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STATE LAW IMMUNITY OF LOCAL GOVERNMENTAL ENTITIES AND THEIR EMPLOYEES

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20-1 BACKGROUND AND LEGISLATIVE ACTIVITY

20-1.01 Sovereign Immunity and Official Immunity Distinguished

As used in this chapter, the term sovereign immunity (sometimes referred to as governmental immunity) refers to the immunity of counties, cities, towns, school boards, authorities, and similar local governmental entities from tort liability under the law of the Commonwealth of Virginia. The term official immunity (sometimes referred to as public servant immunity) refers to the immunity of individual officers, officials, and employees of local governmental entities from tort liability under Virginia law. Although the two doctrines are distinct and require different analyses, the Supreme Court of Virginia has sometimes failed to distinguish between the two doctrines and has frequently referred to the sovereign immunity of local government employees.

20-1.02 Doctrine of Sovereign Immunity

Sovereign immunity is a remnant of ancient common law based on the concept that the king can do no wrong. In 1984, the Supreme Court of Virginia wrote that the doctrine of sovereign immunity is alive and well in the Commonwealth. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984); see *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004); *Gargiulo v. Ohar*, 239 Va. 209, 387 S.E.2d 787 (1990). However, since 1984, the Supreme Court has recognized limitations in the doctrine. See *Friday-Spivey v. Collier*, 268 Va. 384, 601 S.E.2d 591 (2004).

20-1.02(a) Reasons for Sovereign Immunity

In *Messina*, the Supreme Court stated that sovereign immunity serves these purposes:

1. It protects the public purse;
2. Without immunity, inconvenience and danger to the public would exist in the form of officials being fearful and unwilling to carry out public duties;
3. Without immunity, public service might be threatened because citizens would be reluctant to take public jobs;
4. It helps provide for the orderly administration of government; and

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5. It prevents persons from improperly influencing the conduct of governmental affairs through vexatious litigation.

The Court has stated: "Sovereign immunity is '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.'" *City of Va. Beach v. Carmichael Dev. Co.*, 259 Va. 493, 527 S.E.2d 778 (2000). Courts should conclude that sovereign immunity is abrogated only when statutory language explicitly and expressly evidences such a waiver. *Allen v. Cooper*, 589 U.S. ___, 140 S. Ct. 994 (2020); *Biggs v. N. Carolina Dep't of Pub. Safety*, 953 F.3d 236 (4th Cir. 2020) (absent waiver through statute or regulation or other "clear statement," state's removal of suit to federal court does not waive sovereign immunity); *Commonwealth v. Windsor Plaza Condo. Ass'n*, 289 Va. 34, 768 S.E.2d 79 (2014) (Va. Code § 36-96.16, requiring the Attorney General to institute and maintain civil actions on Fair Housing Board referrals, does not waive sovereign immunity); *Ligon v. Cnty. of Goochland*, 279 Va. 312, 689 S.E.2d 666 (2010) (whistleblower statute does not waive sovereign immunity of county). The whistleblower statute was subsequently amended to expressly waive sovereign immunity. Va. Code § 8.01-216.8; 2011 Va. Acts ch. 651.

20-1.02(b) Philosophical Basis for Official Immunity

"Unless the protection of the doctrine [of sovereign immunity] 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, 321 S.E.2d 657 (1984). It would be unwise to permit officers and employees to be sued in their personal capacity for acts done at the express direction of government, unless they depart from that direction. *Id.* The Supreme Court reiterated the policy basis for governmental and official immunity in *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 662 S.E.2d 66 (2008).

20-1.03 Virginia Tort Claims Act

The Virginia Tort Claims Act is found in Va. Code §§ 8.01-195.1 to 8.01-195.9. The Act essentially waives the Commonwealth's tort immunity to the extent of \$100,000 per claimant (\$25,000 per claimant in original Act) or the amount of insurance coverage, whichever is greater. Va. Code § 8.01-195.3; see also *Al-Mustafa Irshad v. Spann*, 543 F. Supp. 922 (E.D. Va. 1982). The Act applies only to the Commonwealth itself, and does not apply to state agencies. *Rector & Visitors of Univ. of Va. v. Carter*, 267 Va. 242, 591 S.E.2d 76 (2004).

No provision of the Act diminishes the immunity of any locality or school board. Va. Code §§ 8.01-195.2, 8.01-195.3; see *Croghan v. Fairfax Cnty. Sch. Bd.*, 59 Va. Cir. 120 (Fairfax Cnty. 2002). Had the General Assembly wanted to abolish sovereign immunity for localities or school boards, the Act would have been the vehicle to do it. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984).

For a discussion of the pros and cons of placing localities under the Tort Claims Act, see Wiley F. Mitchell, Jr., *Case for Counties, Cities and Towns Being Under the Virginia Tort Claims Act*, JOURNAL OF LOCAL GOVERNMENT LAW, Jan. 1986, and David T. Stitt, *Case Against Counties, Cities and Towns Being Under the Virginia Tort Claims Act*, JOURNAL OF LOCAL GOVERNMENT LAW, Jan. 1986.

20-2 SOVEREIGN IMMUNITY OF CITIES AND TOWNS

20-2.01 Governmental–Proprietary Distinction

A municipality (city, town, and possibly an authority) is clothed with a two-fold function: one governmental and the other proprietary. *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004); *Gambrell v. City of Norfolk*, 267 Va. 353, 593 S.E.2d 246

(2004); *Transp., Inc. v. City of Falls Church*, 219 Va. 1004, 254 S.E.2d 62 (1979). A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions. *Id.* It may be liable, just as a private corporation, for failure to exercise or for negligence in the exercise of its proprietary functions. *Id.* When governmental and proprietary functions coincide, the municipality will be accorded immunity. See *Transp., Inc., supra*; *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973).

Distinguishing between governmental and proprietary functions is often very difficult as a result of the lack of a bright line standard. "Although the principles for differentiating governmental and proprietary functions are easily recited, . . . application of these principles has occasioned much difficulty. Generally speaking, when the allegedly negligent act is one involving the maintenance or operation of the service being provided, the function is deemed to be proprietary." *Carter v. Chesterfield Cnty. Health Comm'n*, 259 Va. 588, 527 S.E.2d 783 (2000) (citations omitted). "The underlying test [as to whether an act is governmental rather than proprietary] 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." *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939); see also *Drum Point Props., LLC v. City of Chesapeake*, 110 Va. Cir. 363 (City of Chesapeake 2022) (finding sovereign immunity protects the city from unjust enrichment claim while acknowledging nature of municipality's exercise of power was not clear where city was enforcing law to obtain infrastructure benefit). Generally, prevailing on a sovereign immunity defense for a municipality will require citing a previous case with similar facts in which the Supreme Court applied sovereign immunity. Yet, the Supreme Court has specifically warned against this method. *Ashbury v. City of Norfolk*, 152 Va. 278, 147 S.E. 223 (1929).

20-2.01(a) Characteristics of Governmental Functions

The Virginia Supreme Court has variously described governmental functions as exercises of a municipality's discretion, activities undertaken for the common good or in the interest of public health and safety, and exercises of powers delegated or imposed upon the municipality. *Carter v. Chesterfield Cnty. Health Comm'n*, 259 Va. 588, 527 S.E.2d 783 (2000). Governmental functions are powers and duties performed exclusively for the public welfare. *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004).

Accordingly, the Supreme Court has held that municipalities are immune from tort liability based on allegations of negligence in the planning and design of roads or streets and in the provision of hospital, ambulance, garbage, emergency street-clearing, and mental health services. See *Lohdi v. Fairfax Cnty. Bd. of Sup'rs*, No. 1:12cv1108 (E.D. Va. Dec. 21, 2012), *aff'd*, No. 12-2564 (4th Cir. Mar. 28, 2013); *Edwards v. City of Portsmouth*, 237 Va. 167, 375 S.E.2d 747 (1989); *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962); *City of Norfolk v. Hall*, 175 Va. 545, 9 S.E.2d 356 (1940); *Ashbury v. City of Norfolk*, 152 Va. 278, 147 S.E. 223 (1929); *City of Richmond v. Long's Adm'rs*, 58 Va. (17 Gratt.) 375 (1867), *overruled on other grounds by First Va. Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983).

20-2.01(b) Characteristics of Proprietary Functions

Proprietary functions are performed primarily for the benefit of the municipality. *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004); *City of Va. Beach v. Carmichael Dev. Co.*, 259 Va. 493, 527 S.E.2d 778 (2000). If the function is a ministerial act and involves no discretion, it is proprietary. *City of Chesapeake v. Cunningham, supra*. See, e.g., *City of Va. Beach v. Flippen*, 251 Va. 358, 467 S.E.2d 471 (1996) (routine maintenance of sidewalks); *City of Richmond v. Branch*, 205 Va. 424, 137 S.E.2d 882 (1964) (routine maintenance of existing streets); *Chalkley v. City of Richmond*, 88 Va. 402, 14 S.E. 339 (1891) (routine maintenance of sewer drains).

20-2.02 Specific Governmental Functions

20-2.02(a) Public Safety

20-2.02(a)(1) Police

The operation and maintenance of a police force is a governmental function. *Snyder v. City of Alexandria*, 870 F. Supp. 672 (E.D. Va. 1994); *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002); *Hoggard*, 172 Va. 145, 200 S.E. 610 (1939); *City of Winchester v. Redmond*, 93 Va. 711, 25 S.E. 1001 (1896); *Burch v. Hardwicke*, 71 Va. (30 Gratt.) 24 (1878); *Pridemore v. Hryniewich*, 95 Va. Cir. 448 (City of Norfolk 2017) (maritime police force); *Cunningham v. Rossman*, 80 Va. Cir. 543 (City of Danville 2010) (immunity for auto accident when transporting arrestee). The unauthorized destruction of plaintiff's property by lawfully organized police imposes no liability on a city. *Harman v. City of Lynchburg*, 74 Va. (33 Gratt.) 37 (1880). A municipality has no state law tort liability for injuries resulting from excessive use of force by its police officers while in the performance of duty. See *McPhearson v. Anderson*, 873 F. Supp. 2d 753 (E.D. Va. 2012) (no tort liability for city for alleged false imprisonment by police officers); *Shaffer v. City of Hampton*, 780 F. Supp. 342 (E.D. Va. 1991) (no tort liability for city when officers killed decedent who had drawn a gun); *Bryant v. Mullins*, 347 F. Supp. 1282 (W.D. Va. 1972); see also section 20-6.04. However, if a police officer leaves Virginia (e.g., in hot pursuit), the law where the wrong occurs applies, and immunity may not be available to a locality. *Biscoe v. Arlington Cnty.*, 738 F.2d 1352 (4th Cir. 1984); *Bays v. Jenks*, 573 F. Supp. 306 (W.D. Va. 1983).

Employment decisions, as well as law enforcement duties, are part of the governmental function of maintaining a police force. *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002); see also *Hales v. City of Newport News*, No. 4:11cv28 (E.D. Va. Sept. 30, 2011) (finding police chief and city manager's involvement in implementing policies, procedures, and training for the city's police force undeniably involved the exercise of judgment and discretion, affording them immunity). But see *Baka v. City of Norfolk*, No. 2:21-cv-419 (E.D. Va. Mar. 11, 2022), *appeal dismissed*, *Baka v. City of Norfolk*, No. 21-1957 (4th Cir. June 14, 2022) (fire departments do not enjoy sovereign immunity for suits regarding employee's terms and conditions of employment because they are not "for the general benefit and well-being of its citizens" and are not related to the department's "power and duty to provide emergency services").

20-2.02(a)(2) Jails

The operation of a jail or lockup is a purely governmental function, a part of the public duty to suppress crime and disorder. *Franklin v. Town of Richlands*, 161 Va. 156, 170 S.E. 718 (1933). A municipality has no liability under state law for injuries caused to a prisoner by unsanitary conditions, lack of heat, assaults by other prisoners, or negligence of jail employees. *Id.*; accord *Brown v. Mitchell*, 308 F. Supp. 2d 682 (E.D. Va. 2004). District courts in the Fourth Circuit disagree on whether a regional jail authority has enough attributes of a municipal corporation² to be treated as one for sovereign immunity purposes. Compare *Thornhill v. Aylor*, No. 3:15cv24 (E.D. Va. May 25, 2017) (finding that regional jails lack essential attributes of a municipal corporation), *Boren v. Nw. Reg'l Jail Auth.*, No. 5:13cv13 (W.D. Va. Sept. 30, 2013) (same), and *Heckenlaible v. Va. Reg'l Peninsula Jail Auth.* No. 4:06cv25 (E.D. Va. Aug. 3, 2006) (same), with *Haleem v. Quinones*, No. 5:17cv3 (W.D. Va. Sept. 30, 2017) and *Dowdy v. Pamunkey Reg. Jail Auth.*, No. 3:14cv3 (E.D. Va.

² The Virginia Supreme Court has described the term "municipal corporation" as "a bit of a misnomer." *Fines v. Rappahannock Area Cmty. Servs. Bd.*, 301 Va. 305, 876 S.E.2d 917 (2022). In that case, where the Court held that sovereign immunity did not apply to a community services board providing mental health services, it noted that the term "is used to refer broadly to political subdivisions of the State, created for the convenient administration of such governmental powers as may be entrusted to them [T]he term encompasses entities that are not municipal corporations in the strict sense of the term, but . . . in the generic sense, . . . include[s] those quasi-municipal corporations which are created to perform an essentially public service." *Id.* (internal quotations and citations omitted).

May 15, 2014) (both holding regional jails have enough attributes of a municipal corporation to be treated as one for sovereign immunity purposes). A state court agreed with the reasoning of the federal district courts that found that regional jails are not municipal corporations. *Finamore v. Trent*, 95 Va. Cir. 38 (City of Lynchburg 2016).

20-2.02(a)(3) Firefighting

The organization and operation of a fire department is a governmental function. *City of Richmond v. Va. Bonded Warehouse*, 148 Va. 60, 138 S.E. 503 (1927). A municipality is not liable for loss of buildings due to an inadequate supply of water or for failure to extinguish a fire. *Down's Adm'r v. City of Roanoke*, 16 Va. Cir. 330 (City of Roanoke 1989). Post-fire interviewing of victim of fire is a governmental function. But see *Burson v. City of Bristol*, 176 Va. 53, 10 S.E.2d 541 (1940), wherein firefighters pulling down walls of a burned building five days after fire were deemed to have left the firefighting function and engaged in making the streets safe for passersby. Fire Departments do not enjoy sovereign immunity for suits regarding an employee's terms and conditions of employment, including Title VII sex discrimination and retaliation claims. *Baka v. City of Norfolk*, No. 2:21-cv-419 (E.D. Va. Mar. 11, 2022), *appeal dismissed*, *Baka v. City of Norfolk*, No. 21-1957 (4th Cir. June 14, 2022).

20-2.02(a)(4) Water Service for Fire Protection

The provision of water supply designed for fire protection is a governmental function, and therefore, the municipality is not liable for wrongful death when a fire hydrant did not receive adequate flow of water to timely put out a fire. *Massenburg v. City of Petersburg*, 298 Va. 212, 836 S.E.2d 391 (2019) (providing and maintaining fire hydrants is a governmental function) (LGA filed an amicus brief); *Kane v. City of Richmond*, 18 Va. Cir. 442 (City of Richmond 1990).

20-2.02(a)(5) Emergency Response

In removing from streets more than 800 trees left by a hurricane, city had no liability for negligence of employees. *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962). Work performed in response to a public disaster is performed for a public and governmental purpose, and the city is immune from liability in such work. *Id.* Emergency response is one of the most important functions of local government, and *Fenon* could be extended to any natural disaster (flood, tornado, etc.) or man-made disaster (toxic chemical spill or release, transportation disaster, etc.).

20-2.02(a)(6) Snow and Ice Removal

In *Bialk v. City of Hampton*, 242 Va. 56, 405 S.E.2d 619 (1991), the Virginia Supreme Court held that the clearing from streets of a large snowfall was a governmental act responding to emergency weather conditions in opening streets to vital public services. See also *Gambrell v. City of Norfolk*, 267 Va. 353, 593 S.E.2d 246 (2004) (removal of snowfall in city-owned parking lot a governmental function). But see *Woods v. Town of Marion*, 245 Va. 44, 425 S.E.2d 487 (1993), discussed in section [20-2.03\(a\)](#), suggesting that there is a point at which an emergency ceases to exist.

20-2.02(a)(7) Animal Control

The capture and impoundment of stray animals is a governmental function. *McAfee v. City of Richmond*, 46 Va. Cir. 420 (City of Richmond 1998).

