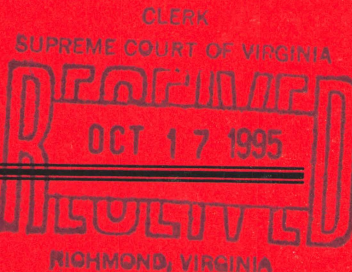


251Va248



IN THE
Supreme Court of Virginia

RECORD NO. 951044

BARBARA HALBERSTAM,

Appellant,

v.

**COMMONWEALTH OF VIRGINIA
and
GEORGE MASON UNIVERSITY,**

Appellees.

JOINT APPENDIX

**Charles J. Samuels
Attorney at Law
Suite 103
10615 Judicial Drive
Fairfax, Virginia 22030
(703) 591-9203**

Counsel for Appellant

**James S. Gilmore, III
Catherine C. Hammond
Gregory E. Lucyk
A. Ann Berkebile
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-6976**

Counsel for Appellees

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FILED
CIVIL INTAKE

94 OCT -4 PM 2:55
COUNTY

CLERK, CIRCUIT COURT
FAIRFAX, VA

V I R G I N I A :

IN THE CIRCUIT COURT FOR FAIRFAX

BARBARA HALBERSTAM,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA

SERVE: James S. Gilmore, III,
Office of the Attorney General
Supreme Court Building
101 North 8th Street
Richmond, Virginia 23219

AND

GEORGE MASON UNIVERSITY,

SERVE: George W. Johnson, President
Office of the President
Room D103
4400 University Drive
George Mason University
Fairfax, Virginia 22030

Defendants.

MOTION FOR JUDGMENT

COMES NOW the Plaintiff, Barbara Halberstam, by counsel, and moves this Honorable Court for an award and execution of judgment against the defendants, Commonwealth of Virginia and George Mason University, jointly and severally in the amount of SEVENTY FIVE THOUSAND DOLLARS (\$75,000.00), with interest from October 5, 1993, plus court costs, and states as follows:

1. At all times relevant, Defendant, George Mason University, was an agent of the Defendant, Commonwealth of Virginia, acting within the scope and course of its' agency.

2. On or about October 5, 1993, Plaintiff, Barbara Halberstam, was a student of Defendant, George Mason University.
3. On or about October 5, 1994, at approximately 8:00p.m., Plaintiff, Barbara Halberstam, drove her automobile to Defendant, George Mason University's campus in Fairfax County, Virginia and parked her car at Defendant, George Mason University's parking lot with the intent to walk to Defendant, George Mason University's library.
4. At the same time and place aforesaid, Defendants, Commonwealth of Virginia and George Mason University were under a duty to use reasonable care to: prevent unsafe conditions from occurring on said premises; maintaining the sidewalks, walkways, driveways, parking spaces and premises in a safe manner for its' students; to provide a safe passage for its' students on the sidewalks, walkways, driveways, parking spaces and premises; to warn students of any unsafe conditions; to otherwise maintain the grounds, sidewalks, walkways, driveways, parking spaces and premises in a safe condition for students and Plaintiff, Barbara Halberstam's use and to otherwise adhere to the applicable provisions of the Virginia Uniform Standard Building Code.
5. Notwithstanding the above duties, Defendants, Commonwealth of Virginia and George Mason University were careless and negligent in failing to use reasonable care to: prevent unsafe conditions from occurring on said premises; maintain the sidewalks, walkways, driveways, parking spaces and premises in a safe manner for its' students; provide a safe passage for its' students on the sidewalks, walkways, driveways, parking spaces and premises; warn

students of any unsafe conditions; otherwise maintain the grounds, sidewalks, walkways, driveways, parking spaces and premises in a safe condition for students and Plaintiff, Barbara Halberstam's use; adhere to the applicable provisions of the Virginia Uniform Standard Building Code, and were otherwise negligent.

6. Defendants, Commonwealth of Virginia and George Mason University, allowed the grounds, sidewalks, walkways, driveways, parking spaces and premises to remain in an unsafe condition despite the fact that it knew, or in the exercise of reasonable care, should have known of the unsafe condition and further failed to warn the Plaintiff, Barbara Halberstam, of that unsafe condition.

7. At the same time and place aforesaid, as a direct and proximate result of the Defendants, Commonwealth of Virginia and George Mason University's negligence, Plaintiff, Barbara Halberstam, fell at the George Mason University campus in Fairfax County, Virginia.

8. As a direct and proximate result of the aforesaid, which is a direct a proximate result of the negligence of Defendants, Commonwealth of Virginia and George Mason University, Plaintiff, Barbara Halberstam, suffered severe and permanent personal injuries, has incurred and will continue to incur hospital and medical expenses in an effort to be cured and relieved of said injuries.

9. As a direct and proximate result of the said injuries, Plaintiff, Barbara Halberstam, has suffered and will continue to suffer pain and mental anguish.


10. As a direct and proximate result of the negligence of the Defendants, Commonwealth of Virginia and George Mason University, Plaintiff, Barbara Halberstam, sustained severe and permanent disfigurement.

11. As a direct and proximate result of the negligence of the Defendants, Commonwealth of Virginia and George Mason University, Plaintiff, Barbara Halberstam, lost wages and will lose wages in the future.

12. Plaintiff, Barbara Halberstam, has given proper legal notice to the Defendants, Commonwealth of Virginia and George Mason University, of this claim as required by §8.01-195.6 of the Code of Virginia, 1950, by filing a written statement as to the nature of the claim and the time and place her injuries occurred with the persons specified by the statute and within six (6) months of the time this cause of action accrued.

WHEREFORE the Plaintiff, Barbara Halberstam, by counsel, requests an award and execution and judgment against the Defendants, Commonwealth of Virginia and George Mason University, jointly and severally, in the amount SEVENTY FIVE THOUSAND DOLLARS (\$75,000.00), plus interest from October 5, 1993, plus her costs expended in this action.

BARBARA HALBERSTAM
By Counsel



Charles J. Samuels
Counsel for Plaintiff
10615 Judicial Drive
Suite 103
Fairfax, Virginia 22030
703/591-9203
Virginia State Bar No. 20821
halberstam\mfjcwv.gmu

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

BARBARA HALBERSTAM,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA,
and
GEORGE MASON UNIVERSITY,

Defendants.

Law No. 135

FILED
94 OCT 28 PM 1:54
JOHN L. HENRY
CLERK, CIRCUIT COURT
FAIRFAX, VA

DEMURRER, MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT
AND PLEA OF SOVEREIGN IMMUNITY

THE COMMONWEALTH OF VIRGINIA ("Commonwealth") and GEORGE MASON UNIVERSITY ("GMU") ask that this Court sustain its demurrer and/or plea of sovereign immunity and grant its motion to dismiss/motion for summary judgment based on the following:

1. The plaintiff has alleged in her Motion for Judgment that she has suffered personal injuries as a result of falling at the campus of GMU. She claims that she was injured because of the negligence of the defendants. Motion for Judgment. ¶ 8.

2. To the extent that an action for damages can be brought against the Commonwealth, it may only be brought under the authority of the Tort Claims Act. Section 8.01-195.3 et seq. of the Code of Virginia.

3. To the extent that the plaintiff seeks relief, she must comply strictly with the Tort Claims Act.

4. To the extent that the plaintiff seeks to recover against GMU, the demurrer, motion to dismiss/motion for summary judgment and plea of sovereign immunity should be granted because:

a. GMU is an agency of the Commonwealth.

b. All agencies of the Commonwealth are immune from suit under the doctrine of sovereign immunity.

5. The Commonwealth is also immune from suit pursuant to the doctrine of sovereign immunity because the plaintiff has failed to give the Commonwealth adequate notice of her claim under § 8.01-195.6 of the Tort Claims Act. Specifically, she has not identified the "place" of her injury with sufficient detail to comply with the strict requirements of the Tort Claims Act.

WHEREFORE, for the foregoing reasons, the Commonwealth of Virginia and George Mason University respectfully request that this Court grant their demurrer, motion to dismiss/motion for summary judgment, and plea of sovereign immunity, and dismiss this case with prejudice.

Respectfully submitted

VIRGINIA COMMONWEALTH UNIVERSITY

By: A. Ann Berkebile
Counsel

James S. Gilmore, III
Attorney General

Catherine C. Hammond
Deputy Attorney General

Gregory E. Lucyk
Senior Assistant Attorney General

A. Ann Berkebile
Assistant Attorney General

101 North 8th Street
Richmond, Virginia 23219
804/786-9516

Certificate

I hereby certify that on October 27th, 1994, a true and correct copy of the foregoing Demurrer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity was mailed to Charles J. Samuels, Esq., 10615 Judicial Drive, Suite 103, Fairfax, VA 22030.

A. Am Bekebile

ab\halberstam.mot

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

BARBARA HALBERSTAM,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA,
and
GEORGE MASON UNIVERSITY,

Defendants.

Law No. 3356

FILED
9 OCT 28 PM 1:54
JOHN L. FINEY
CLERK, CIRCUIT COURT
FAIRFAX, VA

GROUND'S OF DEFENSE

THE COMMONWEALTH OF VIRGINIA ("Commonwealth") and GEORGE MASON UNIVERSITY ("GMU") state as follows for their grounds of defense to the plaintiff's Motion for Judgment:

1. The Commonwealth and GMU admit the allegations contained in paragraph 1.
2. The Commonwealth and GMU admit the allegations contained in paragraph 2.
3. The Commonwealth and GMU are without sufficient knowledge and information to either admit or deny the allegations contained in paragraph 3 and, therefore, deny them and call for strict proof thereof.
4. Paragraph 4 states legal conclusions calling for no response from the Commonwealth and GMU.
5. The Commonwealth and GMU deny the allegations contained in paragraph 5.
6. The Commonwealth and GMU deny the allegations contained in paragraph 6.

7. The Commonwealth and GMU deny the allegations contained in paragraph 7.

8. The Commonwealth and GMU deny the allegations contained in paragraph 8.

9. The Commonwealth and GMU deny the allegations contained in paragraph 9.

10. The Commonwealth and GMU deny the allegations contained in paragraph 10.

11. The Commonwealth and GMU deny the allegations contained in paragraph 11.

12. The Commonwealth and GMU admit that the plaintiff, through her attorney, has submitted a form of notice of claim in this case. The Commonwealth and GMU deny that the notice of claim met the requirements of § 8.01-195.6 and, under the circumstances, intend to rely on the defense of sovereign immunity.

AFFIRMATIVE DEFENSES

1. The Commonwealth and GMU state that the plaintiff was, by her own actions, guilty of negligence which caused, or contributed to the cause, of her injuries and, therefore, her recovery is barred herein.

