school funds, for purposes of *§ 22.1-194*, when the insurance company pays a motor vehicle claim.

Counsel: Patrick C. Asplin (Mark D. Obenshain; Keller Obenshain, on brief), for appellant.

Steven M. Frei (Holly Parkhurst Essing; Hall, Sickels, Rostant, Frei & Kattenburg, on brief), for appellees.

Judges: PRESENT: Hassell, C.J., Lacy, Keenan, Kinser, Lemons, and Agee, JJ., and Stephenson, S.J. OPINION BY JUSTICE G. STEVEN AGEE. SENIOR JUSTICE STEPHENSON, with whom JUSTICE LACY and JUSTICE KEENAN join, dissenting.

Opinion by: G. STEVEN AGEE

Opinion

[568]** **[*233]** I.

The dispositive issue in this appeal is whether the trial court erred in denying a school board's motion to reduce the plaintiffs' *ad damnum* clause to $ 50,000, the limit on liability the school board alleged was set by *Code § 22.1-194*. For the reasons that follow, we will affirm the judgment of the trial court.

II.

[*234] John Harris Hannah, Jr. ("Hannah"), a minor who sues by his mother and next friend, Barbara Foster, now Barbara Ruffner ("Ruffner"), and Ruffner, individually (collectively, "the Plaintiffs"), instituted an action against the Frederick County School Board ("the School Board"), seeking damages for personal injuries and other loss sustained by Hannah and Ruffner as a result of a school bus accident. The School Board admitted its negligence caused the accident, but contended damages were limited to $ 50,000 **[***2]** by *Code § 22.1-194*. Alternatively, the School Board asserted the Plaintiffs' right to recover was barred by the doctrine of sovereign immunity if the $ 50,000 limit did not apply.

The School Board is a member of the Virginia School Board Association ("VSBA") which operates a self-insurance pool (the "Pool"), as authorized by *Code § 15.2-2703*. The School Board is a member of the Pool, which provides various lines of self-insurance to the School Board, including liability coverage of up to $ 1,000,000 for motor vehicle accidents.

The School Board filed a motion to reduce the Plaintiffs' *ad damnum* clause to $ 50,000, arguing *Code § 22.1-194* limited its liability in this case to $ 50,000 because the School Board met the self-insurance qualification of *Code § 22.1-190(D)*. Even though the School Board admitted it had never obtained the certificate of self-insurance from the Commissioner of the Department of Motor Vehicles required by *Code § 22.1-190(D)*, it contended members of the Pool were exempt from that requirement by *Code § 15.2-2704* **[***3]** .

The trial court disagreed and found the specific statutory provision of *Code § 22.1-190(D)* controlling. The trial court ruled that a certificate of self-insurance from the Commissioner of the Department of Motor Vehicles is required when the liability limit of *Code § 22.1-194* is to be claimed by reference to *Code § 22.1-190*. The trial court therefore denied the motion to reduce the *ad damnum* and

awarded Hannah damages of $ 74,500 and Ruffner damages of $ 4,510. We awarded the School Board this appeal.

A.

The resolution of the issues on appeal depends on the statutory interpretation of three different Code sections which state in pertinent part:

HN1[↑] **[*235]** A. Every vehicle shall be covered in a policy of liability and property damage insurance issued by an insurance carrier authorized to transact business in this Commonwealth, in the amounts of at least $ 50,000 for injury, including death, to 1 person, $ 200,000 for injury, including death, to all persons injured in any 1 accident, **[**569]** and $ 10,000 for damage, including destruction, to the property of any person, other than the insured . . . .

. **[***4]** . . .

D. *This insurance shall not be required in cases where* pupils are transported in vehicles which are owned or operated by a . . . *school board which has qualified for and received a certificate of self-insurance* from the Commissioner of the Department of Motor Vehicles, following a certification of financial responsibility equal to that required under subsection A of this section.

Code § 22.1-190(A) and (D) (emphasis added).

HN2[↑] In case the locality or *the school board is the owner*, or operator through medium of a driver, *of, or otherwise is the insured under the policy upon*, a vehicle involved in an accident, the locality or school board shall be subject to action up to, but not beyond, the limits of valid and collectible insurance in force to cover the injury complained of *or, in cases set forth in subsection D of § 22.1-190, up to but not beyond the amounts of insurance required under subsection A of § 22.1-190 and the defense of governmental immunity shall not be a bar to action or recovery.*

Code § 22.1-194 (emphasis added).

HN3[↑] A group self-insurance pool shall be deemed a self-insurer **[***5]** for motor vehicle security under § 46.2-368. *Members of the pool participating in the motor vehicle self-insurance provided by the pool shall be deemed to meet the requirements of security as required and an application for a certificate of self-insurance under § 46.2-368 shall not be required.*

Code § 15.2-2704 (emphasis added).

HN4[↑] **[*236]** Pursuant to Code § 22.1-194, a school board is subject to a limited waiver of sovereign immunity when its vehicle is "involved in an accident." Immunity is waived either to "the limits of valid and collectible insurance in force to cover the injury" or the coverage set by Code § 22.1-190(A) when the certificate of self-insurance under Code § 22.1-190(D) has been obtained.

The School Board argues that it is entitled to the liability limit derived from Code § 22.1-190(A), $ 50,000 in this case, although it has not obtained the certificate of self-insurance required by Code § 22.1-190(D). The School Board avers that, as a member of the Pool, Code § 15.2-2704 **[***6]** exempts it from the self-insurance certificate requirement of Code § 22.1-190(D), and thus, that it qualifies for the Code § 22.1-190(A) limitation level.

The question to be answered is whether the School Board, without meeting the requirements of Code § 22.1-190(D), may nonetheless qualify for the limited liability by virtue of Code § 15.2-2704. Application of accepted rules of statutory construction answer that inquiry in the negative.

B.

HN5[↑] "When one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized, if possible, and where they conflict, the latter prevails." Virginia Nat'l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979); *accord* County of Fairfax v. Century Concrete Servs., 254 Va. 423, 427, 492 S.E.2d 648, 650 (1997); Dodson v. Potomac Mack Sales & Service, 241 Va. 89, 94-95, 400 S.E.2d 178, 181, 7 Va. Law Rep. 1327 (1991).

Code § 15.2-2703 HN6[↑] authorizes a variety of designated political subdivisions **[***7]** [1] to join self-insurance pools while Code § 15.2-2704 establishes the powers of those pools. Code § 15.2-2704 exempts all covered political subdivisions in such self-insurance pools from obtaining a certificate of self-insurance *under* Code § 46.2-368. [2] **[*237]** Neither the

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[1] HN7[↑] Political subdivision, for purposes of Code § 15.2-2703, "means any county, city, or town, school board, Transportation District Commission, or any other local governmental authority or local agency or public service corporation owned, operated or controlled by a locality or local government authority, with power to enter into contractual undertakings." Code § 15.2-2701.

[2] HN8[↑] A certificate of self-insurance under Code § 46.2-368 refers to Chapter 3 of Title 46.2, but does not address the particular requirements of insurance coverage for specific categories or functions of political subdivisions. By contrast, Code § 22.1-190 and Code § 22.1-194 are located in Chapter 12, Article 2 of Title 22.1,

self-insurance **[**570]** pool statutes nor Code § 46.2-368 reference the self-insurance certificate requirement set out in Code § 22.1-190(D).

[*8]** By contrast, Code § 22.1-190 HN9[↑] sets forth insurance requirements, specific only to school boards, that must be met with respect to vehicles used in the transportation of students. One of these requirements is that a school board obtain a certificate of self-insurance from the Department of Motor Vehicles, set out in Code § 22.1-190(D), in order to benefit from the lower statutory liability limits available in Code § 22.1-194.

Other HN10[↑] noteworthy evidence exists demonstrating the General Assembly's intent to differentiate between the use of insurance pools by political subdivisions generally and by school boards specifically. For example, Code § 15.2-2704, the more general statute, exempts the Pool from providing uninsured motorist coverage otherwise mandated by Code § 38.2-2206. In comparison, Code § 22.1-190(A), the specific statute, sets a minimum required liability coverage of $ 50,000 for school boards and mandates that "the policy of insurance shall provide coverage for loss or damage caused by an uninsured motorist **[***9]** . . . ."

The School Board argues that Code § 15.2-2704 and Code § 22.1-190(D) "can be reasonably construed to give full force and effect to each." The School Board does so by reading the exemption for a certificate of self-insurance in Code § 15.2-2704 as an implied exemption to the Code § 22.1-190(D) certificate requirement. It is incongruous for the School Board to rely on Code § 15.2-2704, the statute of general application, to waive the certification requirement but then claim that Code § 22.1-190, the statute of specific application, establishes the *ad damnum* limitation of $ 50,000. As noted above, the School Board's reasoning creates a conundrum in the case of uninsured motorist coverage.

The School Board's proposed reading ignores the General Assembly's expressed intent to regulate the insurance requirements for motor vehicles used to transport students by a specific statutory framework as opposed to the general requirements of the Pool for all other permitted political subdivisions. The more specific **[***10]** statutory provisions must prevail. HN11[↑] The General Assembly has specifically required school boards to meet different requirements regarding motor vehicle insurance than other political subdivisions. Among those requirements is obtaining a certificate of self-insurance where **[*238]** the liability limit of Code § 22.1-194 is to be claimed by reference to Code § 22.1-190.

Construing the statutes in this manner "harmonizes Code § 22.1-190(D) and Code § 15.2-2704 so as to give full force and effect to both" without undermining the important governmental purpose and benefit that self-insurance pools provide. Such a construction has no effect on any political subdivision, other than school boards, which is the evident intent of the General Assembly through its more specific statutes in Title 22.1. HN12[↑] School boards who wish to join self-insurance pools and take advantage of the liability limit under Code § 22.1-194, as in this case, need only apply for a certificate of self-insurance from the Commissioner of the Department of Motor Vehicles as **[***11]** mandated by the plain language of the statute.

C.

The School Board alternatively argues that if it is not entitled to the $ 50,000 statutory liability cap, the Plaintiffs' claims are barred by the doctrine of sovereign immunity.

Initially, the School Board argues the reference to "the policy" in the first sentence of Code § 22.1-194 means only a policy as set out in Code § 22.1-190(A) which must be "issued by an insurance carrier authorized to transact business in this Commonwealth." In reliance upon Code § 15.2-2709, which provides group self-insurance pools are not an insurance company or an insurer, the School Board then reasons the Code § 22.1-194 provision for "valid and collectible insurance in force" must come only from "the policy". In other words, since the Pool's **[**571]** self-insurance is not insurance in the form of "the policy", then Pool funds cannot be "valid and collectible insurance."

The School Board, however, reads only part of the first sentence in Code § 22.1-194. HN13[↑] The plain reading of the statute reflects that a school board **[***12]** is "subject to action up to . . . the limits of valid and collectible insurance in force" in two circumstances. The first instance is where "the school board is the owner . . . of . . . a vehicle involved in an accident . . . ." The second instance is where the school board "otherwise is the insured under *the policy* upon[] a vehicle involved in an accident . . . ." (emphasis added).

By writing the statute in the disjunctive, the General Assembly has clearly provided that the School Board, solely by virtue of its ownership of "a vehicle involved in an accident" is liable up to "the limits of valid and collectible insurance." While a school board may **[*239]** also be liable when it "otherwise is the insured under the policy," that circumstance is not a condition precedent for the School Board's liability when it owns "a vehicle involved in an accident."

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which deals specifically with insurance provisions for pupil transportation.

It is uncontested that the School Board owned the vehicles involved in the accident in this case. By the plain language of the statute, that is sufficient to subject the School Board to liability up to "the limits of valid and collectible insurance." While not the proceeds of an insurance "policy," in the strictest sense of that term, **[***13]** the insurance protection provided by the Pool is nonetheless "valid and collectible insurance in force to cover the injury complained of." *See generally USAA Casualty Insurance v. The Hertz Corp.*, 265 Va. 450, 578 S.E.2d 775 (2003).

Finally, the School Board argues that since it did not satisfy the requirements of *Code § 22.1-190(D)*, it cannot be required to pay the judgment because *Code § 22.1-194* prohibits using school funds to satisfy motor vehicle claims "except where approved self-insurance has been provided pursuant to *§ 22.1-190(D)*." *HN14*[↑] Requiring the School Board, via Pool payment, to pay the appellees' judgment does not violate *Code § 22.1-194*'s prohibition against using school funds to satisfy motor vehicle claims. Payments from the assets of the Pool are no longer "school funds," but are Pool funds. To hold otherwise would be tantamount to holding that a school board's insurance premiums paid to an insurance company constitute "school funds," for purposes of *Code § 22.1-194*, when the insurance company pays a motor vehicle claim.

III.

For **[***14]** the reasons set forth above, the School Board is not entitled to the $ 50,000 liability limit of *Code § 22.1-190(A)* as derived through *Code § 22.1-194* because it failed to obtain a certificate of self-insurance from the Department of Motor Vehicles as required by *Code § 22.1-190(D)*. Code *§ 22.1-194* abrogated the School Board's sovereign immunity up to the limits of its coverage through the Pool, which is sufficient to satisfy the Plaintiff's award in this case. Accordingly, the judgment of the trial court will be affirmed.

Affirmed.

Dissent by: STEPHENSON

Dissent

[*240] SENIOR JUSTICE STEPHENSON, with whom JUSTICE LACY and JUSTICE KEENAN join, dissenting.

I respectfully dissent. It is well established that, when two statutes are in apparent conflict, a court, if reasonably possible, must give them such a construction as will give force and effect to both. *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998); *Board of Supervisors v. Marshall*, 215 Va. 756, 761, 214 S.E.2d 146, 150 (1975).

In the present case, it is reasonably **[***15]** possible to construe and harmonize Code *§ 22.1-190(D)* and *Code § 15.2-2704* so as to give full force and effect to both. *Code § 22.1-190(D)* reasonably can be read to govern school boards that are individually self-insured for school bus accidents, requiring such school boards to apply for and receive a certificate of self-insurance. However, when a school board is not individually self-insured but is a member of a self-insurance pool, *Code § 15.2-2704* provides that it "shall be deemed to meet the requirements of security **[**572]** as required and *an application for a certificate of self-insurance . . . shall not be required.*" (Emphasis added.) Therefore, the School Board qualified for the limit on liability despite its lack of a certificate of self-insurance.

In reaching this conclusion, I have given weight to the intent of the General Assembly in approving self-insurance pools for political subdivisions such as school boards. That intent is expressed in *Code § 15.2-2700* as follows:

The General Assembly hereby finds and determines that insurance **[***16]** protection is essential to the proper functioning of political subdivisions; that the resources of political subdivisions are burdened by the high cost of and frequent inability to secure such protection through standard carriers; that proper risk management requires the spreading of risk so as to minimize fluctuation in insurance needs; and that, therefore, all contributions of financial and administrative resources made by a political subdivision pursuant to an intergovernmental contract as authorized by this chapter are made for a public and governmental purpose, and that such contributions benefit each contributing political subdivision.

The trial court's ruling and the holding of the majority in the present case undermine the important governmental purpose and benefit that self-insurance pools provide. School boards, without the **[*241]** $ 50,000 limit on liability, would be reluctant to become members of and reap the benefit from a self-insurance pool.

I would hold, therefore, that the trial court erred in denying the School Board's motion to reduce the Plaintiffs' *ad damnum* to $ 50,000 and in awarding damages in excess of the $ 50,000 limit. Accordingly, I would reverse the trial **[***17]** court's judgment and remand the case for a redetermination of damages.

End of Document

Bell Atlantic-Virginia v. Arlington County

Supreme Court of Virginia

June 6, 1997, Decided

Record No. 961830

Reporter
254 Va. 60 *; 486 S.E.2d 297 **; 1997 Va. LEXIS 61 ***

BELL ATLANTIC-VIRGINIA, INC. v. ARLINGTON COUNTY

Prior History: [***1] FROM THE CIRCUIT COURT OF ARLINGTON COUNTY. Benjamin N.A. Kendrick, Judge.

Disposition: Reversed and remanded.

Core Terms

motion for judgment, allegations, demurrer, damaged, just compensation, plea in bar, sovereign immunity, trial court

Case Summary

Procedural Posture
Plaintiff communications company filed suit against defendant county alleging inverse condemnation seeking a declaratory judgment and just compensation for alleged damage to underground telephone lines. The Circuit Court of Arlington County (Virginia) sustained the county's demurrer and plea in bar, concluding the county had sovereign immunity. The company appealed.

Overview

The company filed suit against the county after the county damaged the company's underground utility facilities while installing a waterworks system and a sewage disposal system. The company sought a declaratory judgment a just compensation due to the county's taking. The trial court sustained the county's demurrer and plea in bar, concluding that the company's allegations were barred by the county's sovereign immunity. The county did not present any evidence in support of its plea in bar. The court held that from the allegations contained in the second amended motion for judgment, it was clear that the company stated a claim for just compensation under *Va. Const. art. I, § 11*. Under *art. I, § 11 of the Constitution of Virginia*, a property owner was permitted to enforce his constitutional right to just compensation in a common law action, which was not a tort action, but rather a contract action that was not barred by the doctrine of sovereign immunity.

Outcome
The judgment sustaining the county's demurrer and plea in bar was reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

HN1[] **Special Proceedings, Eminent Domain Proceedings**

Va. Const. art. I, § 11 provides that private property shall not be taken or damaged for public uses, as that term is defined by the general assembly, without just compensation. The General Assembly, in Va. Code Ann. § 15.1-276, defines the term "public uses" to embrace all uses which are necessary for public purposes. Section 15.1-292 empowers a county to acquire property by purchase, condemnation, or otherwise in order to construct, operate, or maintain its waterworks, and § 15.1-320 similarly empowers a county regarding its sewage disposal system.

Administrative Law > Sovereign Immunity

Civil Procedure > ... > Federal & State Interrelationships > State Sovereign Immunity > State Immunity

Torts > Public Entity Liability > Immunities > Sovereign Immunity

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Governments > Local Governments > Claims By & Against

HN2[] **Administrative Law, Sovereign Immunity**

Va. Const. art. I, § 11 is self-executing and permits a property owner to enforce his constitutional right to just compensation in a common law action. We have held that such an action is not a tort action; rather, it is a contract action and, therefore, is not barred by the doctrine of sovereign immunity.

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

HN3[] **Responses, Defenses, Demurrers & Objections**

A demurrer admits as true all material facts well pleaded, facts impliedly alleged, and facts that may be fairly inferred from those alleged.

Judges: Present: All the Justices. OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

Opinion by: ROSCOE B. STEPHENSON, JR.

Opinion

[*61] [298]** OPINION BY JUSTICE ROSCOE B. STEPHENSON, JR.

In this inverse condemnation proceeding, we decide whether the trial court erred in (1) sustaining the defendant's plea in bar on the ground of sovereign immunity and (2) sustaining the defendant's demurrer on the ground that the plaintiff's second amended motion for judgment fails to state a claim for damages under *Article I, Section 11 of the Constitution of Virginia*.

Bell Atlantic-Virginia, Inc. (Bell Atlantic) filed a second amended motion for judgment against Arlington County (the County), seeking a declaratory judgment pursuant to *Code § 8.01-184* and "just compensation due to [the County's] taking or damaging of [Bell Atlantic's] property on or about: September 30, 1992; and June 8, 1994." Count I of the motion for judgment relates to the September 30, 1992 incident, and Count II pertains to the June 8, 1994 incident.

In each count, Bell Atlantic alleges that "the County took and/or damaged Bell Atlantic's underground **[***2]** utility facilities for public use." [1] In Count I, Bell Atlantic further alleges the following: (1) "the damage or taking occurred so [the County] could construct, install or maintain its waterworks system;" (2) "the actions of [the County] were unconstitutional in that [the County] took or damaged Bell Atlantic's property and applied it for public use without just **[*62]** compensation being made, and without Bell Atlantic's consent, contrary to Article I, Section 11, of the Constitution of the Commonwealth of Virginia;" and (3) "Bell Atlantic therefore brings suit upon an implied contract" to recover the damages resulting from the taking or damage. Bell Atlantic's allegations in Count II are virtually identical to those in Count I except that, in Count II, the alleged taking or damage occurred in connection with the County's sewage disposal system.

[*3]** The County filed a demurrer, asserting, *inter alia*, that "the claims alleged in the Second Amended Motion for Judgment are barred by the County's sovereign immunity" and that Bell Atlantic failed "to allege sufficient facts to state a cause of action for either breach of implied contract or a taking of property without just compensation." The County also filed a plea in bar, asserting that Bell Atlantic's action is a simple tort action and, thus, is barred by sovereign immunity.

In its final order entered June 10, 1996, the trial court sustained the County's demurrer and plea in bar, concluding that "the Second Amended Motion for Judgment does not contain allegations sufficient to plead violations of *Article I, Section 11 of the Virginia Constitution* and/or for breach of implied contract and that such allegations are barred by the County's sovereign immunity." We awarded Bell Atlantic an appeal.

HN1[] *Article I, Section 11 of the Constitution of Virginia* provides that private property shall not be taken or damaged for "public uses," as that term is defined by the General

[1] The property allegedly taken or damaged on September 30, 1992, is described as including "the following communications lines: (a) 2100 pair cable; and (b) 1800 pair cable." The property allegedly taken or damaged on June 8, 1994, is described as including "the following lines: (a) 200 pair cable; and (b) 600 pair cable."