20-2.02(b) Health and Sanitation Regulation

Duties that relate to the preservation of the public health and care of the sick concern the public as a whole and are governmental in nature. *Ashbury v. City of Norfolk*, 152 Va. 278, 147 S.E. 223 (1929); *Orellana v. Region Ten Cmty. Servs. Bd.*, 60 Va. Cir. 350 (City of Charlottesville 2002) (detoxification center).

20-2.02(b)(1) Hospitals

A public hospital is not liable for the torts of its servants and agents. *Maia's Adm'r v. E. State Hosp.*, 97 Va. 507, 34 S.E. 617 (1899); *see also* 9B M.J., *Hospitals & Sanitariums* § 5 (2016). In the operation of a hospital, a city exercises discretionary legislative power, and in providing for the sanitary police of the city and providing accommodations for the care and cure of the disabled, a city should not be exposed to liability. *City of Richmond v. Long's Adm'rs*, 58 Va. (17 Gratt.) 375 (1867) (city not liable for damages due to death of enslaved person who escaped from hospital), *overruled on other grounds by* *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983); *see also* *Stevens v. Hosp. Auth. of Petersburg*, 42 Va. Cir. 321 (City of Richmond 1997).

20-2.02(b)(2) Health Facilities

Despite indicia of proprietary nature, provision of nursing home services by a local governmental entity is a governmental function. *Carter v. Chesterfield Cnty. Health Comm'n*, 259 Va. 588, 527 S.E.2d 783 (2000); *see also* *Hughes v. Lake Taylor City Hosp.*, 54 Va. Cir. 239 (City of Norfolk 2000) (nursing home operated by hospital authority). The development and operation of an independent living facility by a county health commission, especially if it is part of a continuum of health care, is a governmental function. *Jean Moreau & Assocs. v. Health Ctr. Comm'n*, 283 Va. 128, 720 S.E.2d 105 (2012).

20-2.02(b)(3) Ambulance Service

Operation of an ambulance service is akin to operation of a hospital; it is directly tied to the health, welfare, and safety of citizens and is a governmental function. *Edwards v. City of Portsmouth*, 237 Va. 167, 375 S.E.2d 747 (1989). It is irrelevant that a city charged a nominal fee per call and also that the same service is provided by private entities. *Id.* A city-operated van service transporting citizens for non-emergency health care is a governmental function. *Goode v. City of Alexandria*, 3 Va. Cir. 218 (City of Alexandria 1984). A private entity providing ambulance service is not an independent contractor when the government by contract exercises power over the manner in which work is performed; however, ambulance service is a governmental function in which the state's agent is entitled to immunity. *Andrews v. LogistiCare Sols. L.L.C.*, 78 Va. Cir. 45 (Fairfax Cnty. 2008).

20-2.02(b)(4) Day Care

Provision of services by a city's social services department relating to child day care is a governmental function. *Ingram v. City of Norfolk*, No. 9101271 (City of Portsmouth Cir. Ct. Aug. 19, 1996).³

20-2.02(b)(5) Garbage Removal

Garbage removal is considered a part of the public health function of local governments and a governmental function. *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973); *Ashbury v. City of Norfolk*, 152 Va. 278, 147 S.E. 223 (1929).

20-2.02(b)(6) Landfill

Operation and maintenance of a landfill is a governmental function. *Robinson v. City of Richmond*, 16 Va. Cir. 263 (City of Richmond 1989) (suit allowed to go forward on public nuisance theory).

20-2.02(c) Water, Sewer, and Stormwater Drainage Systems

The planning, design, and implementation of municipal water, sewer, and stormwater drainage systems are governmental functions. The maintenance and operation of such systems, however, are proprietary functions. *Robertson v. W. Va. Water Auth.*, 287 Va. 158,

³ This chapter cites several unpublished circuit court opinions, most of which were rendered prior to the time that the publication of circuit court opinions became more routine. Although lacking precedential value, the unpublished opinions may be helpful to the practitioner by illustrating the views of various circuit courts on a particular issue.

752 S.E.2d 875 (2014); *Chalkley v. City of Richmond*, 88 Va. 402, 14 S.E. 339 (1891). *But see Massenburg v. City of Petersburg*, 298 Va. 212, 836 S.E.2d 391 (2019) (suggesting that when alleged negligence in maintaining water system is directly connected to fire suppression, conduct is governmental) (LGA filed an amicus brief). In *City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004), the Court held that the city's planning and redesign of its water treatment plant were governmental functions, and the city was thus protected by sovereign immunity from allegations that it provided unsafe drinking water. *See also Jenkins v. Cnty. of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993) (acceptance of storm drainage easement creates contractual duty of maintenance; failure to maintain storm drainage easement can effect a constitutional taking); *Stansbury v. City of Richmond*, 116 Va. 205, 81 S.E. 26 (1914). For further information, see discussion in sections [20-2.03\(b\)](#) and [20-2.03\(c\)](#) addressing routine maintenance or clerical acts regarding such systems.

20-2.02(d) Planning

The Supreme Court has consistently held that municipalities act in their governmental capacity in the planning, engineering, and design of public facilities and improvements.

20-2.02(d)(1) Streets and Sidewalks

Planning and designing public streets and sidewalks are governmental functions. *Maddox v. Commonwealth*, 267 Va. 657, 594 S.E.2d 567 (2004) (sidewalk design is a legislative function); *Jones v. City of Williamsburg*, 97 Va. 722, 34 S.E. 883 (1900) (failure to enact ordinance prohibiting use of bicycles on sidewalk is governmental); *Evans v. City of Richmond*, 33 Va. Cir. 93 (City of Richmond 1993) (recommendation against allowing curb cut because of safety concerns is governmental).

20-2.02(d)(2) Water and Sewer Systems and Plants; Stormwater Facilities

Engineering, designing, and planning of water and sewer systems is governmental. *City of Norfolk v. Hall*, 175 Va. 545, 9 S.E.2d 356 (1940); *Stansbury v. City of Richmond*, 116 Va. 205, 81 S.E. 26 (1914); *Costello v. Frederick Cnty. Sanitation Auth.*, 50 Va. Cir. 373 (Frederick Cnty. 2000) (town dismissed on demurrer; case proceeded against authority). Adoption of a plan for a sewage treatment plant is governmental. *Mountain Venture P'ship Lovettsville II v. Town of Lovettsville*, 45 Va. Cir. 60 (Loudoun Cnty. 1997). Designing improvements to control stormwater from street is governmental. *Brizendine v. City of Roanoke*, 43 Va. Cir. 353 (City of Roanoke 1997).

20-2.02(e) Traffic Signals and Other Traffic Control Devices

Determination of need for and placement of traffic control devices is a governmental function. *Freeman v. City of Norfolk*, 221 Va. 57, 266 S.E.2d 885 (1980) (failure to provide street lighting, barriers, and warning signs imposes no liability); *Transp., Inc. v. Falls Church*, 219 Va. 1004, 254 S.E.2d 62 (1979). Where a pedestrian's fall was caused by slippery tape used to mark a crosswalk, the Supreme Court held that the crosswalk was a traffic regulatory device and the maintenance of the device was a governmental function. *Harrell v. City of Norfolk*, 265 Va. 500, 578 S.E.2d 756 (2003). Where a city failed to prune a tree, allowing it to obscure a stop sign, there is no liability because maintenance of the sign is a governmental function. Since maintenance of the sign is governmental, it is unnecessary to decide whether tree maintenance is governmental or proprietary. *Williams v. City of Alexandria*, 14 Va. Cir. 128 (City of Alexandria 1988) (maintenance of stop sign); *see also Chandler v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1172 (E.D. Va. 1995) (sovereign immunity for alleged negligence regarding safety devices at or near a railroad crossing; no duty to keep railroad right-of-way free from obstructions); *Beach v. Mid-Atl. Coca Cola Bottling Co.*, 17 Va. Cir. 253 (Fairfax Cnty. 1989) (no liability for traffic control sign obscured by shrubbery). *But see Hobbs v. Richmond Metro. Auth.*, 36 Va. Cir. 488 (City of Richmond 1995) (operation of tollgate is proprietary function).

20-2.02(f) Public Transportation

Finding that a subsidized municipal bus service was operated by the city for the common welfare of its residents and not for its own special benefit, a federal district court held that the city was entitled to sovereign immunity for the exercise of a governmental function. *Ali v. City of Fairfax*, No. 1:14cv1143 (E.D. Va. Mar. 30, 2015); see also *Pavelka v. Carter*, 996 F.2d 645 (4th Cir. 1993) (construing similar Maryland common law).

20-2.02(g) Building Code Enforcement and Inspections

The Supreme Court held that the demolition of a building as a public nuisance pursuant to the Building Code is a valid and discretionary exercise of a municipality's police power, and therefore the city was entitled to sovereign immunity regarding the performance of a governmental function. *Lee v. City of Norfolk*, 281 Va. 423, 706 S.E.2d 330 (2011); see also *Bergen v. Fourth Skyline Corp.*, 501 F.2d 1174 (4th Cir. 1974); *Vanity Stores v. Town of Kilmarnock*, 49 Va. Cir. 533 (Lancaster Cnty. 1998); *Dunn v. City of Williamsburg*, 35 Va. Cir. 420 (City of Williamsburg 1995); *Boyd v. Brown*, 12 Va. Cir. 54 (City of Newport News 1986); 1993 Op. Va. Att'y Gen. 163 (local government building officials and the local governments that employ them are immune from tort liability for negligent acts and omissions in enforcing the USBC); 1990 Op. Va. Att'y Gen. 172; Annotation, *Municipal Liability for Negligent Performance of Building Inspector's Duties*, 24 A.L.R. 5th 200 (2006).

20-2.02(h) Public Buildings—Operation and Maintenance

When a person's injuries are caused by municipal operations that are governmental in nature, immunity applies. *Harrell v. City of Norfolk*, 265 Va. 500, 578 S.E.2d 756 (2003); see *Lewis v. City of Charlottesville*, 47 Va. Cir. 313 (City of Charlottesville 1998) (operation of courthouse is governmental function even when used for proprietary reasons); *Fitzgerald v. City of Danville*, 44 Va. Cir. 10 (City of Danville 1997) (sovereign immunity for tort actions arising out of maintenance of a courthouse); *Miles v. City of Richmond*, 26 Va. Cir. 170 (City of Richmond 1991) (operation and maintenance of a physical plant in which government services are performed are themselves governmental functions; plaintiff injured in an elevator accident at city hall had no cause of action against city). In an unpublished opinion, *Adams v. City of Richmond*, No. 991007 (Va. Feb. 7, 2000), the Court held that maintenance of a courthouse and its grounds, including walkways, was a governmental function. *But see City of Richmond v. Grizzard*, 205 Va. 298, 136 S.E.2d 827 (1964) (use of building as Welfare Department did not immunize duty as landlord renting to church on Sundays).

As for maintenance of sewer lines, however, see the discussion at section [20-2.03\(c\)](#).

20-2.02(i) Libraries

Libraries are a governmental function provided for the public benefit. *Murray v. Horton Automatics*, 52 Va. Cir. 466 (City of Charlottesville 2000).

20-2.02(j) Purchase of Land

In *City of Virginia Beach v. Carmichael Development Co.*, 259 Va. 493, 527 S.E.2d 778 (2000), the Supreme Court stated that the condemnation of property for governmental purposes is clearly a governmental function. So also was the buying of property for resale or lease, despite the proprietary aspects of such action, when the city had stated its purpose in doing so was to resolve disputes over vacant lands in order to control development consistent with public safety concerns.

20-2.02(k) Legislative Acts

Even where states have abolished sovereign immunity, municipal immunity from tort liability for legislative acts remains. 18 McQuillin on Municipal Corporations, *Municipal Liability for Torts* § 53.04a (1984). Zoning is a legislative function that has been delegated by the General Assembly to the local governing bodies. *Shannon Fredericksburg Motor Inn v. Hicks*, 434 F. Supp. 803 (E.D. Va. 1977).

20-2.03 Specific Proprietary Functions

20-2.03(a) Streets and Sidewalks

A municipality has a positive and nondelegable duty to keep and maintain its streets and sidewalks in repair and in safe condition for public travel. *Votsis v. Ward's Coffee Shop, Inc.*, 217 Va. 652, 231 S.E.2d 236 (1977) (dictum that private parties who derive benefit from abutting public sidewalk have no duty to maintain); *City of Richmond v. Branch*, 205 Va. 424, 137 S.E.2d 882 (1964). Although a city is not an insurer against accidents in its streets, it has a duty to keep them in reasonably safe condition for persons who use ordinary care and prudence. *City of Norfolk v. Hall*, 175 Va. 545, 9 S.E.2d 356 (1940). A municipality "is bound only to use due and proper care to see that its streets and sidewalks are reasonably safe to persons passing on or along them, when exercising ordinary care and prudence to that end." *City of Portsmouth v. Lee*, 112 Va. 419, 71 S.E. 630 (1911). However, in *Pfister v. City of Norfolk*, 80 Va. Cir. 348 (City of Norfolk 2010), the court held that a defect must be slight to relieve a city of liability as matter of law. See section 20-2.03(a)(2) as to defects found by the Supreme Court to be "slight."

In an unpublished opinion, the Virginia Supreme Court indicated that a locality as an easement holder may assume the duty to prevent harm to third parties if it voluntarily undertakes to remediate dangerous conditions and fails to exercise reasonable care in performing that undertaking. *Cline v. Commonwealth*, No. 151037 (Va. Sept. 8, 2016) (unpubl.); see also *Zook v. City of Norfolk*, 87 Va. Cir. 47 (City of Norfolk 2013) (city has duty to remove dangerous tree beside roadway if it knew or should have known it was in danger of falling).

In *Harrell v. City of Norfolk*, 265 Va. 500, 578 S.E.2d 756 (2003), the Supreme Court narrowly described the proprietary function as to streets as the repair of potholes, depressions, and dips. There is no liability for planning and design of streets or the maintenance of traffic regulatory devices; see sections 20-2.02(d)(1) and 20-2.02(e).

In contrast to its finding in *Bialk v. City of Hampton*, 242 Va. 56, 405 S.E.2d 619 (1991), that removal of snowfall was a governmental function, see section 20-2.02(a)(6), the Supreme Court in *Woods v. Town of Marion*, 245 Va. 44, 425 S.E.2d 487 (1993), considered an accident caused by a town's failure to remove an accumulation of ice that had been formed by a leaking town water line over the course of several weeks to be the result of negligence in performing a proprietary function. Where no emergency existed and the town was negligent in the proprietary functions of both routine street maintenance and water line maintenance, there can be no surprise that the court declined to extend immunity. In another case, where any emergency had ceased to exist, a circuit court judge held that, sometime after a snowfall, the removal of snow and ice that was originally an emergency governmental function becomes a proprietary function, and trial would determine the reasonableness of the Town's response. *Smith v. Town of Front Royal*, 61 Va. Cir. 5 (Warren Cnty. 2003) (sovereign immunity denied when ice remained on sidewalk a week after storm); accord *Chiles v. Gray*, 37 Va. Cir. 459 (City of Richmond 1996). The grading of streets has been held to be a proprietary function. *Jones' Adm'r v. City of Richmond*, 118 Va. 612, 88 S.E. 82 (1916); *Orme v. City of Richmond*, 79 Va. 86 (1884) (failure to warn of eight-foot grade change after lowering of street).

20-2.03(a)(1) Notice as to Defects on Public Property

A municipality must have actual or constructive notice of a defect on public property in time to have it remedied before liability attaches. *City of Va. Beach v. Roman*, 201 Va. 879, 114 S.E.2d 749 (1960). A plaintiff must show more than that a defect on public property has come into being and caused plaintiff's injury. For example, the City of Virginia Beach was held to have no liability where plaintiff proved only that she broke her leg by stepping into a deep grass-covered hole on public property.

A municipality has constructive notice of a defect in a public way adjoining a street when the defect has existed for such a period of time that the defect could have been discovered by the exercise of ordinary care. *City of Richmond v. Holt*, 264 Va. 101, 563 S.E.2d 690 (2002). In this case, a woman had fallen in a hole in a grassy area beside the street. The Court noted that the crosswalk established by the city led directly to the grassy area and, thus, implicitly invited pedestrians to use that area as a public way. Also, at the curb adjoining the grassy area, public parking was permitted. Persons entering and exiting vehicles through doors situated next to the curb were required to step into the grassy area. There was evidence the hole had existed for at least two years but there had been no routine inspections of the area by the city. The Court held that such evidence was sufficient to establish constructive notice. See also *City of Portsmouth v. Houseman*, 109 Va. 554, 65 S.E. 11 (1909). When a defect is such that it might have developed recently and suddenly, and evidence to the contrary is lacking, constructive notice will not be inferred. *Erle v. City of Norfolk*, 139 Va. 38, 123 S.E. 364 (1924). Existence of a defect for one or two days does not constitute constructive notice as a matter of law. *Shamlee v. City of Richmond*, 7 Va. Cir. 157 (City of Richmond 1982). Constructive notice that a manhole cover is partially paved over does not by itself create constructive notice of a clogged sewage pipe. *East v. Town of Vinton*, 95 Va. Cir. 372 (Roanoke Cnty. 2017).