2. The Commonwealth and GMU state that the plaintiff assumed the risk of her injuries and, therefore, her recovery is barred herein.

3. The Commonwealth and GMU state that the condition which allegedly caused the plaintiff to fall was open and obvious.

4. The Commonwealth and GMU deny that the plaintiff was

injured to the extent claimed, if at all.

5. The Commonwealth and GMU intend to rely on any and all defenses available to them at trial.

WHEREFORE, for the foregoing reasons, the Commonwealth of Virginia and George Mason University respectfully request that the Court dismiss this action with prejudice.

Respectfully submitted

COMMONWEALTH OF VIRGINIA
and GEORGE MASON UNIVERSITY

By: A. Ann Berkebile
Counsel

James S. Gilmore, III
Attorney General

Catherine C. Hammond
Deputy Attorney General

Gregory E. Lucyk
Senior Assistant Attorney General

A. Ann Berkebile
Assistant Attorney General

101 North 8th Street
Richmond, Virginia 23219
804/786-9516

Certificate

I hereby certify that on October 27th, 1994, a true and correct copy of the foregoing was mailed to Charles J. Samuels, Esq., 10615 Judicial Drive, Suite 103, Fairfax, VA 22030.

A. Ann Berkebile

12-12-94

FILED
94 DEC 13 PM 3:27
FAIRFAX COUNTY COURT

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

BARBARA HALBERSTAM,

Plaintiff,

v.

LAW NO. 135637

**COMMONWEALTH OF VIRGINIA
AND GEORGE MASON UNIVERSITY,**

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
DEMURRER, MOTION TO DISMISS/MOTION FOR
SUMMARY JUDGMENT AND PLEA OF SOVEREIGN IMMUNITY**

The COMMONWEALTH OF VIRGINIA ("Commonwealth") and GEORGE MASON UNIVERSITY ("GMU") submit the following Memorandum of Law in Support of Their Demurrer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity:

STATEMENT OF THE FACTS

This is a personal injury action. The plaintiff alleges that she was injured when she fell at a campus of GMU. She contends that her injuries were caused by the negligence of the defendants. Motion for Judgment, ¶ 8.

Before filing this lawsuit, the plaintiff, through her attorney, filed a Notice of Claim which identified the time and place of her injury in the following manner:

On October 5, 1993, Ms. Halberstam, a student at George Mason University, was parking her vehicle in the school parking lot at approximately 7:45 p.m. ... Upon exiting her vehicle she stepped into this eroded area/pothole which caused her to lose her balance, fall and injure herself....¹

¹A copy of the plaintiff's Notice of Claim is attached as Exhibit A.

The plaintiff's notice did not identify in which parking lot (or where in "the parking lot") the accident supposedly occurred. The plaintiff did not even specify on which of GMU's campuses she supposedly fell.²

ARGUMENT

1. Claims Against GMU Are Barred By The Doctrine Of Sovereign Immunity

To the extent that the plaintiff is attempting to establish a claim against GMU, her recovery is barred by the doctrine of sovereign immunity. As noted by Virginia's Supreme Court "[t]he doctrine that the [Commonwealth's] governmental agencies, while acting in their governmental capacity, are immune from liability for tortious personal injury negligently inflicted, has long been recognized and applied in Virginia." Kellam v. School Board, 202 Va. 252 (1960).³ The Virginia Tort Claims Act did nothing to destroy the immunity of the Commonwealth's agents. Adopted in 1982, the Act states only that "the Commonwealth shall be liable for money accruing on or after July 1, 1982." (emphasis added).⁴ The Act makes no mention of allowing for suits against agents of the Commonwealth.

2. The Plaintiff's Claim Against the Commonwealth is Barred by the Doctrine of Sovereign Immunity

To the extent that an action for damages can be brought against the Commonwealth, it

²GMU and the Commonwealth do not dispute that at sometime following the plaintiff's fall they became aware of the location of the plaintiff's alleged accident. They are merely contesting the plaintiff's compliance with the specific and mandatory requirements of the Tort Claims Act in this proceeding.

³See also Bowers v. Commonwealth, 225 Va. 245 (1983) (agent/engineer working on highway improvement project entitled to immunity); Maia's Adm'r v. Eastern State Hospital, 97 Va. 507 (1988) (public corporations and agents of the state are immune from liability arising out of the exercise of their governmental powers and duties).

⁴Code of Virginia § 8.01-195.3.

may only be brought under the Tort Claims Act. Section 8.01-195.3 et seq. of the Code of Virginia. This Act establishes a limited waiver of sovereign immunity by the Commonwealth when the Act's terms and provisions are complied with strictly.⁵ Since the plaintiff failed to comply with the Tort Claims Act, the defense of sovereign immunity is still available to the Commonwealth and the plaintiff's claim should be dismissed.

Specifically, the plaintiff has failed to comply with the notice provisions of the Tort Claims Act which state:

Every claim cognizable against the Commonwealth or transportation district shall be forever barred unless the claimant or his agent, attorney or representatives have filed a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred....⁶

The plaintiff's Notice is deficient for several reasons. First, the Notice does not identify which of the many GMU parking lots the plaintiff was in at the time of her fall. Nor does it specify where she was injured in the parking lot. It does not even identify which of GMU's campuses she was visiting when she was supposedly injured.

Town of Crewe v. Marler, 228 Va. 109 (1984), is directly on point. In Town of Crewe, the Virginia Supreme Court addressed the failure of a plaintiff to comply with the requirements of the notice statute applicable to suits against cities or towns. The statute at issue there, § 8.01-222, provided that no action could be maintained unless a written statement of the

⁵See Wilson v. State Highway Commissioner, 174 Va. 82, 91 (1939) (any statute in derogation of the sovereign's immunity must be strictly construed); Dunnington v. Ford, 80 Va. 177, 178 (1885) (a citizen suing the Commonwealth under a statute "must follow its provisions with exact strictness").

⁶Code of Virginia § 8.01-195.6.

nature of the claim setting the time and place at which the injury is alleged to have occurred was filed with the city or county attorney, mayor, or chief executive. There, the plaintiff had submitted letters to the town manager regarding an injury that she received while walking on a public sidewalk, but she failed to identify the precise location of her fall. Id. at 111-12.

Nevertheless, the town manager admitted in an evidentiary hearing that he did know of the precise location of the accident, even though it had not been mentioned in the plaintiff's letters.

The plaintiff argued that she had substantially complied with the requirements of the statute in lieu of the fact that "everyone" knew of the location of the accident anyway. Id. at 112. The Virginia Supreme Court disagreed and held that the plaintiff had not complied with the provisions of the statute. Id. at 114. In support of its decision, the Court stated as follows:

For this Court to place any limitation on the clear and comprehensive language of the statute, or to create an exception where none exists under the guise of statutory construction, would be to defeat the purpose of the enactment and to engage in judicial legislation.

Id.⁷

The same analysis applies here. As was the case with § 8.01-222 in Town of Crewe, § 8.01-195.6 requires that the notice set forth the "time and place at which the injury is alleged to have occurred." In this respect, the language of §§ 8.01-222 and 8.01-195.6 is identical. Accordingly, the precedent set by our Supreme Court in Town of Crewe regarding the adequacy of notice is equally applicable here.⁸

⁷See also Daniel v. City of Richmond, 199 Va. 490 (1957) (fact that City of Richmond had actual notice of the particulars of the plaintiff's claim was irrelevant when the plaintiff failed to comply with the notice requirements of the statute).

⁸There is a significant difference between § 8.01-222 and § 8.01-195.6, however. Unlike § 8.01-222, the Tort Claims Act, through § 8.01-195.7, provides that a failure to properly file

The analysis engaged in by the Circuit Court of the City of Richmond in Jennings v. Commonwealth, 14 Va. Cir. 331 (1989), is also on point with the case at bar. In Jennings, the plaintiff sued the Commonwealth of Virginia for injuries that she allegedly sustained when she fell while visiting one of MCV's hospitals. The plaintiff submitted a timely notice of claim identifying the place where she was injured as "Room 248 at the Medical College of Virginia Hospital." The Commonwealth argued that the plaintiff's notice was insufficient under the Tort Claims Act since she failed to specify in which of MCV's Hospital buildings she had fallen and since there was more than one "Room 248" in the MCV complex. The Richmond Circuit Court accepted the Commonwealth's analysis and dismissed the case after noting:

[g]enerally, the Commonwealth of Virginia is immune from suit. On July 1, 1982, the Virginia General Assembly enacted Section 8.01-195.1 (the Virginia Tort Claims Act) and thereby waived governmental immunity from suit in some limited situations in derogation of the common law. In these cases the plaintiff may only bring suit in the manner prescribed by the statute. It is well settled that litigants must strictly comply with the terms of statutes that remove the veil of immunity from suit from the Commonwealth.

Id. at 332.⁹

It is clear that the plaintiff in this case did not comply with the clear and strict requirements of § 8.01-195.6. Under the circumstances, the plaintiff's claim is barred by the doctrine of sovereign immunity.

the notice mandated by § 8.01-195.6 renders a claim forever barred. Consequently, unlike the notice requirements of § 8.01-222, the Tort Claims Act notice requirements are jurisdictional. See also Wilson v. State Highway Commissioner, 174 Va. 82, 93-94 (1939) (sovereign immunity of Commonwealth involves questions of subject matter jurisdiction).

⁹The Court also relied heavily on the analysis and reasoning of Town of Crewe.

CONCLUSION

For the foregoing reasons, the Commonwealth of Virginia and George Mason University respectfully request that this Court sustain their Demurrer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
GEORGE MASON UNIVERSITY

By : A. Ann Berkebile
Counsel

James S. Gilmore, III
Attorney General

Gregory E. Lucyk
Senior Assistant Attorney General

A. Ann Berkebile
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
804) 786-9516

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed first class, postage prepaid this 9th day of December 1994, to Charles J. Samuels, Esquire, 10615 Judicial Drive, Suite 103, Fairfax, Virginia 22030.

A. Ann Berkebile

October 11, 1993

Claudia Young
Risk Management
George Mason University
2B9
4400 University Drive
Fairfax, VA 22030

Re: Injury Sustained on George Mason University Campus

Dear Ms. Young,

As you requested October 7, 1993, during our phone conversation, below are the details of how I injured my right knee and lower back. I am a part-time student at GMU and have a congenital joint disease (Fairbanks disease, or epiphyseal dysplasia multiplex) and have had total joint replacements of both my hips and shoulders.