Assembly, without just compensation. The General Assembly, in Code § 15.1-276, defines the term "public uses" **[***4]** to "embrace all uses which are necessary for public purposes." Code § 15.1-292 empowers a County to acquire property by purchase, condemnation, or otherwise in order to construct, operate, or maintain its waterworks, and Code § 15.1-320 similarly empowers a County regarding its sewage disposal system.

HN2[↑] Article I, Section 11 of the Constitution is self-executing and permits a property owner to enforce his constitutional right to just compensation in a common law action. We have held that such an action is not a tort action; rather, it is a contract action and, therefore, is not barred by the doctrine of sovereign immunity. *Jenkins v. County of Shenandoah, 246 Va. 467, 470, 436 S.E.2d 607, 609 (1993)*; *Burns v. Board of Supervisors, 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977)*.

[*63] In the present case, the County did not present any evidence in support of its plea in bar. Therefore, in deciding both the plea in bar and the County's demurrer, we, like the trial court, must confine our consideration **[**299]** to the allegations contained in Bell Atlantic's second amended motion for judgment. [2]

[*5]** *HN3*[↑]

A demurrer admits as true all material facts well pleaded, facts impliedly alleged, and facts that may be fairly inferred from those alleged. *Palumbo v. Bennett, 242 Va. 248, 249, 409 S.E.2d 152, 152 (1991)*; *Bowman v. State Bank of Keysville, 229 Va. 534, 536, 331 S.E.2d 797, 798 (1985)*.

From the allegations contained in the second amended motion for judgment, it is clear that Bell Atlantic states a claim for just compensation under *Article I, Section 11 of the Constitution of Virginia*. [3] Therefore, the trial court erred in sustaining the County's plea in bar and demurrer.

Consequently, we will reverse the trial court's judgment and remand the case for further proceedings.

Reversed and remanded.

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[2] The County contends that, in deciding this case, we should consider allegations made by Bell Atlantic in its original motion for judgment and amended motion for judgment. We do not agree. Demurrers and pleas in bar were sustained as to those pleadings. Thereafter, with leave of court, Bell Atlantic filed its second amended motion for judgment. In so doing, it did not incorporate or refer to any of the allegations that were set forth in its original or amended motions for judgment. The trial court based its decision "on [the County's] Demurrer and Special Plea in Bar to the *Second Amended Motion for Judgment*," and we cannot do otherwise (emphasis added). *See Norfolk & W.R. Co. v. Sutherland, 105 Va. 545, 549-50, 54 S.E. 465, 466 (1906)*.

[3] We express no opinion, however, whether such a claim will be viable after the facts are fully developed by the evidence.

Neutral
As of: January 21, 2019 7:13 PM Z

AGCS Marine Ins. Co. v. Arlington Cty.

Supreme Court of Virginia

June 15, 2017, Decided

Record No. 160221

Reporter
293 Va. 469 *; 800 S.E.2d 159 **; 2017 Va. LEXIS 113 ***

AGCS MARINE INSURANCE COMPANY, A/K/A ALLIANZ GLOBAL CORPORATE & SPECIALTY, A/S/O HARRIS TEETER, ET AL. v. ARLINGTON COUNTY

Prior History: [***1] FROM THE CIRCUIT COURT OF ARLINGTON COUNTY. Louise M. DiMatteo, Judge.

AGCS Marine Ins. Co. v. Arlington County, 2016 Va. LEXIS 128 (Va., Sept. 14, 2016)

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

personal property, public use, damaged, insurers, inverse condemnation, condemnation, allegations, private property, fixtures, just compensation, real property, inverse condemnation claim, sewage, sovereign immunity, circuit court, appurtenant, amended complaint, cases, damage private property, for-public-use, highway, principles, lessee, rights, original complaint, eminent domain, proffered, flooding, leave to amend, purposeful

Case Summary

Overview

HOLDINGS: [1]-The circuit court properly dismissed the insurers' original inverse condemnation complaint under Va. Const. art. I, § 11 for failure to state a claim because the it sounded wholly in tort and did not state a prima facie cause of action for inverse condemnation where it neither expressly nor impliedly alleged that a county or anyone working for it purposefully caused the backflow of raw sewage into a grocery store or deliberately allowed it to happen in order to keep the entire system operating for other users; [2]-The circuit court erred in denying the insurers' motion for leave to amend their complaint because neither § 11 nor the implied constitutional right of action for inverse condemnation made a categorical distinction between personal and real property, and the damage to the store's personal property came as a result of, or "incident to," the backflow.

Outcome
Judgment affirmed in part, reversed in part, and matter remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Evidence > Inferences & Presumptions > Inferences

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] **Defenses, Demurrers & Objections, Demurrers**

When an appeal arises from the grant of a demurrer, appellate courts state the factual allegations in the complaint in a light most favorable to the insurers, giving them the benefit of all reasonable inferences that arise from those allegations. However, they do not accept the veracity of conclusions of law camouflaged as factual allegations or inferences.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN2[] **Fundamental Rights, Eminent Domain & Takings**

Va. Const. art. I, § 11 states that the General Assembly shall pass no law whereby private property, the right to which is

fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use.

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

HN3[] **Elements, Public Use**

The power of eminent domain is limited. Private property cannot be damaged or taken except for public use, and, even then, the power can be exercised only to the extent necessary to achieve the stated public use.

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

HN4[] **Elements, Just Compensation**

When a lawful taking or damaging of property is justified by a public use, it must be remedied by payment of just compensation to the owner.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Eminent Domain Proceedings

HN5[] **Fundamental Rights, Eminent Domain & Takings**

Although the underlying principles are constitutional, a multitude of legislative enactments manage the formal process of eminent domain and just compensation. Va. Code Ann. §§ 25.1-100 to -421, 1-219.1, 5.1-34, 10.1-201, 15.2-1901.1, 33.2-1000 to -1034, 56-49, 56-260, 56-347, 56-464.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

HN6[] **Fundamental Rights, Eminent Domain & Takings**

Read literally, the operative clause of Va. Const. art. I, § 11 states only that the General Assembly "shall pass no law" that takes or damages private property except for public use, thus implying that the constitutional prohibition acts solely as a limitation upon the legislature. For good reason, courts have never accepted such a hyper-literal reading of this provision. From ancient times, ad hoc seizures of property without direct legislative approval were understood to violate the requirement of just compensation no less than outright legislative confiscations. Following in this tradition, the Constitution of Virginia declares the right to private property to be "fundamental." Va. Const. art. I, § 11, Va. Code Ann. § 1-219.1(A). This view presupposes that an essential interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

Real Property Law > Eminent Domain Proceedings

HN7[] **Real Property Law, Eminent Domain Proceedings**

In an eminent domain context, property rights are basic civil rights, and a government's failure to protect private property rights puts every other civil right in doubt.

Real Property Law > Inverse Condemnation > Constitutional Issues

Torts > Public Entity Liability

HN8[] **Inverse Condemnation, Constitutional Issues**

Virginia law recognizes inverse condemnation as a viable theory of recovery for de facto violations of Va. Const. art. I, § 11. Inverse condemnation arises out of the self-executing nature of § 11 and, thus, must be distinguished from common-law tort claims.

Real Property Law > Inverse Condemnation > Constitutional Issues

HN9[] **Inverse Condemnation, Constitutional Issues**

Inverse condemnation permits recovery only when property is taken or damaged for public use—thereby bestowing on the

owner a right to sue upon an implied contract that he will be paid therefor such amount as would have been awarded if the property had been condemned under the eminent domain statute. This implied-contract characterization captures well the idea that just-compensation provisions represent a historical compact between citizens and their government that has become part of the constitutional culture.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Quasi Contracts

Real Property Law > Inverse Condemnation > Constitutional Issues

HN10[] **Types of Contracts, Quasi Contracts**

The implied-contract explanation also reinforces the first premise of inverse condemnation law, which recognizes a remedy for a de facto taking or damaging of private property in the same way that eminent domain proceedings provide a remedy for a de jure taking or damaging. In inverse condemnation cases, the law implies the constitutional duty of compensation in circumstances where the taking or damaging of private property would be compensable under traditional eminent domain principles. For this reason, an inverse condemnation claim is not a tort action, but a contract action based upon an implied constitutional promise of compensation. The limits of this implied constitutional promise are found in the express language of *Va. Const. art. I, § 11*, from which an inverse condemnation claim arises.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

HN11[] **Fundamental Rights, Eminent Domain & Takings**

Va. Const. art. I, § 11 prohibits the taking or damaging of private property for public use without just compensation. The power of eminent domain can never be exercised except for public use, and, even then, that power can only be exercised to the extent necessary to achieve the stated public use. The constitutional duty of just compensation thus presupposes that the taking or damaging of private property was for public use and done only to the extent necessary to achieve the stated public use.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

Real Property Law > Inverse Condemnation > Remedies

HN12[] **Fundamental Rights, Eminent Domain & Takings**

Va. Code Ann. § 1-219.1(A) provides an exclusive definition of "public uses" and limits the acquisition of private property to these specified uses. The statute, however, does not address the damaged for public use language in *Va. Const. art. I, § 11*. Each of the six public uses in the statutory definition applies to property that is taken. Va. Code Ann. § 1-219.1(A)(i)-(vi). Nothing in the statute limits inverse condemnation liability for damage to personal property.

Real Property Law > Inverse Condemnation > Defenses

Torts > Negligence

HN13[] **Inverse Condemnation, Defenses**

Because the power of eminent domain extends only to "lawful acts" by government officials, it does not include "negligent" or other "wrongful" acts committed outside of or in violation of their delegated authority. If they exceed their authority, or violate their duty, they act at their own risk, and the State is not responsible or liable therefor. What is true for eminent domain is likewise true for inverse condemnation claims. Tortious or wrongful conduct by a government official, acting outside his or her lawful authority, can never be a sufficient ground, in itself, for an inverse condemnation award.

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights

Torts > Public Entity Liability

HN14[] **Eminent Domain Proceedings, Constitutional Limits & Rights**

The eminent domain provisions in the Virginia Constitution

have no application to tortious or unlawful conduct.

Real Property Law > Inverse Condemnation

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

HN15[] **Real Property Law, Inverse Condemnation**

Inverse condemnation, as its name suggests, is the mirror-image of eminent domain. To invoke the power of eminent domain, a governmental or public instrumentality must intend to use the property taken for a proper public purpose.

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

HN16[] **Elements, Public Use**

An owner must allege and prove at least the kind of deliberate taking of a calculated risk, so that the damage can meaningfully be said to have occurred "for" (i.e., in order to accomplish) a public use.

Real Property Law > Inverse Condemnation

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

HN17[] **Real Property Law, Inverse Condemnation**

A claim for inverse condemnation requires an intent to take property for a public use.

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

Torts > Negligence

HN18[] **Elements, Public Use**

An accidental destruction of property does not benefit the public. The public-use limitation is the factor which distinguishes a negligence action from one under the constitution for destruction.

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

Torts > Negligence

Torts > Public Entity Liability

HN19[] **Elements, Public Use**

Where an injury involves a tort, being caused by the negligence of public officers or their agents, it cannot be said that property is taken or damaged for public use.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Torts > Public Entity Liability

Real Property Law > Inverse Condemnation > Constitutional Issues

HN20[] **Fundamental Rights, Eminent Domain & Takings**

An inverse condemnation action is not a tort action, but a contract action under *Va. Const. art. I, § 11*.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN21[] **Fundamental Rights, Eminent Domain & Takings**

Va. Const. art. I, § 11 applies to purposeful acts as well as purposeful failures to act.

Real Property Law > Inverse Condemnation > Constitutional Issues

Torts > Negligence

Real Property Law > Torts > Nuisance

Real Property Law > Torts > Trespass to Real Property

HN22[] **Inverse Condemnation, Constitutional Issues**

The government asking private property owners to bear the cost of a public improvement distinguishes an inverse

condemnation claim from a mere tort claim alleging negligence, nuisance, trespass, or other common-law theories of recovery. None of these claims require any showing that the damage resulted from a purposeful act or omission seeking to advance the "public welfare" in a manner that satisfies the for-public-use requirement of *Va. Const. art. I, § 11*. This is not meant to imply that negligence allegations without fail defeat an otherwise valid inverse condemnation claim that satisfies the for-public-use requirement. Mere negligence is insufficient, but that is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just compensation will be owed. To prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action—or inaction—in the face of that known risk.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN23[] **Fundamental Rights, Eminent Domain & Takings**

The function of the "damage" clause of *Va. Const. art. I, § 11* is not to waive sovereign immunity for the Commonwealth and its proxies in order to subject them to liability as private parties for any damage asserted by a property owner that might conceivably arise from a public use of land adjoining or proximate to the property allegedly damaged.

Constitutional Law > State Sovereign Immunity

HN24[] **Constitutional Law, State Sovereign Immunity**

The doctrine of sovereign immunity is "alive and well" in Virginia, and the complexity that exists in the law of sovereign immunity cannot be eliminated by the simple expedient of doing away with the doctrine by judicial fiat. The General Assembly, not the courts, wholly occupies this field of law.

Constitutional Law > State Sovereign Immunity

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN25[] **Constitutional Law, State Sovereign Immunity**

The State is immune from liability for the tortious acts of its servants, agents, and employees, in the absence of express constitutional or statutory provisions making it liable. The General Assembly has employed an incremental approach by enacting a limited waiver of immunity in the Virginia Tort Claims Act. *Va. Code Ann. § 8.01-195.3*. The General Assembly has also addressed the scope of sovereign immunity in a host of other claim-specific statutes, generally granting and maintaining sovereign immunity for the Commonwealth and its entities except for bad-faith conduct, gross negligence, or willful misconduct, and often expressly disclaiming any intent to modify or abrogate sovereign immunity.

Real Property Law > Inverse Condemnation > Defenses

HN26[] **Inverse Condemnation, Defenses**

Absent evidence satisfying the for-public-use requirement, a property owner may not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency.

Real Property Law > Inverse Condemnation > Defenses

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN27[] **Inverse Condemnation, Defenses**

Even though inverse condemnation is raised in some actions where a "taking" is inadvertent or negligent, inverse condemnation is not appropriate to avoid sovereign immunity in a true tort action against the government.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

HN28[] **Amendment of Pleadings, Leave of Court**

There are occasions when proffered amendments raise matters outside the arguments and briefing of an earlier demurrer. When this occurs, a circuit court need not make a dispositive finding that the amended complaint states a legally viable claim before granting leave to amend. It is sufficient, under those circumstances, to observe that amendment would not

prejudice the responding parties. Va. Sup. Ct. R. 1:8.

Real Property Law > Inverse Condemnation > Constitutional Issues

HN29[] **Inverse Condemnation, Constitutional Issues**

Because an inverse condemnation claim arises from the "self-executing" character of Va. Sup. Ct. R. I, § 11, that provision necessarily informs the scope of such claims.

Constitutional Law > State Constitutional Operation

HN30[] **Constitutional Law, State Constitutional Operation**

When interpreting a constitutional provision—no less than a statute, regulation, contract, or will—courts begin with its text.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN31[] **Fundamental Rights, Eminent Domain & Takings**

Nothing in the denotation of "private property" in Va. Const. art. I, § 11 excludes personal property—which, by definition, is simply a subset of private property. This language tracks nearly verbatim the *Takings Clause of the Fifth Amendment to the United States Constitution*, which declares, "nor shall private property be taken for public use, without just compensation." *U.S. Const. amend. V.*

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN32[] **Fundamental Rights, Eminent Domain & Takings**

Nothing in the text or history of the Takings Clause of the Fifth Amendment, or judicial precedents, suggests that the just-compensation requirement is any different when it comes to appropriation of personal property.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

HN33[] **Fundamental Rights, Eminent Domain & Takings**

It may be rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN34[] **Fundamental Rights, Eminent Domain & Takings**

"Private property" under Va. Const. art. I, § 11 applies to personal property.

Real Property Law > Inverse Condemnation > Constitutional Issues

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights

HN35[] **Inverse Condemnation, Constitutional Issues**

The General Assembly defines "property" for eminent domain purposes to include land and personal property, and any right, title, interest, estate or claim in or to such property. Va. Code Ann. § 25.1-100. While this definition does not directly address inverse condemnation claims, it has the indirect effect of doing so because such claims presuppose a constitutionally "implied contract" arising out of a de facto use of the eminent domain power and are thus claims under Va. Const. art. I, § 11.

Real Property Law > Inverse Condemnation > Constitutional Issues

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights

Real Property Law > Eminent Domain Proceedings > Elements > Just Compensation

HN36[] **Inverse Condemnation, Constitutional Issues**

Va. Const. art. I, § 11 makes no categorical distinction between personal and real property. The implied constitutional right of action for inverse condemnation likewise contains no such distinction. If such a claim meets all of the necessary requirements to recover for a taking or damaging of private property, it is no defense that the property taken or damaged was personal and not real property. Accordingly, personal property taken or damaged is an interest subject to just compensation principles.

Real Property Law > Inverse Condemnation > Procedures

HN37[] **Inverse Condemnation, Procedures**

The "implied contract" theory of inverse condemnation stems from the general rule that a plaintiff can waive a tort action and sue upon an implied contract where a tort is committed which involves an injury to personal property.

Real Property Law > Fixtures & Improvements > Fixture Characteristics

HN38[] **Fixtures & Improvements, Fixture Characteristics**

Items of personal property that become affixed or annexed to real property, but retain their separate identity, generally are known as fixtures, and are considered real property by definition.

Constitutional Law > Bill of Rights > Fundamental Rights > Eminent Domain & Takings

HN39[] **Fundamental Rights, Eminent Domain & Takings**

The prohibition against taking or damaging private property except for public use, Va. Const. art. I, § 11, applies to personal property. Whether the personal property has been transformed into real property under fixture law is irrelevant. The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.

Judges: OPINION BY JUSTICE D. ARTHUR KELSEY.

Opinion by: D. ARTHUR KELSEY

Opinion

[*473] [161]** PRESENT: All the Justices

OPINION BY JUSTICE D. ARTHUR KELSEY

Two insurers paid claims for property damage to a Harris Teeter grocery store arising from the malfunctioning of a county sewer line. Exercising their subrogation rights, the insurers filed an inverse condemnation suit against Arlington County on the theory that the sewer backup constituted a taking and/or damaging of private property for a public use without just compensation in violation of the Constitution of Virginia. The circuit court dismissed the insurers' complaint with prejudice and denied their motion for leave to file an amended complaint.

We agree with the circuit court that the original complaint failed to state a claim for inverse condemnation. We disagree, however, with the court's denial of the insurers' motion for leave to amend their complaint. The allegations in the proffered amended complaint, coupled with the reasonable inferences arising from these allegations, assert a legally viable claim for inverse condemnation. We thus affirm in part, **[***2]** reverse in part, and remand for further proceedings.

I.

HN1[] Because this appeal arises from the grant of a demurrer, we state the factual allegations in the complaint in the light most favorable to the insurers, giving them the benefit of all reasonable inferences that arise from those allegations. *See* Coutlakis v. CSX Transp., Inc., 293 Va. 212, 215, 796 S.E.2d 556, 558 (2017). However, we do not accept the veracity of conclusions of law camouflaged as factual allegations or inferences. *See* Arogas, Inc. v. Frederick Cty. Bd. of Zoning Appeals, 280 Va. 221, 224, 698 S.E.2d 908, 910 (2010). Instead, we review all conclusions of law de novo. *See* Evans v. Evans, 280 Va. 76, 81-82, 695 S.E.2d 173, 175-76 (2010).

In this case, the property insurers - AGCS Marine Insurance Company and Indemnity Insurance Company of North America - **[*474]** issued policies to Harris Teeter, the lessee of a building used for its grocery store in Arlington County. The insurers together paid approximately $1.8 million under their policies to Harris Teeter for property damage resulting from the backup of a county sewer line that caused raw sewage to flow into the grocery store in May 2012. The subrogated insurers filed suit against the County alleging only one count - an inverse condemnation claim under Article I,

Section 11 of the Constitution of Virginia.

The original complaint stated that the sewer line and the sewage treatment plant for the sewer line "were maintained for the public purpose of supplying Arlington **[***3]** County with water and sewage disposal services." J.A. at 3. The sewage backup, the complaint alleged, "was caused by the failure of Arlington County to properly maintain and operate the sewage treatment plant." *Id.* The complaint provided several specific examples of this overall failure, including that the County (1) failed to "properly operate, inspect, maintain **[**162]** and test" the sewer system; (2) failed to maintain and repair the pumps in the plant; (3) failed to supervise its employees at the treatment plant; (4) "ignored warnings from its employees" about the equipment; (5) "bypassed safety features of the equipment"; and (6) neglected necessary repairs. *Id.*

Nothing in the complaint expressly or impliedly alleged that the County purposefully caused the backflow of raw sewage into the Harris Teeter grocery store. Nor did the complaint allege that anyone working for the County either purposefully caused the backflow or deliberately allowed it to happen in order to keep the entire system operating for all other users of the county sewer system.