20-2.03(a)(2) Minimal Defects

Slight defects in sidewalks from which a reasonable person would not anticipate danger do not give rise to negligence. *City of Suffolk v. Carter*, 251 Va. 1, 464 S.E.2d 154 (1995) (5/8-inch sidewalk gradation separation not actionable as matter of law); *Med. Ctr. Hosps. v. Sharpless*, 229 Va. 496, 331 S.E.2d 405 (1985) (1-to 1¼-inch difference in elevation was so slight as to constitute no negligence as a matter of law); *City of Newport News v. Anderson*, 216 Va. 791, 223 S.E.2d 869 (1976) (depression in sidewalk 3 inches long, 4 inches wide, and 1 inch deep at its deepest point is not actionable); *City of Roanoke v. Sutherland*, 159 Va. 749, 167 S.E. 243 (1933) (1⅛ inch difference in elevation of sidewalk sections is so slight as to not constitute simple negligence).

20-2.03(a)(3) Open and Obvious Defects

Open and obvious defects do not give rise to municipal liability. *Town of Hillsville v. Nester*, 215 Va. 4, 205 S.E.2d 398 (1974). Plaintiff whose fall was caused by a 2¼-inch depression adjacent to a water meter box was guilty of contributory negligence as a matter of law even though momentarily distracted by other pedestrians. *West v. City of Portsmouth*, 217 Va. 734, 232 S.E.2d 763 (1977). Plaintiff who fell on a sidewalk with slabs having a difference in elevation of 2½ inches was guilty of contributory negligence as a matter of law. *Nester, supra*. Plaintiff who fell in depression 8-12 inches across and 2-3 inches deep was guilty of contributory negligence as a matter of law. *Rocky Mount Shopping Ctr. Assocs. v. Steagall*, 235 Va. 636, 369 S.E.2d 193 (1988) (not a municipal case, but useful in defending sidewalk claims); *City of Richmond v. Lambert*, 111 Va. 174, 68 S.E. 276 (1910) (no city duty to remove 4½-inch step serving as a building stoop and encroaching into right of way). But see *City of Richmond v. Gentry*, 111 Va. 160, 68 S.E. 274 (1910) (jury verdict upheld for plaintiff stumbling over 3-foot boulder).

Because a municipality is not liable for slight defects (up to 1¼ inches difference in elevation) or open and obvious defects (as little as a 2¼-inch depression), it appears that plaintiffs have very little latitude in framing viable claims for sidewalks defects. But see *Tickle v. City of Roanoke*, 81 Va. Cir. 324 (City of Roanoke 2010) (issue for fact-finder whether 6-inch gap actionable and whether there was contributory negligence).

When a plaintiff knows of the existence of a condition but without reasonable excuse forgets about the condition and falls into, off of, or over it, he is guilty of contributory negligence as a matter of law. *Scott v. City of Lynchburg*, 241 Va. 64, 399 S.E.2d 809 (1991).

20-2.03(a)(4) Street-Related but Non-Proprietary Functions

Courts have evaluated a local government's potential liability arising out of a number of street-related, non-proprietary functions.

1. No liability for alleged negligent maintenance of traffic regulatory devices because they perform a governmental function. *See Harrell v. City of Norfolk*, 265 Va. 500, 578 S.E.2d 756 (2003) (pedestrian crosswalk); *Transp., Inc. v. City of Falls Church*, 219 Va. 1004, 254 S.E.2d 62 (1979) (malfunctioning traffic signal). *See* section [20-2.02\(e\)](#).
2. No liability for grease spill on sidewalk occurring during garbage collection, a governmental function. *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973).
3. No liability for negligence in removing trees from streets after hurricane because city's emergency response was a governmental function. *Fenon v. City of Norfolk*, 203 Va. 551, 125 S.E.2d 808 (1962).
4. No liability for failure to keep streets free of snow and ice. *Artis v. City of Alexandria*, 11 Va. Cir. 110 (City of Alexandria 1987).
5. No liability when poor drainage, of which city had notice, allowed ice to form that caused fatal accident. *Lester v. City of Roanoke*, 20 Va. Cir. 319 (City of Roanoke 1990). *But see Woods v. Town of Marion*, 245 Va. 44, 425 S.E.2d 487 (1993), in section [20-2.03\(a\)](#).

20-2.03(b) Water

The operation of a water department is a proprietary function notwithstanding that the water is also used for extinguishing fires. *Woods v. Town of Marion*, 245 Va. 44, 425 S.E.2d 487 (1993); *City of Richmond v. Va. Bonded Warehouse Corp.*, 148 Va. 60, 138 S.E. 503 (1927). Providing water for fire protection, however, is a governmental function. *Kane v. City of Richmond*, 18 Va. Cir. 442 (City of Richmond 1990). The planning, design, and engineering of a public water or sewer system are governmental functions; however, once a system has been constructed and experience has shown it to be inadequate, liability attaches. *Stansbury v. City of Richmond*, 116 Va. 205, 81 S.E. 26 (1914) (dictum as to liability for inadequate system). This does not mean that municipal design and planning as a discretionary legislative function is frozen in time, never to be subject to redesign or planning at any point. *See City of Chesapeake v. Cunningham*, 268 Va. 624, 604 S.E.2d 420 (2004); section [20-2.02\(c\)](#).

In water and sewer cases, there is no liability without (1) actual negligence in construction or operation; (2) notice to the authorities of a break or overflow accompanied by failure to repair promptly; or (3) actual notice, from similar prior occurrences, of defective maintenance. *City of Richmond v. Hood Rubber Prods. Co.*, 168 Va. 11, 190 S.E. 95 (1937). The doctrine of *res ipsa loquitur* has no application to water main breaks. *Id.* "It would not be reasonable to hold the city liable for a failure to inspect its meters when it has not been shown either that good practice required an inspection or what would be a fair standard of inspection." *Id.*

20-2.03(c) Sewer

The maintenance and operation of a sanitary sewer system are proprietary functions. The planning and design of the sewer system are governmental functions. *Robertson v. W. Va. Water Auth.*, 287 Va. 158, 752 S.E.2d 875 (2014); *Chalkley v. City of Richmond*, 88 Va. 402, 14 S.E. 339 (1891) (holding that repairs to a city sewer that caused invasion of plaintiff's basement actionable as nuisance).

In sewer backup cases, a plaintiff must prove that the primary negligence of the municipality proximately caused damage. It is not sufficient merely to prove that effluent backed up during a period of heavy rainfall and that a previous backup had occurred. *Town of West Point v. Evans*, 224 Va. 625, 299 S.E.2d 349 (1983). Where a town had in place a “once a year” maintenance program for sewer lines and plaintiff proved only that a grease clog occurred in sewer main and sewer backed up into plaintiff’s house, the town had no liability. Plaintiff failed to prove the essential element of negligence as the cause of the blockage. *Town of Vinton v. Bryant*, 238 Va. 229, 384 S.E.2d 76 (1989).

A municipality is not liable for failure to provide a sewer system, for defective plans, or for damage caused by extraordinary rain or floods. See 18 McQuillin on Municipal Corporations, *Municipal Liability for Torts* §§ 53.119, 53.121, and 53.124. As to liability for inadequate systems, there is a split of authority. *Id.* § 53.123.

When a municipal corporation provides sewer services outside its territorial limits, it is performing a proprietary function. *Town of Rocky Mount v. Wenco, Inc.*, 256 Va. 316, 506 S.E.2d 17 (1998) (note the court held that this principle is applicable to “utility services”). The proprietary function statement is dictum because the issue in the case was the duty of the town to extend sewer service outside the town limits.

20-2.03(d) Market

A city is bound to use the same care as a private owner with respect to invitees. *City of Norfolk v. Anthony*, 117 Va. 777, 86 S.E. 68 (1915).

20-2.03(e) Electric Utility

The operation of an electric utility is a proprietary function. *Holt v. Bowie*, 333 F. Supp. 843 (W.D. Va. 1971).

20-2.03(f) Gas Utility

The operation of gas works is a proprietary function. *City of Richmond v. James*, 170 Va. 553, 197 S.E. 416 (1938).

20-2.03(g) Rental of Municipal Property

In a landlord-tenant relationship, a city is engaged in a proprietary function although property may be primarily used for governmental purposes. See *City of Richmond v. Grizzard*, 205 Va. 298, 136 S.E.2d 827 (1964) (involving rental of city property to a church for Sunday school use); cf. *Kellam v. Sch. Bd. of City of Norfolk*, discussed at section [20-5.01](#); *Lewis v. City of Charlottesville*, 47 Va. Cir. 313 (City of Charlottesville 1998) (operation of courthouse is governmental function even when used for proprietary reasons). In *Gambrell v. City of Norfolk*, 267 Va. 353, 593 S.E.2d 246 (2004), the Supreme Court held that its determination that the failure to clear a municipal parking lot of snow was the exercise of a governmental function was unaffected by the fact that the parking lot was leased to a private entity.

20-2.03(h) Airport

Operation of an airport is a proprietary function. *Bowling v. City of Roanoke*, 568 F. Supp. 446 (W.D. Va. 1983). The routine maintenance of airport runways is a proprietary function. *Alpine Air, Inc. v. Metro. Wash. Airports Auth.*, 62 Va. Cir. 215 (Fairfax Cnty. 2003) (based on § 5.1-173(B) of the Metropolitan Washington Airports Authority Act). Virginia Code § 5.1-33, however, states that airport land is occupied and controlled for public, governmental, and municipal purposes.

20-2.03(i) Swimming Pool

The operation of a swimming pool is a proprietary act. *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939). Virginia Code § 15.2-1809, however, states that cities, towns, and public access authorities are liable only for gross negligence in the operation of

pools, parks, playgrounds, and other recreational facilities. See *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987); section [20-2.05\(b\)\(1\)](#).

20-2.03(j) Parking Garage

In *Miller v. City of Norfolk*, 57 Va. Cir. 22 (City of Norfolk 2001), the court held that the operation of a parking garage was a proprietary function. In *Gambrell v. City of Norfolk*, 267 Va. 353, 593 S.E.2d 246 (2004); however, the Supreme Court held that the removal of snow from a municipal parking lot was a governmental function and thus different from the proprietary, routine maintenance of municipal streets and parking lots.

20-2.04 Coinciding Governmental and Proprietary Functions

Where governmental and proprietary functions coincide, the municipality will be accorded immunity. In *Bialk v. City of Hampton*, 242 Va. 56, 405 S.E.2d 619 (1991), the Virginia Supreme Court held that the clearing from streets of a large snowfall was both a governmental act in responding to emergency weather conditions in opening streets to vital public services and a proprietary act of maintaining the surface of the street. Because the two coincided, the governmental factor was determinative. When traffic regulation (governmental) coincided with street maintenance (proprietary), the municipality was held not liable. *Transp., Inc. v. City of Falls Church*, 219 Va. 1004, 254 S.E.2d 62 (1979). Also, when garbage collection (governmental) coincided with sidewalk maintenance (proprietary), the municipality was held not liable. *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973). Immunity has been granted when roadway and stormwater control design (governmental function), combined with poor maintenance of roadway (proprietary function), allegedly caused accident. *Brooks v. City of Roanoke*, 89 Va. Cir. 439 (City of Roanoke 2015) (combined stormwater control design and curb maintenance); *Brizendine v. City of Roanoke*, 43 Va. Cir. 353 (City of Roanoke 1997) (same); see also *Lewis v. City of Charlottesville*, section [20-2.03\(g\)](#). But see *Woods v. Town of Marion*, section [20-2.03\(a\)](#).

20-2.05 Statutory Provisions

20-2.05(a) Notice of Claims Requirement—Va. Code § 15.2-209

Every claim cognizable against any locality for negligence is barred unless the claimant files a written statement of the nature of the claim, including the time and place at which the injury is alleged to have occurred, within six months 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 Va. Code § 8.01-229 apply. The statement must be filed with the county, city, or town attorney or with the chief executive or mayor of the county, city, or town. The notice is deemed filed when it is received in the office of the official to whom the notice is directed. The burden of proof is on the claimant to establish receipt of the notice. The provisions of this procedural statute are mandatory, are to be strictly construed, and take precedence over the provisions of any local charter. Va. Code § 15.2-209.

This provision is not a bar to a claim, however, if the local government attorney, chief executive, or mayor has actual knowledge of the claim—which must include the nature of the claim and the time and place at which the injury is alleged to have occurred—within six months after the cause of action has accrued. *Id.*

Under the prior notice provision now repealed (former Va. Code § 8.01-222), the Supreme Court held that notice is required for public nuisance claims based on negligent performance of an authorized act and that the statute did not apply to claims against employees. *Breeding v. Hensley*, 258 Va. 207, 519 S.E.2d 369 (1999); see also *Talbert v. City of Charlottesville*, 48 Va. Cir. 94 (City of Charlottesville 1999) (§ 8.01-222 does not apply to claims of intentional torts).

Also construing Va. Code § 8.01-222, the Court held that notice was defective when it failed to state where an accident occurred even when everybody knew the location. *Town of Crewe v. Marler*, 228 Va. 109, 319 S.E.2d 748 (1984); cf. *Halberstam v. Commonwealth*,

251 Va. 248, 467 S.E.2d 783 (1996) (actual notice immaterial under Virginia Tort Claims Act; notice must be sent in proper manner to designated official and contain within it all statutorily required information). But note that the VTCA was amended in 2016 to excuse a failure to provide notice in certain circumstances where the Commonwealth “had actual knowledge of the claim” within one year from the time the claim accrued. Va. Code § 8.01-195.6(A).

20-2.05(a)(1) Municipal Employee as Agent of Claimant

A city employee can become an agent of claimant for purpose of notice. Where a police officer promised to file a report of an accident with the proper city official, the officer became an agent of claimant, and the notice provision was complied with. *Heller v. City of Va. Beach*, 213 Va. 683, 194 S.E.2d 696 (1973). *Miles v. City of Richmond*, 236 Va. 341, 373 S.E.2d 715 (1988), appears to represent an extension of *Heller*. Plaintiff immediately reported her injury to city personnel, who investigated and sent a report of accident to various city officials, including the city attorney. The court held that a city employee who prepared, signed, and forwarded the accident report to the city attorney did so as the agent or representative of the claimant in substantial compliance with the statute.

20-2.05(a)(2) Specificity of Required Notice

Where plaintiff’s claim letter stated fall occurred at “102 South Jefferson Street, near the corner of Jefferson Street and Salem Avenue, directly in front of the Uptown Florist Shop,” but fall actually occurred just around the corner on Salem Avenue, court dismissed case for failure to comply with the notice provisions. *Adams v. City of Roanoke*, No. CL86-645 (City of Roanoke Cir. Ct. Oct. 20, 1986) (construing repealed Va. Code § 8.01-222).

However, when plaintiff fell at Swansboro Playground, which is at 31st Street and Stockton Street, but notice stated that fall occurred at Swansboro Playground at 34th Street and Stockton Street, court held that plaintiff complied with the notice provisions because the notice correctly stated the place of the fall with sufficient clarity, even though the correct identity of the place was followed by erroneous information. *Pellot-Rosa v. City of Richmond*, 9 Va. Cir. 138 (City of Richmond 1987) (construing repealed Va. Code § 8.01-222).

20-2.05(b) Statutory Immunities

20-2.05(b)(1) Va. Code § 15.2-1809—Recreational Facilities

The statute provides localities with immunity from simple negligence in operation of beaches, pools, parks, playgrounds, skateboard facilities, and recreational facilities; however, cities and towns are liable for gross or wanton negligence in operation of these facilities. See also *Seabolt v. Cnty. of Albemarle*, 283 Va. 717, 724 S.E.2d 715 (2012) (statute does not operate to waive the immunity of counties from gross negligence claims). In *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996), the Virginia Supreme Court held that the statutory immunity for recreational facilities applies to city-maintained beach boardwalks and entrance gates. The Court also described gross negligence as the utter disregard of prudence amounting to complete neglect of the safety of another. The Court emphasized the importance of deliberate conduct. It also held that gross negligence can be proved from the combination of several acts of simple negligence. The Court thus reversed the trial court, which had held as a matter of law that gross negligence was not proven despite prior notice on three occasions that the boardwalk’s gate was broken. Relying on *Chapman*, the Court in *Volpe v. City of Lexington*, 281 Va. 630, 708 S.E.2d 824 (2011), held that the city’s knowledge of and failure to take any safety steps regarding the dangers of a dam-created “hydraulic” in waters of a city park where swimming was allowed created a jury issue with regard to gross negligence.