At about 7:45 p.m. October 5, I drove into the parking area in front of the Finley Building (see attached diagram and photographs) with my husband as a passenger, but finding no available handicap spaces, I parallel parked in a metered space on the inner circle. I exited my car and after closing my door, I turned to walk around the back of my car and stepped off of the roadway onto the inner circle with my right foot. Because of the lack of lighting, I did not see the drop-off and, caught unawares, began to fall. As I fell, my body was twisted away from my car and I fell back into the car (facing away from it), twisting my right knee and throwing out my back.

As can be seen in the enclosed photographs, where the roadway ends at the inner circle there is a drop-off of several inches -- but around most of the inner circle low concrete barriers have been placed to create a curb. Unfortunately, there is no such barrier beside the parking space that I used that night, and, worse, there is an area of roadway erosion at that parking space that has left less roadway to stand on and a greater drop-off.

We went home and I put a heating pad on my back and took some Nuprin for the pain. I called my doctor's office the morning of October 6 and they prescribed bed rest and muscle relaxers; my doctor was in surgery all day and he could see me the following morning. I was still in pain on October 7 and I could not put any weight on my right leg. My right leg hurt so that I had to have my husband drive me to the doctor's, where my knee, ankle, and lower back were x-rayed (see attached doctor's report).

Because of the injury I have had to take time off of work, suffered spasms in my back and right knee. I am submitting this claim for coverage of my medical expenses and reimbursement for the time I have lost from work because I would not have suffered these injuries if the roadway/curb had been properly maintained and if there had been adequate lighting.

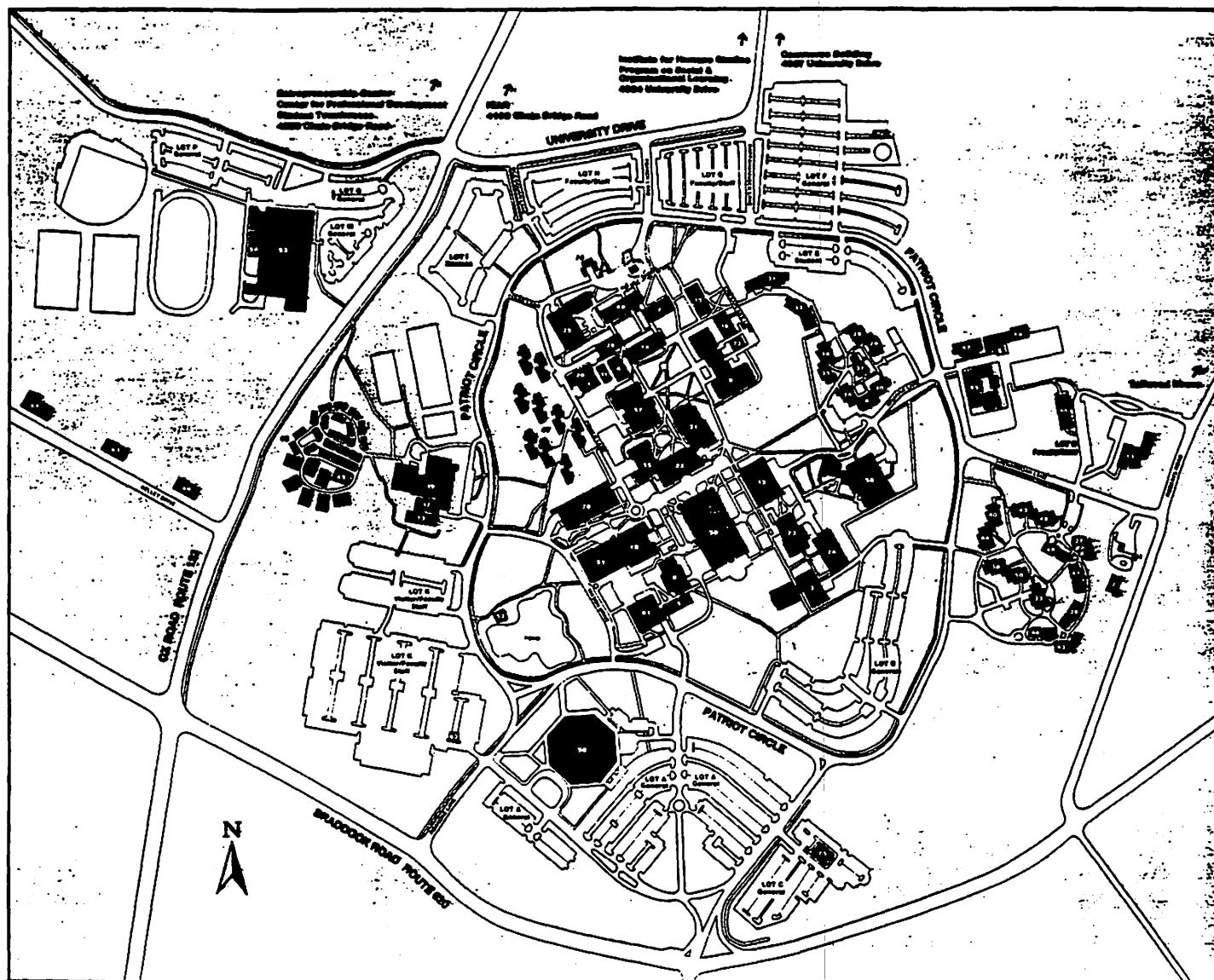
I would appreciate your prompt attention to this matter as well as your repairing the parking space and putting in some better lighting so no one else suffers any similar injury.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara Halberstam".

Barbara Halberstam
3903 Railroad Ave.
Fairfax, VA 22030

Campus Map



Academic

- 1 Aquia Module
- 2 Buchanan House
- 3 Enterprise Hall*
- 4 Central Module
- 5 College Hall
- 6 Dickenson Hall
- 7 East Building
- 8 Fine Arts Building
- 9 Fenwick Library
- 10 George's Hall
- 11 Greenhouse
- 12 King Hall
- 13 Krasnow Institute*
- 14 Krug Hall
- 15 Lecture Hall
- 16 N. Chesapeake Module
- 17 North P.E. Module
- 18 Performing Arts Building
- 19 Physical Ed. Building
- 20 Pohick Module
- 21 Robinson Hall I

Residential

- 22 Robinson Hall II
- 23 Science & Tech. I
- 24 Science & Tech. II
- 25 Thompson Hall
- 26 West Building
- 27 Adams Hall
- 28 Amherst Hall
- 29 Brunswick Hall
- 30 Carroll Hall
- 31 Commonwealth Hall
- 32 Dominion Hall
- 33 Eisenhower Hall
- 34 Essex Hall
- 35 Franklin Hall
- 36 Grayson Hall
- 37 Hanover Center
- 38 Harrison Hall
- 39 Jackson Hall
- 40 Jefferson Hall
- 41 Kennedy Hall

- 42 Lincoln Hall
- 43 Madison Hall
- 44 Monroe Hall
- 45 Patriot Village
- 46 Roosevelt Hall
- 47 Student Apartments
- 48 Truman Hall
- 49 Washington Hall
- 50 Wilson Hall

Cultural & Recreational

- 51 Concert Hall
- 52 Cross Cottage
- 53 Field House
- 54 Field House Module
- 55 Harris Theater
- 56 Patriot Center

Student Unions

- 57 Student Union I
- 58 Student Union II
- 59 University Center*

Administration

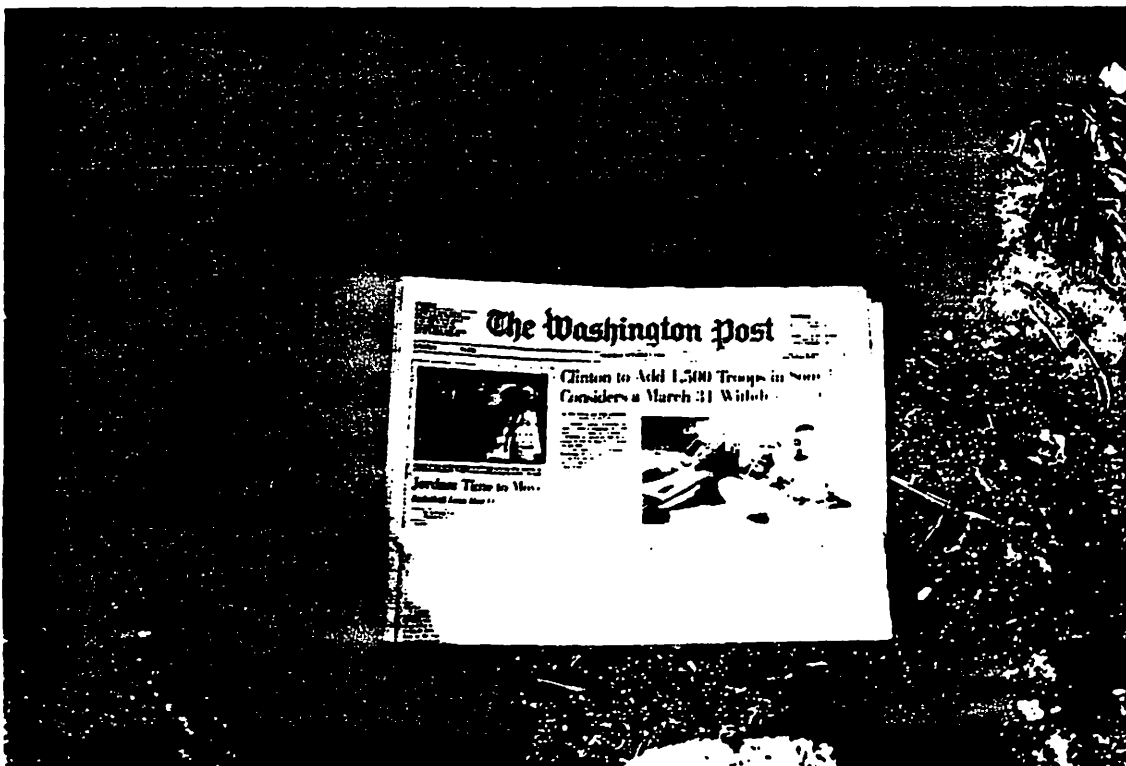
- 60 Finley Building
- 61 Mason Hall
- 62 Visitor Information

Support Facilities

- 63 Baker House
 - 64 Carty House
 - 65 Central Plant
 - 66 Child Development Center
 - 67 Facilities Planning Bldg.
 - 68 Graduate House
 - 69 Maintenance Building
 - 70 Parking Deck
 - 71 Recycling Center
 - 72 S. Chesapeake Module
 - 73 South P.E. Module
 - 74 Storage Trailers
 - 75 University Police
- *under construction







CHARLES J. SAMUELS
ATTORNEY AT LAW
10615 JUDICIAL DRIVE, SUITE 103
FAIRFAX, VIRGINIA 22030
(703) 591-9203

November 19, 1993

Ms. Donna Briggs
Division of Risk Management
P.O. Box 1140
Richmond, Virginia 23208-1121

Re: Your Claim No.: 3001-2659
My Client: Barbara Halberstam

Dear Ms. Briggs:

I represent the interests of Barbara Halberstam for personal injuries sustained on October 5, 1993. This incident occurred as Ms. Halberstam was exiting her car which was parked in a George Mason University parking lot. It was dark outside and she stepped into a hole in the asphalt parking lot. This hole was not visible due to the darkness of the parking lot and the position of her car parked along side the curb. After stepping into the hole she lost her balance and fell against her car causing her to injure her knee. Orthoscopic surgery is scheduled for Thursday, November 18, 1993.

