SOVEREIGN IMMUNITY IN VIRGINIA: ALIVE AND WELL IN THE 21ST CENTURY

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The celebrated Virginian Chief Justice John Marshall pragmatically observed that "[i]t is not rational to suppose that the sovereign power should be dragged before a court."[3] Even founding fathers with different political philosophies agreed with this principle. Both James Madison, the master builder of our federal constitution, and Alexander Hamilton, an originator of early American financial policies, supported the concept of sovereign immunity as a necessary protection, particularly during our nation's infancy. Madison wrote that "[i]t is not in the power of individuals to call any state into court."[4] Hamilton likewise believed that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind. . . ."[5] This article discusses the vitality of the doctrine of sovereign immunity in Virginia in the 21st century, recent developments in this area of the law and practical issues in its application.

A. The Historical Basis for Sovereign Immunity in Virginia

The concept that a sovereign may not be sued in its own courts dates back to "at least as early as the thirteenth century, during the reign of Henry III (1216-1272)."[6] The doctrine of sovereign immunity came to the Colonies with the common law of England[7] and was "indeed a subject of great importance in the early days of the Republic."[8] Under the common law, the sovereign was immune from suits based upon the belief that the sovereign could do no wrong.[9] The basis of sovereign immunity is the "logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[10] The

Commonwealth of Virginia incorporated this doctrine into its jurisprudence, however, under a different theory. To adopt the doctrine of sovereign immunity upon the premise that the sovereign could do no wrong would have been repugnant to the patriots who stiffened against the colonial measures of the British. In Hinchey v. Ogden,[11] the Supreme Court described the modern basis for adherence to the doctrine of sovereign immunity as follows:

> The doctrine of sovereign immunity from suit, rooted in the ancient common law, was originally based on the monarchical, semireligious tenant that "the King can do no wrong." In modern times, it is more often explained as 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. The public service might be hindered and the public safety endangered if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.[12]

In short, the Hinchey Court emphasized that the principle is not necessarily based upon any notion that a government can do no wrong, but upon the importance of "order and uniformity in the administration of the affairs of government."[13]

A year later, the Court made clear in Messina v. Burden[14] that:

> [T]he 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.[15]

While it has long been settled in Virginia that the Commonwealth cannot be sued without its consent,[16] those lawyers representing parties allegedly injured by state action have repeatedly sought to chip away at the sovereign immunity doctrine especially since its application undoubtedly

causes extreme hardships in particular cases.[17] In response to such efforts, the Supreme Court of Virginia has affirmed that "the doctrine of sovereign immunity is 'alive and well' in Virginia."[18] These attacks on the doctrine continue with increasing subtlety in courts and in the General Assembly, particularly with respect to municipalities. [19]

B. Recent Cases From the Supreme Court of Virginia on Sovereign Immunity

Virginia courts constantly address the application of sovereign immunity in the modern world by balancing the need for a functional government with relief for injured parties.[20] Recent decisions from the Supreme Court of Virginia illustrate the continued effect of the doctrine of sovereign immunity on today's circumstances.

1. Recreational Facilities

In Lostrangio v. Laingford,[21] the Supreme Court considered whether sovereign immunity applied to town-sponsored "events." A woman who sustained injuries at a July 4th celebration jointly sponsored by a town and its Chamber of Commerce claimed that she tripped and fell over a feed bucket negligently left outside a petting zoo. The fundamental question in Lostrangio was whether the "celebration" was a "recreational facility" within the meaning of Va. Code Ann. § 15.2-1809, which grants municipalities immunity for negligence in the maintenance or operation of recreational facilities.

The Court reviewed the statutory meaning and judicial construction of the term "recreational facility"[22] and ruled that the term means "a place for citizens' diversion and entertainment.'"[23] Additionally, the Court observed that recreational facilities within the scope of § 15.2-1809 typically involve property owned by the locality with fixed improvements maintained and operated by the locality.[24] The Town in question sought immunity solely on the basis of having jointly sponsored the recreational event. The Supreme Court concluded that a "recreational event" was not

a "recreational facility" within the plain meaning of § 15.2-1809.[25] The Court contrasted a "facility" as "something tangible with a purpose of diverting and entertaining the public" with an "event" that is "something that happens . . . a noteworthy occurrence or happening.'"[26] Therefore, the Court held that the Town was not entitled to sovereign immunity under § 15.2-1809 even though the Town intended to provide diversion and entertainment.[27]