In *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987), the Supreme Court held that a building used for stage shows, symphony, ballet, meetings, and speeches is a “recreational facility” within the meaning of Va. Code § 15.2-1809. In *Frazier*, where a child

fell into the orchestra pit, the Court found no gross negligence although the City was in violation of its own Building Code and a similar fall had previously occurred.

Construing *Chapman* and *Frazier*, the Supreme Court in *City of Lynchburg v. Brown*, 270 Va. 166, 613 S.E.2d 407 (2005), noted that *Chapman* involved a deliberate decision not to repair a known hazard, while *Frazier* and *Brown* involved situations where municipal employees committed acts of omission by failing to observe a hazard that was open and obvious. The latter conduct amounts to ordinary negligence and a failure to exercise reasonable care; therefore, immunity was available. The Court in *Volpe* did not mention *City of Lynchburg*, although it found that the existence of the “hydraulic” was not open and obvious. The Court was not addressing the issue of immunity, but the common law that an invitee has the right to assume that premises are reasonably safe unless a dangerous condition is open and obvious.

In *Hawthorn v. City of Richmond*, 253 Va. 283, 484 S.E.2d 603 (1997), the Court held that Va. Code § 15.2-1809 provides immunity against nuisance claims.

A county-owned bus used for parks and recreation purposes is not a “recreational facility.” The Supreme Court declined to decide whether a county employee driver could take advantage of Va. Code § 15.2-1809. *DePriest v. Pearson*, 239 Va. 134, 387 S.E.2d 480 (1990). In *Decker v. Harlan*, 260 Va. 66, 531 S.E.2d 309 (2000), however, the Court distinguished *DePriest* as addressing only whether the bus was a recreational facility and granted immunity to the city and garbage truck driver who was removing trash from a coliseum, a recreational facility. The Court, however, did not rule as to whether the driver was entitled to immunity under the statute. In *Lostrangio v. Laingford*, 261 Va. 495, 544 S.E.2d 357 (2001), the Court distinguished between a “recreational event” and a “recreational facility,” holding that a “recreational event” sponsored by the town (July 4th celebration) was not a “recreational facility” contemplated by the provisions of Va. Code § 15.2-1809. See also *Hutchinson v. Richmond Metro. Auth.*, 37 Va. Cir. 280 (City of Richmond 1995) (statute applies to area outside a baseball stadium).

In *Sheppard v. Fairfax County Park Authority*, 51 Va. Cir. 152 (Fairfax Cnty. 1999), the circuit court held that the immunity of Va. Code § 15.2-1809 applies to local and regional park authorities by operation of Va. Code § 29.1-509 (providing immunity to landowners or “any other person in control of land or premises” for claims related to use of the land for recreational purposes).

20-2.05(b)(2) Va. Code § 15.2-970—Water Control Facilities

The statute provides localities with immunity from suits arising out of the design, maintenance, performance, operation, or existence of dams, levees, seawalls, or other structures, the purpose of which is to prevent the tidal erosion, flooding, or inundation of such locality. In *Peerless Insurance Co. v. County of Fairfax*, 274 Va. 236, 645 S.E.2d 478 (2007), the Supreme Court held that Va. Code § 15.2-970 applies to a stormwater detention pond. In *Continental Casualty Co. v. Town of Blacksburg*, 846 F. Supp. 483 (W.D. Va. 1993), the district court held that this statutory provision applied to storm drainage systems. See also *Brooks v. City of Roanoke*, 89 Va. Cir. 439 (City of Roanoke 2015) (drainage pipe and curb structures designed to prevent inundation); *Mitcham v. City of Winchester*, 63 Va. Cir. 427 (City of Winchester 2003) (design and maintenance of stormwater control system are governmental functions); *Carter v. City of Norfolk*, 54 Va. Cir. 195 (City of Norfolk 2000) (statute applies to accident arising from hole in ground caused by storm drainage pipe leak); *Meyers v. Murphy*, No. CL98-2604 (City of Norfolk Cir. Ct. May 20, 1999) (accident caused by city vehicle arose out of maintenance of stormwater system, which was part of effort to prevent flooding); *Brizendine v. City of Roanoke*, 43 Va. Cir. 353 (City of Roanoke 1997) (immunity applies to suit alleging stormwater control design and maintenance caused accident).

20-2.05(b)(3) Va. Code § 29.1-509—Landowners Allowing Recreational Use of Land

This section provides immunity for landowners or “any other person in control of land” from liability for negligence regarding land used for recreational purposes. In *City of Virginia Beach v. Flippen*, 251 Va. 358, 467 S.E.2d 471 (1996), the Virginia Supreme Court held that “any other person” included a municipality responsible for the maintenance of privately owned property that allowed public beach access. In *Lutfi v. United States*, No. 11-1966 (4th Cir. Apr. 24, 2013) (unpubl.), the statute applied to require a showing of gross negligence before a plaintiff who fell at the Air Force Memorial in Arlington could prevail.

20-2.05(b)(4) Va. Code § 8.01-224—No Immunity in Blasting

Defense of governmental immunity is not available in blasting cases.

20-2.06 Interlocutory Appeal

If a circuit court, before trial, grants or denies a plea of sovereign immunity, the order is eligible for immediate appellate review. Va. Code § 8.01-670.2(A). The process follows the petition-for-review procedures of Va. Code § 8.01-626, applicable to preliminary injunctions. *Id.* The interlocutory appeal does not stay the circuit court proceedings unless the appeal could be dispositive of the entire civil action or for good cause. Va. Code § 8.01-670.2(B).

20-3 SOVEREIGN IMMUNITY OF COUNTIES**20-3.01 In General**

Counties are integral parts of the State created for civil administration, and in the absence of statute, enjoy the same immunity as the State. *Seabolt v. Cnty. of Albemarle*, 283 Va. 717, 724 S.E.2d 715 (2012); *Mann v. Arlington Cnty. Bd.*, 199 Va. 169, 98 S.E.2d 515 (1957); *Fry v. Albemarle Cnty.*, 86 Va. 195, 9 S.E. 1004 (1889). Counties are not liable for tortious injuries caused by negligence of their officers, servants, and employees. *Mann, supra*. County immunity is retained even when the county takes on characteristics of a city and exercises many powers and performs services rendered by a city. *Id.* County immunity from liability cannot be waived even when insurance coverage exists to cover the event. *Id.* In *Seabolt v. County of Albemarle*, 283 Va. 717, 724 S.E.2d 715 (2012), the Court held that Va. Code § 15.2-1809, extending to localities immunity for simple negligence in operation of parks and recreation facilities, does not waive a county’s absolute immunity even for acts of gross negligence. In the absence of a legislative waiver of immunity, a circuit court is without jurisdiction to adjudicate a tort claim against the county.

The governmental-proprietary distinction, applicable to municipal corporations, has no application to counties. *Fry v. Albemarle Cnty.*, 86 Va. 195, 9 S.E. 1004 (1889). The Equal Protection Clause of the Fourteenth Amendment is not violated because municipalities have liability in the performance of proprietary functions while counties retain immunity. *Obenshain v. Halliday*, 504 F. Supp. 946 (E.D. Va. 1980). Furthermore, a county does not waive its state tort immunity by operating an airport in interstate commerce that is regulated by the federal government. *Id.*

Although the governmental-proprietary distinction has no application to counties, the Supreme Court has noted in a defamation case that county boards act in a dual capacity. One capacity is a legislative capacity that occurs only when a board is creating legislation, and the other is a supervisory administrative capacity. When a board is acting in the latter capacity, an administrator in making a report to a board has qualified immunity, not absolute immunity, and thus may be liable in a defamation action for statements made with malice. *Isle of Wight Cnty. v. Nogiec*, 281 Va. 140, 704 S.E.2d 83 (2011); see also section [20-7.02\(d\)\(3\)](#).

20-3.02 Statutory Provisions Relating to Counties**20-3.02(a) Va. Code § 15.2-1248**

No action may be maintained against a county upon any claim or demand until such claim has been presented to the board of supervisors for allowance. Va. Code § 15.2-1248. This section applies only to monetary claims against a county. *See Seabolt v. Cnty. of Albemarle*, 283 Va. 717, 724 S.E.2d 715 (2012) (holding that Va. Code § 15.2-1243 et seq. do not apply to tort claims); *Nuckols v. Moore*, 234 Va. 478, 362 S.E.2d 715 (1987) (holding § 15.2-1248 has no application in an action for declaratory judgment and mandamus). Note, however, that § 15.2-1248 applies where equitable remedies are sought if money damages are also requested. *Nuckols, supra*; *see also Eberhardt v. Fairfax Cnty. Emps.' Ret. Sys. Bd. of Trs.*, No. 1:10cv771 (E.D. Va. Mar. 30, 2012). Excepted from Va. Code § 15.2-1248 are certain controversies where the county has agreed to submit to binding arbitration. The statute also applies to employee claims arising out of the employment relationship. *Mansoor v. Cnty. of Albemarle*, 124 F. Supp. 2d 367 (W.D. Va. 2000), *aff'd on other grounds*, 319 F.3d 133 (4th Cir. 2003). The statute applies to state civil rights claims against counties as well. *Gray v. Rhoads*, 55 Va. Cir. 362 (City of Charlottesville 2001), *rev'd and remanded on other grounds*, 268 Va. 81, 597 S.E.2d 93 (2004).

20-3.02(b) Va. Code § 15.2-1246

Virginia Code § 15.2-1246 establishes procedural and jurisdictional predicates to an action against a county. *Karara v. Cnty. of Tazewell*, 450 F. Supp. 169 (W.D. Va. 1978), *aff'd*, 601 F.2d 159 (4th Cir. 1979). If a claimant is present at the board meeting when his claim against a county is disallowed, he may appeal by filing written notice with the clerk of the board and executing a bond to the county within thirty days from the date of the board's decision. If a claimant is not present at the board meeting when his claim is disallowed, he may appeal by filing written notice with the clerk of the board and executing the required \$250 bond within thirty days after service of notice of disallowance. *See Johnson v. Chesterfield Cnty.*, 20 Va. Cir. 427 (Chesterfield Cnty. 1990).

The appellant must further assure faithful prosecution of such appeal and the payment of all costs that shall be adjudged against the appellant by the court. Failure to execute the required bond within the time frame allowed is a jurisdictional defect that cannot be corrected. *Parker v. Prince William Cnty.*, 198 Va. 231, 93 S.E.2d 136 (1956); *see also Cnty. of Albemarle v. Camirand*, 285 Va. 420, 738 S.E.2d 904 (2013) (service of a single document entitled "Appeal Bond" did not comply with the statutory written notice requirement in order to perfect the appeal of the county's disallowance of a claim for retirement benefits). Note that a claim cannot be denied unless the county attorney sent written notice by certified mail to the claimant of the date the governing body would consider the claim. Va. Code § 15.2-1245. Failure to appeal a claim made pursuant to Va. Code § 15.2-1246, however, does not bar an inverse condemnation action. *Hartwell v. Cnty. of Fairfax*, 83 Va. Cir. 105 (Fairfax Cnty. 2011).

See Kirkpatrick v. Cnty. of Prince William, 384 S.E.2d 800, 6 Va. Law Rep. 673 (1989). In an unusual published order, the Virginia Supreme Court stated that Va. Code § 15.2-1246 was satisfied when a written notice of appeal was served on the Clerk of the Board and bond was executed within thirty days of service of the notice of the disallowance. Therefore, it was error to dismiss because the motion for judgment was filed more than thirty days after the notice of disallowance.

20-3.02(c) Statutory Immunities Available to Counties

In addition to their common law immunity, counties may also take advantage of the statutory immunities provided by Va. Code §§ 15.2-1809 (recreational facilities) and 15.2-970 (water control facilities). *See section 20-2.05(b).*

20-4 IMMUNITY OF LOCAL AUTHORITIES

20-4.01 In General

After years of judicial confusion regarding whether an authority assumes the level of sovereign immunity of the entity that created it, i.e., the city or county, or if it only has immunity equivalent to that of a municipal corporation regardless of the entity that created it,⁴ the Virginia Supreme Court definitively stated in *Jean Moreau & Associates v. Health Center Commission*, 283 Va. 128, 720 S.E.2d 105 (2012), that authorities do not automatically enjoy the immunity of the creating entity. Rather, first it must be determined if the authority is an arm or agency of the Commonwealth. See, e.g., *Prendergast v. Northern Va. Reg'l Park Auth.*, 227 Va. 190, 313 S.E.2d 399 (1984) (holding regional park authority, not created directly by state enacting statute but at the discretion of a locality, was not an arm of the Commonwealth). If it is not an arm of the Commonwealth, the attributes of the particular entity must be examined to determine whether it is a municipal corporation. If the entity is deemed to be a municipal corporation, it will enjoy immunity regarding its performance of governmental functions. Therefore, the discussion of the distinction between governmental and proprietary functions for cities and towns is applicable to authorities. See section 20-2.01; see also 2012 Op. Va. Att'y Gen. 96 (sanitation commission is municipal corporation entitled to sovereign immunity).

20-4.02 The Fundamental Characteristics of a Municipal Corporation

If the authority in question is not an arm of the Commonwealth, it is necessary to evaluate its broader attributes to determine whether it is a municipal corporation. In *Fines v. Rappahannock Area Community Services Board*, 301 Va. 305, 876 S.E.2d 917 (2022), the Virginia Supreme Court reviewed a circuit court decision that a multi-jurisdictional community services board was a municipal corporation entitled to sovereign immunity. The Rappahannock Area Community Services Board (RACSB) provides services related to mental health and substance abuse for the City of Fredericksburg and Counties of Caroline, King George, Spotsylvania, and Stafford. A former client brought tort claims against RACSB and a therapist previously employed there. The circuit court granted RACSB's plea in bar claiming sovereign immunity as a municipal corporation performing a governmental function.

On appeal, the Supreme Court reversed, finding RACSB did not possess the "fundamental characteristics" of a municipal corporation. Applying the two-part test enunciated in *Hampton Roads Sanitation District Commission v. Smith*, 193 Va. 371, 68 S.E.2d 497 (1952), the Court first considered the extent to which RACSB possessed attributes of a municipal corporation. In particular, courts must consider six factors: whether the relevant authority (1) was created as a "body corporate and politic" as a political subdivision of the Commonwealth; (2) was created to serve a public purpose; (3) has the power to have a common seal, to sue and be sued, to enter into contracts, and to acquire, hold, and dispose of its revenues and property; (4) enjoys the power of eminent domain; (5) may borrow money and issue tax-exempt bonds; and (6) is managed by a board of directors or a commission. *Id.* In evaluating these attributes, courts should look at the statutory language of the enabling legislation and "not the actions actually taken by the entity." *Id.* If an entity possesses "enough" of these attributes, it will be deemed a municipal corporation—though the threshold of "enough" is remarkably imprecise. The Court advised only that the more of these attributes the entity possesses and, in particular, the more statutory autonomy it enjoys, the more likely it is to be deemed a municipal corporation. In the case of RACSB, the authority fully or partially demonstrated four of the six attributes.

⁴ See, for example, *Holland v. Nelson County Service Authority*, 68 Va. Cir. 99 (Nelson Cnty. 2005), in which the court held that a county service authority was entitled to the same sovereign immunity granted to counties because it performs a function of county government. The court alternatively concluded that if the authority was only entitled to municipal sovereign immunity, establishing and operating a well and water system was a governmental, not a proprietary, function.

For example, RACSB can enter into contracts, borrow money, purchase real estate, issue bonds, sue and be sued; it does not pay federal or state taxes, participates in the state's retirement system, and is subject to the Freedom of Information Act. Nevertheless, the Court found that overall, the community services board "looks less like a municipal corporation and more like an auxiliary of the establishing localities." *Id.*

The Court then turned to the second step of the two-part test: "the particular purpose for determining whether a municipal corporation is present." *Id.* (quoting *Virginia Elec. & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 225 S.E.2d 364 (1976)). In this inquiry, a court must look to the underlying issue or "pivotal point" in the case and whether it is a matter of procedure or of substantive law. If the case turns on a procedural matter, the relevant authority is more likely to be deemed a municipal corporation. For example, in *Fines*, the pivotal point was whether RACSB is immune from tort liability. In a matter of first impression for the Virginia Supreme Court, it held—consistent with most federal courts that have considered the issue—that immunity from tort liability is a matter of substantive state law. Therefore, the Court concluded that because RACSB lacked sufficient attributes of a municipal corporation, and the pivotal point of the case involved a matter of substantive law, the community services board was not a municipal corporation. Having determined that RACSB was not a municipal corporation, the Court noted it "need not consider whether [RACSB] performs a governmental or proprietary function." *Id.*

The *Fines* case, while not representing new legal precedent, serves as a reminder that community services boards, districts, commissions, and other locality-created entities do not necessarily enjoy the same immunity as the creating locality, and their immunity is not necessarily determined by the governmental or proprietary nature of their functions.