All further communications should be directed to my attention and all previous authorizations are hereby revoked. Additionally, I would appreciate receiving copies of any recorded statements.

I will provide you with her medical bills and records as I receive them. In the meantime, should you have any questions, feel free to contact me.

Sincerely,

Charles J. Samuels

Charles J. Samuels

CJS:smh

cc: Ms. Barbara Halberstam

briggs.ltr

CHARLES J. SAMUELS

ATTORNEY AT LAW

10615 JUDICIAL DRIVE, SUITE 103

FAIRFAX, VIRGINIA 22030

(703) 591-9203

January 12, 1994

Ms. Donna Briggs
Division of Risk Management
P.O. Box 1140
Richmond, Virginia 23208-1121

Re: Your Claim No.: 3001-2659
My Client: Barbara Halberstam

Dear Ms. Briggs:

I previously wrote to you in November, 1993 concerning my client's injuries sustained at George Mason University on October 5, 1993. I am enclosing with this letter some of her medical records and bills. I have requested additional medical records and bills and will send them to you as they are received.

I have enclosed Walter Abendschein, M.D.'s medical records from 10/7/93-11/23/93. This is the orthopedist who performed orthoscopic surgery on my client. Also enclosed is his bill in the amount of \$2,300.00. In addition I have enclosed a prescription receipt for Roxicet in the amount of \$7.64. I have ordered medical records from Sibley Hospital for the out-patient surgery and I am waiting for an anesthesiology bill to arrive as well. Finally I am waiting for lost wage information. Hopefully I will be forwarding these records to you in the very near future.

In the mean time, should you have any questions, please feel free to contact me.

Sincerely,



Charles J. Samuels

Enclosure

cc: Ms. Barbara M. Halberstam

CJS:smh

briglupd.rec

CHARLES J. SAMUELS
ATTORNEY AT LAW
10615 JUDICIAL DRIVE, SUITE 103
FAIRFAX, VIRGINIA 22030
(703) 591-9203

February 14, 1994

Ms. Donna Briggs
Division of Risk Management
P.O. Box 1140
Richmond, Virginia 23208-1121

Re: Your Claim No. 300 102 659
My Client: Barbara Halberstam

Dear Ms. Briggs:

To follow up our telephone conversation of Monday, February 7, 1994 I have enclosed an updated Medical Itemization in the amount of \$5,001.74. I have also enclosed medical records and bills from Walter Abendschein, M.D., the orthopedist who treated and performed arthroscopic surgery on Mrs. Halberstam. Also enclosed are medical records and bills from Sibley Hospital where the surgery was performed and medical records and bills from Carl L. Sylvester, the anesthesiologist at Sibley Hospital as well as prescription receipts.

I have also enclosed photographs showing the scene where this accident took place. As you can see in these photographs there is a concrete divider along side of the asphalt everywhere except for the location where Mrs. Halberstam stepped out of her car. At the place where there was no concrete divider, the asphalt was eroded away leaving a large pothole or depression.

As a result of this accident my client suffered a great amount of pain, swelling and tenderness to her knee. Her orthopedist treated her conservatively but the symptoms did not subside. Later he gave her two cortisone injections to reduce the pain and swelling but this was not successful. Finally he performed arthroscopic surgery at Sibley Memorial Hospital on November 17, 1993. The surgery report is enclosed for your review. During surgery a considerable amount of swelling and fluid was noted. The femoral condyle had lesions with grade 2 and 3 tears with evidence of cartilage break down around it.


Fianlly, I have enclosed photographs showing the soft cast Mrs. Halberstam was required to wear, the walker/knee immobilizer she was prescribed and the surgical scars, which will be permanent. The other photos show pre and post operative swelling on the knee.

Ms. Donna Briggs
February 14, 1994
Page 2

In addition to the above, Ms. Halberstam sustained lost wages as a result of this accident. She is employed in the field of customer service at Tax Analysts. Her rate of pay is \$22.84. She missed 113.25 hours as a result of this accident. This equals \$2,586.63 in lost wages. Documentation concerning the lost wage portion of this claim is enclosed.

Based on all the circumstances in this case, including the clear liability, seriousness of injury, medical bills in excess of \$5,000.00 and lost wages in excess of \$2,500.00 I have authority and offer to settle this claim for Thirty-five Thousand Dollars (\$35,000.00). After your review of these records I would appreciate if you would contact me to finalize the resolution of this claim.

Sincerely,


Charles J. Samuels

Enclosures

cc: B. Halberstam

CJS:sh

brigl1stl.clm

COMMONWEALTH of VIRGINIA

DEPARTMENT OF GENERAL SERVICES

February 22, 1994

DIVISION OF RISK MANAGEMENT

**Charles J. Samuels, Esquire
10615 Judicial Drive, Suite 103
Fairfax, VA 22030**

**JAMES MADISON BUILDING
4TH FLOOR
109 GOVERNOR STREET
RICHMOND, VIRGINIA 23219
(804) 786-5968
FAX (804) 371-8400
VOICE/TDD (804) 786-6152**

**Ref: Barbara Halberstam
File No. 300102659**

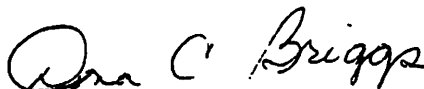
Dear Mr. Samuels:

**This letter will acknowledge receipt of your demand letter dated
February 14, 1994.**

**We are currently researching the merits of your allegations. In the
meantime, please feel free to forward any additional information that you may
wish us to consider when we evaluate the liability issues involved.**

**This letter is not an admission of the validity of your claim, and the
Commonwealth reserves all defenses in this matter, both procedural and
substantive.**

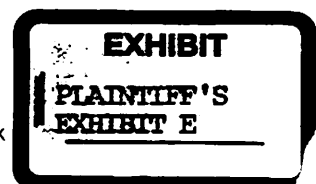
Sincerely yours,



**Dona C. Briggs
Claims Management Specialist
(804) 786-2692**

**DCB:ch
cc: R.D. First**

27
DES



CHARLES J. SAMUELS

ATTORNEY AT LAW

10615 JUDICIAL DRIVE, SUITE 103

FAIRFAX, VIRGINIA 22030

(703) 591-9203

March 14, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Director
Division of Risk Management
4th Floor
109 Governor Street
Richmond, Virginia 23219

Re: Notice of Claim
Claimant: Barbara Halberstam
Your File No. 300 102 659

Dear Sir/Madam:

Pursuant to Code of Virginia, §8.01-195.6, this Notice of Claim is provided. Mrs. Barbara Halberstam is the claimant and I represent her interests for personal injuries sustained on October 5, 1993 at George Mason University.

On October 5, 1993, Mrs. Halberstam, a student at George Mason University, was parking her vehicle in the school parking lot at approximately 7:45p.m.. She parallel parked alongside the curb and began to exit her vehicle. Due to the fact that the area where she parked was unlit, she did not notice a pothole or eroded area in the asphalt of the parking lot. Upon exiting her vehicle she stepped into this eroded area/pothole which caused her to lose her balance, fall and injure herself. George Mason University was responsible for maintaining the parking lot where these injuries occurred.

Should you have any questions, or if I may provide you with any additional information, feel free to contact me.

Sincerely,

Charles Samuels

Charles J. Samuels

CJS:md
halberstam\dirrmgmu.rep

● **SENDER:** Complete items 1 and 2 when additional services are desired, and complete items 3 and 4.
Put your address in the "RETURN TO" Space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for additional service(s) requested.

1. ☐ Show to whom delivered, date, and addressee's address. (Extra charge)
2. ☐ Restricted Delivery (Extra charge)

3. Article Addressed to: DIRECTOR DIVISION OF RISK MANAGEMENT 4th FLOOR 109 GOVERNOR STREET RICHMOND, VIRGINIA 23219	4. Article Number P 412 228 795 Type of Service: <input type="checkbox"/> Registered <input type="checkbox"/> Insured <input checked="" type="checkbox"/> Certified <input type="checkbox"/> COD <input type="checkbox"/> Express Mail <input checked="" type="checkbox"/> Return Receipt for Merchandise Always obtain signature of addressee or agent and DATE DELIVERED .
5. Signature — Addressee X	8. Addressee's Address (ONLY if requested and fee paid)
6. Signature — Agent X <i>Barlene Hoper</i>	
7. Date of Delivery MAR 18 1984	

PS Form 3811, Apr. 1989

U.S.G.P.O. 1989-238-815

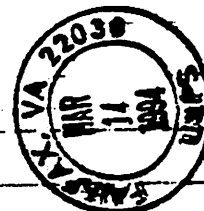
DOMESTIC RETURN RECEIPT

P 412 228 795

Dir, Div. of Risk Mgmt
4th Floor 200 Governor St
Richmond VA 23219

1.29

1.00



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2.29

CHARLES J. SAMUELS

ATTORNEY AT LAW

10615 JUDICIAL DRIVE, SUITE 103
FAIRFAX, VIRGINIA 22030
(703) 591-9203

July 25, 1994

Ms. Dona C. Briggs
Department of General Services
James Madison Building
109 Governor Street 4th floor
Richmond, Virginia 23219

Re: Claim Number: 300 102 659
My client: Barbara Haberstam

Dear Ms. Briggs:

We have previously corresponded concerning my client, Ms. Barbara Haberstam's personal injury claim. I have enclosed a report from John B. Gooch, P.E., CSP. This report details the specific code violations which proximately caused Ms. Haberstam's injuries.

I hope this information helps to make an early resolution of this claim. Please contact me should you have any questions or desire any additional information.