The County demurred on several grounds, the principal one being that the allegations asserted, at best, a negligence claim barred by sovereign immunity **[***4]** and not cognizable as a constitutional violation. The County also argued that the sewer backup did not itself constitute a public use of Harris Teeter's property. The insurers disagreed and contended that it did not matter that "the *sewage backup*" itself did not constitute a public use because the only question was "whether the *sewage treatment plant* serves a public purpose, which it obviously does." R. at 29 (emphases in original); *see also id.* at 90 (same).

[*475] The circuit court granted the County's demurrer and dismissed the case with prejudice. The insurers moved to reconsider and requested leave to file a proffered amended complaint that amplified their claim. The court denied both motions and entered final judgment.

II.

On appeal, the insurers argue that their original complaint stated a viable claim for inverse condemnation and that, even if it did not, the proffered amended complaint provides whatever amplification of the claim may be necessary. Like the circuit court, we conclude that the original complaint sounded wholly in tort and did not state a prima facie cause of action for inverse condemnation. We disagree, however, with the circuit court's decision to deny the insurers leave to amend their **[***5]** complaint. The amplified allegations in the amended complaint, coupled with the reasonable inferences that one could draw from them, state a viable claim for inverse condemnation.

A. THE FOR-PUBLIC-USE REQUIREMENT OF INVERSE CONDEMNATION

1.

HN2[↑] The Constitution of Virginia states

> [T]he General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use.

Va. Const. art. I, § 11. *HN3*[↑] The power of eminent domain is thus limited. Private property cannot be "damaged or taken except for public use," and, even then, the power can be exercised only to the extent **[*476]** "necessary to achieve the stated public use." *Id.* *HN4*[↑] When a lawful taking or damaging of property is justified by a public use, it must be remedied by payment of "just compensation to the owner." *Id.*[1]

HN6[↑] Read literally, the operative clause of *Article I, Section 11 of the Constitution of Virginia* states only that the General Assembly "shall pass no law" that takes or damages private property except for public use, *id.*, thus implying that **[***6]** the constitutional prohibition acts solely as a limitation upon the legislature. For good reason, we have never accepted such a hyper-literal reading of this provision. From ancient times, ad hoc seizures of property without direct legislative approval were understood to violate the requirement of just compensation no less than outright legislative confiscations. *See* Magna Carta, ch. 28 (prohibiting the King's officers **[**163]** from taking "the corn or other goods of any one without instantly paying money for them, unless he can obtain respite from the free-will of the seller"), *reprinted in* Boyd C. Barrington, The Magna Carta and Other Great Charters of England 228, 237 (1899). That ancient maxim found its voice in the *Takings Clause of the Fifth Amendment to the United States Constitution*, a provision that

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[1] *HN5*[↑] Though the underlying principles are constitutional, a multitude of legislative enactments manage the formal process of eminent domain and just compensation. *See Code §§ 25.1-100 to -421*; *see also id. §§ 1-219.1, 5.1-34, 10.1-201, 15.2-1901.1, 33.2-1000 to -1034, 56-49, 56-260, 56-347, 56-464*. *See generally* 2 Charles E. Friend & Kent Sinclair, Friend's Virginia Pleading and Practice § 27.22, at 27-72 to -86 (2d ed. 2007 & Supp. 2016-2017).

St. George Tucker believed was meant "to restrain the arbitrary & oppressive measure of obtaining supplies by impress[ment] as was practiced during the last war, not infrequently without any Compensation whatsoever." 4 St. George Tucker, Ten Notebooks of Law Lectures 147 (in the Tucker-Coleman Papers on file with the Earl Gregg Swem Library, College of William and Mary); *see also* 1 St. George Tucker, Blackstone's Commentaries, Editor's App. Note D, at 305-06 (same).

Following in this tradition, the Constitution of Virginia declares the right to private **[***7]** property to be "fundamental." Va. Const. art. I, § 11; *see also* Code § 1-219.1(A). This view presupposes that an essential "interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Fin. Corp., 405 U.S. 538, 552, 92 S. Ct. 1113, 31 L. Ed. 2d 424 (1972). "In a word," James Madison said, "as a man **[*477]** is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, Property (Mar. 29, 1792), *reprinted in* 1 The Founders' Constitution 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987). Madison continued, "If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights." *Id.* at 599. It "has long been recognized," therefore, that HN7[↑] property rights are "basic civil rights," Lynch, 405 U.S. at 552, and that a government's failure to protect private property rights puts every other civil right in doubt.[2]

2.

Informed by these background principles, HN8[↑] Virginia law recognizes inverse condemnation as a viable theory of recovery for de facto violations of Article I, Section 11 of the Constitution of Virginia. *See generally* Kent Sinclair, Sinclair on Virginia Remedies § 64-1, at 64-1 to -5 (5th ed. 2016). Inverse condemnation arises out of the self-executing **[***8]** nature of Article I, Section 11 and thus must be distinguished from common-law tort claims. *See* Burns v. Board of Supervisors, 218 Va. 625, 627, 238 S.E.2d 823, 825 (1977).

HN9[↑] Inverse condemnation permits recovery only when "property is taken or damaged *for public use*" - thereby bestowing on the owner a right to "sue upon an *implied contract* that he will be paid therefor such amount *as would have been awarded* if the property had been condemned under the eminent domain statute." **[*478]** *Id.* (emphases added).[3] This implied-contract characterization captures well the idea that just-compensation **[**164]** provisions represent a "historical compact" between citizens and their government that "has become part of our constitutional culture." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

HN10[↑] The implied-contract explanation also reinforces the first premise of inverse condemnation law, which recognizes a remedy for a de facto taking or damaging of private property in the same way that eminent domain proceedings provide a remedy for a de jure taking or damaging. In inverse condemnation cases, the law implies the constitutional duty of compensation in circumstances where the taking or damaging of private property would be compensable under traditional eminent domain principles. For this reason, we say that an inverse condemnation claim **[***9]** "is not a tort action, but a contract action" based upon an implied constitutional promise of compensation. Jenkins v. County of Shenandoah, 246 Va. 467, 470, 436 S.E.2d 607, 609, 10 Va. Law Rep. 484 (1993).

The limits of this implied constitutional promise are found in the express language of Article I, Section 11 of the Constitution of Virginia, from which an inverse condemnation claim arises. *See* Burns, 218 Va. at 627, 238 S.E.2d at 825 (noting that an inverse condemnation claim is "a contract action *under* Article I, Section 11 of the Constitution of

[2] *See* 1 William Blackstone, Commentaries *129 (stating that individual rights and liberties "may be reduced to three principal or primary articles - the right of personal security, the right of personal liberty, and the right of private property - because as there is no other known method of compulsion . . . but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense" (altering punctuation)); *see also* Fuller v. Edwards, 180 Va. 191, 197, 22 S.E.2d 26, 29 (1942) (same); 2 Joseph Story, Commentaries on the Constitution of the United States § 1790, at 547-48 (Thomas M. Cooley ed., 4th ed. 1873) ("Indeed, in a free government almost all other rights would become utterly worthless if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature and the rulers.").

[3] *See also* Richmeade, L.P. v. City of Richmond, 267 Va. 598, 600-01, 594 S.E.2d 606, 608 (2004); Richmond, Fredericksburg & Potomac R.R. v. Metropolitan Wash. Airports Auth., 251 Va. 201, 212, 468 S.E.2d 90, 96-97 (1996); Jenkins v. County of Shenandoah, 246 Va. 467, 470, 436 S.E.2d 607, 609, 10 Va. Law Rep. 484 (1993); Prendergast v. Northern Va. Reg'l Park Auth., 227 Va. 190, 195, 313 S.E.2d 399, 402 (1984); Nelson Cty. v. Loving, 126 Va. 283, 299-300, 101 S.E. 406, 411 (1919); Nelson Cty. v. Coleman, 126 Va. 275, 279, 101 S.E. 413, 414 (1919); Upper Appomattox Co. v. Hardings, 52 Va. (11 Grat.) 1, 4 (1854).

Virginia" (emphasis added)). HN11[↑] Article I, Section 11 prohibits the taking or damaging of private property "for public use without just compensation." Va. Const. art. I, § 11. The power of eminent domain can never be exercised "except for public use," and, even then, that power can only be exercised to the extent "necessary to achieve the stated public use." *Id.* The constitutional duty of just compensation thus presupposes that the taking or damaging of private property was "for public use" and done only to the extent "necessary to achieve the stated public use." *Id.*[4]

[*479] At one level, it is quite easy to apply this for-public-use limiting principle. HN13[↑] Because the power of eminent domain extends only to "lawful acts" by government officials, it does not include "negligent" or other "wrongful" acts committed outside of or in violation of their delegated authority. Eriksen v. Anderson, 195 Va. 655, 660-61, 79 S.E.2d 597, 600 (1954).[5] "If they exceed their authority, or violate their **[***10]** duty, they act at their own risk, and the State is not responsible or liable therefor." *Id.* (citation omitted). What is true for eminent domain is likewise true for inverse condemnation claims. Tortious or wrongful conduct by a government official, acting outside his or her lawful authority, can never be a sufficient ground, in itself, for an inverse condemnation award.[6]

[*480] **[**165]** At nearly all other levels, however, the for-public-use limiting principle can be quite difficult to apply. No "magic formula" addresses the multitude of fact patterns that can arise, and, truth be told, there are "few invariable rules in this area." Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 31, 133 S. Ct. 511, 518, 184 L. Ed. 2d 417 (2012). Several of our cases nonetheless provide a useful framework for understanding the factual scenarios that satisfy this limitation on inverse condemnation claims.

In *Jenkins*, we considered a county water-drainage easement

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[4] HN12[↑] Code § 1-219.1(A) provides an exclusive definition of "public uses" and limits the "acquisition" of private property to these specified uses. The statute, however, does not address the "damaged . . . for public use" language in Article I, Section 11 of the Constitution of Virginia. Each of the six "public uses" in the statutory definition applies to property that is "taken." *See* Code § 1-219.1(A)(i)-(vi). Nothing in the statute limits inverse condemnation liability for damage to personal property.

[5] *See also* City of Va. Beach v. Ookes, 263 Va. 510, 517, 561 S.E.2d 726, 729 (2002) (stating that "we have consistently held that HN14[↑] the 'eminent domain provisions in the Virginia Constitution have no application to tortious or unlawful conduct'" (citation omitted)); State Highway & Transp. Comm'r v. Lanier Farm, Inc., 233 Va. 506, 511, 357 S.E.2d 531, 534, 3 Va. Law Rep. 2775 (1987) (same); Wilson v. State Highway Comm'r, 174 Va. 82, 88-93, 4 S.E.2d 746, 749-51 (1939) (holding that a suit against the State for damages based on negligent construction of a highway was barred by sovereign immunity); *cf.* Commonwealth v. Chilton Malting Co., 154 Va. 28, 33-37, 152 S.E. 336, 337-39 (1930) (distinguishing the implied-contract theory described in Nelson County v. Coleman, 126 Va. at 278-79, 101 S.E. at 414, in part because the Commonwealth "ha[d] neither taken the property of the company nor used it for its own purposes," unlike in *Coleman*, where the county took land and used it as a public road, and concluding that "this case cannot be maintained against the Commonwealth, because it is based upon a tort, and it is not true that after the alleged tort the property was converted to the use of the Commonwealth").

[6] To varying degrees, other states are in substantial agreement with this view. *See* St. Francis Drainage Dist. v. Austin, 227 Ark. 167, 296 S.W.2d 668, 671 (Ark. 1956) ("When all is said and done, and regardless of what this cause of action may be called, it sounds in tort."); Tilton v. Reclamation Dist. No. 800, 142 Cal. App. 4th 848, 48 Cal. Rptr. 3d 366, 369-74 (Cal. Ct. App. 2006) (concluding that "garden variety inadequate maintenance . . . is not an adequate basis for an inverse condemnation claim"); Trinity Broad. of Denver, Inc. v. City of Westminster, 848 P.2d 916, 920-22 (Colo. 1993) (HN15[↑] "[I]nverse condemnation, as its name suggests, is the mirror-image of eminent domain. To invoke the power of eminent domain, a governmental or public instrumentality . . . must intend to use the property taken for a proper public purpose . . . ."); Johnson v. City of Atlanta, 117 Ga. App. 586, 161 S.E.2d 399, 400-01 (Ga. Ct. App. 1968) ("From the facts set out in the petition no inference can be drawn that the damage to the plaintiff's house was done in order that it be used for a 'public purpose.'"); Angelle v. State, 212 La. 1069, 34 So. 2d 321, 323-27 (La. 1948) (stating that the "public purposes" requirement of the Louisiana Constitution cannot be met by mere proof of "negligent acts or omissions"); Electro-Jet Tool & Mfg. Co. v. City of Albuquerque, 1992-NMSC-060, 114 N.M. 676, 845 P.2d 770, 774-80 (N.M. 1992) (stating that HN16[↑] "the owner must allege and prove at least the kind of deliberate taking of a calculated risk described above, so that the damage can meaningfully be said to have occurred 'for' (*i.e.*, in order to accomplish) a public use"); Yokoun v. City of Lake Oswego, 335 Ore. 19, 56 P.3d 396, 401-02 (Or. 2002) (holding that HN17[↑] "a claim for inverse condemnation requires . . . intent to take the property for a public use"); Gearin v. Marion Cty., 110 Ore. 390, 223 P. 929, 933 (Or. 1924) ("There was no intention upon the part of the county to subject the property or any part thereof to a public use . . . ."); City of San Antonio v. Pollock, 284 S.W.3d 809, 820-21 (Tex. 2009) (HN18[↑] "An accidental destruction of property does not benefit the public. The public-use limitation 'is the factor which distinguishes a negligence action from one under the constitution for destruction.'" (citation omitted)); Chavez v. City of Laramie, 389 P.2d 23, 24-25 (Wyo. 1964) (HN19[↑] "Where the injury involves a tort, being caused by the negligence of public officers or their agents, it cannot be said that property is taken or damaged for public use.").

that crossed two lots in a residential subdivision. On the easement, the lot owners alleged, the county had dug an improperly designed drainage ditch and failed to maintain it. On a regular basis, the ditch flooded the lots because it was "incapable of conveying concentrated storm water." *Jenkins, 246 Va. at 469, 436 S.E.2d at 609*. We addressed the only for-public-use **[***11]** question before us: whether there was "evidence" that the drainage ditch (situated on an easement dedicated to the county by a subdivision developer) "was part of a water discharge system which served to divert water" from developed land onto the plaintiffs' property. *Id. at 470, 436 S.E.2d at 609*. We held that there was such evidence. *See id.*

We did not hold that the flooding damage triggered inverse condemnation liability simply because the ditch was a component of the county's water-discharge system. Instead, we pointed out that the alleged purpose and function of the ditch - which was located on the plaintiffs' property - was "to divert water from approximately 36 acres of developed land onto their property," and it was flooding from that very diversion that damaged the plaintiffs' lots. *Id.* It did not matter that the original design of the ditch or its later disrepair was negligent under traditional tort principles. *See id. HN20*[↑] An inverse condemnation action, we reaffirmed, "is not a tort action, but a contract action" under *Article I, Section 11 of the Constitution of Virginia*. *Id.*

[*481] We considered a similar scenario in *Hampton Roads Sanitation District v. McDonnell, 234 Va. 235, 360 S.E.2d 841, 4 Va. Law Rep. 840 (1987)*. There, a pump station operated by a sanitation district handled overload conditions by opening a "bypass valve" that "divert[ed] the overflow from the pump **[***12]** station and discharge[ed] the wastewater upon [the plaintiff's] property." *McDonnell, 234 Va. at 237, 360 S.E.2d at 842*. "The undisputed evidence," we observed, proved that the sanitation district "intentionally discharged sewage" onto the plaintiff's property by designing the bypass valve to "permit such discharge when the flow became excessive." *Id. at 238-39, 360 S.E.2d at 843*. These facts established that the pump station damaged private property "for public uses" under *Article I, Section 11 of the Constitution of Virginia*. *Id.*

In a more recent case, *Kitchen v. City of Newport News*, we held that an inverse condemnation claim could proceed to trial based on allegations that a municipality had caused residential subdivisions to serve as "contingent retention or detention pond areas" for **[**166]** water overflowing a nearby creek and pond. *275 Va. 378, 387-89, 657 S.E.2d 132, 137-38 (2008)*. These factual allegations supported the landowner's claim that the municipality flooded his property "for public use" because, whether expressly or implicitly, the municipality chose to use the subdivisions as contingent overflow areas for the municipal water-discharge system. *Id.*

Our most recent case addressing the for-public-use requirement is *Livingston v. Virginia Department of Transportation, 284 Va. 140, 726 S.E.2d 264 (2012)*. Like *Jenkins* and *Kitchen, Livingston* involved flooding. Various homeowners claimed that the Virginia Department of Transportation (VDOT) redesigned an **[***13]** existing water-discharge system serving an area in Fairfax County. The redesign included relocating a tributary of the Potomac River, narrowing the natural width of the tributary by 62%, filling in portions of watershed marshes to construct a highway, and building the highway "in such a way," allegedly, "as to serve as a concrete wall blocking any northern flow of water from the channel." *Livingston, 284 Va. at 146, 726 S.E.2d at 268*. Subsequent failure to maintain the tributary, along with other highway construction and commercial development, the homeowners claimed, only created worse conditions. *See id. at 146-47, 726 S.E.2d at 268*.

[*482] During a heavy storm, the redesigned system blocked northern water flow and sent stormwater south, overwhelming the tributary and causing the sewage water to back up through sewers and flood basements. *See id. at 145-46, 726 S.E.2d at 267*. The homeowners filed an inverse condemnation claim against VDOT arguing that the redesigned system damaged their property "for public use." *Id. at 148, 726 S.E.2d at 268-69*. In response, VDOT argued that the for-public-use requirement could be satisfied only when government "engages in an affirmative and purposeful act that devotes private property . . . to public use." *Id. at 157, 726 S.E.2d at 274* (alteration omitted).

We rejected VDOT's application of the for-public-use requirement **[***14]** to the facts of that case. *HN21*[↑] *Article I, Section 11* applies to purposeful acts as well as purposeful failures to act. "In essence," we read the allegations of the *Livingston* complaint to imply that "VDOT *elected to use* the [newly constructed highway] and nearby residential developments as *makeshift storage sites* for excess stormwater" instead of maintaining the relocated tributary that earlier diverted excess water into the Potomac River. *Id. at 159, 726 S.E.2d at 275* (emphases added). This purposeful and uncompensated "public use" of private property as a makeshift storage site was exactly the "type of mischief that *Article I, Section 11* was adopted more than 100 years ago to remedy." *Id. at 160, 726 S.E.2d at 275-76*. "We thus conclude[d] that the Plaintiffs ha[d] sufficiently alleged that their homes were damaged for public use under *Article I, Section 11* to withstand demurrer." *Id. at 160, 726 S.E.2d at 276*.

The common thread in each of these cases is that the purposeful act or omission causing the taking of, or damage to, private property was for a public use. In *Jenkins* and *Kitchen*, governmental authorities used private property as flooding sites to handle expected overflows from the public stormwater system. In *McDonnell*, the damage to private property was for a public use because a bypass valve, operating **[***15]** as designed, poured excess sewage onto an adjacent landowner's property. In *Livingston*, VDOT "elected to use" nearby residential developments as "makeshift storage sites for excess stormwater." *284 Va. at 159, 726 S.E.2d at 275*.

[*483] In none of these scenarios was private property taken or damaged through the mere negligence of a governmental actor incident to, or while participating in, a public function. Rather, in these cases, *HN22*[↑] the government "asked private property owners . . . to bear the cost of a public improvement." *Id. at 160, 726 S.E.2d at 275*. This element distinguishes an inverse condemnation claim from a mere tort claim alleging negligence, nuisance, trespass, or other common-law theories of recovery. None of those claims require any showing that the damage resulted from a purposeful act or omission seeking to advance the "public welfare," *id.*, in a manner that satisfies the for-public-use requirement **[**167]** of *Article I, Section 11 of the Constitution of Virginia*.[7]

3.

Judged against these principles, the insurers' original complaint did not allege a legally viable inverse condemnation claim against the County. The complaint asserted that the County's sewage treatment plant and underground sewer lines existed "for the public purpose of supplying Arlington County with water and sewage disposal services." J.A. at 3. From that premise, the insurers alleged several ways in which the County failed "to properly maintain and operate the sewage treatment plant." *Id.* These failures, the insurers concluded, "resulted in a taking and/or damaging of the private property of Harris Teeter, without just compensation, in violation of *Article I, § 11*." *Id.* at 5.

These allegations simply proved too much, and thus, proved nothing. They presupposed that inverse condemnation principles can provide a remedy for property damage of any nature, whether intentional, negligent, or wholly **[***17]** innocent, caused by a **[*484]** governmental entity. If that were true, of course, sovereign immunity would no longer exist in the Commonwealth of Virginia for property damage claims.[8] Nearly every function that a government and its agents perform (e.g., building roads, driving police vehicles, maintaining traffic signals, operating school buses, deploying snow plows, and constructing bridges) can, and sometimes does, damage private property.