20-5 IMMUNITY OF SCHOOL BOARDS

20-5.01 School Boards Generally Enjoy Immunity from Liability for Tort Claims

The seminal case involving school board immunity is *Kellam v. School Board of City of Norfolk*, 202 Va. 252, 117 S.E.2d 96 (1960). The plaintiff in *Kellam* had fallen in a high school auditorium that had been leased to a private promoter for a concert. The Court held that the Board was not liable because in leasing the auditorium the Board was performing its educational function. The *Kellam* court indicated that the test is whether the activity in question tends to promote the cause of public education and noted that the test will be applied liberally. *Id.*; see also *Graham v. City of Manassas Sch. Bd.*, 390 F. Supp. 3d 702 (E.D. Va. 2019) (school board immune from claims of gross negligence, battery, assault, and intentional infliction of emotional distress related to school employee's abuse of minor students); *Doe v. Russell Cnty. Sch. Bd.*, No. 1:16cv45 (W.D. Va. April 13, 2017) (custodial services at a school are governmental function); *Simpson v. Thorsen*, 84 Va. Cir. 252 (City of Suffolk 2012) (maintenance of school facilities is a governmental function and thus no negligence claim for allowing toxic mold); *Alexandria City Sch. Bd. v. Fox-Seko Constr., Inc.*, 74 Va. Cir. 92 (City of Alexandria 2007) (construction contractor's claim of fraud in inducement barred by sovereign immunity); *Croghan v. Fairfax Cnty. School Bd.*, 59 Va. Cir. 120 (Fairfax Cnty. 2002) (absolute immunity for gross and simple negligence); *Carr v. Salem City Schs.*, 48 Va. Cir. 84 (City of Salem 1999) (sovereign immunity for school board); *Mattox v. Campbell Cnty. Sch. Bd.*, 37 Va. Cir. 221 (Campbell Cnty. 1995) (school boards are entitled to sovereign immunity for acts of both simple and gross negligence); 2008 Op. Va. Att'y Gen. 118 (employment of janitors is a governmental function and a school board is immune from injury to third party resulting from janitor's negligence). Note, however, that teachers do not enjoy official immunity for willful conduct and gross negligence. *Hill v. Laury*, No. 3:06cv79 (E.D. Va. Aug. 15, 2006).

The "nuisance" exception to sovereign immunity does not apply to school boards. *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990); *Kellam, supra*; *Hunt v. Sch. Bd. of City of Norfolk*, No. CL90-3617 (City of Norfolk Cir. Ct. Apr. 17, 1991).

For a discussion of school board immunity, see 2007 Op. Va. Att’y. Gen. 95.

20-5.02 Statutory Exceptions to School Board Immunity

By statute, school boards may be sued for claims arising out of school bus accidents. Liability extends to the greater of available insurance or statutory minimum insurance. Va. Code § 22.1-194. The statutory minimum, however, is not available to participants in a self-insurance pool unless they individually obtain a certificate of self-insurance from the Commissioner of the Department of Motor Vehicles, as required by Va. Code § 22.1-290(D). The provision under the general self-insurance pool statute that a certificate is not required for pool participants, Va. Code § 15.2-2704, does not prevail over the specific requirement of § 22.1-290(D). *Frederick Cnty. Sch. Bd. v. Hannah*, 267 Va. 231, 590 S.E.2d 567 (2004) (also holding Va. Code § 22.1-194 applies to self-insurance pool protection and the pool’s insurance proceeds are not “school funds”); see *Quarles v. Sch. Bd. of Henrico Cnty.*, No. CL06-102 (Henrico Cnty. Cir. Ct. Nov. 7, 2006) (holding school bus liability limited to statutory \$50,000 self-insurance limit).

In *Newman v. Erie Insurance Exchange*, 256 Va. 501, 507 S.E.2d 348 (1998), the Virginia Supreme Court overruled in part *Stern v. Cincinnati Insurance Co.*, 252 Va. 307, 477 S.E.2d 517 (1996), and held that a student who approached a stopped school bus with its gate down and flashing lights was “using” the bus for purposes of a school board’s uninsured motorist insurance coverage. The Court followed *Stern*, however, in holding that the child was not “getting on” the bus. See also *Roach v. Botetourt Cnty. Sch. Bd.*, 757 F. Supp. 2d 591 (W.D. Va. 2010) (a school bus is “involved in an accident” if a student is approaching or leaving a school bus); *Wagoner v. Benson*, 256 Va. 260, 505 S.E.2d 188 (1998) (distinguishing *Stern* and holding in a factually similar situation that insurance was applicable, and sovereign immunity was waived pursuant to Va. Code § 22.1-194, when an insurance policy covered the “loading” of a school bus).

Whether the waiver of sovereign immunity under Va. Code § 22.1-194 applies to a non-collision accident that occurred during a bus evacuation drill depends on whether collectible insurance exists for the injury. *Wharton v. Albemarle Cnty. Sch. Bd.*, 47 Va. Cir. 169 (Albemarle Cnty. 1998).

Virginia Code § 22.1-194 is a complete waiver of sovereign immunity up to the limits of insurance coverage; a plaintiff is not required to show that the servant (bus driver) was grossly negligent before the master (school board) can be liable under Va. Code § 22.1-194. *Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001); see also *Carmichael v. Newport News Sch. Bd.*, 44 Va. Cir. 43 (City of Newport News 1997). Virginia Code § 22.1-194 does not abrogate official immunity (referred to by the Supreme Court as “sovereign immunity”) that might be available to the driver under the *Messina-James* test discussed in section [20-7.02\(c\)](#).

20-6 EXCEPTIONS TO SOVEREIGN IMMUNITY

20-6.01 Public Nuisance

Municipal corporations do not have sovereign immunity against claims of public nuisance. A public nuisance is a condition that is a danger to the public. *Taylor v. City of Charlottesville*, 240 Va. 367, 397 S.E.2d 832 (1990) (citing *White v. Town of Culpeper*, 172 Va. 630, 1 S.E.2d 269 (1939)). In *Taylor*, the city constructed a short street to serve an apartment complex. At the terminus of the street, no guardrails or warning signs were constructed, although there existed a steep precipice and a stream thirty-seven feet beyond the pavement. The City had received complaints about dangerous conditions at the end of the street. Under these circumstances, the Court held that the city had no governmental immunity from a nuisance theory claim when a death resulted after a car plunged into the stream on a dark, rainy night. See also *Maddox v. Commonwealth*, 267 Va. 657, 594 S.E.2d

567 (2004) (distinguishing claims of nuisance against a state from those against a municipality).

A city, however, cannot be liable for a nuisance if the activity complained of is lawfully authorized and not constructed or maintained in a negligent manner. Thus, when a city, acting within its authority, constructed jetties, and its construction and maintenance were without negligence, the city had no liability when jetties caused deposit of sand under a fishing pier. *City of Va. Beach v. Va. Beach Steel Fishing Pier, Inc.*, 212 Va. 425, 184 S.E.2d 749 (1971). In *City of Newport News v. Hertzler*, 216 Va. 587, 221 S.E.2d 146 (1976), it was held that the city was authorized to establish a park and operated it without negligence, notwithstanding complaints of neighbors as to noise, trash, traffic, dust, etc. Therefore, applying the rule established by *Steel Fishing Pier*, the Court declined to find that the city was maintaining a nuisance.

In *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996), the Virginia Supreme Court held that plaintiff's reliance on negligent acts does not defeat a claim of nuisance. To be a public nuisance, the nuisance must either be unauthorized by law or created or maintained negligently. See also *Stevens v. Hosp. Auth. of Petersburg*, 42 Va. Cir. 321 (City of Richmond 1997) (hospital authority not entitled to sovereign immunity for creating a public nuisance). In *Breeding v. Hensley*, 258 Va. 207, 519 S.E.2d 369 (1999), the Court held that an allegation of negligent placement by a town employee of an unauthorized obstruction that unnecessarily impeded lawful use of public streets stated a claim of public nuisance so as to survive demurrer. On the merits, the trial court was to consider the size and extent of the obstruction and the issue of permanency.

Whether facts of a particular case amount to a public nuisance is a question of fact for a jury. *Robinson v. City of Richmond*, 16 Va. Cir. 263 (City of Richmond 1989).

Unlike cities and towns, school boards do have governmental immunity as to public nuisances because they are agents or instrumentalities of the State and partake of the State's sovereignty as to tort liability. *Taylor v. City of Newport News*, 214 Va. 9, 197 S.E.2d 209 (1973) (discussing *Kellam v. Sch. Bd. of City of Norfolk*, 202 Va. 252, 117 S.E.2d 96 (1960)); *Hunt v. Sch. Bd. of City of Norfolk*, No. CL90-3617 (City of Norfolk Cir. Ct. Apr. 17, 1991). Counties, as arms of the Commonwealth, may possess immunity to public nuisances on the same basis.

20-6.02 Contractual Claims

The doctrine of sovereign immunity has never been extended to the defense of actions based upon valid contracts entered into by duly authorized agents of government. *Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 391 S.E.2d 258 (1990). An ultra vires contract, however, is void ab initio and creates no liability. *King George Cnty. Serv. Auth. v. Presidential Serv. Co. Tier II*, 267 Va. 448, 593 S.E.2d 241 (2004); *York Cnty. v. King's Villa Inc.*, 226 Va. 447, 309 S.E.2d 332 (1983).

An inverse condemnation claim is a contract action and therefore not barred by the doctrine of sovereign immunity. *AGCS Marine Ins. Co. v. Arlington Cnty.*, 293 Va. 469, 800 S.E.2d 159 (2017); *Bell Atl.-Va., Inc. v. Arlington Cnty.*, 254 Va. 60, 486 S.E.2d 297 (1997); see also *Nelson Cnty. v. Coleman*, 126 Va. 275, 101 S.E. 413 (1919) (where a county commits a tort that involves an injury to private property, the plaintiff may waive the tort and sue upon an implied contract to pay for the property that has been wrongfully taken, damaged, or converted to the county's use). In *Jenkins v. County of Shenandoah*, 246 Va. 467, 436 S.E.2d 607 (1993), the Virginia Supreme Court held that the alleged failure to maintain a county drainage easement, resulting in damage to property, was an action in contract and thus the county was not entitled to sovereign immunity. See also *Livingston v. Va. Dep't of Transp.*, 284 Va. 140, 726 S.E.2d 264 (2012) (a single event of flooding can support an inverse condemnation claim); *Kitchen v. City of Newport News*, 275 Va. 378,

657 S.E.2d 132 (2008) (allegation of repeated flooding states claim for inverse condemnation); *Waltman v. King William Cnty. Sch. Bd.*, 81 Va. Cir. 381 (King William Cnty. 2010) (sovereign immunity does not bar injunctive relief for repeated flooding from storm drainage pond); *Holland v. Nelson Cnty. Serv. Auth.*, 68 Va. Cir. 99 (Nelson Cnty. 2005) (no sovereign immunity for an inverse condemnation claim). It should be noted, however, that Article I, Section 11 of the Constitution of Virginia does not waive sovereign immunity 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. Va. Elec. & Power Co.*, 284 Va. 501, 731 S.E.2d 916 (2012). There must be a “taking of property or damaging of the property or a *property right*.” *Id.* (inverse condemnation action alleging diminution in value of property from electric transmission lines on abutting property).

On the other hand, quasi-contractual actions such as unjust enrichment, quantum meruit, and implied contract are premised on the absence of a valid contract and thus counties are protected from such actions by the doctrine of sovereign immunity. *MCI Constructors v. Spotsylvania Cnty.*, 60 Va. Cir. 290 (Spotsylvania Cnty. 2002) (quasi-contractual quantum meruit claim is barred by a county’s sovereign immunity); see also *Jean Moreau & Assocs. v. Health Ctr. Comm’n*, 283 Va. 128, 720 S.E.2d 105 (2012) (county protected by sovereign immunity for quasi-contractual claim such as quantum meruit; municipal corporation immune if performing a governmental function). In addition, in the absence of a statutory or contractual waiver, the Commonwealth and its agencies have sovereign immunity from liability for pre-judgment interest on contract claims. *Commonwealth v. AMEC Civil, LLC*, 280 Va. 396, 699 S.E.2d 499 (2010).

20-6.03 Torts Occurring Outside of the Commonwealth

When a Virginia local government is guilty of tortious conduct outside the boundaries of the Commonwealth, federal courts or courts of other states will generally apply the immunity law of the state where the wrong occurred. In *Biscoe v. Arlington County*, 738 F.2d 1352 (D.C. Cir. 1984), a tort action was filed against Arlington County after a high-speed chase conducted by county police officers resulted in injuries to an innocent bystander in the District of Columbia. The county’s effort to defend on the basis of sovereign immunity was rejected by the Fourth Circuit, which held that the Full Faith and Credit Clause does not require courts outside of the Commonwealth to apply the state’s immunity law. See also *Skipper v. Prince George’s Cnty.*, 637 F. Supp. 638 (D. D.C. 1986); *Bays v. Jenks*, 573 F. Supp. 306 (W.D. Va. 1983).

20-6.04 Intentional Torts and Gross Negligence of Employees

A municipality does not lose its sovereign immunity merely because its employee commits an intentional tort during the performance of a governmental function. *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002); see also *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999) (interpreting Virginia law); *Boone v. City of Norfolk*, 54 Va. Cir. 166 (City of Norfolk 2000); *Coward v. City of Richmond*, 40 Va. Cir. 333 (City of Richmond 1996); *Gordon v. City of Winchester*, 38 Va. Cir. 274 (Warren Cnty. 1995) (even though police officer may be grossly negligent and therefore unprotected by official immunity, city and police department cannot be vicariously liable for his gross negligence).⁵

20-6.05 Constitutional Violations

A municipality may be liable, under 42 U.S.C. § 1983, for the constitutional violations of its officers and employees if the violative acts are a manifestation of official policy or custom. Policy or custom may be demonstrated through: an express policy; the decisions of a person with final policymaking authority; an omission, such as the failure to train employees, that demonstrates a deliberate indifference to the rights of citizens; or through

⁵ Maritime law presents a different rule; a municipality may be held vicariously liable for the maritime torts of its employee. See, e.g., *Glover v. Hryniewich*, 438 F. Supp. 3d 625 (E.D. Va. 2020).

a practice that is so “persistent and widespread” that it effectively constitutes a custom with the force of law. *Carter v. Morris*, 164 F.3d 215 (4th Cir. 1999). See [Chapter 19, 42 U.S.C. § 1983](#), for a fuller discussion of municipal liability under § 1983.

20-7 OFFICIAL IMMUNITY OF OFFICERS AND EMPLOYEES

20-7.01 Background

As used in this chapter, the term “official immunity” refers to the immunity from personal liability enjoyed, in certain circumstances, by some officers and employees of local governments or school boards. This immunity has, on occasion, been referred to by the Supreme Court as “sovereign immunity” or “public servant immunity.” The doctrine is “complex” but “alive and well” in the Commonwealth. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984). In order to fulfill the purpose of sovereign immunity, the doctrine must be extended to some of the people who help run the government. *Id.*⁶

20-7.02 Eligibility for Immunity

20-7.02(a) Position of Employment

20-7.02(a)(1) At Common Law

Persons who occupy the highest levels of the three branches of government, such as governors, judges, members of state and local legislative bodies, and other high-level government officials, have generally been accorded absolute immunity. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984) (citing Prosser, *Handbook of the Law of Torts* § 132 (4th ed. 1971)); see *Doyle v. Hogan*, 1 F.4th 249 (4th Cir. 2021) (Maryland Governor and Attorney General immune from suit regarding enforcement of state’s Youth Mental Health Protection Act). Members of local governing bodies have no personal liability for their legislative acts. 4 McQuillin on Municipal Corporations, *Elections, Officers and Employees* § 12.222. In *Schaecher v. Bouffault*, 88 Va. Cir. 234 (Clarke Cnty. 2014), *aff’d on other grounds*, 290 Va. 83, 772 S.E.2d 589 (2015), a circuit court held that a planning commissioner was entitled to legislative immunity. As to statutory immunity for members of local governing bodies, see Va. Code § 15.2-1405, discussed at section [20-7.02\(f\)\(16\)](#).