2. Quasi-Contractual Claims

In The Dr. William E. S. Flory Small Bus. Dev. Ctr. v. Com. of Virginia, Dep't of Business Assistance,[28] the Supreme Court considered whether sovereign immunity applied to liability for quasi-contractual claims. The plaintiff claimed that the Virginia Department of Business Assistance ("VDBA") was liable to him for services rendered pursuant to the Virginia Public Procurement Act[29] under a quasi-contractual theory. The plaintiff is a non-stock corporation created by the Prince William Industrial Development Authority, which provides services to local small businesses under the United States Small Business Administration federal assistance program. The VDBA reimbursed the plaintiff under a series of memoranda agreements executed annually. Before the plaintiff and the VDBA executed one of the memoranda agreements, a dispute arose in which the plaintiff sought reimbursement for certain services and expenses. The plaintiff filed suit under theories of express oral promise, quantum meruit and contract implied by acceptance of services.

The trial court dismissed the suit, and the Supreme Court affirmed the decision. The Supreme Court noted that the common law does not shield a sovereign from liability for valid contracts.[30] However, the Court ruled that quasi-contractual claims were premised on the absence of a contract and that the Commonwealth could not be liable under the common law for such claims unless recovery was authorized specifically by a statute abrogating the sovereign immunity of the Commonwealth.[31]

3. Independent Contractors

In Atkinson v. Sachno,[32] the Supreme Court analyzed the application of sovereign immunity to independent contractors. In this case, a woman brought a medical malpractice action against a physician for failing to advise her of the results of an X-ray report. The physician provided consulting services for the Disability Determination Services ("DDS"), a division of the Virginia Department of Vocational Rehabilitation, in examining claimants' applications for Social Security disability benefits. The physician was a private doctor who voluntarily chose, but was not required, to perform consultative examinations for DDS.

Citing James v. Jane[33] and Lohr v. Larsen,[34] the Supreme Court reviewed the applicable standards governing whether an individual is entitled to the protections of sovereign immunity.[35] The Court explained that the initial threshold for an individual receiving sovereign immunity is that he or she must be an employee or agent of the Commonwealth.[36] Therefore, the Supreme Court summarily ruled that "the James test is not applicable if the individual is an independent contractor and, thus, not an employee or agent of the Commonwealth."[37] The Court acknowledged that individual facts and circumstances normally play an important role in determining whether an individual is an independent contractor.[38] Under the applicable facts and circumstances, the Court had little trouble in determining that the physician exercised his own professional judgment without any control by the DDS over his means and methods of examination and evaluation.[39] Thus, the Court found the physician was an independent contractor and, thereby, not entitled to the protections of sovereign immunity.[40]

C. Practical Issues in the Application of the Doctrine of Sovereign Immunity

1. *Respondeat Superior*

Analysis of the doctrine of sovereign immunity frequently focuses on the circumstances under which counties or cities or their employees receive its protection. A significant practical question that often arises is the extent to which the doctrine of *respondeat superior* applies in the sovereign immunity context. The framework for the application of sovereign immunity to governmental bodies is the starting point for any evaluation of this issue.

Generally, sovereign immunity extends to all agencies of the Commonwealth to protect them against tort suits unless a state statute expressly provides otherwise.[41] As political subdivisions of the Commonwealth, counties enjoy the same protections as the Commonwealth.[42] On the other hand, municipalities in Virginia only receive sovereign immunity when they are engaged in "governmental functions" as opposed to "proprietary functions."[43] Proprietary functions are powers performed for the benefit of the municipality and, thus, do not enjoy the protection of sovereign immunity.[44] Delineating between the two functions often is difficult especially when the act in question arguably shares both governmental and proprietary characteristics.[45] Courts routinely provide municipalities with sovereign immunity protection when governmental and proprietary functions collide so long as "the governmental function is the overriding factor."[46]

Typically, governmental agencies and individual government employees do not receive sovereign immunity for international torts[47], grossly negligent conduct[48] or acts outside the scope of employment.[49] Within the parameters of the sovereign immunity protections of the governmental entity and application of the James v. Jane and Lohr v. Larsen test for individuals, the Virginia General Assembly and the Supreme Court of Virginia have not addressed squarely whether a governmental entity may be held liable on a *respondeat superior* theory based upon an

individual employee's intentional tort, grossly negligent conduct or act committed outside the scope of employment.