One may fairly ask why government should not be liable in tort to the same extent a private person would be. But that question - predicated on a recurrent policy objection to sovereign immunity generally - is not the issue before us. As we have emphasized, *HN24*[↑] "the doctrine of sovereign immunity is 'alive and well' in Virginia," and "the complexity that exists in the law of sovereign immunity cannot **[***18]** be eliminated by the simple expedient of doing away with the doctrine by judicial fiat." *Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984)*.[9] Instead, we address a much

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[7] We do not mean to imply that negligence allegations without fail defeat an otherwise valid inverse condemnation claim that satisfies the for-public-use requirement. Mere negligence is insufficient, as one court has aptly explained, but

> [t]hat is not to say that the later characterization of a public agency's deliberate action as negligence automatically removes the action from the scope of the constitutional requirement for just compensation. So long as the entity has made the deliberate calculated decision to proceed with a course of conduct, in spite of a known risk, just **[***16]** compensation will be owed. . . . [T]o prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action - or inaction - in the face of that known risk.

Arreola v. County of Monterey, 99 Cal. App. 4th 722, 122 Cal. Rptr. 2d 38, 53-55 (Cal. Ct. App. 2002).

[8] In a different context, we made much the same point:

> [W]e do not agree with the contention that *HN23*[↑] the function of the "damage" clause of *Article I, Section 11* is to waive sovereign immunity for the Commonwealth and its proxies in order to subject them to liability as private parties for *any* damage asserted by a property owner that might conceivably arise from a public use of land adjoining or proximate to the property allegedly damaged.

Byler v. Virginia Elec. & Power Co., 284 Va. 501, 508, 731 S.E.2d 916, 920 (2012) (emphasis in original).

[9] The General Assembly, not the courts, wholly occupies this field of law. As we have consistently said, *HN25*[↑] "the State is immune from liability for the tortious acts of its servants, agents and employees, in the absence of express constitutional or statutory provisions making it liable." *Eriksen, 195 Va. at 657, 79 S.E.2d at 598*. The General Assembly has employed an incremental approach by enacting a limited waiver of immunity in the *Virginia Tort Claims Act*. *See* *Code § 8.01-195.3*. The General Assembly has also

narrower question here: What are the outer limits of the waiver of **[**168]** sovereign immunity for an inverse condemnation claim under *Article I, Section 11 of the Constitution of Virginia*? We have never interpreted that constitutional provision as an omnibus waiver of sovereign immunity for tort actions. Instead, we examine carefully **[*485]** the specific allegations of the claim to determine whether it satisfies the constitutional for-public-use prerequisite.

The original complaint did not satisfy this prerequisite. Nothing in it expressly alleged or reasonably implied that the County purposefully damaged the Harris Teeter grocery store *for* a public use. No allegation suggested that the County planned or designed its system to allow the backflow in an effort to keep the entire county sewer system operating for all other users.[10] Simply alleging that damage occurred *incident to* the operation of the public sewage system is insufficient to state a claim for inverse condemnation under *Article I, Section 11 of the Constitution of Virginia*.

As many courts have recognized, *HN26*[] absent evidence satisfying the for-public-use requirement, "[i]t has been definitely held that a property owner may **[***19]** not recover in an inverse condemnation proceeding for damages caused by acts of carelessness or neglect on the part of a public agency." *Tilton v. Reclamation Dist. No. 800, 142 Cal. App. 4th 848, 48 Cal. Rptr. 3d 366, 369-74 & n.4 (Cal. Ct. App. 2006)* (quoting *Hayashi v. Alameda Cty. Flood Control & Water Conserv. Dist., 167 Cal. App. 2d 584, 334 P.2d 1048, 1053 (Cal. Ct. App. 1959)*); *see supra* notes 5-6 and accompanying text. *See generally* 9 Thompson on Real Property § 80.05(b)(2), at 365-66 (David A. Thomas ed., 3d Thomas ed. 2011) (*HN27*[] "[E]ven though inverse condemnation is raised in some actions where the 'taking' is inadvertent or negligent, inverse condemnation is not appropriate to avoid sovereign immunity in a true tort action against the government." (footnote omitted)).[11] Our **[*486]** precedent is in full accord with this prevailing view. We thus agree with the circuit court that the insurers' original complaint failed to state a claim.

4.

After the circuit court granted the County's demurrer, the insurers sought to remedy their sparse initial pleading by asking for leave to file a proffered amended complaint. Most of the amplified allegations in the proffered amended complaint merely add detail to the charge that the County negligently failed to maintain and operate its sewer system in a competent manner. Like the circuit court, **[***20]** we find no legal significance in the added specificity of these negligence allegations.

That said, several allegations in the amended complaint assert or at least imply that the County purposefully took or failed to take certain actions that, when combined, intentionally caused the sewer line at Harris Teeter to back up *so that* the entire system could continue to operate. Prior to the backup at Harris Teeter, the insurers allege, "the County *purposefully* diverted sewage and/or storm water from another County treatment facility or pump station that it had closed" yet never increased the capacity of the plant or followed the recommendations of engineers for other changes "even though in doing so *it knew* that a sewage back-flow onto the property of others *would occur*." J.A. at 153-54 (emphases added).

The insurers also allege that the County adopted "policies, procedures and practices" that "made it *most probable* that a sewage backup would occur." *Id.* (emphasis added). A reasonable inference from these allegations appears to be that

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addressed the scope of sovereign immunity in a host of other claim-specific statutes, generally granting and maintaining sovereign immunity for the Commonwealth and its entities except for bad-faith conduct, gross negligence, or willful misconduct, and often expressly disclaiming any intent to modify or abrogate sovereign immunity. *See, e.g.*, *Code §§ 2.2-515.2(F)(2)*, *5.1-173(B)*, *8.01-187*, *8.01-192*, *8.01-216.8*, *15.2-970*, *15.2-1809*, *15.2-6603*, *15.2-6629*, *15.2-7403*, *21-167*, *21-247*, *22.1-194*, *33.2-1103*, *38.2-229(B)*, *38.2-1321.1(A)*, *38.2-2711(A)*, *38.2-2814*, *38.2-2913*, *38.2-5511*, *38.2-6015*, *44-146.28:1*, *44-146.36(B)*, *46.2-203.2(E)*, *46.2-342(L)*, *52-41*, *52-49*, *54.1-2516(A)*, *54.1-2818.1*, 54.1-3038, *60.2-114.01(E)*, *62.1-44.24(1)*, *63.2-1902*, *65.2-1006(A)(2)*.

[10] At oral argument on appeal, the insurers conceded this point. *See* Oral Argument Audio at 14:18 to 15:31.

[11] *See also A.W. Guns, Annotation, Damage to Private Property Caused by Negligence of Governmental Agents as "Taking," "Damage," or "Use," for Public Purposes, in Constitutional Sense, 2 A.L.R.2d 677, §§ 2, 6(a) (2017)* ("Not all cases involving negligent planning, construction, etc., of public projects have resulted in recovery for one seeking damages under the eminent domain theory. Recovery has consistently been denied where sought to be based on activities negligently engaged in or carried on which were the mere performance of some public function or duty, but were unrelated to a deliberate taking or damaging of private property, constituting mere tortious acts which were not the necessary consequence or result of some public undertaking or project. . . . Circumvention of immunity from tort liability for negligence of governmental bodies . . . has been repeatedly refused where the activities negligently engaged in or carried on were the mere performance of some public function or duty unrelated to a deliberate taking or necessary damaging of private property, and constituted mere tortious acts, not the necessary consequence or result of some public undertaking or project." (collecting cases)).

the County was willing to incur the "most probable" risk of damaging the Harris Teeter property to keep the sewer system operational for all other users. *See id.* at 153-55. The County allegedly did so to compensate for its underfunded and poorly managed maintenance program. *See id.*

If the insurers could prove that the policies, procedures, and practices of the County consisted of a plan or design to use the Harris Teeter property in this manner, they may have an inverse condemnation claim. Despite these new allegations, the circuit court denied the motion for leave to amend and dismissed the case with prejudice. While we acknowledge the circuit court's apparent skepticism of these allegations, the court should nonetheless have permitted the amendment.

"On appeal, review of the trial court's decision to grant or deny a motion to amend is limited to the question whether the trial judge abused his discretion." *Lucas v. Woody, 287 Va. 354, 363, 756 S.E.2d 447, 451 (2014)* (citation omitted). After sustaining a demurrer, a court should grant a motion for leave to amend except when, for example, the proffered amendments are legally futile, when the amendment is untimely under an order granting leave to amend by a certain deadline or fails to satisfy other conditions in the scheduling order, when there is no proffer or description of the new allegations, when amendment would be unduly prejudicial to the responding party, or when the amending party has engaged in improper litigation tactics. *See Rule 1:8*; *Mortarino v. Consultant Eng'g Servs., Inc., 251 Va. 289, 295-96, 467 S.E.2d 778, 782-83 (1996)* (relying primarily on the lack of **[*487]** prejudice to find that the trial court abused its discretion in denying leave to amend); *Kole v. City of Chesapeake, 247 Va. 51, 57, 439 S.E.2d 405, 409, 10 Va. Law Rep. 722 (1994)* (relying exclusively on the absence of prejudice). *See generally* Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 11.2[B], at 813-19 (6th ed. 2014 & Supp. 2016-2017); 1 Friend & Sinclair, *supra* note 1, § 6.07[1], at 6-15 to -17.

[169]** In this case, the County makes no argument that the insurers' amended complaint was either untimely or prejudicial. It contends only that the circuit court properly denied leave to amend because the amended complaint fails to cure the shortcomings of the original complaint, and amendment was thus legally futile. *See* Appellee's **[***21]** Br. at 16-17; *see, e.g., Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 403-04, 337 S.E.2d 744, 748-49 (1985)*. The circuit court agreed with this view. We do not. The amended allegations and the reasonable inferences from them support a viable legal theory of recovery, and thus, the circuit court abused its discretion in denying the motion for leave to amend. *See, e.g., Mortarino, 251 Va. at 295-96, 467 S.E.2d at 782-83* (finding **[*488]** that the trial court did not err in sustaining a demurrer but reversing denial of leave to amend the defective pleading).[12]

B. Damage to Personal Property

Harris Teeter leased the real property on which it maintained its grocery store. The sewage backup allegedly caused $1.8 million in damages, consisting of the loss of grocery stock and the costs of removing the damaged goods and cleaning the store.[13] The subrogated **[**170]** insurers make no claim for damages on behalf of the owner of the real property. As an alternative basis for affirming the circuit court's dismissal, the County argues that the insurers cannot recover for damage to personal property not qualifying as fixtures. We reject that argument as inconsistent with the history and text of *Article I, Section 11 of the Constitution of Virginia* and its implicit constitutional claim for inverse condemnation.

1.

HN29[↑] Because an inverse condemnation claim arises from the "self-executing" **[***22]** character of *Article I, Section 11*, that provision necessarily informs the scope of such claims. *See Burns, 218 Va. at 627, 238 S.E.2d at 825*. *HN30*[↑] When interpreting a constitutional provision - no less than a statute, regulation, contract, or will - we begin with its text, which here states: "No private property shall be damaged or taken for public use without just compensation to the owner thereof." *Va. Const. art. I, § 11*.

HN31[↑] Nothing in the denotation of "private property" excludes personal property - which, by definition, is simply a subset of private property. The original text of what would later become *Article I, Section 11 of the Constitution of Virginia*, which was **[*489]** introduced in 1830, forbade any law "whereby private property shall be taken for public uses,

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[12] *HN28*[↑] There are occasions when the proffered amendments raise matters outside the arguments and briefing of the earlier demurrer. When this occurs, a circuit court need not make a dispositive finding that the amended complaint states a legally viable claim before granting leave to amend. It is sufficient, under those circumstances, to observe that amendment would not prejudice the responding parties. *See Rule 1:8*; *see, e.g., Mortarino, 251 Va. at 295-96, 467 S.E.2d at 782-83*; *Kole, 247 Va. at 57, 439 S.E.2d at 409*.

[13] At oral argument on appeal, the insurers suggested that Harris Teeter suffered damage to its real property in addition to its merchandise, including damage to its flooring, shelving, coolers, and freezers. *See* Oral Argument Audio at 1:08 to 1:31. They conceded, however, that the only damages that they seek in this action are for the lost merchandise and the cost of removing it and cleaning up the store. *See id.* at 1:31 to 2:02.

without just compensation." Va. Const. art. III, § 11 (1830); *see* John Dinan, The Virginia State Constitution 67 (2d ed. 2014). This language tracked nearly verbatim the *Takings Clause of the Fifth Amendment to the United States Constitution*, which declares, "nor shall private property be taken for public use, without just compensation." *U.S. Const. amend. V.*

There has never been any serious debate as to whether the *Takings Clause of the Fifth Amendment* applies to personal property. As the United States Supreme Court recently reiterated, *HN32*[↑] "[n]othing in the text or history of the *Takings Clause*, or our precedents, suggests that the [just-compensation requirement] is any different when it comes to appropriation of personal property." **[***23]** *Horne v. Department of Agric., U.S. , 135 S. Ct. 2419, 2425-28, 192 L. Ed. 2d 388 (2015)*. *HN33*[↑] It may be "rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation." *Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F.2d 1280, 1285 (7th Cir. 1993)* (collecting cases).[14]

We find it equally clear that *HN34*[↑] "private property" under *Article I, Section 11 of the Constitution of Virginia* applies to personal property. For as long as the power of eminent domain has existed, so too have the limitations on this power applied to the confiscation of personal property. The barons at Runnymede demanded just compensation for personal property. *See* Magna Carta, *supra*, at ch. 28 (requiring compensation for the taking of "corn or other goods"). Blackstone similarly viewed eminent domain principles as fully applicable to personal property. *See* 1 Blackstone, *supra* note 2, at *138-39 (declaring that "no man's land *or goods*" could be seized in violation of "the great charter, and the law of the land" (emphasis added)); *see also* 5 Edw. 3 c. 9 ("That no Man from henceforth shall . . . [have his] *Goods, nor Chattels* seised into the King's Hands, against the Form of the Great Charter, and the Law of the Land." (emphasis added)). And St. George Tucker concluded **[*490]** that the seizure of personal property was the probable reason for the adoption of the federal *Takings Clause*. *See* 4 Tucker, Ten Notebooks of Law Lectures, *supra*, at 147 (stating that the *Takings Clause* "was probably intended to restrain **[***24]** the arbitrary & oppressive measure of obtaining *supplies* by impress[ment] as was practiced during the last war, not infrequently without any Compensation whatsoever" (emphasis added)); *see also* 1 Tucker, Blackstone's Commentaries, *supra*, Editor's App. Note D, at 305-06 (same).

[171]** Consistent with this view, *HN35*[↑] the General Assembly defines property for eminent domain purposes to include "land and personal property, and any right, title, interest, estate or claim in or to such property." *Code § 25.1-100*. While this definition does not directly address inverse condemnation claims, it has the indirect effect of doing so because such claims presuppose a constitutionally "implied contract" arising out of a de facto use of the eminent domain power, *Nelson Cty. v. Coleman, 126 Va. 275, 279, 101 S.E. 413, 414 (1919)*, and are thus claims "*under Article I, Section 11 of the Constitution of Virginia*." *Burns, 218 Va. at 627, 238 S.E.2d at 825* (emphasis added); *see supra* at 6-8.

In short, *HN36*[↑] *Article I, Section 11* makes no categorical distinction between personal and real property. The implied constitutional right of action for inverse condemnation likewise contains no such distinction. If such a claim meets all of the necessary requirements to recover for a taking or damaging of private property, it is no defense that the property taken or damaged was personal and not real property. *See* 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 226 (1974) (observing that "personal **[***25]** property taken or damaged" is an interest "subject to just compensation" principles).

2.

The County does not directly challenge the historical basis of our reasoning, but instead asserts that our precedent has departed from it. As the County reads our prior cases, we have adopted a per se rule that damage to personal property is only recoverable if the personal property has been transmuted into real property under the law of fixtures. We read our case law differently.

Our line of precedent on this issue began with *City of Richmond v. Williams, 114 Va. 698, 77 S.E. 492 (1913)*. There, a municipality **[*491]** condemned land on which a lessee stored lumber. We held, under the then-current version of the eminent domain statute that required condemnation commissioners to ascertain "just compensation for the land *or other property* proposed to be condemned," that it was proper to award the lessee compensation for the costs of removing the lumber and for the loss of the "foundation timbers on which the lumber was piled." *Williams, 114 Va. at 699-703, 77 S.E. at 492-94* (emphasis added).

Neither the lumber piles nor the foundation timbers were fixtures, yet *Williams* concluded that "we can only satisfy the

[14] *See also Superior Coal & Builders Supply Co. v. Board of Educ., 260 Ky. 84, 83 S.W.2d 875, 876 (Ky. 1935)* ("[N]or does it make any difference that a portion of the plaintiff's property was personal property, as [the just-compensation provisions of the Kentucky Constitution] apply to both real and personal property.").

language of the [eminent domain] statute by construing the language used as embracing personal property." *Id. at 702, 77 S.E. at 494* (citing **[***26]** former Code § 1105-f(5)). This statutory language, we emphasized, was enacted "in obedience to" the *Eminent Domain Clause of the Virginia Constitution*, *id. at 701, 77 S.E. at 493*, and required an award that constitutes "a full equivalent for the damages to the land *or other property injured*, as well as for that which is taken," *id. at 703, 77 S.E. at 494* (emphasis added). *Cf. Coleman, 126 Va. at 278, 101 S.E. at 414* (recognizing that *HN37*[☤] the "implied contract" theory of inverse condemnation stems from the general rule that a plaintiff can waive a tort action and sue upon an implied contract "where a tort is committed which involves an injury to *personal property*" (emphasis added)).

In another such case, *Town of Cape Charles v. Ballard Bros. Fish, 200 Va. 667, 107 S.E.2d 436 (1959)*, a town filed an eminent domain proceeding to condemn an easement to dredge a deep water channel through a creek. The trial court's instructions to the eminent domain commissioners tasked with assessing just compensation "in effect excluded from consideration the value of the oysters and the oyster beds that would be taken or destroyed by the dredging operation." *Ballard Bros., 200 Va. at 673, 107 S.E.2d at 440*. Relying on *Williams*, we held that the oysters were the "personal property" of the lessee "and if taken or damaged in eminent domain proceedings, just compensation must be rendered therefor." *Id.* We did not condition the holding **[***27]** in *Ballard Bros.*, as the County infers that we did, *see* Appellee's Br. at 11, on the view **[*492]** that the oysters were fixtures appurtenant to real property. That assertion, whether true or not, had no impact on our holding.[15]

[172]** The County, however, draws our attention to a separate line of cases in support of its argument that only fixtures appurtenant to real property can be included in a damage award. We do not read these cases so broadly.

In *Potomac Electric Power Co. v. Fugate*, two power companies sought a declaratory judgment that the State Highway Commissioner was "required to reimburse [them] for the costs" of relocating their "utility facilities" that they were required to move when the Commissioner acquired the land on which the facilities were located.[16] *211 Va. 745, 746, 180 S.E.2d 657, 657 (1971)*. The prior condemnation proceeding did not take or damage the utility facilities. The only issue, then, was whether the power companies were required to bear the costs of moving their own facilities. We held that they were.

The power companies in *Fugate* had no property right to place their facilities at that particular location. There was no easement or lease granting such a right. They were located there pursuant to "mere licenses, revocable **[***28]** at will," and, under common law, the utility bore "the burden of relocating facilities at its own cost" under such circumstances. *Id. at 747-48, 180 S.E.2d at 658-59*. The condemnation proceeding, therefore, took no property rights of any nature from the power companies. The only thing the power companies lost was the right to use a license that was revocable at will, and thus, there was no "damage in the constitutional sense." *Id. at 749-50, 180 S.E.2d at 660*.

The irony of *Fugate*, at least in the manner that the County uses it, is that we specifically distinguished the situation in that case from the one here - an inverse condemnation claim by a lessee for damage to personal property:

> What has been said distinguishes the cases of **[*493]** *Town of Cape Charles v. Fish Co., 200 Va. 667, 107 S.E.2d 436 (1959)*, and *Richmond v. Williams, 114 Va. 698, 77 S.E. 492 (1913)*, relied upon by the plaintiffs. In each of those cases, the *personal property damaged* or required to be removed by public undertaking was in place under a *leasehold right*. Thus, as incidental to the damaging of a property right, *i.e.*, the leasehold interest, compensation for the costs of relocating the personal property was constitutionally required.

Id. at 750, 180 S.E.2d at 660 (emphases added).[17]

The County also relies upon *Taco Bell of America, Inc. v. Commonwealth Transportation Commissioner of Virginia, 282 Va. 127, 710 S.E.2d 478 (2011)*. In that case, the

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[15] Our observation that "it would not be practicable to take up and replant these oysters" was only relevant to our conclusion that the duty of a property owner to minimize the damages that he sustains from a taking was inapplicable because the property owner "is not bound to enter upon a doubtful and speculative undertaking." *Ballard Bros., 200 Va. at 673, 107 S.E.2d at 440*.

[16] The power company also asserted implied rights of action under various statutory provisions, which we also rejected, but that discussion has no relevance here.