A city mayor was held to be immune from liability for a claim arising out of his ordering the arrest and imprisonment of the plaintiff. The court found this act to be a judicial function of the mayor’s office. *Johnston v. Moorman*, 80 Va. 131 (1885). In *Yacht Sales International v. City of Virginia Beach*, 977 F. Supp. 408 (E.D. Va. 1997), a city manager was held entitled to official immunity.

Quasi-judicial immunity shielded from liability Department of Corrections personnel who were responsible for having released juvenile defendants from a corrections facility. *Harlow v. Clatterbuck*, 230 Va. 490, 339 S.E.2d 181 (1986). Building inspectors, however, are more akin to police officers enforcing laws, rules, and regulations and are not entitled to the absolute immunity afforded by quasi-judicial immunity. *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003). A circuit court clerk is not entitled to quasi-judicial immunity merely because of his position, although if the action at issue was the product of discretion or was in accordance with a judicial order, quasi-judicial immunity might be available. *Harbeck v. Smith*, 814 F. Supp. 2d 608 (E.D. Va. 2011); *cf. Dowdy v. Commonwealth*, No. 7:11cv492 (W.D. Va. Oct. 25, 2011) (court clerks entitled to quasi-judicial immunity for administrative duties).

A Commonwealth’s Attorney was not entitled to quasi-judicial immunity from a state law defamation claim because his allegedly defamatory statements were without “any

⁶ Although beyond the scope of this chapter, local government officers are generally not vicariously liable for the tortious act of their subordinates. *Sawyer v. Corse*, 58 Va. (17 Gratt) 230 (1867); *Pigott v. Ostulano*, 74 Va. Cir. 228 (City of Norfolk 2007). But see *First Virginia Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983), as to ministerial acts of deputies of constitutional officers.

plausible connection to a tenable pending or forthcoming criminal prosecution.” *Viers v. Baker*, 298 Va. 553, 841 S.E.2d 857 (2020) (reversing lower court, which had incorrectly applied federal immunity law to state-law claim).

Common law immunity can be waived by an explicit and unequivocal renunciation of the protection. *Bd. of Sup’rs of Fluvanna Cnty. v. Davenport & Co.*, 285 Va. 580, 742 S.E.2d 59 (2013) (board of supervisors waived common law legislative immunity by: (1) declining to assert legislative immunity, (2) voluntarily filing a complaint that, due to the board’s burden of proof, involved issues protected by legislative immunity, and (3) making an unequivocal waiver of protection from inquiry into legislative motivation in the text of its complaint).

20-7.02(a)(2) By Statute

See section [20-7.02\(f\)](#) for a compilation of the Virginia statutes extending official immunity.

20-7.02(a)(3) Independent Contractors

Independent contractors are not entitled to the protection of sovereign immunity. *Atkinson v. Sachno*, 261 Va. 278, 541 S.E.2d 902 (2001); *Andrews v. LogistiCare Solutions LLC*, 78 Va. Cir. 45 (Fairfax Cnty. 2008). To determine whether a person is an independent contractor, the court should use the four-part test set forth in *Hadeed v. Medic-24, Ltd.*, 237 Va. 277, 377 S.E.2d 589 (1989), not the *James-Messina* factors discussed in section [20-7.02\(b\)](#). See *Ogunde v. Prison Health Servs., Inc.*, 274 Va. 55, 645 S.E.2d 520 (2007). But see *Consortium Sys., LLC v. Lane Eng’g, Inc.*, 95 Va. Cir. 73 (Scott Cnty. 2017) (citing *V.N. Green & Co. v. Thomas*, 205 Va. 903, 140 S.E.2d 635 (1965), and holding sovereign immunity extends to a construction contractor performing work for a sovereign entity).

20-7.02(b) Status of Employing Agency

In determining who is eligible for official immunity, the threshold inquiry, with the possible exception of persons in high governmental office (see section [20-7.02\(a\)\(1\)](#)), is whether the employing agency of the officer or employee is entitled to immunity. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984). County employees may be immune. *Id.* City employees have also been accorded this protection. *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991). School board employees are eligible for immunity. *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988).

20-7.02(c) James v. Jane Test

The Virginia Supreme Court has established a non-exclusive four-factor test for determining availability of official immunity. *Pike v. Hagaman*, 292 Va. 209, 787 S.E.2d 89 (2016); *Messina, supra*; *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980). The factors are as follows:

1. Nature of the function the employee performs: it must be a vitally important public function.
2. Extent of governmental entity’s interest and involvement in the function: the employing governmental entity must have official interest and direct involvement in the function.
3. Degree of control and direction exercised over the employee: the governmental entity must exercise control and direction over the employee. (How much control is unclear. In *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988), the Court stated a school board exercised control through school principal and also relied on the state constitution and state statute relating to supervision of schools).

4. Whether the alleged wrongful act involves exercise of judgment and discretion: the act must not be merely ministerial. *McBride v. Bennett*, 288 Va. 450, 764 S.E.2d 44 (2014) (operation of police vehicle when responding to call is discretionary although dispatch did not rate call an emergency); *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012) (decision by school principal to not investigate threat of a fight was discretionary act); see also *Reid v. Hammer*, 62 Va. Cir. 251 (City of Richmond 2003) (immunity applies to accident occurring after emergency call canceled because officer unaware of cancellation). Compare *Nationwide Mut. Ins. Co. v. Hylton*, 260 Va. 56, 530 S.E.2d 421 (2000) (rear end collision in anticipation of traffic stop), and *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991) (police officer engaged in high-speed pursuit was exercising discretion), with *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991) (no judgment or discretion required for routine operation of sheriff's vehicle).

The defendants in *James* were three physicians who were also full-time faculty members at the University of Virginia Medical School. Applying the four-factor test first enunciated in *James*, the Court found that the state's interest and involvement in the treatment of specific patients was slight and that the state exercised slight control over the physicians in their treatment of patients. Therefore, official immunity was denied.

Applying the *James-Messina* four-factor test, the Virginia Supreme Court held in *Lee v. Bourgeois*, 252 Va. 328, 477 S.E.2d 495 (1996), that the function of an attending physician in a state teaching hospital was primarily related to patient care and involved professional judgment and that the state's interest and degree of involvement were slight; therefore, the attending physician was not entitled to official immunity.

In *Lohr v. Larsen*, 246 Va. 81, 431 S.E.2d 642 (1993), the Virginia Supreme Court held that a state-employed public health physician was entitled to official immunity for his alleged negligent acts. Under the *James* test, the Court found that the public health physician's functions were closely tied to the government's interest in providing quality health care to the poor and that the state exercised control over the doctor's equipment, procedures, medicine dispensed, and patients seen. See also *Benjamin v. Univ. Internal Med. Found.*, 254 Va. 400, 492 S.E.2d 651 (1997) (medical doctor employed by state facility in administrative role entitled to sovereign immunity). In *Pike v. Hagaman*, 292 Va. 209, 787 S.E.2d 89 (2016), the Supreme Court held that a nurse was protected by sovereign immunity even though her alleged negligence involved routine patient care because the patient's operation was rare and VCU was the only hospital in the state with the ability to undertake it. As a state statute provides that an essential governmental function for VCU is to provide "specialized health services not widely available in the Commonwealth," the first two factors of the *James-Messina* test were met. Clearly, some fine line-drawing has occurred between the physicians in *James* and *Lee* on the one hand and the medical personnel in *Hagaman*, *Lohr*, and *Benjamin* on the other hand.

In *Whitley v. Commonwealth*, 260 Va. 482, 538 S.E.2d 296 (2000), the Court found that provision of health care to an inmate, in conjunction with physicians' orders that required the nurses to administer, monitor, and assess the effects of medication prescribed for treatment of a serious medical condition, was discretionary in nature and required the exercise of judgment. Thus, the nurses were entitled to immunity. Compare *Hughes v. Lake Taylor Hosp.*, 54 Va. Cir. 239 (City of Norfolk 2000) (registered nurses and respiratory therapist in nursing home not entitled to immunity), *Gray v. Commonwealth*, 40 Va. Cir. 419 (City of Richmond 1996) (state nurses who misinjected medication not entitled to official immunity), and *McCandlish v. Kron*, 38 Va. Cir. 302 (Albemarle Cnty. 1996) (pediatric intensive care nurses at state hospital not entitled to official immunity for acts of negligence consisting solely of errors in providing basic patient care), with *Rogers v.*

Commonwealth, 38 Va. Cir. 217 (Albemarle Cnty. 1995) (official immunity granted to nurses in a specialized cardiac care unit who assisted physicians in cultivating their specialized training and exercised considerable judgment and discretion). See *Stevens v. Hosp. Auth. of Petersburg*, 45 Va. Cir. 162 (City of Richmond 1998) (hospital housekeeping, security employees, administrator, and nurses entitled to official immunity at a non-teaching hospital). Although these cases are difficult to distinguish, a circuit court has tried to draw a line by stating that sovereign immunity is usually denied in instances where the primary function of the defendant is individual patient care. *White v. Belgrave*, 87 Va. Cir. 303 (City of Charlottesville 2013). *Hagaman*, while not negating that distinction, has added another layer of complexity by factoring in the rarity and complexity of the patient's medical condition.

The last prong of the four-factor test has been particularly difficult to apply when a government employee is operating a vehicle that is involved in an accident. The Court has stated that sovereign immunity applies in such situations when driving requires a degree of judgment and discretion that embraces "special risks" in order to effectuate the governmental purpose. It does not apply to situations that involve ordinary driving in routine traffic. *McBride v. Bennett*, 288 Va. 450, 764 S.E.2d 44 (2014).

Sovereign immunity was thus granted when a government employee was engaged in a vehicular pursuit, *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991), responding to a car fire, *National Railroad Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216 (1991), responding to an accident even though not dispatched thereto, *Smith v. Settle*, 254 Va. 348, 492 S.E.2d 427 (1997), driving children on a school bus, *Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001), and spreading salt during a snowstorm, *Stanfield v. Peregoy*, 245 Va. 339, 429 S.E.2d 11 (1993) (noting immunity might not have applied if the accident had occurred while the driver was coming to or from the area to which he was assigned).

Sovereign immunity was not granted when an accident occurred when a deputy was serving judicial process, *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991), the school bus was empty of children, *Wynn v. Gandy*, 170 Va. 590, 197 S.E. 527 (1938), and a fire truck was responding to a non-emergency public service call, *Friday-Spivey v. Collier*, 268 Va. 384, 601 S.E.2d 591 (2004).

The difficulty in line-drawing is exemplified by the *Friday-Spivey* decision and the Court's decision in *McBride v. Bennett*, 288 Va. 450, 764 S.E.2d 44 (2014). In both cases, the first responder was dispatched to a call pursuant to a policy that required them to operate without lights or sirens and obey all traffic laws. The *Friday-Spivey* dispatch was for an infant in a locked car; the *McBride* for a domestic disturbance. In both, the responders broke a traffic law (failure to yield and speeding, respectively) that resulted in injuries to third parties. However, the responders in *Friday-Spivey* were not afforded sovereign immunity, while the ones in *McBride* were. The Court's majority did not extensively distinguish *Friday-Spivey*, but the different result may have been based on the testimony of the drivers: *Friday-Spivey's* stated he knew there was "no danger" while *McBride's* stated they thought an emergency response was warranted. Such distinctions prompted the *McBride* concurrence to state that "to the extent that *Friday-Spivey* suggests that the application of sovereign immunity turns on such subjective assessments or internal policies and operating procedures, it should be overruled."

In *Anders v. Kidd*, No. 131891 (Va. Oct. 31, 2014) (unpubl.), when the accident occurred, the ambulance driver was admittedly driving in a non-emergency manner in transporting a person with known mental health issues who was complaining of shortness of breath. But because the Court found that the driver was mindful that the patient's condition could deteriorate and thus had to exercise discretion regarding if and when to

change the method of transport from non-emergency to emergency, sovereign immunity was granted.

In *Clemens v. Pleasants*, 86 Va. Cir. 398 (City of Charlottesville 2013), the court stated that what makes a task discretionary for immunity analysis is the degree to which the exercise of discretion is tied to the other three factors identified in *James*, i.e., how actively engaged in the governmental function the official was at the time of the tort. See also *Baker v. Miller*, 74 Va. Cir. 98 (Fauquier Cnty. 2007), applying *James v. Jane* test and declining to extend immunity to a game warden involved in routine patrol and not in pursuit of a violator or engaged in any emergency action.

In *Tsapel v. Anderegg*, 51 Va. Cir. 139 (City of Richmond 1999), the court held that a social worker was entitled to official immunity on the basis of the exercise of discretion in determining whether to request a temporary detention order. See also 2002 Op. Va. Att’y Gen. 278 (probation officers supervising community service by probationers entitled to official immunity for discretionary acts).

20-7.02(d) Factors That May Eradicate Official Immunity

20-7.02(d)(1) Performance of a Ministerial Duty

In the performance of ministerial acts or those not involving the exercise of judgment and discretion, there is no immunity. *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991); *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 301 S.E.2d 8 (1983) (circuit court clerk indexing land records has no immunity); *Hoggard v. City of Richmond*, 172 Va. 145, 200 S.E. 610 (1939). A ministerial act is “one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done.” *Dovel v. Bertram*, 184 Va. 19, 34 S.E.2d 369 (1945).

Reporting of suspected abuse as mandated by statute is not a ministerial act. *Niese v. City of Alexandria*, 264 Va. 230, 564 S.E.2d 127 (2002). A circuit court held that a sheriff’s dispatcher does not have a ministerial duty to send a deputy to the scene upon notification of a threat of physical harm. *Jackson v. Bateman*, No. CL94-3172 (Louisa Cnty. Cir. Ct. Nov. 13, 1995); see also *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012) (decision by school principal to not investigate threat of a fight was discretionary act). A federal court held that the provision of food, water, and sanitary conditions at a regional jail is a ministerial act. *Adams v. NaphCare, Inc.*, 243 F. Supp. 3d 707 (E.D. Va. 2017).

20-7.02(d)(2) Bad Faith or Malice

Immunity is not available when an officer or employee acts in bad faith. *Harlow v. Clatterbuck*, 230 Va. 490, 339 S.E.2d 181 (1986). In a slander action, police officer’s qualified privilege was lost by clear and convincing evidence of malice. *Schnupp v. Smith*, 249 Va. 353, 457 S.E.2d 42 (1995). In *Tomlin v. McKenzie*, 251 Va. 478, 468 S.E.2d 882 (1996), the Virginia Supreme Court held that an allegation of bad faith or malicious intent defeated reliance on statutory immunity for child abuse investigations (Va. Code § 63.2-1512) at the plea in bar stage when no evidence was taken.

20-7.02(d)(3) Intentional Misconduct

If intentional torts are committed, immunity will be denied, irrespective of whether committed within or without the scope of employment. *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987). In *Koffman v. Garnett*, 265 Va. 12, 574 S.E.2d 258 (2003), the Supreme Court held that the alleged nature of a football coach’s tackle of a student player stated a cause of action for intentional battery, and thus official immunity did not require dismissal of the action. In *Tomlin v. McKenzie*, 251 Va. 478, 468 S.E.2d 882 (1996), the Court held that an allegation of professional malpractice defeated reliance on statutory immunity for child abuse investigations under Va. Code § 63.2-1512 at the plea in bar stage when no evidence was taken. In *Balderson v. McNamara*, 49 Va. Cir. 254 (Westmoreland Cnty.

1999), the court held that social service employees were not entitled to official immunity when the alleged conduct was an intentional tort (defamation).

However, the Supreme Court stated in dicta in *Isle of Wight County v. Nogiec*, 281 Va. 140, 704 S.E.2d 83 (2011), that:

Just as in judicial proceedings, we think that absolute privilege in legislative proceedings serves the public interest. In particular, it encourages individuals who participate in such proceedings to speak freely on issues relating to “the operation of the government.” *Krueger v. Lewis*, 834 N.E.2d 457, 464 (Ill. Ct. App. 2005). That public interest, however, must be balanced against “the right of an individual to enjoy his reputation free from defamatory attacks.” *Id.* We therefore believe that application of the privilege should be limited to proceedings before a legislative body in which the public interest in free speech outweighs the potential harm to an individual’s reputation. In our view, this only occurs when the legislative body is acting in its legislative capacity—i.e., when it is creating legislation—rather than in its supervisory or administrative capacity.

The Court went on to hold that an assistant county administrator was entitled only to qualified immunity for statements made during a report to the board of supervisors, because the board was not acting in a legislative capacity at that time. The court then upheld the jury determination of defamation, finding that the plaintiff had met his burden of proving malice. See section 20-3.01 as to the effect on defamation claim of capacity in which board is acting. *Cf. Sola Verde v. Town of Front Royal*, 83 Va. Cir. 54 (Warren Cnty. 2011) (sovereign immunity granted to town in alleged defamation action as it was performing a governmental function when considering the use of solar power for the town; demurrer granted as to town council members because their “questions” could not constitute defamatory statements).