A number of Virginia Circuit Courts have analyzed this narrow, but extremely practical, point and have generally extended the protection of sovereign immunity. For example, in Gordon v. City of Winchester,[50] the Circuit Court of Warren County granted sovereign immunity to the City of Winchester for grossly negligent acts committed by members of the Winchester Police Department during the pursuit of a stolen vehicle. The Court first held that operation of a police force is clearly a government function; therefore, the City could not be held liable for the wrongful acts of its officers. The Court then distinguished between the immunity afforded a municipality and the immunity afforded a municipal officer in a detailed analysis:

> The immunity of a public officer derives from the intrinsic character of the act that he is performing. James v. Jane, 221 Va. 43, 53, 267 S.E.2d 113 (1980). Where sovereign immunity applies, the immunity of the public officer is coterminous with the immunity of the governmental unit for whom he is acting, but where his actions exceed the scope of protected action, he steps beyond the pale of protection, and he loses the protection of governmental immunity, but the governmental unit, which still stands within the pale of protection, remains protected from suit because of its sovereign immunity. While the erring police officer, who is allegedly grossly negligent, may be held personally liable, the City and its police department may not be held vicariously liable for his gross negligence. See Restatement (Second) of Torts, § 895D, comments g and j. "The true rule would seem to be to require 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*"[51]

The Gordon Court held that a governmental employee clearly can forfeit his or her right to sovereign immunity by engaging in grossly negligent or intentional acts, but such actions do not

expose the governmental entity necessarily to liability under a *respondeat superior* theory, nor do such actions disqualify the governmental entity from an entitlement to sovereign immunity.

Second, the Circuit Court for the City of Richmond reached a similar conclusion providing the City of Richmond with sovereign immunity despite the alleged intentional acts committed by members of the Richmond Police Department.[52] In this case, a female detective sued the City under a theory of *respondeat superior*, alleging that a co-worker had assaulted her on numerous occasions. The Court considered, but rejected, the position taken by some states that the occurrence of intentional torts are automatically outside the scope of the municipality's exercise of its governmental powers and are, therefore, not within the protection afforded to governmental activities by the sovereign immunity doctrine. Likewise, the Court dismissed the view that intentional torts are beyond the scope of the governmental authority conferred on a municipality, and, therefore, the municipality cannot be said to have authorized or sanctioned the actions taken by its agents. Instead, the Court held that the doctrine of sovereign immunity continues to protect municipalities from liability for intentional torts committed by employees while performing a governmental function.[53]

Third, in Mattox v. Campbell County Sch. Bd.,[54] the Circuit Court of Campbell County addressed this issue in the context of a personal injury suit against the Campbell County School Board for alleged negligent and grossly negligent acts committed by a school board employee within the scope of his employment as he performed repairs on an elementary school. The Court refused to hold the school board liable under a theory of *respondeat superior* and granted the school board protection from allegations of both simple and gross negligence under sovereign immunity.[55]

Fourth, in Niese v. Harsley,[56] the Circuit Court for the City of Alexandria extended sovereign immunity to the City of Alexandria in a suit against the City and a police officer for the officer's allegedly intentional sexual assault and intentional infliction of emotional harm. The Court noted that the sovereign is immune from liability for intentional, as well as negligent, torts of its employees engaged in governmental functions.

These Virginia Circuit Court decisions stand for the proposition that where immunity applies, the immunity of the employee is coterminous with the immunity of the governmental unit for whom he is acting. However, where the employee's conduct exceeds the scope of the governmental employer, the extent of his protection from a sovereign immunity standpoint may diverge with that of the governmental entity while the governmental entity remains protected from suit. Plainly stated, it appears that where City employees are engaged in governmental functions and they commit negligent or even intentional torts, their employer will not be held liable under a *respondeat superior* theory, and sovereign immunity should dictate dismissal of any claims against the City.

2. Common Law Rules are Subject to Legislative Modification

The common law principle that the liabilities of principals and agents are coterminous is not applicable when altered by the Virginia General Assembly. For example, in Schwartz v. Brownlee,[57] the Court interpreted Va. Code Ann. § 8.01-581.15, which imposed a cap on medical malpractice recovery, but limited the cap to health care providers. The Court ruled that the non-health care employer was not entitled to the limitations of the cap even though the employer's liability was predicated upon the acts of its employees. Thus, Va. Code § 8.01-581 changed the common law principle that the liabilities of agents and principals are coterminous.