[17] Although the insurers do not seek compensation for the injury that Harris Teeter sustained to its leasehold interest (i.e., for the damage to the real property itself), the damage to the personal property did come as a result of, or "incident to," the flooding of the real property with raw sewage. *See* Black's Law Dictionary 879 (10th ed. 2014) (defining "incident" as "Dependent on, subordinate to, arising out of, or otherwise connected with (something else, usu[ally] of greater importance)"). Moreover, as was the case in *Fugate*, Harris Teeter's personal property was in place pursuant to a lease agreement.

Transportation Commissioner condemned a Taco Bell restaurant and surrounding land for a highway [***29] project. The issue in the case was narrow: whether the condemnation award should pay for various pieces of equipment in the restaurant, including ovens, refrigerators, freezers, sinks, and other similar items. Implicit in the Commissioner's argument was that he had no interest in taking these items and did not, in fact, actually take any of them. Under the Commissioner's view, Taco Bell should have simply packed up those items and moved them out of the condemned property.

The trial court agreed with the Commissioner and struck Taco Bell's evidence on this issue. We reversed. In our view, Taco Bell had presented enough evidence that these items were fixtures, and thus part of the real property that the Commissioner had taken, to survive a motion to strike and submit the question to the jury. *See* [**173] *Taco Bell*, 282 Va. at 133, 710 S.E.2d at 482. We never once suggested, as the County seems to infer, that Taco Bell would not have had a valid claim if the Commissioner had actually taken [*494] equipment that had never become fixtures annexed to the realty. Answering that question was not at all the point of our decision in *Taco Bell*.[18]

Finally, the County turns to *Livingston*, our most recent pronouncement on these issues. Our [***30] opinion in *Livingston*, the County contends, adopted a per se rule that an inverse condemnation claimant cannot recover for damages to personal property that does not constitute a fixture appurtenant to real property. In fairness, we must acknowledge that a single sentence of our opinion, *see* *Livingston*, 284 Va. at 161, 726 S.E.2d at 276 ("We stress, however, that the Plaintiffs can only recover for damage to personal property that was appurtenant to their homes; for *Article I, Section 11*'s primary focus is the taking and damaging of real property."), provides some conceptual scaffolding for such a claim. But that statement is far too weak to support the weight of the County's argument.

In *Livingston*, the debate over recovery for damages to personal property centered on VDOT's argument that, because it lacked specific statutory authorization to condemn personal property, it could not as a matter of law be liable in inverse condemnation for taking or damaging personal property. Our entire analysis, save one sentence, responded solely to VDOT's specific argument. "We reject[ed] VDOT's contention" because nothing in our precedent prohibited inverse condemnation liability for personal property not included within the condemning authority's grant of eminent [***31] domain power and because *Williams* and *Fugate* supported recovery for personal property. *See id. at 160-61, 726 S.E.2d at 276*.[19] This single-sentence, "appurtenant to" qualification alluded to, but did not mention, any factors relevant to fixtures. The parties' briefs [*495] in *Livingston* similarly failed to address the law of fixtures in any detail. Nor did our opinion or the parties' briefs cite any supporting authority that might illuminate the precise meaning of this caveat.

While often used interchangeably, "appurtenances" and "fixtures" are not identical synonyms in the lexicon of law. All fixtures are appurtenances, but not all appurtenances are fixtures. A fixture is but one kind of appurtenance. For example, an above-ground hot tub may or may not be an appurtenant fixture, but a custom-built, in-ground swimming pool could be considered an appurtenance but not a fixture. We thus find it implausible that the ambiguous "appurtenant to" sentence in *Livingston* was meant to overrule *Williams* and *Fugate* and thereby establish a per se rule under Virginia law that inverse condemnation liability can never extend to personal property that does not become transformed into realty under fixture principles.[20]

Our reluctance to adopt such a per se rule is confirmed by *Livingston*'s earlier citation with approval of *Williams* and

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[18] Notably, *Taco Bell* did not involve a lessee claimant. Taco Bell was the owner of the restaurant, the land underneath it, and the equipment within it. In a dispute with a condemning authority, we treat lessees differently than fee simple owners and find that "as between the condemnor and lessee, structures attached to the condemned real estate but owned by the lessee are realty . . . even though, as between the landlord and lessee, the structures may be personalty." *Lamar Corp. v. City of Richmond*, 241 Va. 346, 351, 402 S.E.2d 31, 34, 7 Va. Law Rep. 1776 (1991); *see also Lamar Corp. v. Commonwealth Transp. Comm'r*, 262 Va. 375, 382, 552 S.E.2d 61, 64 (2001); *Exxon Corp. v. M & O Holding Corp.*, 221 Va. 274, 281, 269 S.E.2d 371, 376 (1980); *Norfolk S. Ry. v. American Oil Co.*, 214 Va. 194, 199-200, 198 S.E.2d 607, 611 (1973); *Foodtown, Inc. v. State Highway Comm'r*, 213 Va. 760, 763-64, 195 S.E.2d 883, 886 (1973).

[19] Neither the County nor the insurers ask that we reconsider *Livingston* or any aspect of its holding.

[20] Instead, the enigmatic sentence in *Livingston* should be contextualized by the specific facts and arguments made by the parties. The first clause of the sentence references "Plaintiffs" as the subject and appurtenances to "their homes" as its predicate object. *Livingston*, 284 Va. at 161, 726 S.E.2d at 276. The second clause of the sentence adds only that the "primary focus" of *Article I, Section 11 of the Constitution of Virginia* - rather than its *exclusive* [***32] focus - is the taking of, or damage to, real property. *Id.* Read together, these statements suggest a case-specific observation focusing, perhaps, on principles of remoteness, proximate cause, and foreseeability under the unique facts of that dispute.

Fugate. *See* **[**174]** *Livingston*, 284 Va. at 161, 726 S.E.2d at 276. If the County's interpretation had been the true ruling of *Livingston*, we would have just as well have said that *Article I, Section 11 of the Constitution of Virginia* applies only to real property because that is what personal property essentially becomes when it constitutes a fixture. *See, e.g.*, *State Highway & Transp. Comm'r v. Edwards Co.*, 220 Va. 90, 94, 255 S.E.2d 500, 503 (1979) (observing that the fixture test determines "whether an item of personal property upon realty *itself becomes realty*" (emphasis added)).[21] As observed earlier, no Virginia precedent has ever established such an ahistorical rule, *see supra* at 22-27, and we do not recognize it today.

[*496] 3.

For these reasons, we hold that *HN39*[↑] the prohibition against taking or damaging "private property . . . except for public use," *Va. Const. art. I, § 11*, applies to personal property. Whether the personal property has been transformed into real property under fixture law is irrelevant. As Chief Justice Roberts succinctly stated: "The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home." *Horne*, ___ U.S. at ___, 135 S. Ct. at 2426. We see no reason why the same duty should not apply to a grocer's stock.

III.

In **[***33]** sum, the circuit court correctly sustained the County's demurrer to the insurers' original complaint because its allegations did not state a viable legal claim for inverse condemnation. The court erred, however, in denying the insurers leave to amend their complaint. The allegations in the proffered amended complaint, coupled with the reasonable inferences arising from them, assert a prima facie case of inverse condemnation.

We thus affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

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[21] *See also Clayton v. Lienhard*, 312 Pa. 433, 167 A. 321, 322 (Pa. 1933) (defining fixtures as items of personal property that, in law, are deemed "realty"); 2 Thompson, supra, § 13.02(b), at 347 (David A. Thomas ed., 3d Thomas ed. 2014 & Supp. 2016) (*HN38*[↑] "Items of personal property that become affixed or annexed to real property, but retain their separate identity, generally are known as fixtures, and are *considered real property by definition* . . . ." (emphasis added)).

Messina v. Burden

Supreme Court of Virginia

October 12, 1984

Record Nos. 811485, 820299

Reporter
228 Va. 301 *; 321 S.E.2d 657 **; 1984 Va. LEXIS 203 ***

Frank Messina v. William W. Burden; Leonard Armstrong v. Dennis R. Johnson

Prior History: [***1] Appeal from a judgment of the Circuit Court of the City of Portsmouth. Hon. Lester Schlitz, judge presiding. (Record No. 811485). Appeal from a judgment of the Circuit Court of Arlington County. Hon. Charles H. Duff, judge presiding. (Record No. 820299).

Armstrong v. Johnson, 1982 Va. Cir. LEXIS 125, 22 Va. Cir. 490 (1982)

Disposition: *Affirmed.*

Core Terms

immunity, sovereign immunity, motion for judgment, doctrine of sovereign immunity, trial court, employees, duties, government employee, decisions, appeals, buildings, sovereign, purposes, community college, government entity, discretionary, contends, governmental function, level of government, sustain a demurrer, government agency, majority opinion, school board, supervisory, Operations, abolish, cases, purse

Case Summary

Procedural Posture
In a consolidated matter, plaintiffs, theater victim and manhole victim, appealed from the judgments of the Circuit Court of the City of Portsmouth and the Circuit Court of Arlington County (Virginia), which sustained the pleas of sovereign immunity by defendants, superintendent of buildings and the chief of operations division of the department of public works, in plaintiffs' tort actions.

Overview
Plaintiffs, theater victim and manhole victim, sustained injuries on public property, when plaintiff theater victim fell from a college stage and plaintiff manhole victim was injured when he stepped on a defective manhole. Plaintiff theater victim filed an action against defendant superintendent of buildings, and plaintiff manhole victim filed an action against defendant chief of operations division of the department of public works. Defendants filed pleas of sovereign immunity. The trial court sustained the pleas. On appeal, the actions were consolidated. The court affirmed, holding that defendant superintendent was entitled to sovereign immunity because he was operating within the scope of his employment and there was no claim of gross negligence or intentional misconduct. Defendant public works chief was entitled to sovereign immunity even though he was a county employee, and not a state employee. The court held that if an individual worked for an immune governmental entity then that individual was eligible for the protection afforded by the doctrine of sovereign immunity.

Outcome
The court affirmed the lower court's decision to sustain defendants', superintendent of buildings and the chief of operations division of the department of public works, pleas of sovereign immunity, in a tort action by plaintiffs, theater victim and manhole victim. The court held that defendant superintendent was entitled to immunity because he was operating within the scope of his employment. Defendant chief was immune as a county employee.

LexisNexis® Headnotes

Governments > State & Territorial
Governments > Claims By & Against

HN1[] **State & Territorial Governments, Claims By & Against**

The doctrine of sovereign immunity is "alive and well" in Virginia.

Governments > Local Governments > Claims By & Against

Governments > State & Territorial
Governments > Claims By & Against

HN2[] **Local Governments, Claims By & Against**

See Va. Code Ann. § 8.01-195.3.

Administrative Law > Sovereign Immunity

Governments > State & Territorial
Governments > Claims By & Against

Public Contracts Law > Governmental Immunities > Sovereign Immunity

Public Contracts Law > Governmental Immunities > Consent to be Sued

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN3[] **Administrative Law, Sovereign Immunity**

Sovereign immunity is a privilege of sovereignty. Without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. Without sovereign immunity public service might be threatened because citizens might be reluctant to take public jobs. If the sovereign could be sued at the instance of every citizen the state could be controlled in the use and disposition of the means required for the proper administration of the government.

Governments > State & Territorial
Governments > Claims By & Against

HN4[] **State & Territorial Governments, Claims By & Against**

The doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.

Governments > State & Territorial
Governments > Claims By & Against

HN5[] **State & Territorial Governments, Claims By & Against**

In order to fulfill the purposes of sovereign immunity, the protection afforded by the doctrine cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed. For example, limiting protection to the state itself does nothing to insure that officials will act without fear. If every government employee is subject to suit, the state could become as hamstrung in its operations as if it were subject to direct suit. The reason for this is plain: the state can act only through individuals.

Governments > State & Territorial
Governments > Claims By & Against

HN6[] **State & Territorial Governments, Claims By & Against**

Government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys.

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Absolute Immunity

Governments > Courts > Judges > Judicial Immunity

Torts > Public Entity Liability > Immunities > General Overview

HN7[] **State & Territorial Governments, Claims By & Against**

Governors, judges, members of state and local legislative bodies, and other high level governmental officials have generally been accorded absolute immunity.

Headnotes/Summary

Headnotes

(1) Immunity -- Sovereign -- In Force in Virginia.

(2) Immunity -- Sovereign -- Negligence -- Simple -- Statutory Construction -- Commonwealth Liable for Damages in Certain Cases [*Code § 8.01-195.3* (as amended by c. 397 (1982))] -- Doctrine of Sovereign Immunity Preserved by Tort Claims Act as Amended in 1982 and Cannot be Eliminated by Judicial Fiat.

(3) Immunity -- Sovereign -- Purposes of Doctrine Stated.

(4) Immunity -- Sovereign -- Negligence -- Simple -- Doctrine Extends Immunity to Employees Other than Officials at Highest Levels of Government.

(5) Immunity -- Sovereign -- Negligence -- Simple -- Immunity Extended to Supervisory Employee of Community College (*Messina*, Record No. 811485).

(6) Immunity -- Sovereign -- Negligence -- Simple -- Scope of Employment -- Critical Factor is Whether Employee Acted Within Scope of Authority.

[*2] (7) Immunity -- Sovereign -- Negligence -- Simple -- Scope of Employment -- Employee in *Messina* (Record No. 811485) Alleged to be Acting Within Scope of Authority and Immune for Act of Simple Negligence.**

(8) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- If Individual Works for Immune Governmental Entity May be Entitled to Sovereign Immunity in Proper Case.

(9) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- Factors to be Considered in Determining Immunity -- Commonwealth Employees -- Stated.

(10) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- Evidence -- Factors to be Considered in Determining Immunity -- Non-Commonwealth Employees of Immune Governmental Entities -- Factors Determining Immunity of Commonwealth Employees Relevant to Immunity of Non-Commonwealth Employees of Other Governmental Entities.

(11) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- Evidence -- Factors to be Considered in Determining Immunity -- Non-Commonwealth Employees of Immune Governmental Entities -- Supervisory Employee of Arlington County Acting Within Scope of Employment Immune From Liability for Simple [*3] Negligence (*Armstrong*, Record No. 820299).**

Two cases are considered in the opinion. In *Messina* v. *Burden* (Record No. 811485), the Superintendent of Buildings of Tidewater Community College, part of the Virginia Community College system, was sued for alleged negligent injury to an actor by a fall on a stairway behind the stage of the College theatre. The plaintiff, Messina, first sued the College but then, by amended motion for judgment, sued the Superintendent in his official capacity. Plaintiff filed a second amended motion after a demurrer based on sovereign immunity was sustained. Plaintiff by the second amended motion sued the defendant, not setting forth his job title and not alleging the defendant acted within the scope of his employment. A second demurrer based on sovereign immunity was sustained.

In *Armstrong* v. *Johnson* (Record No. 820299), the Chief of the Operations Division of the Department of Public Works of Arlington County Virginia, was sued when plaintiff sustained injuries by stepping on a defective manhole cover. The defendant was a supervisory officer subject to administrative review by the Director of the Department of Transportation [***4] of Arlington County. The County has sovereign immunity. A demurrer based on sovereign immunity was sustained.

In both cases it is argued that the doctrine of sovereign immunity should be rejected by the Supreme Court. Questions also are presented concerning the application of the doctrine of sovereign immunity to government employees.

1. The doctrine of sovereign immunity is in force in Virginia.

2. The General Assembly, by its amendment in c. 397 (1982) of *Code § 8.01-195.3* of the Virginia Tort Claims Act, indicated that the Act should not be construed to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth. The doctrine of sovereign immunity thus cannot be eliminated by judicial fiat.

3. The doctrine of sovereign immunity serves a multitude of purposes including, but not limited to, protecting the public purse. The additional purposes include providing for the smooth operation of government; eliminating the public inconvenience and danger possibly stemming from the reticence of officials to act; and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use [***5] of vexatious litigation.

4. To accomplish the purposes of the doctrine of sovereign immunity, the doctrine must be extended not only to officials at the highest levels of the three branches of government, but also to some of those who help run the government, the state acting only through individuals and these individuals not being able to function effectively if in fear of personal liability as a result of litigation.

5. The defendant, Burden, in *Messina*, was alleged to be the Superintendent of Buildings of Tidewater Community College, a part of the Community College system, a supervisory employee acting within the scope of his employment. The defendant was thus a supervisory employee of the Commonwealth and is entitled to immunity from simple negligence for acts done within the scope of his employment.

6. One of the critical factors in deciding whether a government employee is entitled to sovereign immunity for simple negligence, is whether he was acting within or without his authority at the time of doing or failing to do the act complained of.

7. In *Messina* the defendant, Burden, in the second amended motion for judgment, was alleged to be acting within **[***6]** the scope of his employment with regard to the act complained of. This allegation, coupled with the supervisory nature of the defendant's work and the absence of a claim of gross or intentional negligence entitles the defendant to immunity. *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979), distinguished.*

8. If an individual works for an immune governmental entity then, in a proper case, the individual is entitled to sovereign immunity for simple negligence. Thus a county employee such as the defendant, Johnson, in *Armstrong* may be entitled to sovereign immunity. *James v. Jane, 221 Va. 43, 51, 267 S.E.2d 109, 112 (1980); Short v. Griffitts, 220 Va. 53, 55, 255 S.E.2d 479, 481 (1979), explained.*

9. Among the factors to be considered in determining whether a person potentially entitled to sovereign immunity for liability for simple negligence is entitled to that immunity in a particular case are: (a) the nature of the function performed by the employee; (b) the extent of the State's interest and involvement in the function; (c) the degree of control and direction exercised by the State over the employee; and (d) whether the act complained **[***7]** of involved the use of judgment and discretion. *James v. Jane, 221 Va. 43, 53, 267 S.E.2d 109, 112 (1980), followed.*

10. The factors to be considered in determining the entitlement of a person to sovereign immunity stated in *James v. Jane, 221 Va. 43, 53, 267 S.E.2d 109, 113 (1980)* (Headnote 9) apply also to employees of other immune governmental entities.

11. In *Armstrong* (Record No. 820299) the defendant, Johnson, is entitled to immunity. Arlington County shares the sovereign immunity of the Commonwealth. The activities of the defendant, Johnson, an employee of the County, involved judgment and discretion. The County had a clear interest in his work and exercised administrative control over him.

Syllabus

Supervisory employees of Tidewater Community College and of Arlington County have sovereign immunity from liability for simple negligence; general discussion of doctrine of sovereign immunity in Virginia.

Counsel: *H. Joel Weintraub (Decker, Cardon, Weintraub, Thomas & Hitchings*, on brief), for appellant. (Record No. 811485)

J. J. O'Keefe, III (Outland, Gray, O'Keefe & Hubbard, on brief), for appellee. (Record No. 811485)

[*8]** *Blair D. Howard (Howard & Howard, P.C.*, on brief), for appellant. (Record No. 820299)

Charles G. Flinn, County Attorney, for appellee. (Record No. 820299)

Judges: Carrico, C.J., Cochran, Poff, Compton, Stephenson, Thomas, JJ., and Harrison, Retired Justice. Thomas, J., delivered the opinion of the Court. Poff, J., concurring. Cochran, J., dissenting. Stephenson, J., joins in this dissent.

Opinion by: THOMAS

Opinion

[*304] **[**658]** These two appeals present the same issue from slightly different perspectives. Both appeals concern whether the doctrine of sovereign immunity extends to government employees such as those involved in these cases. They differ in that William W. Burden, the appellee in the

first appeal, was an employee of Tidewater Community College, part of the Virginia Community College System, and thus, in essence, an employee of the State, while Dennis R. Johnson, the appellee in the second appeal, was an employee of Arlington County. These appeals give us the opportunity to reexamine the complex law of sovereign immunity as it has evolved in the Commonwealth.

[*305] [659]** I. *Background*

A. *Messina*

In the first appeal, Frank **[***9]** Messina was injured when he tripped and fell on a stairway located behind the stage of the College Theater on the Frederick Campus of Tidewater Community College. At the time of his injury Messina was an actor in a play being performed at the theater.

Messina first sued the community college. However, that action was nonsuited and an amended motion for judgment was filed against William W. Burden, the college's superintendent of buildings.

In the amended motion for judgment, Messina made several allegations against Burden including the following:

> On or about March 11, 1979, the Defendant, William W. Burden, was the Superintendent of Buildings for the Defendant Tidewater Community College, was its employee, and was acting within the scope of his employment; and as the Superintendent of Buildings it was his duty to maintain and supervise the maintenance of the buildings of the Tidewater Community College. . . .

Burden filed a demurrer in which he contended that the action against him was barred by the doctrine of sovereign immunity. The court sustained the demurrer with leave to Messina to amend.

Messina filed a second amended motion for judgment. This time **[***10]** Messina was careful not to set forth Burden's job title. Moreover, in his new pleading, Messina did not allege that Burden was acting within the scope of his employment or that he had supervisory responsibilities. In response, Burden filed a plea of sovereign immunity. The court sustained the plea.

On appeal, Messina contends that the trial court erred in two particulars: first by sustaining the demurrer to the first amended motion for judgment, second by sustaining the plea to the second amended motion for judgment.