Sincerely,



Charles J. Samuels

Enclosures

CJS:sg
hab.ins

John B. Gooch Associates

• CONSULTING ENGINEERS

7405 COLSHIRE DRIVE • MCLEAN, VIRGINIA 22102 • PHONE (703) 356-1045
BRANCH: 609-35 BAYSHORE DRIVE • OCEAN CITY, MARYLAND 21842 • PHONE (410) 289-4653

JOHN B. GOOCH, P. E., CSP
KENNETH J. GOOCH
WILLIAM S. GOOCH

July 20, 1994.

CHARLES J. SAMUELS, ESQ.
10615 Judicial Drive, Suite 103
Fairfax, Virginia 22030

Re: Barbara Halberstam
D/L October 5, 1993

Dear Sir:

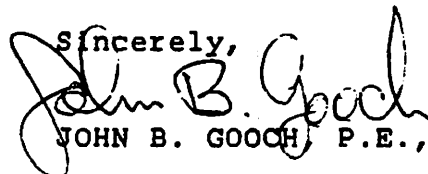
The following is a report of a personal injury of Ms. Barbara Halberstam on October 5, 1993. Ms. Halberstam, a student at George Mason University, was going to the school library at approximately 7:45 PM. She parked in a metered, parallel parking space in front of the Finley Building. This parking space is on the island in front of the Finley building that includes the Information Booth. See Exhibit A - Location on University Campus Map. When Ms. Halberstam stepped out of her car on the drivers side she stepped into an area where the concrete bumper was missing and the level of the dirt adjacent to the asphalt parking surface was two to two-and-one-half inches below the asphalt surface. See Exhibits B 1 through 3 and B 8. The difference in elevation that caused Ms. Halberstam to fall and sustain personal injuries, was due to the wash out from water flowing from the parking area to the catch basin located in the center of the island. This condition still exists today.

~~Sun-set~~ on October 5, 1993 at 6:46 PM, approximately one hour before the accident occurred, and the moon at 7:45 was below the horizon and not visible. We understand the weather was clear. The only street lighting was on the other side of the roadway approximately 75 feet away. These lighting standards were approximately 20 feet high and on the far side of Ms. Halberstam's car. Therefore, the car cast a shadow where the difference in elevation of the walking surface occurred.

It is our understanding that George Mason University is a State owned facility and as such is included under section 36-98.1 of The Code of Virginia and are governed by the Virginia Uniform Statewide Building Code (USBC) Volume I as well as Volume II - Building Maintenance Code. Under section 101.1, the BOCA National Property Maintenance Code (BOCA) is adopted and incorporated in the Building Maintenance Code. The BOCA code, under Article 3, section PM-301.0 Exterior Property Areas, sub-paragraph PM-301.3 Sidewalks and Driveways states, "All sidewalks, walkways, driveways parking spaces and similar areas shall be kept in a proper state of repair, and maintained free of hazardous conditions." (emphasis added)

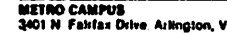
It is our conclusion that the University not only permitted this dangerous condition to exist over a period of time in violation of accepted safety standards but this hazard was also in direct violation of the Virginia Uniform Statewide Building Code.