More recently, the Supreme Court of Virginia addressed this issue in Linhart v. Lawson,[58] dealing with a school bus accident involving an employee of the Norfolk School Board and a private citizen. The plaintiff filed suit against the School Board and the employee alleging that the employee's negligence caused the injury. The trial court dismissed the motion for judgment, holding that the employee was entitled to sovereign immunity under Messina, and that because the School Board's liability "is entirely dependent upon and derived from" the employee's actions, it is entitled to immunity as well.

On appeal, the Supreme Court ruled that the General Assembly partially waived the School Board's immunity by enacting Va. Code Ann. § 22.1-194, which allows suits against a school board in limited circumstances. Upon observing that the statute did not require that the School Board and its employee be sued jointly, the Court ruled that the General Assembly created an exception to the common law principle that the liabilities of principals and agents are coterminous.[59] Accordingly, the Supreme Court affirmed the lower court's ruling to the extent it dismissed the claims against the employee, and remanded the case with instructions to reinstate the claims against the School Board.

3. Abrogation Must be Closely Scrutinized

When a party claims that a statute or law abrogates the immunity afforded by the common law, such derogation will be strictly construed by the courts.[60] The rule that the legislature is the only body that can abrogate the Commonwealth's immunity is sacrosanct as "the power to consent to suit . . . rests in the legislature and not in the judiciary."[61] In discussing the Commonwealth's sovereign immunity, the Supreme Court of Virginia has noted that "[i]n the absence of express statutory or constitutional provisions waiving immunity, the Commonwealth and its agencies are immune from liability for the tortious acts or omissions of their agents and

employees."[62] Indeed, even the rules of the Court, as adopted by the Supreme Court of Virginia, must give way to sovereign immunity.[63]

D. Conclusion

The doctrine of sovereign immunity engenders political discussion as to the appropriate amount of accountability owed by a government to its citizens. The doctrine's rationale has replaced historic tradition with democratic pragmatism in order to maintain the government's effectiveness. Nonetheless, the unfortunate facts and events which give rise to potential claims against governmental entities necessarily will mean that plaintiffs' will continue to challenge the foundation and limits of sovereign immunity. Each year, Virginia courts will confront novel approaches seeking to whittle away at sovereign immunity, and each year Virginia courts will continue to issue decisions affirming the fundamental precepts and filling in the gaps in the doctrine's application and scope.

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[3] Hans v. State of Louisiana, 134 U.S. 1, 14 (1890) (citing 3 Elliot's Debates 555 (2d ed. 1863)).

[4] Nevada v. Hall, 440 U.S. 410, 436 n.3 (1979) (Rehnquist, C.J., dissenting) (citing 3 Elliot's Debates at 553).

[5] Hans, 134 U.S. at 13 (citing The Federalist No. 81).

[6] Seminole Tribe v. Florida, 517 U.S. 44, 103 (1972) (Souter, J., dissenting).

[7] It is beyond debate that the states were immune from suits by their own citizens in their own courts at the time of the adoption of the United States Constitution. See, e.g., United States v. Lee, 106 U.S. 196, 205-06 (1882). "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down by courts and jurists that it is hardly necessary to be formally asserted." Hans, 134 U.S. at 16.

[8] Hall, 440 U.S. at 435 (Rehnquist, C.J., dissenting); see also Va. Code Ann. § 1-10 (stating that "[t]he common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly").

[9] Carr v. Sch. Bd of City of Salem, 48 Va. Cir. 84 (City of Salem 1999).

[10] Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1975) (Holmes, J.).

[11] 226 Va. 234, 307 S.E.2d 891 (1983).

[12] Id. at 240, 307 S.E.2d at 894 (quoting 72 Am. Jur. 2d States, Territories and Dependencies § 99).

[13] Hinchey, 226 Va. at 240, 307 S.E.2d at 894.

[14] 228 Va. 301, 321 S.E.2d 657 (1984).

[15] Id. at 308, 321 S.E.2d at 660.

[16] Wilson v. State Highway Commissioner, 174 Va. 82, 89, 4 S.E.2d 746, 749 (1939).

[17] See, e.g., Carr, 48 Va. Cir. at 85.

[18] Messina, 228 Va. at 307, 321 S.E.2d at 660.

[19] While recognizing the vitality of the doctrine, the Messina Court noted the General Assembly's authority to abolish or alter the doctrine and its decision to partially waive the doctrine through the Virginia Tort Claims Act, Va. Code Ann. §§ 8.01-195.1 to §8.01-195.9, observing that it "could have used that act as a vehicle to abolish sovereign immunity," but did not. Messina, 228 Va. at 307, 321 S.E.2d at 660.