B. *Armstrong*

Leonard Armstrong was injured when he stepped on a defective manhole cover located in a street in Arlington County. Armstrong sued Dennis R. Johnson and, in his motion for judgment, alleged **[*306]** that Johnson was "Chief of the Operations Division of the Department of Public Works in Arlington County, Virginia." Johnson filed a special plea of immunity and a demurrer. Thereafter, the parties entered into a stipulation of facts in which they agreed that at the time of Armstrong's injury, Johnson was Chief of the Operations Division as alleged. They further agreed that there were eleven sections within Johnson's division and that he administered **[***11]** all of them. They also agreed that Johnson's work required the application of engineering knowledge and skills to solve highway construction and maintenance problems. They agreed further that Johnson had "wide latitude in exercising independent judgment, subject only to administrative review by the Director of the Department of Transportation."

The trial court sustained the demurrer and the plea of immunity. In a memorandum opinion, the trial court first stated that Arlington County shared the sovereign immunity of the Commonwealth, then reasoned that the county "is not a 'local government agency' as that term has been used in several of the decisions denying immunity to employees of such agencies." The trial court also stated that Johnson's duties were "analogous to the 'executive officers' in *Lawhorne v. Harlan [214 Va. 405, 200 S.E.2d 569 (1973)]* who were charged with the operation of a vast hospital complex." The court noted further that the charge against Johnson was one of simple negligence, not gross negligence or intentional misconduct.

On appeal, Armstrong contends that the trial court made two errors. He says the court erred in holding that Johnson "while **[***12]** acting as Chief . . . of Operations . . . was not acting as an employee of a local government agency." He also says the trial court erred in sustaining Johnson's demurrer and plea.

[660]** II. *Discussion*

A. *Issues Common to Both Appeals*

At least two common themes run through both appeals. One theme is that the doctrine of sovereign immunity has been so eroded that it has lost its vitality and should be done away with completely by this Court. The other theme concerns the difficulty in determining which government employees are entitled to immunity.

[*307] 1. *Vitality of the Doctrine*

[1-2] Contrary to the suggestions of the appellants, *HN1*[↑] the doctrine of sovereign immunity is "alive and well" in Virginia. Though this Court has, over the years, discussed the

doctrine in a variety of contexts and refined it for application to constantly shifting facts and circumstances, we have never seen fit to abolish it. Nor does the General Assembly want the doctrine abolished. In 1981, the General Assembly enacted the Virginia Tort Claims Act. Had it so chosen, the legislature could have used that act as a vehicle to abolish sovereign immunity. It did just the **[***13]** contrary. In a 1982 amendment to the Act the General Assembly provided as follows:

> HN2[↑] [N]or shall any provision of this article . . . be so construed as to remove or *in any way diminish* the sovereign immunity of any county, city, or town in the Commonwealth.

Code § 8.01-195.3 (emphasis added). Thus, the complexity that exists in the law of sovereign immunity cannot be eliminated by the simple expedient of doing away with the doctrine by judicial fiat.

2. *Determining Employee Immunity*

The more important question raised by the two appeals is under what circumstances an employee of a governmental body is entitled to the protection of sovereign immunity. In order to resolve this question, we must focus upon what the doctrine of sovereign immunity was meant to achieve.

[3-4] One of the most often repeated explanations for the rule of state immunity from suits in tort is the necessity to protect the public purse. *See* Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983). However, protection of the public purse is but one of several purposes for the rule. In Board of Public Works v. Ganni, 76 Va. 455 (1882), we said that HN3[↑] sovereign immunity **[***14]** is a privilege of sovereignty and we then explained that without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. We also stated that without sovereign immunity public service might be threatened because citizens might be reluctant to take public jobs. We said further that if the sovereign could be sued at the instance of every citizen the State could be "controlled **[*308]** in the use and disposition of the means required for the proper administration of the government." 76 Va. at 462 (quoting The Siren, 74 U.S. (7 Wall.) 152, 154 (1868)).

More recently, in *Hinchey*, we rejected the idea that protection of the public purse is or ever was the sole basis of the doctrine. There, we said that while maintenance of public funds is important, another equally important purpose of the rule is the orderly administration of government. In *Hinchey*, we relied upon 72 Am. Jur. 2d *States, Territories, and Dependencies* § 99, which described sovereign immunity "as a rule of social policy, which protects the state from burdensome interference with the performance of its **[***15]** governmental functions and preserves its control over state funds, property, and instrumentalities." 226 Va. at 240, 307 S.E.2d at 894.

From these several sources it is apparent that HN4[↑] the doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation. Given the several purposes of the doctrine, it follows that HN5[↑] in **[**661]** order to fulfill those purposes the protection afforded by the doctrine cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed. For example, limiting protection to the State itself does nothing to insure that officials will act without fear. If every government employee is subject to suit, the State could become **[***16]** as hamstrung in its operations as if it were subject to direct suit. The reason for this is plain: the State can act only through individuals. *See* Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942).

At least twice in the past, we have acknowledged the importance of affording immunity to certain government employees. In one case we approached the question on the basis of policy:

> It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction.

[*309] Sayers v. Bullar, 180 Va. at 229, 22 S.E.2d at 12. To the same effect is First Va. Bank-Colonial v. Baker, 225 Va. 72, 79, 301 S.E.2d 8, 12 (1983), where we said that HN6[↑] "government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys." *See* Note, *Virginia's Law of Sovereign Immunity: An Overview*, 12 U. Rich. L. Rev. 429 (1978).

There is very little debate regarding the extension of the doctrine to those who operate at the **[***17]** highest levels of the three branches of government. HN7[↑] Governors,

judges, members of state and local legislative bodies, and other high level governmental officials have generally been accorded absolute immunity. W. Prosser, *Handbook of the Law of Torts* § 132 at 987-988 (4th ed. 1971). General agreement breaks down, however, the farther one moves away from the highest levels of government. Nevertheless, on a case-by-case basis, this Court has extended immunity to other governmental officials of lesser rank.

In *Sayre v. The Northwestern Turnpike Road, 37 Va. (10 Leigh) 454 (1839)*, we held the president and directors of the Northwestern Turnpike Road to be immune against a claim that a bridge built by their company was negligently constructed. In *Sayers v. Buffar, 180 Va. 222, 22 S.E.2d 9 (1942)*, we held that workers who performed blasting operations for the State were immune from liability because there was no evidence that in blasting they did anything other than exactly what they were required to do by the sovereign. We stated that the "defendants were simply carrying out instructions given them by" a state agency. *Id. at 230, 22 S.E.2d at 12*. We said **[***18]** in *Sayers* that the workers "were acting solely in their representative capacity as lawful and proper agents of the State and not in their own individual right." *Id. at 229, 22 S.E.2d at 12*. In *Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960)*, we held that a city school board was immune when charged with negligence in failing to keep the aisles clear in a high school auditorium that had been rented to a third party for a program. *Accord Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*; *Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968)*.

In *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*, we held that two hospital administrators and a surgical intern at the University of Virginia hospital were immune in a suit brought by the representative of a patient who died while in the hospital. **[*310]** In *Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982)*, we held that a division school superintendent and a high school principal were immune in a suit alleging that their failure to provide a safe environment resulted in plaintiff's being stabbed. In *Bowers v. Commonwealth, 225 Va. 245, 302 [***19] S.E.2d 511 (1983)*, we held that a highway department resident engineer was immune from a suit where plaintiff sustained an injury on a culvert that was constructed by the highway department. **[**662]** Most recently we held that the Superintendent of the Norfolk-Virginia Beach Expressway was immune when sued for failing to provide adequate barriers and traffic control which led to a collision. *Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983)*.

Deciding which government employees are entitled to immunity requires line-drawing. Yet, given the continued vitality of the doctrine, the Court must engage in this difficult task. Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles from our prior decisions, and by examining the facts and circumstances of each case this task can be simplified.

B. *Analysis of Messina and Armstrong*

Messina and *Armstrong* do not involve officials at the very highest levels of government who have generally been accorded absolute immunity. Thus, to decide the question of immunity in these appeals, we must make a close examination of the facts and circumstances.

1. **[***20]** *Messina*

[5] In *Messina*, the trial court did not err in sustaining the demurrer to the first amended motion for judgment. In that pleading, Messina pleaded himself out of court. Messina alleged that the college was part of the Community College System, that Burden was employed by the college, that Burden was the "Superintendent of Buildings," that Burden had the "duty to maintain and supervise the maintenance of the buildings" at the college, and that Burden "was acting within the scope of his employment." It is clear from the first amended motion for judgment that Burden was a supervisory employee of the State of Virginia who was operating within the scope of his employment in doing or failing to do the act of simple negligence complained of by Messina; as such he **[*311]** was entitled to immunity. *See Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511 (1983)*; *Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982)*; *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*.

[6-7] In support of his second assignment of error, Messina relies heavily upon *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*. Messina contends that the allegations **[***21]** in his case were virtually the same as in *Short* where this Court ruled that the doctrine of sovereign immunity did not bar the claim. However, *Short* is distinguishable. The most telling difference is that in the instant appeal Messina alleged that Burden was acting within the scope of his employment with regard to the act complained of. * No such allegation was made in *Short*. One of the critical factors in deciding whether a government employee is entitled to immunity is whether he

* The facts concerning the nature of Burden's work were contained primarily in the first amended motion for judgment to which the trial court sustained a demurrer with leave to amend. Though the plea followed the second amended motion for judgment, it is obvious from the trial court's final order that it relied upon both motions for judgment in determining Burden's status. Messina interposed no objection to this procedure. Indeed in his brief he refers to both pleadings. Thus, the trial court did not err in considering allegations contained in the first amended motion for judgment.

was acting within or without his authority at the time of doing or failing to do the act complained of. In *Messina* this critical point must be resolved in favor of Burden. The fact that he is said by the plaintiff to have been operating within the scope of his employment together with the allegation of the supervisory nature of his work and the absence of any claim of gross negligence or intentional misconduct demonstrates the correctness of the trial court's decision to sustain the plea of sovereign immunity.

[*22]** 2. *Armstrong*

[8] In support of his first assignment of error, Armstrong argues that Johnson was a county employee rather than an employee of the Commonwealth as the trial court found, and hence, that he was not eligible to claim sovereign immunity. He relies upon a passing comment in *James v. Jane, 221 Va. 43, 51, 267 S.E.2d 108, 112 (1980)*, where we said that "[w]e make a distinction **[**663]** between the Sovereign Commonwealth of Virginia and its employees, and local governmental agencies and their employees."

Armstrong construes that comment and similar language in *Short v. Griffitts, 220 Va. 53, 55, 255 S.E.2d 479, 481 (1979)*, as **[*312]** the pronouncement of a *per se* rule that the doctrine of sovereign immunity never applies to an employee of a local governmental agency. We disavow such a construction. The distinction we mentioned in *James* and *Short* is one of degree rather than kind. A state employee has a closer nexus to the sovereign. And the identity of the employer is one of the factors to be considered in determining whether a government employee is entitled to the protection of the immunity doctrine. Where an employee **[***23]** works for the sovereign itself, an entity we know to be immune, we can eliminate the step in the analysis which otherwise would require us to ascertain whether the employee who asserts immunity works for an immune governmental entity. As must be obvious from the decision reached in *Banks* v. *Sellers* (handed down after the trial court's ruling in *Armstrong*), where we held a school superintendent and a principal immune, employees of governmental entities other than the Commonwealth itself can receive the benefits of sovereign immunity.

Given our analysis of this appeal, it was unnecessary to attempt to turn Johnson into a quasi-state employee in order for him to be entitled to the protection of sovereign immunity. It would place an unnecessary strain on the English language and on the creative genius of attorneys to require transformation of an employee of a local immune body into a state employee in order to entitle him to immunity. The more workable rule is the one here announced: If an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine.

[9-10] In his second assignment **[***24]** of error, Armstrong contends that even if Johnson is a person who can secure, in a proper case, the benefits of sovereign immunity, that immunity should be withheld in the instant case because Johnson fails to meet the test set forth in *James* v. *Jane. James* involved suits against doctors at the University of Virginia Medical School. At trial, plaintiff alleged that he was injured as the result of negligent acts on the part of the doctors in performing a myelogram. All of the doctors were full-time faculty members of the University of Virginia Medical School. They were required to teach, to do research, and to take care of patients. They were all fully licensed physicians. They all pleaded sovereign immunity. The trial court held that they were immune. We reversed. In our view, the doctors were essentially independent contractors as far as their relationship with their patients **[*313]** was concerned. We concluded that since matters of treatment were left up to them individually, the State had no control over the doctor-patient relationship and, therefore, the State's immunity had no application to the doctors with regard to claims of negligent medical treatment.

[*25]** In *James* we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:

1. the nature of the function performed by the employee;

2. the extent of the state's interest and involvement in the function;

3. the degree of control and direction exercised by the state over the employee; and

4. whether the act complained of involved the use of judgment and discretion.

221 Va. at 53, 267 S.E.2d at 113. Armstrong contends that Johnson does not meet the *James* analysis because the *State* had no control over him and the *State* had no interest in Johnson's work. The response to Armstrong's contention is simple: the word "state" was used in this test only because in *James* the State was the immune body for which the doctors worked. Our use of the word "state" did not mean **[**664]** that in cases where the individual seeking immunity was not a State employee the State's interest in and control over the individual still had to be examined. Had the doctors in *James* worked for another immune governmental entity, that entity's name would have been used in the test. Thus, in applying **[***26]** the *James* test to employees of other immune governmental entities, the word "state" should be deleted and the proper description of the governmental entity substituted.

[11] Consequently, in *Armstrong*, in applying the *James* test, the first question is whether Johnson works for an immune body. Since Johnson works for Arlington County and since counties share the tort immunity of the Commonwealth, *Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957)*, then Johnson is eligible for immunity if other applicable criteria are met. When the *James* test is modified to insert the word "county" in the place of the word "state," it is apparent that Johnson must be afforded immunity. His activities clearly involved judgment and discretion. The county exercised administrative control over Johnson and his **[*314]** department. The county had a clear interest in the work performed by Johnson.

III. *Conclusion*

For all the foregoing reasons, we hold that there was no error in the judgments appealed from. Therefore, the judgments in both appeals will be affirmed.

Affirmed.

Concur by: POFF

Concur

POFF, J., concurring.

I concur in the result, and I have decided **[***27]** to join in the majority opinion in the hope that it will contribute to uniformity in the application of the law of sovereign immunity in this Commonwealth. I must add, however, that I have a somewhat different view of what the law ought to be.

The complexity the majority finds in the case law results mainly from historical confusion over the differences between the doctrine of sovereign immunity and the doctrine of public-servant immunity (sometimes imprecisely labeled "official immunity"). The confusion stems, I believe, from undue reliance upon the truism that government can act only through the acts of its employees.

The two doctrines are akin but different in concept and effect. The doctrine of sovereign immunity, rooted originally in the tenuous theory that the King of England could do no wrong, finds its most legitimate justification in the right of government to protect its assets, owned in common by the people at large, and to promote the welfare and safety of the body politic by assuring orderly administration of governmental functions.

On the other hand, the primary purpose of the doctrine of public-servant immunity, while related to those underlying the doctrine **[***28]** of sovereign immunity, is to encourage citizens, including those of modest means, to enter government service and, once employed, to carry out their assigned missions responsibly without fear of personal liability for accidental injuries resulting from acts or omissions committed in the exercise of their discretionary powers. Public-servant immunity does not attach merely because the level of government for which the employee works enjoys sovereign immunity.

[*315] The rules I suggest would dispense with certain distinctions, invoked in earlier cases, which I consider artificial and illogical. For purposes of the sovereign-immunity analysis, I see no *valid* reason to distinguish between a county and a city; both administer laws and programs which affect the people's interests in the integrity of the public purse and the welfare and safety of the body politic. As an examination of the case law will reveal, it is all but impossible, with any degree of consistency, to determine the difference between a governmental function and a proprietary function, and I would abandon the requirement that **[**665]** courts make the attempt. And, while I would grant no immunity from intentional **[***29]** torts to any employee at any level of government, I would abolish the nebulous distinction we have drawn between simple civil negligence and gross civil negligence.

Having in mind the public-policy purposes of the doctrines of sovereign immunity and public-servant immunity, I favor the following rules:

(1) Absent express waiver, the Commonwealth, counties of the Commonwealth, cities chartered by the Commonwealth, and towns incorporated by the Commonwealth are immune from suit arising out of a tort committed in the discharge of a lawful public function.

(2) Departments, agencies, and other public bodies created by any level of government and authorized to exercise a lawful power of that government enjoy the same immunity.

(3) Chief executive officers and legislators at every level of government, and judicial officers, such as judges, magistrates, and commissioners in chancery, are immune from liability for damages arising out of unintentional torts committed within the scope of their employment.

(4) All other employees of every level of government or of a lawful creature of government are immune from liability from damages arising out of unintentional torts **[***30]** committed in the performance of a judgmental or discretionary duty within the scope of their employment, without regard to whether the misfeasance or nonfeasance is simple or gross.

[*316] These rules, like those precipitated by the majority opinion, may not be the ideal solution. Government continues to grow in size and power, and the danger of tortious injury to private citizens by government employees expands apace. Some say the legislature should abolish the judge-made doctrine of sovereign immunity, grant absolute immunity to every government employee for every kind of tort arising out of and during the course of his employment, and, applying the rule of *respondeat superior*, impose liability solely upon the master for the tortious conduct of the servant, with no right of indemnity against the servant.

I would not go so far. Doubtless, such a legislative package would simplify the body of the law for the benefit of legitimate claimants. But it would inevitably tend to curtail an employee's incentive to perform his duties faithfully, invite frivolous and vexatious litigation, and disrupt the orderly administration of governmental functions, all at the expense [***31] of the people.

Dissent by: COCHRAN

Dissent

COCHRAN, J., dissenting.

The majority opinion has attempted to lay down a rule of sovereign immunity which reconciles our prior decisions. In my view, the attempt fails because the decisions cannot be reconciled. The result is that the tent of sovereign immunity is now to be stretched to protect from liability far more negligent individuals than ever before. [1] What appears to be the critical test is whether the employee of an immune employer was acting within or without the scope of his employment. The effect of the majority opinion, in my view, is to overrule at least three of our recent decisions on this subject.

In *Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960)* and *Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968)*, [***32] we held that a school board, in the performance of its duties, was an arm of the Commonwealth and, in the absence of waiver by statute, immune from liability for negligence. In *Crabbe*, however, we laid down a different rule for a teacher who was employed by a county school board and performing his duties when a pupil in his class was injured in using a [**666] power saw. We held that the fact that the teacher was "performing [*317] a governmental function for his employer" did not exempt him from liability "for his own negligence in the performance of such duties." *209 Va. at 359, 164 S.E.2d at 641*.

Twice we have followed *Crabbe* and held that employees of exempt employers were liable for their own acts of negligence. *James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980)*; *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*. In *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*, a majority relied on the distinction between discretionary and ministerial acts to hold an intern and administrators of a state hospital immune because they exercised discretion in their work. *Id. at 407, 200 S.E.2d at 571-72*. But in *James*, the court, without [***33] overruling *Lawhorne*, held full-time members of the medical faculty at the same hospital subject to liability for their acts of negligence because they exercised complete discretion in their work. *221 Va. at 52-55, 267 S.E.2d at 113-14*.

The majority opinion in *James* repeated the language of *Short* that in our decisions "[w]e make a distinction between the Sovereign Commonwealth of Virginia and its employees, and a governmental agency, created by the Commonwealth, and its employees." I do not consider that the use of that language was casual or inadvertent.

In *Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982)*, a school's division superintendent and principal were held to be immune because of the supervisory and discretionary nature of their work. *Id. at 172-73, 294 S.E.2d at 864-65*. But, in *Crabbe* and *Short*, immunity had been denied a shop teacher, an athletic director, a coach, and a buildings and grounds supervisor. The *Crabbe* and *Short* decisions did not rely on the distinction between discretionary and ministerial functions, as the defendants in those cases clearly exercised discretion by the very nature of their work but were nonetheless [***34] subject to liability for negligence. Later decisions relying on this distinction are a clear departure from the *Crabbe* rule of individual liability.

In the present cases, the majority finds each defendant to be a supervisory employee exercising discretion in his work. [2]

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[1] I agree that the General Assembly has demonstrated an intent to retain sovereign immunity but I fail to perceive any legislative intent that such immunity be extended beyond any limits heretofore established.

[2] The majority contends that the trial court determined the nature of Burden's work from the allegations of the first amended motion for judgment, to which a demurrer previously had been sustained. Because Messina did not object to this procedure, the court finds the action to be proper.

There is no express indication in the order that the first amended motion for judgment formed the basis of the decision. The

This puts the court in the position of endorsing the distinction relied on in **[*318]** *Lawhorne* and *Banks* and contravening the clear mandate of *Crabbe, Short*, and *James*. Accordingly, I dissent. To immunize employees of local arms or agencies of the state government is to regress from established principles of law. In *Short*, we held that whether the employees' duties included supervision, maintenance, and inspection of facilities and whether they breached such duties thereby proximately causing plaintiff's injuries were questions of fact to be decided at trial. 220 Va. at 55, 225 S.E.2d at 480. Similarly, Messina and Armstrong should be entitled to try the questions whether Burden and Johnson had duties to inspect and maintain the premises under their supervision, whether they breached such duties, and whether their breach proximately caused injuries to their respective plaintiffs. **[***35]**

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majority's reliance on Messina's failure to object to a procedure not apparent on the face of the order appears to me to be unjustified. Furthermore, it is worth noting that counsel did object to entry of the order.