20-7.02(d)(3)(i) Virginia’s Good Faith Immunity Doctrine

Virginia courts have long recognized a limited doctrine of “good faith” immunity which allows an official to argue that he was acting in good faith in a situation of an emergency of high intensity. *Davidson v. Allam*, 143 Va. 367, 130 S.E. 245 (1925) (holding that courts will afford law enforcement officers acting in good faith the utmost protection and will recognize the fact that emergencies arise when officers are not expected to exercise the cool and deliberate judgment that courts and juries apply upon investigation in court). These cases generally involve a tort claim of assault and battery because of excessive use of force. See *Turner v. Mitchell*, No. 3:13cv486 (E.D. Va. Apr. 8, 2014) (declining to speak to the scope of the good faith immunity doctrine, but holding that an officer was not entitled to any immunity when he slammed a suspect’s head into concrete where the suspect was non-resisting, was unarmed, and was already fully secured).

20-7.02(d)(4) Gross Negligence

Official immunity is not available where the employee was guilty of gross negligence. *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310 (1990); *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988). Gross negligence is a difficult standard of proof to meet, however. *Frazier v. City of Norfolk*, 234 Va. 388, 362 S.E.2d 688 (1987). In *McLenagan v. Karnes*, 27 F.3d 1002 (4th Cir. 1994), the Fourth Circuit held that a city police officer was entitled to official immunity from liability under state law despite allegation of gross negligence because there was no “complete neglect of the safety of another.” In *Chapman v. City of Virginia Beach*, 252 Va. 186, 475 S.E.2d 798 (1996), the Court described gross negligence as the utter disregard of prudence amounting to complete neglect of the safety of another. The Court emphasized the importance of deliberate conduct. It also held that gross negligence can be proved from the combination of several acts of simple negligence. The Court thus reversed the trial court, which had held as a matter of law that gross negligence was not

proven, despite prior notice on three occasions that the boardwalk's gate was broken. See also *Doe v. Russell Cnty. Sch. Bd.*, No. 1:16cv45 (W.D. Va. April 13, 2017) (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).

The Court in *City of Lynchburg v. Brown*, 270 Va. 166, 613 S.E.2d 407 (2005), noted that *Chapman* involved a deliberate decision not to repair a known hazard, while *Brown* involved a situation where municipal employees committed acts of omission by failing to observe a hazard that was open and obvious. The latter conduct amounts to ordinary negligence and a failure to exercise reasonable care. See also *Ali v. City of Fairfax*, No. 1:14cv1143 (E.D. Va. Mar. 30, 2015) (failure of bus driver to ensure passenger had safely exited bus before pulling off could be gross negligence); *Hill v. Laury*, No. 3:06cv79 (E.D. Va. Aug. 15, 2006) (no official immunity for teacher because willful conduct and gross negligence alleged); *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012) (principal's failure to investigate threat of fight could be gross negligence); *Koffman v. Garnett*, 265 Va. 12, 574 S.E.2d 258 (2003) (nature of football coach's tackle of student player could constitute gross negligence); *Chiles v. Dunn*, No. CL-2009-7555 (Fairfax Cnty. Cir. Ct. Dec. 29, 2010) (failure of firefighters to rescue victim whose location in burning home was known could constitute gross negligence); *Colona v. Accomack Cnty. Sch. Bd.*, 52 Va. Cir. 421 (Accomack Cnty. 2000) (no official immunity for school board employees because gross negligence sufficiently alleged).

Determining the absence of gross negligence as a matter of law normally is not appropriate for a plea in bar asserting sovereign immunity. *Lemen v. Davis-Waters*, 106 Va. Cir. 445 (Culpeper Cnty. 2020) (denying demurrer because whether bus driver's conduct constituted gross negligence was a question for the jury); *Pridemore v. Hryniewicz*, 95 Va. Cir. 448 (City of Norfolk 2017). But see *Hutchinson v. Gunter*, 92 Va. Cir. 372 (City of Roanoke 2016).

20-7.02(d)(5) Acting Outside Scope of Employment

Acting outside the scope of employment eliminates official immunity. *Fox v. Deese*, 234 Va. 412, 362 S.E.2d 699 (1987); cf. *Hammons v. Clarke Cnty.*, 14 Va. Cir. 287 (Clarke Cnty. 1989). In the non-sovereign immunity context, the Virginia Supreme Court has greatly expanded the conduct that can be considered within the scope of employment. See *City of Alexandria v. J-W Enters., Inc.*, 279 Va. 711, 691 S.E.2d 769 (2010) (officer on "extra-duty" detail was acting in public capacity when shooting occurred); *Gina Chin & Assocs. v. First Union Bank*, 260 Va. 533, 537 S.E.2d 573 (2000) (forgery); *Majorana v. Crown Cent. Petroleum Corp.*, 260 Va. 521, 539 S.E.2d 426 (2000) (sexual assault potentially within scope of employment); *Plummer v. Ctr. Psychiatrists, Ltd.*, 252 Va. 233, 476 S.E.2d 172 (1996) (same); *Commercial Bus. Sys. v. BellSouth Servs. Inc.*, 249 Va. 39, 453 S.E.2d 261 (1995) (bribery); see also *Webb v. United States*, 24 F. Supp. 2d 608 (W.D. Va. 1998); *Brittingham v. United States*, 972 F. Supp. 1014 (E.D. Va. 1997) (extensive discussions of scope of employment under Virginia law); cf. *Tomlin v. McKenzie*, 251 Va. 478, 468 S.E.2d 882 (1996).

20-7.02(e) Officers and Employees to Whom Official Immunity Has Been Extended

The following classifications of individuals have been held to be protected from acts of simple negligence by the doctrine.

20-7.02(e)(1) Operations

- a. The superintendent of buildings of a community college. *Messina v. Burden*, 228 Va. 301, 321 S.E.2d 657 (1984).
- b. The chief of the operations division of the department of public works in Arlington County. *Id.*

- c. State Department of Highways resident engineer. *Bowers v. Commonwealth*, 225 Va. 245, 302 S.E.2d 511 (1983).
- d. A county buildings and grounds engineer. *Shelton v. Cooper*, 10 Va. Cir. 260 (Henrico Cnty. 1987).
- e. Superintendent of public expressway. *Hinchey v. Ogden*, 226 Va. 234, 307 S.E.2d 891 (1983).
- f. School Board janitors. 2007 Op. Va. Att’y. Gen. 95.

20-7.02(e)(2) Building Inspections

- a. Building inspectors are not entitled to the absolute immunity afforded by quasi-judicial immunity. *Andrews v. Ring*, 266 Va. 311, 585 S.E.2d 780 (2003) (claim of malicious prosecution). The Court implied, however, that a building inspector would be entitled to qualified immunity for actions taken in good faith and with probable cause. See also *Proffit v. Ring*, No. 1:01cv121 (W.D. Va. Jan. 28, 2002, June 2, 2003) (building inspector immune if he acted in good faith and with probable cause).
- b. City employee in administration and enforcement of building code. *Boyd v. Brown*, 12 Va. Cir. 54 (City of Newport News 1986).

20-7.02(e)(3) Education

- a. A school superintendent and a principal. *Doe v. Russell Cnty. Sch. Bd.*, No. 1:16cv45 (W.D. Va. April 13, 2017); *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012); *Banks v. Sellers*, 224 Va. 168, 294 S.E.2d 862 (1982); *K.I.D. v. Jones*, No. CL14-51 (Richmond Cnty. Cir. Ct. June 8, 2016); *Carr v. Sch. Bd. of Salem*, 48 Va. Cir. 84 (City of Salem 1999); *Young v. Young*, 22 Va. Cir. 46 (Fairfax Cnty. 1990).
- b. School teachers. *Lentz v. Morris*, 236 Va. 78, 372 S.E.2d 608 (1988).
- c. School board and teacher. *Summerell v. Wolfskill*, 34 Va. Cir. 518 (Southampton Cnty. 1994).
- d. School maintenance supervisor for simple negligence. *Mattox v. Campbell Cnty. Sch. Bd.*, 37 Va. Cir. 221 (Campbell Cnty. 1995).

20-7.02(e)(4) Medical

- a. Hospital administrators and a surgical intern at the University of Virginia Hospital. *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973), *overruled on other grounds*, *First Va. Bank-Colonial v. Baker*, 225 Va. 72, 201 S.E.2d 8 (1983).
- b. State-employed public health physician. *Lohr v. Larsen*, 246 Va. 81, 431 S.E.2d 642 (1993). Sovereign immunity does not extend, however, to an emergency medical care provider at a state mental hospital, because the Commonwealth’s involvement in the doctor’s functions was slight and its control limited. *McCloskey v. Kane*, 268 Va. 685, 604 S.E.2d 59 (2004).

- c. Medical doctor employed by state facility in administrative role. *Benjamin v. Univ. Internal Med. Found.*, 254 Va. 400, 492 S.E.2d 651 (1997).
- d. Nurses in a state hospital are entitled to immunity in the teaching function, but not as to patient care. *Marsh v. Med. Coll. of Va.*, 71 Va. Cir. 404 (City of Richmond 2006) (no immunity for negligence in counting sponges). See discussion at section [20-7.02\(c\)](#).
- e. An x-ray technician acting as a supervisor and teacher is entitled to immunity; however, the same person acting in capacity as a trained x-ray technician is not entitled to immunity. *Dowdy v. Pickral*, 79 Va. Cir. 315 (City of Charlottesville 2009). In a related case, an x-ray technician not trained in a certain procedure was accorded immunity because she had to exercise judgment and discretion in performing the procedure in which she had not been trained. *Dowdy v. Commonwealth*, 80 Va. Cir. 399 (City of Charlottesville 2010) (reconsideration denied); *Dowdy v. Commonwealth*, 79 Va. Cir. 311 (City of Charlottesville 2009).

20-7.02(e)(5) Public Safety

- a. City police officers. *Shaffer v. City of Hampton*, 780 F. Supp. 342 (E.D. Va. 1991) (city police); *McBride v. Bennett*, 288 Va. 450, 764 S.E.2d 44 (2014) (responding to domestic disturbance call); *Colby v. Boyden*, 241 Va. 125, 400 S.E.2d 184 (1991) (city police officer accorded immunity from simple negligence under *James-Messina* test when accident occurred during vehicular chase); *Meagher v. Johnson*, 239 Va. 380, 389 S.E.2d 310 (1990) (officer entitled to immunity when fleeing arrestee was struck by police cruiser; conduct did not rise to level of gross negligence); *Pridemore v. Hryniewich*, 95 Va. Cir. 448 (City of Norfolk 2017) (testing of marine police vessel involved discretionary acts; extensive discussion of four-factor test); *Cunningham v. Rossman*, 80 Va. Cir. 543 (City of Danville 2010) (transport of detainee discretionary act; sovereign immunity for vehicular accident); *Johnson v. Puckett*, 80 Va. Cir. 310 (City of Roanoke 2010) (actions responding to 911 call discretionary); *Reid v. Hammer*, 62 Va. Cir. 251 (City of Richmond 2003) (immunity applies to accident occurring after emergency call cancelled because officer unaware of cancellation); *LaPrade v. Hopkins*, 47 Va. Cir. 332 (City of Roanoke 1998) (city police officer involved in transporting arrestee). *But see Cromartie v. Billings*, 298 Va. 284, 837 S.E.2d 247 (2020) (no official immunity granted to police officer whose search was contrary to well-established law, violating constitutional rights).
- b. County police and sheriff's deputies. *Glasco v. Ballard*, 249 Va. 61, 452 S.E.2d 854 (1995) (deputy sheriff who shot shoplifting suspect was entitled to official immunity unless actions found to be grossly negligent); *see also Ray v. Roane*, 948 F.3d 222 (4th Cir. 2020) (county deputy sheriff not entitled to immunity for shooting and killing citizen's dog because pet did not pose immediate danger and use of force was not unavoidable); *Smith v. Daniel*, 47 Va. Cir. 541 (City of Richmond 1999) (deputy sheriff responding to fellow officer's request for assistance warrants immunity); *Shenk v. Spangler*, 46 Va. Cir. 277 (Rockingham Cnty. 1998) (State Police policy regarding high-speed chases is a discretionary function and immunity applies); *Donaldson v.*

Kunkle, Law No. 89-684 (Arlington Cnty. Cir. Ct. Aug. 16, 1989); *Robbins v. Wessel*, 12 Va. Cir. 231 (Chesterfield Cnty. 1988) (county police officer involved in chase immune from simple negligence); *Ferguson v. Foster*, 12 Va. Cir. 130 (Roanoke Cnty. 1988) (sheriff held immune for injuries caused to plaintiff by fellow inmates); 1997 Op. Va. Att’y Gen. 203. See *Heider v. Clemons*, 241 Va. 143, 400 S.E.2d 190 (1991), as to accidents occurring when law enforcement personnel are engaged in routine driving that does not involve sufficient judgment and discretion to afford immunity. See also *Rafter v. Miller*, 87 Va. Cir. 274 (City of Chesapeake 2013) (transporting inmates was not outside the realm of routine driving and no sovereign immunity applied); *Baker v. Miller*, 74 Va. Cir. 98 (Fauquier Cnty. 2007).

- c. Fire Departments. Members of volunteer firefighting company that had implied contract with county. *Nat’l R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216 (1991). In *Friday-Spivey v. Collier*, 268 Va. 384, 601 S.E.2d 591 (2004), the Supreme Court held that a county fire truck driver who was responding under a protocol that required him to obey all the rules of the road was not protected by sovereign immunity because his conduct did not involve the exercise of discretion and judgment. It found unavailing the argument that the specialized skills required to drive a fire truck inherently rendered the function other than ordinary driving in routine traffic circumstances. See also *Daddio v. Ashley*, 43 Va. Cir. 283 (Loudoun Cnty. 1997), in which a volunteer firefighter en route to the firehouse in response to an emergency call was not entitled to sovereign immunity because he failed the third and fourth prongs of the *James-Messina* test: fire company had no control over how he responded and fireman had no discretion to disobey the rules of the road. But see statute enacted subsequent to these decisions, Va. Code § 8.01-225.3, which provides statutory immunity for volunteer firefighters or emergency services personnel responding to an emergency with lights and sirens.
- d. Rescue squad driver in wreck driving transport entitled to immunity. *Anders v. Kidd*, No. 131891 (Va. Oct. 31, 2014) (unpubl.) (even during non-emergency transport, driver exercised discretion because driving manner based on constant evaluation of patient’s condition); *Strong v. Taylor*, No. CL04-10055 (Albemarle Cnty. Cir. Ct. May 10, 2006); *Leahy v. Am. Med. Response*, 49 Va. Cir. 349 (City of Richmond 1999) (paid driver); *Toms v. Greene Cnty. Rescue Squad*, 48 Va. Cir. 520 (City of Charlottesville 1999) (volunteer driver). See statute enacted subsequent to these decisions, Va. Code § 8.01-225.3, which provides statutory immunity for volunteer firefighters or emergency services personnel responding to an emergency with lights and sirens.
- e. Jail employees. *Dowdy v. Pamunkey Reg’l Jail Auth.*, No. 3:14cv3 (E.D. Va. May 15, 2014) (regional jail employees); *Harlow v. Clatterbuck*, 230 Va. 490, 339 S.E.2d 181 (1986) (Virginia Department of Corrections).
- f. Animal Control Officers. 2008 Op. Va. Att’y Gen. 10.

20-7.02(e)(6) Motor Vehicle Operations (Non-Public Safety Employees)

- a. City-employed snowplow operator. *Stanfield v. Peregoy*, 245 Va. 339, 429 S.E.2d 11 (1993). But no immunity for driver of city dump truck under ordinary driving conditions. *Howard v. Streater*, 71 Va. Cir. 61 (City of Richmond 2006).
- b. School bus drivers. School bus driver entitled to official immunity in transportation of children under the four-part *James-Messina* test. *Roach v. Botetourt Cnty. Sch. Bd.*, 757 F. Supp. 2d 591 (W.D. Va. 2010); *Linhart v. Lawson*, 261 Va. 30, 540 S.E.2d 875 (2001). But see *Lemen v. Davis-Waters*, 106 Va. Cir. 445 (Culpeper Cnty. 2020) (bus driver not entitled to immunity when driving empty bus to pick up children at festival); *Quarles v. Henrico Cnty. Sch. Bd.*, No. CL06-102 (Henrico Cnty. Cir. Ct. Nov. 7, 2006) (holding that the failure to operate school bus safety equipment is a ministerial duty).
- c. Garbage truck driver. *Turner v. City of Norfolk*, 80 Va. Cir. 369 (City of Norfolk 2010) (exercising discretion).
- d. Municipal bus driver. *Ali v. City of Fairfax*, No. 1:14cv1143 (E.D. Va. Mar. 30, 2015) (because driver was in the act of performing his governmental duties, transporting passengers, he was exercising discretion and entitled to immunity; follows *Linhart*).