[20] Note, Virginia's Law of Sovereign Immunity: An Overview, 12 U. Rich. L. Rev. 429 (1978).

[21] 544 S.E.2d 357 (2001).

[22] Id. at 359.

[23] Id. (quoting Frazier v. City of Norfolk, 234 Va. 388, 392, 362 S.E.2d 688, 690 (1987)).

[24] Lostrangio, 544 S.E.2d at 359.

[25] Id.

[26] Id. (quoting Webster's Third New International Dictionary 788).

[27] Lostrangio, 544 S.E.2d at 359.

[28] 541 S.E.2d 915 (2001).

[29] Va. Code Ann. §§ 11-35 to –80.

[30] Flory, 541 S.E.2d at 918 (citing Wiecking v. Allied Med. Supply Corp., 239 Va. 548, 551-52, 391 S.E.2d 258, 260 (1990)).

[31] Flory, 541 S.E.2d at 918.

[32] 541 S.E.2d 902 (2001).

[33] 221 Va. 43, 282 S.E.2d 864 (1980).

[34] 246 Va. 81, 431 S.E.2d 642 (1993).

[35] Atkinson, 541 S.E.2d at 904.

[36] Id. at 904-05.

[37] Id. at 905.

[38] Id.

[39] Id. at 906.

[40] Id.

[41] Mann v. Arlington County Bd., 199 Va. 169, 98 S.E.2d 515 (1957); Fry v. Albemarle County, 86 Va. 195, 9 S.E. 1004 (1889).

[42] Lawhorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973); Report of the Senate and House Committees for Courts of Justice on Governmental Immunity, H. Doc. No. 31, at 3 (1975).

[43] Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 1005, 254 S.E.2d 62, 63 (1979).

[44] Hoggard v. City of Richmond, 172 Va. 145, 200 S.E. 610 (1939).

[45] This article does not address the many cases deciding whether a particular municipal act is governmental or proprietary. See, e.g., City of Norfolk v. Hall, 175 Va. 545, 551, 9 S.E.2d 356, 359 (1940); City of Richmond v.

Virginia Bonded Warehouse Corp., 148 Va. 60, 71, 138 S.E. 503 (1927); Jones v. City of Williamsburg, 97 Va. 722, 725, 34 S.E. 833 (1900).

[46] Taylor v. City of Newport News, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973).

[47] Tomlin v McKenzie, 251 Va. 478, 468 S.E.2d 882 (1996).

[48] Glasco v. Ballard, 249 Va. 61, 452 S.E.2d 854 (1995).

[49] Fox v. Deese, 234 Va. 412, 422-25, 362 S.E.2d 699, 706 (1987).

[50] 38 Va. Cir. 274 (Warren County 1995).

[51] Id. at 278 (quoting Sayers v. Bullar, 180 Va. 222, 229, 22 S.E.2d 9, 12 (1942)) (emphasis in original).

[52] Coward v. City of Richmond, 40 Va. Cir. 333 (Richmond 1996).

[53] See also Bracken v. Merrill, 27 Va. Cir. 208, 211 (Shenandoah County 1992) (finding governmental immunity for a state agency in a case involving the intentional tort of false arrest); Slaughter v. Duling, 33 Va. Cir. 476, 482 (Richmond 1972) (ruling that the City of Richmond cannot be liable for the intentional acts of its agents if the function performed was a governmental one or even for its own intentional conduct).

[54] 37 Va. Cir. 221 (Campbell County 1995).

[55] Id. at 222 (citing Short v. Griffitts, 220 Va. 53, 54, 255 S.E.2d 479 (1979)).

[56] No. CL000607 (Alexandria Cir. Ct. Dec. 21, 2000).

[57] 253 Va. 159, 482 S.E.2d 827 (1997).

[58] 540 S.E.2d 875 (2001).

[59] Id. at 877.

[60] Baumgardner v. Southwestern Va. Mental Health Inst., 247 Va. 486, 442 S.E.2d 400 (1994).

[61] Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 457, 117 S.E.2d 685, 689 (1961).

[62] Baumgardner, 247 Va. at 489, 442 S.E.2d at 401.

[63] See Commonwealth v. Luzik, (court disregarded the Commonwealth's failure to assign cross-error in the initial appeal, finding that the Rules of Appellate Procedure and the resulting finality of judgments are not applicable to the issue of sovereign immunity).