Messina v. Burden

Supreme Court of Virginia

October 12, 1984

Record Nos. 811485, 820299

Reporter
228 Va. 301 *; 321 S.E.2d 657 **; 1984 Va. LEXIS 203 ***

Frank Messina v. William W. Burden; Leonard Armstrong v. Dennis R. Johnson

Prior History: [***1] Appeal from a judgment of the Circuit Court of the City of Portsmouth. Hon. Lester Schlitz, judge presiding. (Record No. 811485). Appeal from a judgment of the Circuit Court of Arlington County. Hon. Charles H. Duff, judge presiding. (Record No. 820299).

Armstrong v. Johnson, 1982 Va. Cir. LEXIS 125, 22 Va. Cir. 490 (1982)

Disposition: *Affirmed.*

Core Terms

immunity, sovereign immunity, motion for judgment, doctrine of sovereign immunity, trial court, employees, duties, government employee, decisions, appeals, buildings, sovereign, purposes, community college, government entity, discretionary, contends, governmental function, level of government, sustain a demurrer, government agency, majority opinion, school board, supervisory, Operations, abolish, cases, purse

Case Summary

Procedural Posture
In a consolidated matter, plaintiffs, theater victim and manhole victim, appealed from the judgments of the Circuit Court of the City of Portsmouth and the Circuit Court of Arlington County (Virginia), which sustained the pleas of sovereign immunity by defendants, superintendent of buildings and the chief of operations division of the department of public works, in plaintiffs' tort actions.

Overview
Plaintiffs, theater victim and manhole victim, sustained injuries on public property, when plaintiff theater victim fell from a college stage and plaintiff manhole victim was injured when he stepped on a defective manhole. Plaintiff theater victim filed an action against defendant superintendent of buildings, and plaintiff manhole victim filed an action against defendant chief of operations division of the department of public works. Defendants filed pleas of sovereign immunity. The trial court sustained the pleas. On appeal, the actions were consolidated. The court affirmed, holding that defendant superintendent was entitled to sovereign immunity because he was operating within the scope of his employment and there was no claim of gross negligence or intentional misconduct. Defendant public works chief was entitled to sovereign immunity even though he was a county employee, and not a state employee. The court held that if an individual worked for an immune governmental entity then that individual was eligible for the protection afforded by the doctrine of sovereign immunity.

Outcome
The court affirmed the lower court's decision to sustain defendants', superintendent of buildings and the chief of operations division of the department of public works, pleas of sovereign immunity, in a tort action by plaintiffs, theater victim and manhole victim. The court held that defendant superintendent was entitled to immunity because he was operating within the scope of his employment. Defendant chief was immune as a county employee.

LexisNexis® Headnotes

Governments > State & Territorial
Governments > Claims By & Against

HN1[] **State & Territorial Governments, Claims By & Against**

The doctrine of sovereign immunity is "alive and well" in Virginia.

Governments > Local Governments > Claims By & Against

Governments > State & Territorial
Governments > Claims By & Against

HN2[] **Local Governments, Claims By & Against**

See Va. Code Ann. § 8.01-195.3.

Administrative Law > Sovereign Immunity

Governments > State & Territorial
Governments > Claims By & Against

Public Contracts Law > Governmental Immunities > Sovereign Immunity

Public Contracts Law > Governmental Immunities > Consent to be Sued

Torts > Public Entity Liability > Immunities > Sovereign Immunity

HN3[] **Administrative Law, Sovereign Immunity**

Sovereign immunity is a privilege of sovereignty. Without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. Without sovereign immunity public service might be threatened because citizens might be reluctant to take public jobs. If the sovereign could be sued at the instance of every citizen the state could be controlled in the use and disposition of the means required for the proper administration of the government.

Governments > State & Territorial
Governments > Claims By & Against

HN4[] **State & Territorial Governments, Claims By & Against**

The doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation.

Governments > State & Territorial
Governments > Claims By & Against

HN5[] **State & Territorial Governments, Claims By & Against**

In order to fulfill the purposes of sovereign immunity, the protection afforded by the doctrine cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed. For example, limiting protection to the state itself does nothing to insure that officials will act without fear. If every government employee is subject to suit, the state could become as hamstrung in its operations as if it were subject to direct suit. The reason for this is plain: the state can act only through individuals.

Governments > State & Territorial
Governments > Claims By & Against

HN6[] **State & Territorial Governments, Claims By & Against**

Government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys.

Governments > State & Territorial
Governments > Claims By & Against

Torts > Public Entity Liability > Immunities > Absolute Immunity

Governments > Courts > Judges > Judicial Immunity

Torts > Public Entity Liability > Immunities > General Overview

HN7[] **State & Territorial Governments, Claims By & Against**

Governors, judges, members of state and local legislative bodies, and other high level governmental officials have generally been accorded absolute immunity.

Headnotes/Summary

Headnotes

(1) Immunity -- Sovereign -- In Force in Virginia.

(2) Immunity -- Sovereign -- Negligence -- Simple -- Statutory Construction -- Commonwealth Liable for Damages in Certain Cases [*Code § 8.01-195.3* (as amended by c. 397 (1982))] -- Doctrine of Sovereign Immunity Preserved by Tort Claims Act as Amended in 1982 and Cannot be Eliminated by Judicial Fiat.

(3) Immunity -- Sovereign -- Purposes of Doctrine Stated.

(4) Immunity -- Sovereign -- Negligence -- Simple -- Doctrine Extends Immunity to Employees Other than Officials at Highest Levels of Government.

(5) Immunity -- Sovereign -- Negligence -- Simple -- Immunity Extended to Supervisory Employee of Community College (*Messina*, Record No. 811485).

(6) Immunity -- Sovereign -- Negligence -- Simple -- Scope of Employment -- Critical Factor is Whether Employee Acted Within Scope of Authority.

[*2] (7) Immunity -- Sovereign -- Negligence -- Simple -- Scope of Employment -- Employee in *Messina* (Record No. 811485) Alleged to be Acting Within Scope of Authority and Immune for Act of Simple Negligence.**

(8) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- If Individual Works for Immune Governmental Entity May be Entitled to Sovereign Immunity in Proper Case.

(9) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- Factors to be Considered in Determining Immunity -- Commonwealth Employees -- Stated.

(10) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- Evidence -- Factors to be Considered in Determining Immunity -- Non-Commonwealth Employees of Immune Governmental Entities -- Factors Determining Immunity of Commonwealth Employees Relevant to Immunity of Non-Commonwealth Employees of Other Governmental Entities.

(11) Immunity -- Sovereign -- Negligence -- Simple -- Employee -- Evidence -- Factors to be Considered in Determining Immunity -- Non-Commonwealth Employees of Immune Governmental Entities -- Supervisory Employee of Arlington County Acting Within Scope of Employment Immune From Liability for Simple [*3] Negligence (*Armstrong*, Record No. 820299).**

Two cases are considered in the opinion. In *Messina* v. *Burden* (Record No. 811485), the Superintendent of Buildings of Tidewater Community College, part of the Virginia Community College system, was sued for alleged negligent injury to an actor by a fall on a stairway behind the stage of the College theatre. The plaintiff, Messina, first sued the College but then, by amended motion for judgment, sued the Superintendent in his official capacity. Plaintiff filed a second amended motion after a demurrer based on sovereign immunity was sustained. Plaintiff by the second amended motion sued the defendant, not setting forth his job title and not alleging the defendant acted within the scope of his employment. A second demurrer based on sovereign immunity was sustained.

In *Armstrong* v. *Johnson* (Record No. 820299), the Chief of the Operations Division of the Department of Public Works of Arlington County Virginia, was sued when plaintiff sustained injuries by stepping on a defective manhole cover. The defendant was a supervisory officer subject to administrative review by the Director of the Department of Transportation [***4] of Arlington County. The County has sovereign immunity. A demurrer based on sovereign immunity was sustained.

In both cases it is argued that the doctrine of sovereign immunity should be rejected by the Supreme Court. Questions also are presented concerning the application of the doctrine of sovereign immunity to government employees.

1. The doctrine of sovereign immunity is in force in Virginia.

2. The General Assembly, by its amendment in c. 397 (1982) of *Code § 8.01-195.3* of the Virginia Tort Claims Act, indicated that the Act should not be construed to remove or in any way diminish the sovereign immunity of any county, city or town in the Commonwealth. The doctrine of sovereign immunity thus cannot be eliminated by judicial fiat.

3. The doctrine of sovereign immunity serves a multitude of purposes including, but not limited to, protecting the public purse. The additional purposes include providing for the smooth operation of government; eliminating the public inconvenience and danger possibly stemming from the reticence of officials to act; and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use [***5] of vexatious litigation.

4. To accomplish the purposes of the doctrine of sovereign immunity, the doctrine must be extended not only to officials at the highest levels of the three branches of government, but also to some of those who help run the government, the state acting only through individuals and these individuals not being able to function effectively if in fear of personal liability as a result of litigation.

5. The defendant, Burden, in *Messina*, was alleged to be the Superintendent of Buildings of Tidewater Community College, a part of the Community College system, a supervisory employee acting within the scope of his employment. The defendant was thus a supervisory employee of the Commonwealth and is entitled to immunity from simple negligence for acts done within the scope of his employment.

6. One of the critical factors in deciding whether a government employee is entitled to sovereign immunity for simple negligence, is whether he was acting within or without his authority at the time of doing or failing to do the act complained of.

7. In *Messina* the defendant, Burden, in the second amended motion for judgment, was alleged to be acting within **[***6]** the scope of his employment with regard to the act complained of. This allegation, coupled with the supervisory nature of the defendant's work and the absence of a claim of gross or intentional negligence entitles the defendant to immunity. *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979), distinguished.*

8. If an individual works for an immune governmental entity then, in a proper case, the individual is entitled to sovereign immunity for simple negligence. Thus a county employee such as the defendant, Johnson, in *Armstrong* may be entitled to sovereign immunity. *James v. Jane, 221 Va. 43, 51, 267 S.E.2d 109, 112 (1980)*; *Short v. Griffitts, 220 Va. 53, 55, 255 S.E.2d 479, 481 (1979), explained.*

9. Among the factors to be considered in determining whether a person potentially entitled to sovereign immunity for liability for simple negligence is entitled to that immunity in a particular case are: (a) the nature of the function performed by the employee; (b) the extent of the State's interest and involvement in the function; (c) the degree of control and direction exercised by the State over the employee; and (d) whether the act complained **[***7]** of involved the use of judgment and discretion. *James v. Jane, 221 Va. 43, 53, 267 S.E.2d 109, 112 (1980), followed.*

10. The factors to be considered in determining the entitlement of a person to sovereign immunity stated in *James v. Jane, 221 Va. 43, 53, 267 S.E.2d 109, 113 (1980)* (Headnote 9) apply also to employees of other immune governmental entities.

11. In *Armstrong* (Record No. 820299) the defendant, Johnson, is entitled to immunity. Arlington County shares the sovereign immunity of the Commonwealth. The activities of the defendant, Johnson, an employee of the County, involved judgment and discretion. The County had a clear interest in his work and exercised administrative control over him.

Syllabus

Supervisory employees of Tidewater Community College and of Arlington County have sovereign immunity from liability for simple negligence; general discussion of doctrine of sovereign immunity in Virginia.

Counsel: *H. Joel Weintraub (Decker, Cardon, Weintraub, Thomas & Hitchings*, on brief), for appellant. (Record No. 811485)

J. J. O'Keefe, III (Outland, Gray, O'Keefe & Hubbard, on brief), for appellee. (Record No. 811485)

[*8]** *Blair D. Howard (Howard & Howard, P.C.*, on brief), for appellant. (Record No. 820299)

Charles G. Flinn, County Attorney, for appellee. (Record No. 820299)

Judges: Carrico, C.J., Cochran, Poff, Compton, Stephenson, Thomas, JJ., and Harrison, Retired Justice. Thomas, J., delivered the opinion of the Court. Poff, J., concurring. Cochran, J., dissenting. Stephenson, J., joins in this dissent.

Opinion by: THOMAS

Opinion

[*304] **[**658]** These two appeals present the same issue from slightly different perspectives. Both appeals concern whether the doctrine of sovereign immunity extends to government employees such as those involved in these cases. They differ in that William W. Burden, the appellee in the

first appeal, was an employee of Tidewater Community College, part of the Virginia Community College System, and thus, in essence, an employee of the State, while Dennis R. Johnson, the appellee in the second appeal, was an employee of Arlington County. These appeals give us the opportunity to reexamine the complex law of sovereign immunity as it has evolved in the Commonwealth.

[*305] [659]** I. *Background*

A. *Messina*

In the first appeal, Frank **[***9]** Messina was injured when he tripped and fell on a stairway located behind the stage of the College Theater on the Frederick Campus of Tidewater Community College. At the time of his injury Messina was an actor in a play being performed at the theater.

Messina first sued the community college. However, that action was nonsuited and an amended motion for judgment was filed against William W. Burden, the college's superintendent of buildings.

In the amended motion for judgment, Messina made several allegations against Burden including the following:

> On or about March 11, 1979, the Defendant, William W. Burden, was the Superintendent of Buildings for the Defendant Tidewater Community College, was its employee, and was acting within the scope of his employment; and as the Superintendent of Buildings it was his duty to maintain and supervise the maintenance of the buildings of the Tidewater Community College. . . .

Burden filed a demurrer in which he contended that the action against him was barred by the doctrine of sovereign immunity. The court sustained the demurrer with leave to Messina to amend.

Messina filed a second amended motion for judgment. This time **[***10]** Messina was careful not to set forth Burden's job title. Moreover, in his new pleading, Messina did not allege that Burden was acting within the scope of his employment or that he had supervisory responsibilities. In response, Burden filed a plea of sovereign immunity. The court sustained the plea.

On appeal, Messina contends that the trial court erred in two particulars: first by sustaining the demurrer to the first amended motion for judgment, second by sustaining the plea to the second amended motion for judgment.

B. *Armstrong*

Leonard Armstrong was injured when he stepped on a defective manhole cover located in a street in Arlington County. Armstrong sued Dennis R. Johnson and, in his motion for judgment, alleged **[*306]** that Johnson was "Chief of the Operations Division of the Department of Public Works in Arlington County, Virginia." Johnson filed a special plea of immunity and a demurrer. Thereafter, the parties entered into a stipulation of facts in which they agreed that at the time of Armstrong's injury, Johnson was Chief of the Operations Division as alleged. They further agreed that there were eleven sections within Johnson's division and that he administered **[***11]** all of them. They also agreed that Johnson's work required the application of engineering knowledge and skills to solve highway construction and maintenance problems. They agreed further that Johnson had "wide latitude in exercising independent judgment, subject only to administrative review by the Director of the Department of Transportation."

The trial court sustained the demurrer and the plea of immunity. In a memorandum opinion, the trial court first stated that Arlington County shared the sovereign immunity of the Commonwealth, then reasoned that the county "is not a 'local government agency' as that term has been used in several of the decisions denying immunity to employees of such agencies." The trial court also stated that Johnson's duties were "analogous to the 'executive officers' in *Lawhorne v. Harlan [214 Va. 405, 200 S.E.2d 569 (1973)]* who were charged with the operation of a vast hospital complex." The court noted further that the charge against Johnson was one of simple negligence, not gross negligence or intentional misconduct.

On appeal, Armstrong contends that the trial court made two errors. He says the court erred in holding that Johnson "while **[***12]** acting as Chief . . . of Operations . . . was not acting as an employee of a local government agency." He also says the trial court erred in sustaining Johnson's demurrer and plea.

[660]** II. *Discussion*

A. *Issues Common to Both Appeals*

At least two common themes run through both appeals. One theme is that the doctrine of sovereign immunity has been so eroded that it has lost its vitality and should be done away with completely by this Court. The other theme concerns the difficulty in determining which government employees are entitled to immunity.

[*307] 1. *Vitality of the Doctrine*

[1-2] Contrary to the suggestions of the appellants, *HN1*[↑] the doctrine of sovereign immunity is "alive and well" in Virginia. Though this Court has, over the years, discussed the

doctrine in a variety of contexts and refined it for application to constantly shifting facts and circumstances, we have never seen fit to abolish it. Nor does the General Assembly want the doctrine abolished. In 1981, the General Assembly enacted the Virginia Tort Claims Act. Had it so chosen, the legislature could have used that act as a vehicle to abolish sovereign immunity. It did just the **[***13]** contrary. In a 1982 amendment to the Act the General Assembly provided as follows:

> HN2[↑] [N]or shall any provision of this article . . . be so construed as to remove or *in any way diminish* the sovereign immunity of any county, city, or town in the Commonwealth.

Code § 8.01-195.3 (emphasis added). Thus, the complexity that exists in the law of sovereign immunity cannot be eliminated by the simple expedient of doing away with the doctrine by judicial fiat.

2. *Determining Employee Immunity*

The more important question raised by the two appeals is under what circumstances an employee of a governmental body is entitled to the protection of sovereign immunity. In order to resolve this question, we must focus upon what the doctrine of sovereign immunity was meant to achieve.

[3-4] One of the most often repeated explanations for the rule of state immunity from suits in tort is the necessity to protect the public purse. *See* Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983). However, protection of the public purse is but one of several purposes for the rule. In Board of Public Works v. Gannt, 76 Va. 455 (1882), we said that HN3[↑] sovereign immunity **[***14]** is a privilege of sovereignty and we then explained that without the doctrine there would exist inconvenience and danger to the public in the form of officials being fearful and unwilling to carry out their public duties. We also stated that without sovereign immunity public service might be threatened because citizens might be reluctant to take public jobs. We said further that if the sovereign could be sued at the instance of every citizen the State could be "controlled **[*308]** in the use and disposition of the means required for the proper administration of the government." 76 Va. at 462 (quoting The Siren, 74 U.S. (7 Wall.) 152, 154 (1868)).

More recently, in *Hinchey*, we rejected the idea that protection of the public purse is or ever was the sole basis of the doctrine. There, we said that while maintenance of public funds is important, another equally important purpose of the rule is the orderly administration of government. In *Hinchey*, we relied upon 72 Am. Jur. 2d *States, Territories, and Dependencies* § 99, which described sovereign immunity "as a rule of social policy, which protects the state from burdensome interference with the performance of its **[***15]** governmental functions and preserves its control over state funds, property, and instrumentalities." 226 Va. at 240, 307 S.E.2d at 894.

From these several sources it is apparent that HN4[↑] the doctrine of sovereign immunity serves a multitude of purposes including but not limited to protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation. Given the several purposes of the doctrine, it follows that HN5[↑] in **[**661]** order to fulfill those purposes the protection afforded by the doctrine cannot be limited solely to the sovereign. Unless the protection of the doctrine extends to some of the people who help run the government, the majority of the purposes for the doctrine will remain unaddressed. For example, limiting protection to the State itself does nothing to insure that officials will act without fear. If every government employee is subject to suit, the State could become **[***16]** as hamstrung in its operations as if it were subject to direct suit. The reason for this is plain: the State can act only through individuals. *See* Sayers v. Butler, 180 Va. 222, 22 S.E.2d 9 (1942).

At least twice in the past, we have acknowledged the importance of affording immunity to certain government employees. In one case we approached the question on the basis of policy:

> It would be an unwise policy to permit agents and employees of the State to be sued in their personal capacity for acts done by them at the express direction of the State, unless they depart from that direction.

[*309] Sayers v. Butler, 180 Va. at 229, 22 S.E.2d at 12. To the same effect is First Va. Bank-Colonial v. Baker, 225 Va. 72, 79, 301 S.E.2d 8, 12 (1983), where we said that HN6[↑] "government can function only through its servants, and certain of those servants must enjoy the same immunity in the performance of their discretionary duties as the government enjoys." *See* Note, *Virginia's Law of Sovereign Immunity: An Overview*, 12 U. Rich. L. Rev. 429 (1978).

There is very little debate regarding the extension of the doctrine to those who operate at the **[***17]** highest levels of the three branches of government. HN7[↑] Governors,

judges, members of state and local legislative bodies, and other high level governmental officials have generally been accorded absolute immunity. W. Prosser, *Handbook of the Law of Torts* § 132 at 987-988 (4th ed. 1971). General agreement breaks down, however, the farther one moves away from the highest levels of government. Nevertheless, on a case-by-case basis, this Court has extended immunity to other governmental officials of lesser rank.

In *Sayre v. The Northwestern Turnpike Road, 37 Va. (10 Leigh) 454 (1839)*, we held the president and directors of the Northwestern Turnpike Road to be immune against a claim that a bridge built by their company was negligently constructed. In *Sayers v. Bullar, 180 Va. 222, 22 S.E.2d 9 (1942)*, we held that workers who performed blasting operations for the State were immune from liability because there was no evidence that in blasting they did anything other than exactly what they were required to do by the sovereign. We stated that the "defendants were simply carrying out instructions given them by" a state agency. *Id. at 230, 22 S.E.2d at 12*. We said **[***18]** in *Sayers* that the workers "were acting solely in their representative capacity as lawful and proper agents of the State and not in their own individual right." *Id. at 229, 22 S.E.2d at 12*. In *Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960)*, we held that a city school board was immune when charged with negligence in failing to keep the aisles clear in a high school auditorium that had been rented to a third party for a program. *Accord Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*; *Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968)*.