See section 20-7.02(e)(5) for motor vehicle cases involving public safety employees and a discussion of the distinction between ministerial and discretionary acts.

20-7.02(e)(7) Legal and Administrative

- a. Public defenders. *Harbeck v. Smith*, 814 F. Supp. 2d 608 (E.D. Va. 2011); *Wenzler v. Hartsoe*, 32 Va. Cir. 334 (City of Suffolk 1994); *Oliver v. Langer*, 32 Va. Cir. 45 (City of Richmond 1993).
- b. County attorney. *Grites v. Cnty. of Clarke*, 14 Va. Cir. 165 (Clarke Cnty. 1988).
- c. Social Workers. *Tsapel v. Anderegg*, 51 Va. Cir. 139 (City of Richmond 1999).
- d. Treasurer engaged in tax collection. *Stone v. Moss*, 75 Va. Cir. 161 (City of Norfolk 2008).

20-7.02(f) Extension of Immunity by Statute or Regulation

By statute, the following persons are generally immune from civil liability for acts done in the performance of their duties unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.

20-7.02(f)(1) Va. Code §§ 2.2-5205 and 2.2-5207

Members of a community policy and management team and family planning and assessment team for decisions made about the appropriate services for a family or the proper placement or treatment of a child who comes before the team, unless it is proven that such person acted with malicious intent.

20-7.02(f)(2) Va. Code § 8.01-47

School personnel who report suspected alcohol or drug use or bomb threats.

20-7.02(f)(3) Va. Code § 8.01-220.1:2

Teachers for acts or omissions while supervising, caring for, or disciplining students, unless the acts or omissions were the result of gross negligence or willful misconduct. Any school employee or volunteer is immune from civil damages arising from the prompt good-faith reporting of alleged acts of bullying or crimes against others to the appropriate school official in compliance with specified procedures. Va. Code § 8.01-220.1:2(B); see *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012) (statute does not apply to principals).

20-7.02(f)(4) Va. Code § 8.01-223.2

All persons for tort liability resulting from statements made by that person (i) that are communicated to a third party, which would be protected under the First Amendment as a matter of public concern; (ii) at a public hearing before the governing body of any locality or other political subdivision, or the boards, commissions, agencies, and authorities thereof, and other governing bodies of any local governmental entity, concerning matters properly before such body; or (iii) if that person is an employee and the statement is made against an employer where retaliatory action is prohibited by Va. Code § 40.1-27.3. The immunity does not apply to statements that the declarant knew or should have known were false, or were made with reckless disregard for whether they were false. Any person who has a suit against him dismissed, or a witness subpoena or subpoena duces tecum quashed, or otherwise prevails in a legal action pursuant to this immunity may be awarded reasonable attorney fees and costs.

20-7.02(f)(5) Va. Code § 8.01-225(A)(1)

Any person who renders emergency assistance ("Good Samaritan" statute). A circuit court held that Va. Code § 8.01-225 provides absolute immunity for gross and simple negligence as long as the actions were in good faith. Also, nonprofit entity (lifesaving crew) is a "person" for purposes of the statutory protection. *Bowen v. Scott Cnty. Lifesaving Crew*, 43 Va. Cir. 28 (Scott Cnty. 1997).

20-7.02(f)(6) Va. Code §§ 8.01-225(A)(9), (A)(11), (A)(13), (A)(14), and (A)(19)

School board or local health department employees while on school property or at a school function who administer emergency care to any person, including the use of CPR or a defibrillator. School board employees regarding the administration of insulin, glucagon, epinephrine, or adrenal medication. Note, however that the standards for administration of such medicines is not consistent, e.g., for epinephrine the administrator must have a good faith belief the student is having an anaphylactic reaction, and for adrenal medication there must be a belief that the student is or is about to be experiencing an adrenal crisis and the administration must be in accordance with the prescriber's instructions.

20-7.02(f)(7) Va. Code § 8.01-225(B)

Licensed physician serving without compensation as medical director for an emergency services agency, as a medical director for an E-911 system, or as supervisor of an automated external defibrillator.

20-7.02(f)(8) Va. Code § 8.01-225.1

Team physicians rendering emergency care at school athletic events.

20-7.02(f)(9) Va. Code § 8.01-225.3

Volunteer firefighters and emergency medical services personnel operating an emergency vehicle with lights and sirens while en route to an emergency.

20-7.02(f)(10) Va. Code §§ 8.01-225.01 and 8.01-225.02

Health care providers (as defined in Va. Code § 8.01-581.1) rendering health care to persons injured in a natural or man-made disaster (as described in Va. Code § 44-146.16) or in response to an order of public health absent willful or gross negligence.

20-7.02(f)(11) Va. Code § 8.01-226.8

County, city, and town personnel, any other public official, and private volunteers who participate in either a program where persons on probation or community service are ordered to perform litter control, refuse service, or landscaping maintenance, or a court-approved voluntary jail diversion program, absent willful misconduct. This section does not grant any immunity to a driver transporting the persons on probation or community service or a motorist who, by his negligence, may injure such probationer or person on community service.

20-7.02(f)(12) Va. Code § 8.01-226.11

Virginia Sheriffs' Association and Virginia Community Policing Institute relating to establishment and operation of an automated victim notification system absent gross negligence or willful misconduct.

20-7.02(f)(13) Va. Code § 8.01-226.5:1

School employees who supervise students self-administering inhaled or auto-injectable asthma medications.

20-7.02(f)(14) Va. Code § 8.01-226.5:2

Hospital and emergency medical services personnel receiving abandoned children. Certain conditions apply if the hospital or emergency medical services agency has voluntarily installed a device for the reception of abandoned infants (sometimes called safe haven baby boxes).

20-7.02(f)(15) Va. Code § 8.01-581.23

Certified mediators and the programs for which the mediators are providing services.

20-7.02(f)(16) Va. Code § 15.2-1405

Members of local governing bodies and other local government boards, commissions, and authorities for exercising or failing to exercise discretionary or governmental authority. Exceptions: (i) misappropriation of funds; (ii) intentional or willful misconduct; and (iii) gross negligence. Voting for the appropriation of funds for a purpose that is generally authorized by statute, even though the specific appropriation may be improperly granted, does not constitute the unauthorized appropriation or misappropriation of funds so as to waive the immunity of Va. Code § 15.2-1405. *Concerned Taxpayers v. Cnty. of Brunswick*, 249 Va. 320, 455 S.E.2d 712 (1995); *see also Davison v. Rose*, No. 1:16cv540 (E.D. Va. July 28, 2017) (Va. Code § 15.2-1405 bars constitutional claims against school board members).

20-7.02(f)(17) Va. Code § 19.2-390.1

Law enforcement officials disseminating or failing to disseminate information related to the sex offender registry.

20-7.02(f)(18) Va. Code §§ 27-1 and 32.1-111.4:4

Firefighters and emergency medical services personnel in emergency sent beyond the territorial limits of their local government enjoy immunity to the same extent as they do in their home jurisdiction. Sending locality also continues to enjoy immunity.

20-7.02(f)(19) Va. Code §§ 27-6.02(B) and 32.1-111.4:3(B)

Volunteer firefighting companies and emergency medical services agencies and associations contracting with locality. *Nat'l R.R. Passenger Corp. v. Catlett Volunteer Fire Co.*, 241 Va. 402, 404 S.E.2d 216 (1991); *see Leahy v. Am. Med. Response*, 49 Va. Cir. 349 (City of Richmond 1999) (sovereign immunity for service and members); *Toms v. Greene Cnty. Rescue Squad*, 48 Va. Cir. 520 (City of Charlottesville 1999) (sovereign immunity for driver of volunteer ambulance); *Daddio v. Ashley*, 43 Va. Cir. 283 (Loudoun Cnty. 1997) (volunteer fire company entitled to immunity under [now Va. Code § 27-6.02] regarding accident

caused by firefighter responding to emergency call to firehouse); *Boyce v. City of Winchester*, 39 Va. Cir. 21 (City of Winchester 1995) (immunity provided volunteer firefighters under [now Va. Code § 27-6.02] does not apply to acts unrelated to firefighting, such as snow removal in station's parking lot).

20-7.02(f)(20) Va. Code § 32.1-127.3

Officers, directors, and employees of clinics, organized in whole or in part for the provision of free health care, in the absence of gross negligence or willful misconduct, for acts or omissions related to the provision of free care.

20-7.02(f)(21) Va. Code § 40.1-51.4:5

Employees who, in good faith with reasonable cause and without malice, truthfully report threatening conduct by a person employed at the same workplace.

20-7.02(f)(22) Va. Code § 42.1-73.1

Library personnel who cause the arrest of persons suspected of willfully concealing library books.

20-7.02(f)(23) Va. Code § 44-146.23

Local government employees engaged in emergency service activities in a natural or man-made disaster, and private and charitable organizations providing resources without compensation pursuant to a governor-declared emergency.

20-7.02(f)(24) Va. Code §§ 63.2-1509 and 63.2-1512

Local government officials and employees, including social workers, probation officers, and school employees, who report suspected child abuse cases. In *Tomlin v. McKenzie*, 251 Va. 478, 468 S.E.2d 882 (1996), the Virginia Supreme Court held that an allegation of bad faith or malicious intent and professional malpractice defeated reliance on statutory immunity for child abuse investigations at the plea in bar stage when no evidence was taken. See *Wolf v. Fauquier Cnty. Bd. of Sup'vrs*, 555 F.3d 311 (4th Cir. 2009) (finding that the "life-coach" defendant's report that her client was suicidal and planning to harm her children was not made in bad faith).

20-8 PUBLIC DUTY DOCTRINE

20-8.01 Duty of Care

In a negligence case involving a local government, the issue of immunity does not become germane until it has been established that a defendant owes to a plaintiff a duty of care that has been breached. *Fox v. Custis*, 236 Va. 69, 372 S.E.2d 373 (1988). Negligence is not actionable unless there is a legal duty, a violation of the duty, and consequent damage. *Id.* Whether a special duty exists is purely a question of law. *Id.*

In negligence claims against public officials, a distinction must be drawn between a public duty owed by the official to the citizenry at large and a special duty owed to a specific identifiable person or class of persons. Only a violation of the latter duty will give rise to civil liability of the official. To hold a public official civilly liable for violating a duty owed to the public at large would subject the official to potential liability for every action undertaken and would not be in society's best interest. *Marshall v. Winston*, 239 Va. 315, 389 S.E.2d 902 (1990); see also *Yacht Sales Int'l v. City of Va. Beach*, 977 F. Supp. 408 (E.D. Va. 1997) (city manager not liable for allegedly negligent budgetary decisions as he owed no special duty to specific persons or entities affected by the decisions).

In *Burdette v. Marks*, 244 Va. 309, 421 S.E.2d 419 (1992), the Virginia Supreme Court held that a special relationship between the plaintiff and an armed, on-duty uniformed officer at the scene of an accident was created by the foreseeability of serious injury to the plaintiff when the deputy failed to intervene to prevent an assault. The possibility of civil

liability exists only when there is a special relationship, which the Court stated can exist (1) between a public official and a third person, which imposes a duty upon the public official to control the third person's conduct, or (2) between a public official and an identifiable person, which gives a right to protection to the other person. Following *Burdette*, a circuit court rejected a 911 dispatcher's plea of the public duty doctrine. The dispatcher had failed to send anyone in response to a call about a traffic accident, and the court found the dispatcher owed a special duty to the victim. *Meeks v. Broschinski*, 63 Va. Cir. 150 (City of Staunton 2003). The Supreme Court distinguished *Burdette* in *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012), where a principal had notice of a potential fight between students. The Court held that unlike the sheriff in *Burdette*, the principal was not aware of the risk of great bodily harm or death and was not present at the fight and able to intervene at the time. Therefore, the Court refused to expand the special-relationship jurisprudence to include the principal-student relationship.

In *Commonwealth v. Peterson*, 286 Va. 349, 749 S.E.2d 307 (2013), the Court stated that if a special relationship exists, the nature of the special relationship establishes the degree of the foreseeability of harm that the plaintiff must establish before there is a duty to warn. Certain relationships such as employer/employee impose a duty to warn when the danger of third-party criminal acts is known or reasonably foreseeable. Other relationships such as business/invitee create a duty to warn only where there is an imminent probability of harm. The Court assumed that a special relationship existed between Virginia Tech and its students, but held that based on the specific facts surrounding the initial investigation of the shootings at the university, i.e., a reasonable belief that the initial murders were domestic in nature, the danger of the mass shooting was not reasonably foreseeable. Construing all of the above cases in an extensive discussion, a circuit court held that the college/student relationship does not constitute a special relationship that would impose a duty on the college to warn or protect a student from sexual assault. *Doe v. Va. Wesleyan Coll.*, 90 Va. Cir. 345 (City of Norfolk 2015). The Virginia Supreme Court historically recognizes special relationships in the carrier/passenger, innkeeper/guest, employer/employee, business owner/invitee, and hospital/patient contexts. Though this list is not exhaustive, the Court has exercised caution in expanding it. See *Brown v. Jacobs*, 289 Va. 209, 768 S.E.2d 421 (2015) (no special relationship between attorney/private investigator, no categorical special relationship between employer/private contractor).

In *Commonwealth v. Burns*, 273 Va. 14, 639 S.E.2d 276 (2007), the Supreme Court clarified the application of the public duty doctrine in Virginia by declining to extend it to Virginia Department of Transportation employees who were guilty of simple and gross negligence in the performance of maintenance work on a public highway. The employees sought to defend on the basis that they owed no special duty to the decedent, but the Court did not reach that issue, holding that the public duty doctrine applies only when a public official owes a duty to control the behavior of a third party, and the third party commits acts of assaultive criminal behavior upon another. The Court declined to expand the doctrine, finding that the sovereign immunity (technically, official immunity) doctrine provides sufficient protection for public employees in the discharge of their public duties. Following *Burns*, the circuit court in *Chiles v. Dunn*, No. CL-2009-7555 (Fairfax Cnty. Cir. Ct. Dec. 29, 2010), held that the doctrine did not bar a suit alleging firefighters were grossly negligent in searching a burning home as there was no intervening third party.

In *Nelson v. Green*, 965 F. Supp. 2d 732 (W.D. Va. 2013), the court held that a social worker owed no legal duty to the father of a minor whom the father alleged was coerced by the social worker to make false allegations against the father. Moreover, no special relationship existed between the social worker and plaintiff's minor child because the social worker never took custody of the child or exercised sufficient control over her. See the extensive discussion of the duty to protect in *A.H. ex rel. C.H. v. Church of God in Christ, Inc.*, 297 Va. 604, 831 S.E.2d 460 (2019) (church employee abuse of third party).

20-8.02 Duty to Control Third Persons

Generally, a person owes no duty to warn or control the conduct of third persons in order to prevent harm to another. *Commonwealth v. Peterson*, 286 Va. 349, 749 S.E.2d 307 (2013); *Thompson v. Skate Am., Inc.*, 261 Va. 121, 540 S.E.2d 123 (2001); *Marshall v. Winston*, 239 Va. 315, 389 S.E.2d 902 (1990). Narrow exceptions exist if there is a special relationship either between the plaintiff and the defendant or between the third-party criminal actor and the defendant. *Commonwealth v. Peterson*, 286 Va. 349, 749 S.E.2d 307 (2013).

Where parole authorities had knowledge of parole violations and failed to reincarcerate a parolee, they had no liability to victims of additional crimes because no special duty was owed to victims. *Fox v. Custis*, 236 Va. 69, 372 S.E.2d. 373 (1988).

Where sheriff and deputy erroneously released a prisoner, they had no liability to spouse of person killed by improperly released prisoner because officials owed no special duty to victim. *Marshall v. Winston*, 239 Va. 315, 389 S.E.2d 902 (1990).

While a normal hospital-patient relationship does not create a duty to protect the patient from third parties, *Nasser v. Parker*, 249 Va. 172, 455 S.E.2d 502 (1995), a special relationship requiring a duty to protect is created when the patient is placed in restraints. *Stevens v. Hosp. Auth. of Petersburg*, 42 Va. Cir. 321 (City of Richmond 1997).

In *Burns v. Gagnon*, 283 Va. 657, 727 S.E.2d 634 (2012), the Court held that a vice principal had a common law duty to supervise and care for students in the school and could be liable for injuries to a student by a third party if he failed to discharge his duties as a reasonably prudent person would under similar circumstances.