Sincerely,


JOHN B. GOOCH, P.E., CSP

JBG/jn

The State University in Northern Virginia

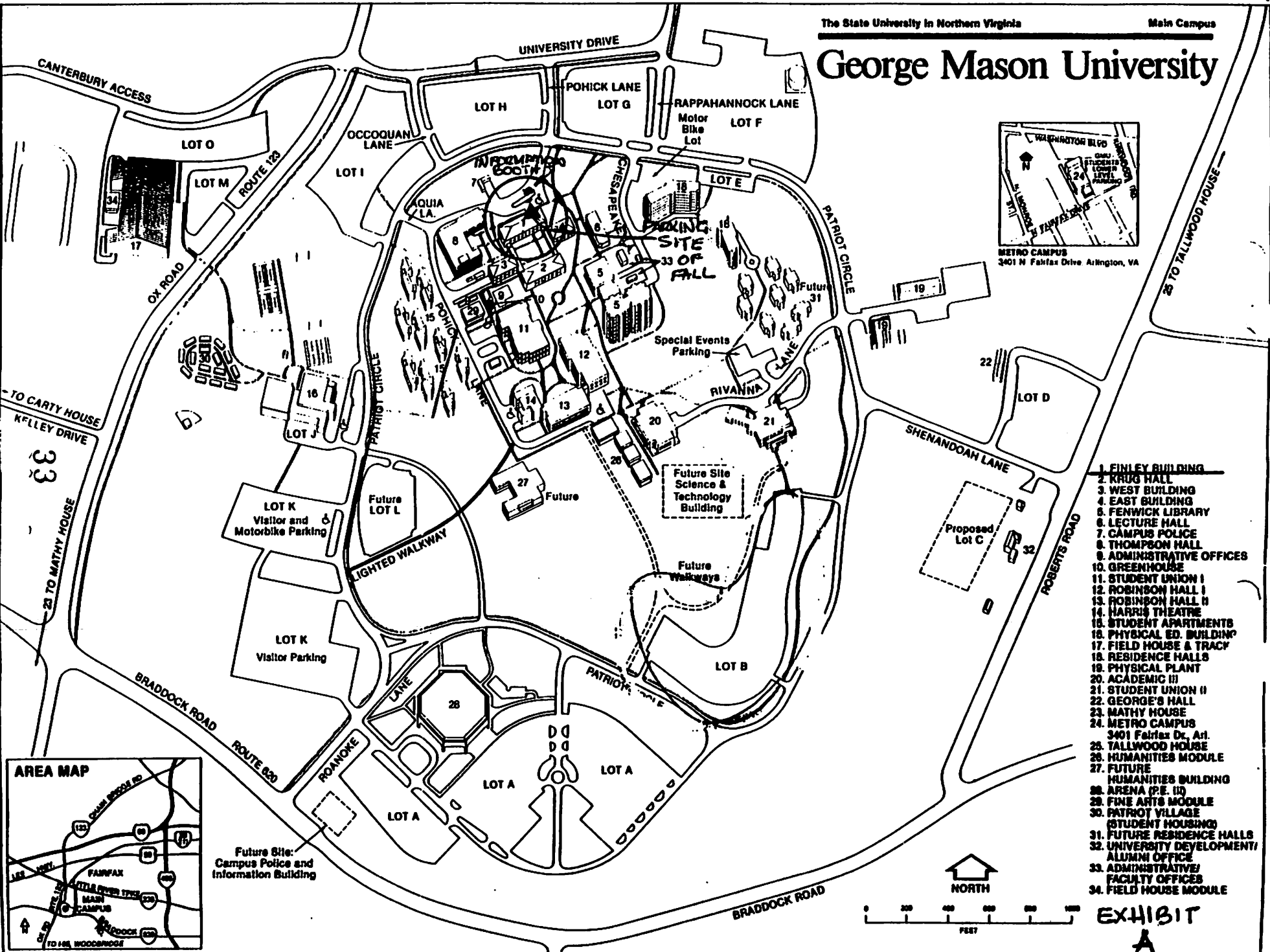


- EXHIBIT



EXHIBIT

A





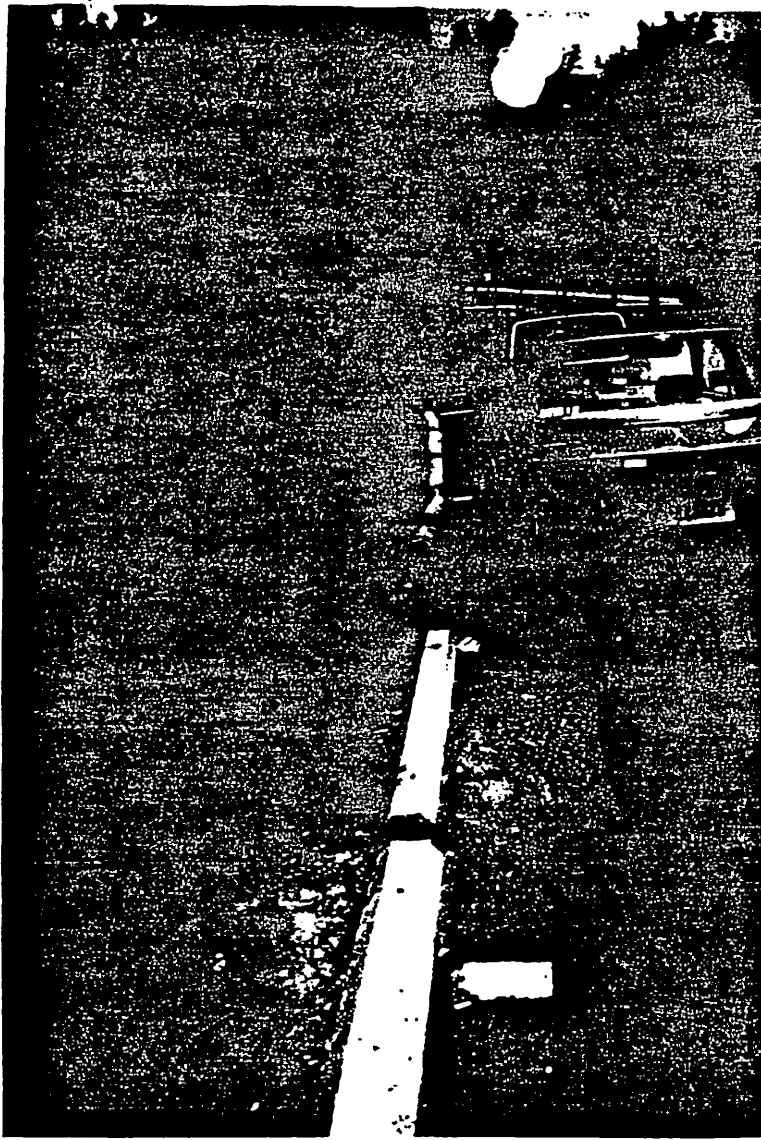
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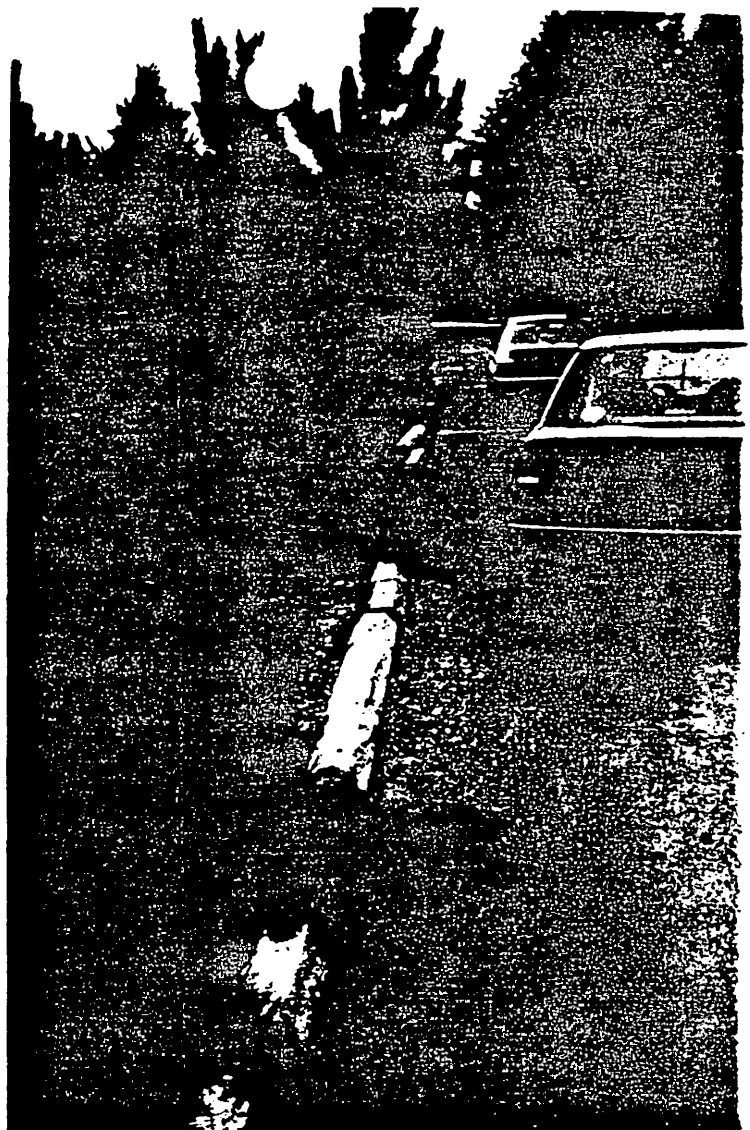
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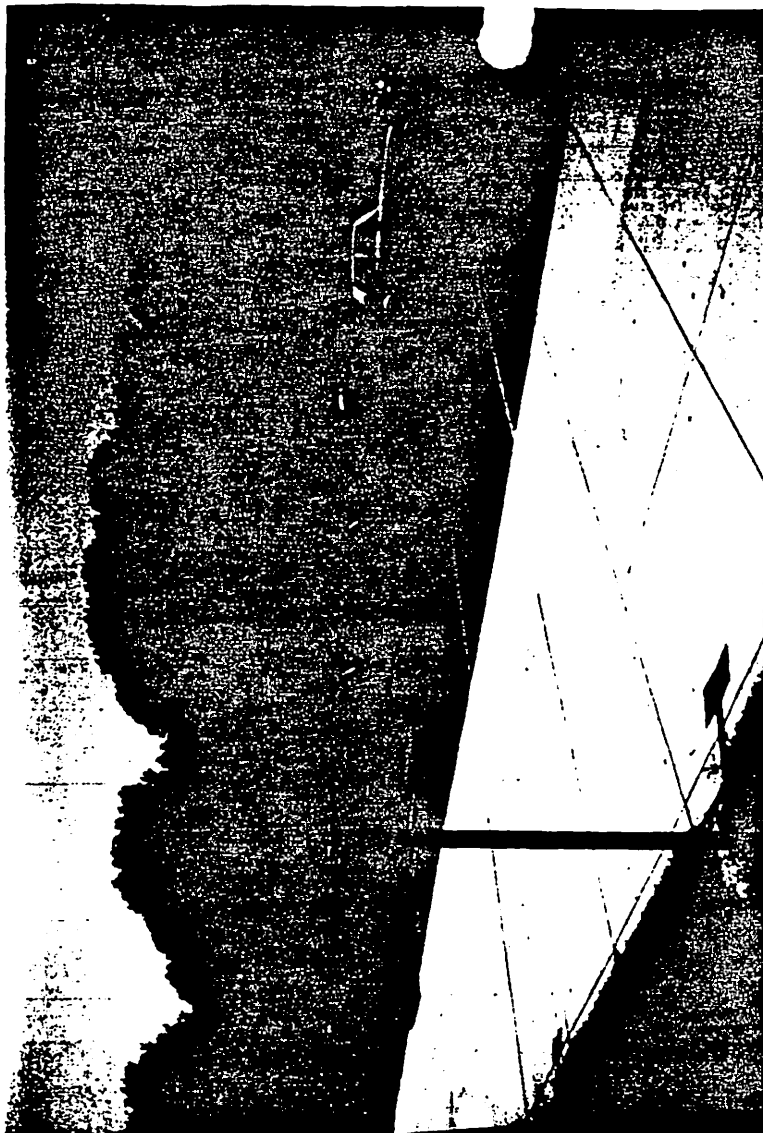


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B-6 35

EXHIBIT
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(PAGE 2)



B-7



B-8

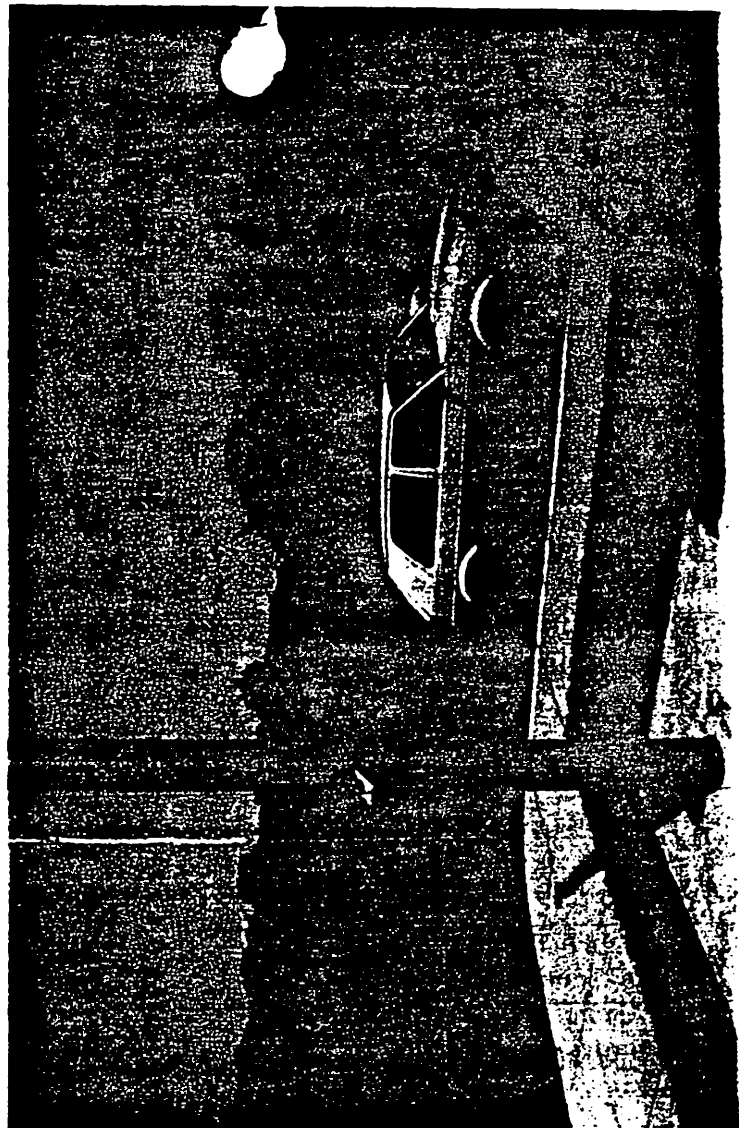


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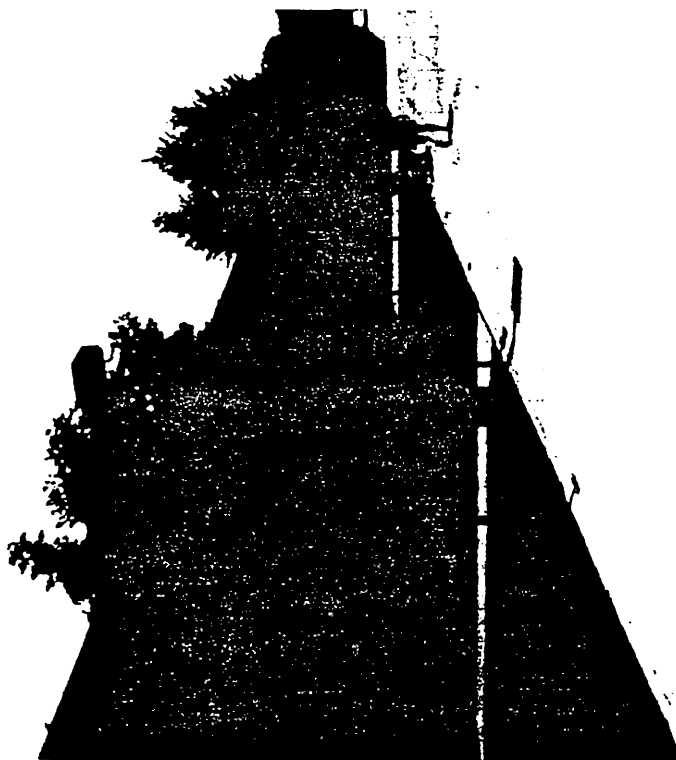
EXHIBIT
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(PAGE 3)



B-10



B-11



B-12 37

EXHIBIT
B
(PAGE 4)



COMMONWEALTH of VIRGINIA

DEPARTMENT OF GENERAL SERVICES

September 19, 1994

DIVISION OF RISK MANAGEMENT

Charles J. Samuels, Esquire
10615 Judicial Drive, Suite 103
Fairfax, VA 22030

P. O. BOX 1140
RICHMOND, VIRGINIA 23208-1121
(804) 786-5968
FAX (804) 371-8400
VOICE/TDD (804) 786-6152

Re: Barbara Halberstam
File No. 300102659

Dear Mr. Samuels:

Thank you for your patience as we proceeded to review the information in connection with your client's liability claim directed against George Mason University (GMU).

We, like Ms. Halberstam, regret that she experienced this unfortunate accident when she was attempting to alight from her car. We can not, however, be an insurer for all injuries which occur on State-owned property. Our investigation of this matter has not revealed sufficient evidence of negligence which would oblige the Commonwealth to accept liability for Ms. Halberstam's fall. Whether or not this location constituted a hidden or unavoidable hazard would still be an issue of fact. For this reason, I regret that we must respectfully decline to accept liability for your client's claim.