In *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*, we held that two hospital administrators and a surgical intern at the University of Virginia hospital were immune in a suit brought by the representative of a patient who died while in the hospital. **[*310]** In *Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982)*, we held that a division school superintendent and a high school principal were immune in a suit alleging that their failure to provide a safe environment resulted in plaintiff's being stabbed. In *Bowers v. Commonwealth, 225 Va. 245, 302 [***19] S.E.2d 511 (1983)*, we held that a highway department resident engineer was immune from a suit where plaintiff sustained an injury on a culvert that was constructed by the highway department. **[**662]** Most recently we held that the Superintendent of the Norfolk-Virginia Beach Expressway was immune when sued for failing to provide adequate barriers and traffic control which led to a collision. *Hinchey v. Ogden, 226 Va. 234, 307 S.E.2d 891 (1983)*.

Deciding which government employees are entitled to immunity requires line-drawing. Yet, given the continued vitality of the doctrine, the Court must engage in this difficult task. Yet, by keeping the policies that underlie the rule firmly fixed in our analysis, by distilling general principles from our prior decisions, and by examining the facts and circumstances of each case this task can be simplified.

B. *Analysis of Messina and Armstrong*

Messina and *Armstrong* do not involve officials at the very highest levels of government who have generally been accorded absolute immunity. Thus, to decide the question of immunity in these appeals, we must make a close examination of the facts and circumstances.

1. **[***20]** *Messina*

[5] In *Messina*, the trial court did not err in sustaining the demurrer to the first amended motion for judgment. In that pleading, Messina pleaded himself out of court. Messina alleged that the college was part of the Community College System, that Burden was employed by the college, that Burden was the "Superintendent of Buildings," that Burden had the "duty to maintain and supervise the maintenance of the buildings" at the college, and that Burden "was acting within the scope of his employment." It is clear from the first amended motion for judgment that Burden was a supervisory employee of the State of Virginia who was operating within the scope of his employment in doing or failing to do the act of simple negligence complained of by Messina; as such he **[*311]** was entitled to immunity. *See Bowers v. Commonwealth, 225 Va. 245, 302 S.E.2d 511 (1983)*; *Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982)*; *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*.

[6-7] In support of his second assignment of error, Messina relies heavily upon *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*. Messina contends that the allegations **[***21]** in his case were virtually the same as in *Short* where this Court ruled that the doctrine of sovereign immunity did not bar the claim. However, *Short* is distinguishable. The most telling difference is that in the instant appeal Messina alleged that Burden was acting within the scope of his employment with regard to the act complained of. * No such allegation was made in *Short*. One of the critical factors in deciding whether a government employee is entitled to immunity is whether he

* The facts concerning the nature of Burden's work were contained primarily in the first amended motion for judgment to which the trial court sustained a demurrer with leave to amend. Though the plea followed the second amended motion for judgment, it is obvious from the trial court's final order that it relied upon both motions for judgment in determining Burden's status. Messina interposed no objection to this procedure. Indeed in his brief he refers to both pleadings. Thus, the trial court did not err in considering allegations contained in the first amended motion for judgment.

was acting within or without his authority at the time of doing or failing to do the act complained of. In *Messina* this critical point must be resolved in favor of Burden. The fact that he is said by the plaintiff to have been operating within the scope of his employment together with the allegation of the supervisory nature of his work and the absence of any claim of gross negligence or intentional misconduct demonstrates the correctness of the trial court's decision to sustain the plea of sovereign immunity.

[***22] 2. *Armstrong*

[8] In support of his first assignment of error, Armstrong argues that Johnson was a county employee rather than an employee of the Commonwealth as the trial court found, and hence, that he was not eligible to claim sovereign immunity. He relies upon a passing comment in *James v. Jane*, 221 Va. 43, 51, 267 S.E.2d 108, 112 (1980), where we said that "[w]e make a distinction [**663] between the Sovereign Commonwealth of Virginia and its employees, and local governmental agencies and their employees."

Armstrong construes that comment and similar language in *Short v. Griffitts*, 220 Va. 53, 55, 255 S.E.2d 479, 481 (1979), as [*312] the pronouncement of a *per se* rule that the doctrine of sovereign immunity never applies to an employee of a local governmental agency. We disavow such a construction. The distinction we mentioned in *James* and *Short* is one of degree rather than kind. A state employee has a closer nexus to the sovereign. And the identity of the employer is one of the factors to be considered in determining whether a government employee is entitled to the protection of the immunity doctrine. Where an employee [***23] works for the sovereign itself, an entity we know to be immune, we can eliminate the step in the analysis which otherwise would require us to ascertain whether the employee who asserts immunity works for an immune governmental entity. As must be obvious from the decision reached in *Banks* v. *Sellers* (handed down after the trial court's ruling in *Armstrong*), where we held a school superintendent and a principal immune, employees of governmental entities other than the Commonwealth itself can receive the benefits of sovereign immunity.

Given our analysis of this appeal, it was unnecessary to attempt to turn Johnson into a quasi-state employee in order for him to be entitled to the protection of sovereign immunity. It would place an unnecessary strain on the English language and on the creative genius of attorneys to require transformation of an employee of a local immune body into a state employee in order to entitle him to immunity. The more workable rule is the one here announced: If an individual works for an immune governmental entity then, in a proper case, that individual will be eligible for the protection afforded by the doctrine.

[9-10] In his second assignment [***24] of error, Armstrong contends that even if Johnson is a person who can secure, in a proper case, the benefits of sovereign immunity, that immunity should be withheld in the instant case because Johnson fails to meet the test set forth in *James* v. *Jane*. *James* involved suits against doctors at the University of Virginia Medical School. At trial, plaintiff alleged that he was injured as the result of negligent acts on the part of the doctors in performing a myelogram. All of the doctors were full-time faculty members of the University of Virginia Medical School. They were required to teach, to do research, and to take care of patients. They were all fully licensed physicians. They all pleaded sovereign immunity. The trial court held that they were immune. We reversed. In our view, the doctors were essentially independent contractors as far as their relationship with their patients [*313] was concerned. We concluded that since matters of treatment were left up to them individually, the State had no control over the doctor-patient relationship and, therefore, the State's immunity had no application to the doctors with regard to claims of negligent medical treatment.

[***25] In *James* we developed a test to determine entitlement to immunity. Among the factors to be considered are the following:

1. the nature of the function performed by the employee;

2. the extent of the state's interest and involvement in the function;

3. the degree of control and direction exercised by the state over the employee; and

4. whether the act complained of involved the use of judgment and discretion.

221 Va. at 53, 267 S.E.2d at 113. Armstrong contends that Johnson does not meet the *James* analysis because the *State* had no control over him and the *State* had no interest in Johnson's work. The response to Armstrong's contention is simple: the word "state" was used in this test only because in *James* the State was the immune body for which the doctors worked. Our use of the word "state" did not mean [**664] that in cases where the individual seeking immunity was not a State employee the State's interest in and control over the individual still had to be examined. Had the doctors in *James* worked for another immune governmental entity, that entity's name would have been used in the test. Thus, in applying [***26] the *James* test to employees of other immune governmental entities, the word "state" should be deleted and the proper description of the governmental entity substituted.

[11] Consequently, in *Armstrong*, in applying the *James* test, the first question is whether Johnson works for an immune body. Since Johnson works for Arlington County and since counties share the tort immunity of the Commonwealth, *Mann v. County Board, 199 Va. 169, 98 S.E.2d 515 (1957)*, then Johnson is eligible for immunity if other applicable criteria are met. When the *James* test is modified to insert the word "county" in the place of the word "state," it is apparent that Johnson must be afforded immunity. His activities clearly involved judgment and discretion. The county exercised administrative control over Johnson and his **[*314]** department. The county had a clear interest in the work performed by Johnson.

III. *Conclusion*

For all the foregoing reasons, we hold that there was no error in the judgments appealed from. Therefore, the judgments in both appeals will be affirmed.

Affirmed.

Concur by: POFF

Concur

POFF, J., concurring.

I concur in the result, and I have decided **[***27]** to join in the majority opinion in the hope that it will contribute to uniformity in the application of the law of sovereign immunity in this Commonwealth. I must add, however, that I have a somewhat different view of what the law ought to be.

The complexity the majority finds in the case law results mainly from historical confusion over the differences between the doctrine of sovereign immunity and the doctrine of public-servant immunity (sometimes imprecisely labeled "official immunity"). The confusion stems, I believe, from undue reliance upon the truism that government can act only through the acts of its employees.

The two doctrines are akin but different in concept and effect. The doctrine of sovereign immunity, rooted originally in the tenuous theory that the King of England could do no wrong, finds its most legitimate justification in the right of government to protect its assets, owned in common by the people at large, and to promote the welfare and safety of the body politic by assuring orderly administration of governmental functions.

On the other hand, the primary purpose of the doctrine of public-servant immunity, while related to those underlying the doctrine **[***28]** of sovereign immunity, is to encourage citizens, including those of modest means, to enter government service and, once employed, to carry out their assigned missions responsibly without fear of personal liability for accidental injuries resulting from acts or omissions committed in the exercise of their discretionary powers. Public-servant immunity does not attach merely because the level of government for which the employee works enjoys sovereign immunity.

[*315] The rules I suggest would dispense with certain distinctions, invoked in earlier cases, which I consider artificial and illogical. For purposes of the sovereign-immunity analysis, I see no *valid* reason to distinguish between a county and a city; both administer laws and programs which affect the people's interests in the integrity of the public purse and the welfare and safety of the body politic. As an examination of the case law will reveal, it is all but impossible, with any degree of consistency, to determine the difference between a governmental function and a proprietary function, and I would abandon the requirement that **[**665]** courts make the attempt. And, while I would grant no immunity from intentional **[***29]** torts to any employee at any level of government, I would abolish the nebulous distinction we have drawn between simple civil negligence and gross civil negligence.

Having in mind the public-policy purposes of the doctrines of sovereign immunity and public-servant immunity, I favor the following rules:

(1) Absent express waiver, the Commonwealth, counties of the Commonwealth, cities chartered by the Commonwealth, and towns incorporated by the Commonwealth are immune from suit arising out of a tort committed in the discharge of a lawful public function.

(2) Departments, agencies, and other public bodies created by any level of government and authorized to exercise a lawful power of that government enjoy the same immunity.

(3) Chief executive officers and legislators at every level of government, and judicial officers, such as judges, magistrates, and commissioners in chancery, are immune from liability for damages arising out of unintentional torts committed within the scope of their employment.

(4) All other employees of every level of government or of a lawful creature of government are immune from liability from damages arising out of unintentional torts **[***30]** committed in the performance of a judgmental or discretionary duty within the scope of their employment, without regard to whether the misfeasance or nonfeasance is simple or gross.

[*316] These rules, like those precipitated by the majority opinion, may not be the ideal solution. Government continues to grow in size and power, and the danger of tortious injury to private citizens by government employees expands apace. Some say the legislature should abolish the judge-made doctrine of sovereign immunity, grant absolute immunity to every government employee for every kind of tort arising out of and during the course of his employment, and, applying the rule of *respondeat superior*, impose liability solely upon the master for the tortious conduct of the servant, with no right of indemnity against the servant.

I would not go so far. Doubtless, such a legislative package would simplify the body of the law for the benefit of legitimate claimants. But it would inevitably tend to curtail an employee's incentive to perform his duties faithfully, invite frivolous and vexatious litigation, and disrupt the orderly administration of governmental functions, all at the expense [***31] of the people.

Dissent by: COCHRAN

Dissent

COCHRAN, J., dissenting.

The majority opinion has attempted to lay down a rule of sovereign immunity which reconciles our prior decisions. In my view, the attempt fails because the decisions cannot be reconciled. The result is that the tent of sovereign immunity is now to be stretched to protect from liability far more negligent individuals than ever before. [1] What appears to be the critical test is whether the employee of an immune employer was acting within or without the scope of his employment. The effect of the majority opinion, in my view, is to overrule at least three of our recent decisions on this subject.

In *Kellam v. School Board, 202 Va. 252, 117 S.E.2d 96 (1960)* and *Crabbe v. School Board and Albrite, 209 Va. 356, 164 S.E.2d 639 (1968)*, [***32] we held that a school board, in the performance of its duties, was an arm of the Commonwealth and, in the absence of waiver by statute, immune from liability for negligence. In *Crabbe*, however, we laid down a different rule for a teacher who was employed by a county school board and performing his duties when a pupil in his class was injured in using a [**666] power saw. We held that the fact that the teacher was "performing [*317] a governmental function for his employer" did not exempt him from liability "for his own negligence in the performance of such duties." *209 Va. at 359, 164 S.E.2d at 641*.

Twice we have followed *Crabbe* and held that employees of exempt employers were liable for their own acts of negligence. *James v. Jane, 221 Va. 43, 267 S.E.2d 108 (1980)*; *Short v. Griffitts, 220 Va. 53, 255 S.E.2d 479 (1979)*. In *Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973)*, a majority relied on the distinction between discretionary and ministerial acts to hold an intern and administrators of a state hospital immune because they exercised discretion in their work. *Id. at 407, 200 S.E.2d at 571-72*. But in *James*, the court, without [***33] overruling *Lawhorne*, held full-time members of the medical faculty at the same hospital subject to liability for their acts of negligence because they exercised complete discretion in their work. *221 Va. at 52-55, 267 S.E.2d at 113-14*.

The majority opinion in *James* repeated the language of *Short* that in our decisions "[w]e make a distinction between the Sovereign Commonwealth of Virginia and its employees, and a governmental agency, created by the Commonwealth, and its employees." I do not consider that the use of that language was casual or inadvertent.

In *Banks v. Sellers, 224 Va. 168, 294 S.E.2d 862 (1982)*, a school's division superintendent and principal were held to be immune because of the supervisory and discretionary nature of their work. *Id. at 172-73, 294 S.E.2d at 864-65*. But, in *Crabbe* and *Short*, immunity had been denied a shop teacher, an athletic director, a coach, and a buildings and grounds supervisor. The *Crabbe* and *Short* decisions did not rely on the distinction between discretionary and ministerial functions, as the defendants in those cases clearly exercised discretion by the very nature of their work but were nonetheless [***34] subject to liability for negligence. Later decisions relying on this distinction are a clear departure from the *Crabbe* rule of individual liability.

In the present cases, the majority finds each defendant to be a supervisory employee exercising discretion in his work. [2]

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[1] I agree that the General Assembly has demonstrated an intent to retain sovereign immunity but I fail to perceive any legislative intent that such immunity be extended beyond any limits heretofore established.

[2] The majority contends that the trial court determined the nature of Burden's work from the allegations of the first amended motion for judgment, to which a demurrer previously had been sustained. Because Messina did not object to this procedure, the court finds the action to be proper.

There is no express indication in the order that the first amended motion for judgment formed the basis of the decision. The

This puts the court in the position of endorsing the distinction relied on in **[*318]** *Lawhorne* and *Banks* and contravening the clear mandate of *Crabbe, Short*, and *James*. Accordingly, I dissent. To immunize employees of local arms or agencies of the state government is to regress from established principles of law. In *Short*, we held that whether the employees' duties included supervision, maintenance, and inspection of facilities and whether they breached such duties thereby proximately causing plaintiff's injuries were questions of fact to be decided at trial. 220 Va. at 55, 225 S.E.2d at 480. Similarly, Messina and Armstrong should be entitled to try the questions whether Burden and Johnson had duties to inspect and maintain the premises under their supervision, whether they breached such duties, and whether their breach proximately caused injuries to their respective plaintiffs. **[***35]**

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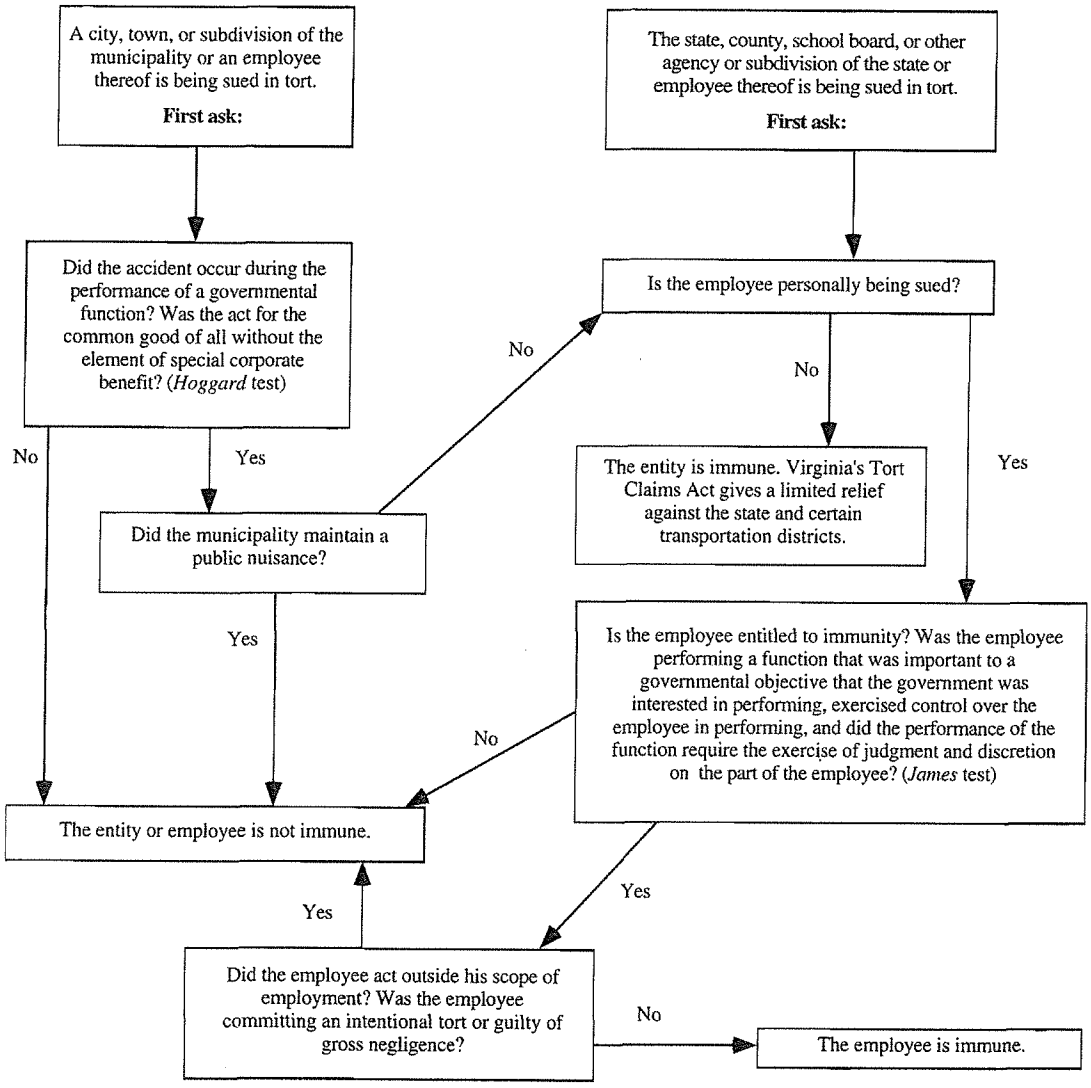
majority's reliance on Messina's failure to object to a procedure not apparent on the face of the order appears to me to be unjustified. Furthermore, it is worth noting that counsel did object to entry of the order.

APPENDIX A—SOVEREIGN IMMUNITY IN VIRGINIA



Sovereign immunity is a complicated area of the law that often changes and is subject to differing interpretations. This chart is a simplification of complicated legal concepts and should not be relied upon as legal advice.

APPENDIX B—LIABILITY

	Snow	Water	Sewer	Parks	Drainage	Roads or Streets	Trash	Privatized Services
State	Never	Never	Never	Never	Never	Never	Never	Never
State Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
State: Tort Claims Act	Always	Always	Always	Always	Always	Always	Always	Always
City	Sometimes	Sometimes	Sometimes	Never	Sometimes	Sometimes	Never	Sometimes
City Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
City: Tort Claims Act	Never	Never	Never	Never	Never	Never	Never	Never
Town	Sometimes	Sometimes	Sometimes	Never	Sometimes	Sometimes	Never	Sometimes
Town Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
Town: Tort Claims Act	Never	Never	Never	Never	Never	Never	Never	Never
County	Never	Never	Never	Never	Never	Never	Never	Never
County Employee	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes
County: Tort Claims Act	Never	Never	Never	Never	Never	Never	Never	Never

This chart assumes that the person or entity in the left-hand column has negligently injured another person or his property. This chart also assumes that there has been neither intentional wrongdoing nor any gross negligence. In other words, in the absence of sovereign immunity, the person or entity in the left-hand column would always be liable.

Sovereign immunity is a complicated area of the law that often changes and is subject to differing interpretations. This chart is a simplification of complicated legal concepts and should not be relied upon as legal advice.