This letter is not an admission of the validity of your client's claim and the Commonwealth reserves all defenses in this matter, both procedural and substantive.

Sincerely yours,

Dona C. Briggs
Claims Management Specialist

DCB:ch
cc: R.D. First

EXHIBIT

PLAINTIFF'S
EXHIBIT H

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

95 JAN 25 PM 1:54
CLERK OF COURT

BARBARA HALBERSTAM,

Plaintiff,

v.

Law No. 135637

**COMMONWEALTH OF VIRGINIA,
and
GEORGE MASON UNIVERSITY,**

Defendants.

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF
DEFENDANTS' DEMURRER, MOTION TO DISMISS/MOTION FOR
SUMMARY JUDGMENT AND PLEA OF SOVEREIGN IMMUNITY**

The COMMONWEALTH OF VIRGINIA ("Commonwealth") and GEORGE MASON UNIVERSITY ("GMU") submit the following Memorandum of Law as a supplement to their earlier Memorandum In Support of Defendants' Demurrer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity and in an effort to address certain questions posed by this Court at the hearing which took place on January 6, 1995 ("the hearing").

ARGUMENT

I. GMU Is Entitled To Sovereign Immunity As An Agency Of The Commonwealth.

As this Court recently recognized, the Tort Claims Act did nothing to abrogate the immunity of the Commonwealth's agencies. MPRAS v. Community Living Alternatives et al. (Fairfax Circuit Court, December 2, 1994) (A copy of this opinion is attached for the Court's convenience). This Court noted in MPRAS,

The [Tort Claims Act] . . . authorized suits to be brought against the Commonwealth, and transportation districts, not against agencies of the Commonwealth. Virginia Code § 8.01-195.3 and 195.4. Consequently, even if the Agency is sui juris, [the Tort Claims Act] does not abrogate the doctrine of sovereign immunity in a claim against a state agency.

MPRAS, p.2. Under the circumstances, the Fairfax Circuit Court dismissed MPRAS' claim against the Virginia Department of Mental Health, Mental Retardation and Substance Abuse. See also Messina v. Burden, 228 Va. 301, 321 S.E.2d 657 (1984);¹ Virginia Board of Medicine v. VPTA, 13 Va. App. 458, 464, 413 S.E.2d 59, 64 (1991), aff'd, 245 Va. 125, 427 S.E.2d 183 (1993) (noting that the General Assembly has waived the immunity of agencies only when they are sued under the Virginia Administrative Procedures Act).

Furthermore, a determination of whether the actions or inaction of GMU involved judgment and discretion (or whether they were "ministerial") does not need to be made by this court in order to rule on GMU's immunity plea. Virginia's Supreme Court recently noted in Baumgardner v. Southwestern Va. Mental Hlth. Inst., 247 Va. 486, 489, 442 S.E.2d 400, 401 (1994), that "[i]n the absence of express statutory or constitutional provisions waiving immunity, the Commonwealth and its agencies are immune from liability for the tortious acts or omissions of their agents and employees." (emphasis added).² Therefore, since the Tort Claims Act did

¹The plaintiff implied in her Memorandum In Opposition and at the hearing that the Tort Claims Act abrogated the immunity of the Commonwealth's agents as well as the State. In addition, in her Memorandum In Opposition, the plaintiff argued that all of the cases recognizing the immunity of the Commonwealth's agents pre-dated the Tort Claims Act, something that is not accurate, as demonstrated by Messina.

²Admittedly, an inquiry into the judgment or discretion or (or whether or not an activity is "ministerial") may be appropriate when considering the immunity of an individual agent/employee of the Commonwealth. See Messina v. Burden, 228 Va. at 312, 321 S.E.2d at 662. However, no such inquiry needs to be made when a state agency, such as GMU, is sued. Baumgardner v. Southwestern Va. Mental Hlth. Inst., 247 Va. at 489, 442 S.E.2d at 401.

nothing to abrogate the immunity of GMU,³ GMU is immune from liability in this lawsuit. Id.

Nevertheless, the plaintiff relies on a series of cases dealing with the liability of cities and towns for street maintenance as support for her claim that the "maintenance" actions (or inaction) of GMU⁴ were "ministerial" in nature and in an effort to escape the sovereign immunity defense (and presumably the requirements of the Tort Claims Act). Memorandum In Opposition at p. 4 [hereinafter referred to as "the City cases"]. The plaintiff's reliance on the City cases is misplaced for at least two reasons. First, as discussed above, even if GMU's actions are "ministerial," it is entitled to immunity. Baumgardner v. Southwestern Va. Mental Hlth. Inst., 247 Va. at 489, 442 S.E.2d at 401. Second, the standard that applies when considering immunity is different for a municipality than it is for the Commonwealth's agents, thereby making an application of municipal immunity law inappropriate in this case. James v. Jane, 221 Va. 43, 51, 282 S.E.2d 864, 869 (1980) (for purposes of immunity, "we make a distinction between the sovereign Commonwealth of Virginia and its employees, and local governmental agencies and their employees").

³See Virginia Board of Medicine v. VPTA, 13 Va. App. 458, 464 413 S.E.2d 59, 64; MPRAS v. Community Living Alternatives et al. (Fairfax Circuit Court, 1994).

⁴The plaintiff's entire claim appears to be based on GMU's allegedly negligent maintenance of its parking lot and walkway. Motion for Judgment. At the hearing, however, counsel for the plaintiff also alleged that part of the plaintiff's claim is based on the construction of the area where the plaintiff fell. Decisions regarding design and construction clearly involve judgment and discretion. Bowers v. Commonwealth, 225 Va. 245, 302 S.E. 2d 511 (1983). This is the rule for cities and towns as well as employees or agents of the Commonwealth. City of Norfolk v. Hall, 175 Va. 545, 551, 9 S.E.2d 356 (1940).

Whereas there is a presumption of immunity for the Commonwealth and its agencies (in that all of their actions are known to be governmental),⁵ a municipality is not immune except when its actions are "governmental," rather than "proprietary" (or ministerial).⁶ Bialk v. City of Hampton, 242 Va. 56, 58, 405 S.E.2d 619, 620 (1991). Cases dealing with municipal immunity delineate classifications for what constitutes "governmental" activity (that is, activity engaged in by cities when they are acting for the public at large)⁷ and for what constitutes proprietary (or ministerial) activity (that is, activity engaged in on behalf of a locality's residents rather than the state as a whole).⁸ For example, the regulation of traffic constitutes a

⁵Baumgardner v. Southwestern Va. Mental Hlth. Inst., 247 Va. 486, 489, 442 S.E.2d 400, 401-402 (1994) (emphasis added).

⁶In the past, the term "ministerial" in the context of municipal immunity has been used interchangeably with the term "proprietary." See, e.g., Jones v. City of Williamsburg, 97 Va. 722, 723-24, 36 S.E. 883 (1900) ("[a] municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial"). See also City of Norfolk v. Hall, 175 Va. 545, 551-52 (distinguishing routine street maintenance, as a "ministerial" function, from the "governmental" function of adopting a plan for the construction of public streets); Woods v. Town of Marion, 245 Va. 44, 45, 425 S.E.2d 487 (1993) (distinguishing the "proprietary" function of routine street maintenance from the "governmental" function of emergency street cleaning measures); Taylor v. City of Newport News, 214 Va. 9, 10-11, 197 S.E.2d 209, 210 (1973) (distinguishing the "proprietary" function of surface street maintenance from the "governmental" function of collecting garbage).

⁷Transportation, Inc. v. City of Falls Church, 219 Va. 1004, 1006, 254 S.E.2d 62, 64 (1979); Fenon v. City of Norfolk, 203 Va. 551, 556, 125 S.E.2d 808, 812 (1962).

⁸Veeco v. Hampton Redevelopment and Housing Authority, 217 Va. 30, 36, 225 S.E.2d 364, 369 (1976); Fenon v. City of Norfolk, 203 Va. at 556, 125 S.E.2d at 812.

"governmental" activity,⁹ but routine street maintenance has been classified as a proprietary or ministerial function.¹⁰

The Supreme Court has also considered "ministerial" activities when determining if employees of the Commonwealth or its agencies are immune. See, e.g., Lawthorne v. Harlan, 214 Va. 405, 200 S.E.2d 569 (1973), overruled on other grounds by First Virginia Bank-Colonial v. Baker, 225 Va. 72, 301 S.E.2d 8 (1983). However, the court has ruled that maintenance activities engaged in by agents of the Commonwealth involve judgment and discretion and entitle such agents to immunity. Messina v. Burden, 228 Va. 301, 321 S.E.2d 657.

In Messina, the Supreme Court held that the superintendent of maintenance and buildings at the Tidewater Community College was entitled to sovereign immunity in an action brought by a student who alleged that the stairway where he fell and sustained injury was negligently maintained. In reaching this decision, the court considered judgment and discretion as indicia of immunity. Id. at 312, 321 S.E.2d at 662.¹¹

Thus, the terms "ministerial" and "judgment or discretion" take on different meanings depending on whether they are being used in a case involving the immunity of a municipality or an agent of the Commonwealth. For this reason alone, it would be inappropriate (as well as

⁹Transportation, Inc. v. City of Falls Church, 219 Va. at 1006, 254 S.E.2d at 64.

¹⁰Id.

¹¹In Messina, the Court also considered several other factors to be considered when ruling on an employee's immunity plea, none of which were exclusively determinative. 228 Va. at 312, 321 S.E.2d at 662.

somewhat dangerous) to apply the complicated and unique body of law adopted in the City cases to the matter at hand, particularly in light of Messina.

Under the circumstances, this Court should rule that GMU is entitled to sovereign immunity in this case.

II. The Plaintiff's Claim Should Be Dismissed As To The Commonwealth Since She Failed To Comply With The Strict And Jurisdictional Requirements Of The Tort Claims Act.

The Commonwealth does not deny that it received actual notice of the location of the plaintiff's fall before the plaintiff filed this lawsuit. However, since the plaintiff failed to comply with the specific notice requirements of the Tort Claims Act, this case should be dismissed.¹²

The plaintiff failed to comply with the Tort Claims Act because: (1) the notice of claim sent to the proper party and in the proper manner prescribed by the Tort Claims Act did not state the "place" where the plaintiff was allegedly injured (in that it did not state on which of GMU's campuses the accident occurred, in which parking lot it occurred or where in "the

¹²In the defendants' previous Memorandum and at the hearing, the deficiencies in the plaintiff's notice of claim were identified to the Court. In summary, the plaintiff described the location of her injury as "in the school parking lot." See Exhibit F to the Plaintiff's original Memorandum In Opposition. This does not even constitute "substantial compliance" with the Tort Claims Act since it has been stipulated that there is more than one campus of GMU and more than one parking lot. Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (1984) (failure to state precise location of injury in written notice is equivalent to failing to describe the location at all and does not constitute substantial compliance with the notice provision for cities and towns even if the city or town has actual notice of the precise location of the injury). Regardless, as will be discussed in more detail in a later section of this Memorandum, "substantial compliance" is not sufficient to meet the prerequisites of the Tort Claims Act.

school's parking lot" it occurred),¹³ and (2) even if this Court were to consider the various letters sent by the plaintiff to GMU as attempted written notice under the Tort Claims Act, this written correspondence did not meet the requirements of the Tort Claims Act since it was not sent to the appropriate officials (that is, the Attorney General or the Director of the Division of Risk Management) and it was not sent by certified mail. Virginia Code § 8.01-195.6.

Furthermore, unlike certain other "notice" statutes in the Virginia Code which are not in derogation of the common law, such as the notice provision for cities and towns (§ 8.01-222) or the former notice provision in the Medical Malpractice Act (§ 8.01-581(A)--note: this requirement no longer exists for maintaining a malpractice claim), substantial or "reasonable" compliance with the Tort Claims Act is not sufficient.¹⁴ As noted by the court in Virginia Board of Medicine v. VPTA,

the Commonwealth may limit the right to sue to certain specified causes . . . and when it does so it can be sued only in the manner and upon the terms and conditions prescribed. Compliance with the conditions and restrictions set forth in the statute is jurisdictional.

¹³As noted previously, a notice does not "state the place" of an injury if the identification of the location is not precise, particularly if the description is subject to more than one interpretation. Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (stating that the plaintiff was injured "in your town" did not constitute stating the "place" of injury for purposes of the requirements of § 8.01-222); Jennings v. Commonwealth, 14 Va. Cir. 331 (1989) (stating the place of injury as "Room 248" at MCV hospital insufficient to meet the terms of the Tort Claims Act since there was more than one room 248 in the MCV complex) (a copy of this opinion is attached).

¹⁴ Town of Crewe v. Marler, 228 Va. 109, 319 S.E.2d 748 (substantial compliance is all that is necessary under § 8.01-222). Hudson v. Surgical Specialists, Inc., 239 Va. 101, 387 S.E.2d 750 (1990) (§ 8.01-581.2A required only reasonable notice).

In contrast, statutes which are in derogation of the common law, such as the Tort Claims Act, are to be strictly construed and they cannot be extended beyond their express terms. Wilson v. State Highway Commissioner, 174 Va. 82, 91, 4 S.E.2d 746, 750 (1939); Chesapeake & Ohio Ry. Co. v. Kincer, 206 Va. 175, 181, 142 S.E.2d 514, 518 (1965).

13 Va. App. 458, 465, 413 S.E.2d 59, 63 (1991) (citations and quotations omitted).¹⁵ Thus, strict compliance with the terms and conditions of the Tort Claims Act is a jurisdictional prerequisite for filing a lawsuit against the Commonwealth.

Nevertheless, at the hearing, counsel for the plaintiff indicated that he considered (and wanted this court to consider) GMU's employees as agents of the Attorney General or the Director of the Division of Risk Management for purposes of receiving notice in compliance with the Tort Claims Act.¹⁶ However, since the Tort Claims Act is to be strictly construed and since compliance with the terms and conditions of the Act is jurisdictional,¹⁷ this rationale simply cannot apply in this case.

Moreover, adopting the plaintiff's agency theory would require this Court to ignore the specific language of the statute, something it cannot do. As the Supreme Court of Virginia stated in Barr v. Town and Country Properties, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Watkins v. Hall, 161 Va. 924, 930, 172 S.E. 445, 447 (1934)),

¹⁵See also McCandlish v. Commonwealth, 76 Va. 1002, 1005 (1882) ("That the Commonwealth cannot be sued except in the manner . . . expressly provided, none will deny; for, as has been observed, it is a settled principle of universal jurisprudence that no sovereign can ever be sued save with his own consent, and of course subject to such limitations as he may think fit to impose") (quotations omitted); Cornwall v. Commonwealth, 82 Va. 644, 646 (1886) ("the plaintiff in error can only sue the State by her own consent, and when he avails of this consent he must pursue the remedy as it is provided by the law") (emphasis added).

¹⁶Presumably, the plaintiff would also want any notice received by Dona Briggs, a claims adjuster at the Division of Risk Management, to be considered notice of the Director.

¹⁷The language of the Tort Claims Act also indicates that compliance with the notice provisions of the statute is jurisdictional. As mentioned in the defendants' earlier memorandum, § 8.01-195.7 provides that failure to properly file the notice mandated by § 195.6 renders the claim forever barred. Consequently, unlike the notice requirements of § 8.01-581.2A, the Tort Claims Act notice requirements are clearly jurisdictional.

Where the legislature has used words of plain and definite import, the courts cannot put upon them a construction which amounts to holding that the legislature did not mean what it has actually expressed.¹⁸

The Tort Claims Act states clearly that the notice is to be sent directly, by certified mail, to the Attorney General or to the Director of the Division of Risk Management, rather than to any employee of a state agency who may eventually relay the information to one of the proper officials. Virginia Code § 8.01-195.6. This court must enforce the requirements of the statute as written.

Also, these provisions were obviously enacted to serve some purpose, such as advising the officials of state government who have the ultimate responsibility to investigate, defend and resolve the Commonwealth's tort disputes, of the details of an accident, directly and in a timely fashion.¹⁹ In addition, the notice requirements of the Tort Claims Act serve the important purpose of establishing specific time deadlines. An action against the Commonwealth cannot be commenced until the claim has been denied by the DRM or the Attorney General or "after the expiration of six months from the date of filing the notice of claim." Virginia Code § 8.01-195.7 (emphasis added). Furthermore, a claim is forever barred unless a notice of claim is filed within a year after a cause of action accrues. Id. Both of these time limiting provisions

¹⁸See also City of Virginia Beach v. ESG Enterprises, 243 Va. 149, 413 S.E.2d 642 (1992).

¹⁹Although it appears as though GMU and Dona Briggs did an acceptable job conducting the initial investigation of this claim, this is, unfortunately, not always the case. There is always a possibility that an agency or a claims adjuster will "drop the ball" and fail to adequately investigate a claim in the early stages when evidence is still fresh. For that reason alone, § 8.01-195.6 acts as a safeguard to protect the interests of the sovereign by ensuring that the officials in the state system with the responsibility of defending tort claims receive notice, directly, of where and when an accident occurred. This enables the Attorney General or the Director of Risk Management to conduct his or her own prompt investigation before the trail grows cold.

recognize the necessity of filing a specific, time triggering, "notice of claim" for purposes of determining compliance with § 8.01-195.7.²⁰

It must be presumed that each of the requirements of the Tort Claims Act were enacted for a valid purpose and the clear language of the Act cannot be ignored. Also, the Tort Claims Act must be strictly construed and compliance with its terms is jurisdictional. Because the plaintiff has failed to comply with the Act's specific terms, her claim must be dismissed.

CONCLUSION

For the foregoing reasons, the defendants respectfully request that this Court sustain their demurrer, motion to dismiss/motion for summary judgment and plea of sovereign immunity and dismiss the plaintiff's action with prejudice.

Respectfully submitted

COMMONWEALTH OF VIRGINIA
and GEORGE MASON UNIVERSITY

By: 
Counsel

James S. Gilmore, III
Attorney General

Catherine C. Hammond
Deputy Attorney General

Gregory E. Lucyk
Senior Assistant Attorney General

²⁰The plaintiff's interpretation of the "notice of claim" required by § 8.01-195.6 as including all correspondence sent to GMU or Dona Briggs would cast into doubt precisely when the time limitations of § 8.01-195.7 would come into play.

A. Ann Berkebile
Assistant Attorney General

900 East Main Street
Richmond, Virginia 23219
804/786-9516

CERTIFICATE

I hereby certify that on January 24th, 1995, a true and correct copy of the foregoing
was mailed to Charles J. Samuels, Esq., 10615 Judicial Drive, Suite 103, Fairfax, VA 22030.

A. Ann Berkebile

aab\halberstam.sup



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
(703) 248-2221 Fax: (703) 385-4432

941
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DEC. 8 1994

TRIAL APPELLATE SECTION
OFFICE OF THE ATTORNEY GENERAL

RICHARD J. JAMBORSKY
F. BRUCE BACH
QUINLAN H. HANCOCK
J. HOWE BROWN
JACK B. STEVENS
THOMAS A. FORTKORT
MICHAEL P. McWEENY
ROSEMARIE ANNUNZIATA
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JANE MARUM ROUSH
JUDGES

COUNTY OF FAIRFAX

CITY OF FAIRFAX

DR. MARK A. ZAFFARANO
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JAMES KEITH
LEWIS D. MORRIS
BURCH MILLSAP
BARNARD F. JENNINGS
LEWIS H. GRIFFITH
WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
RETIRED JUDGES

December 2, 1994

Paul P. Vangellow, Esquire
6109 C Arlington Boulevard
Falls Church, Virginia 22044

James P. Wheeler, Esquire
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

RE: Nicholas E. MPRAS, et al. v.
Community Living Alternatives, At Law No. 123573

Dear Counsel:

This case is before the Court on the Demurrer, Special Plea of Sovereign Immunity and Motion to Dismiss filed by the Defendants Commonwealth of Virginia ("The State") and Virginia Department of Mental Health Mental Retardation and Substance Abuse Services ("The Department"). After oral argument, the Court took these matters under advisement and invited counsel for the Plaintiff to submit additional evidence, if appropriate, in opposition to the Plea in Bar. Plaintiff's counsel submitted a "chronology of events" which has been received as Plaintiff's Exhibit 2, and certain regulations which have been received as Plaintiff's Exhibit 3. After consideration of the pleadings, the oral and written arguments of counsel and Plaintiff's Exhibits 1, 2 and 3, the Plea in Bar and Demurrer are sustained and this matter is dismissed as to these Defendants.

In their four count Amended Motion for Judgment¹, Plaintiffs have sued these Defendants, among others, based upon alleged tortious acts of residents of a residential home for retarded

¹Count I - Negligence, Count II - Gross Negligence, Count III - Failure to Supervise, Count IV - Nuisance.

MPRAS, et al v. Community Living Alternatives

At Law No. 123573

December 2, 1994

individuals during the period between February 4, 1991 and October, 1991. These Defendants claim, inter alia, that the claims are barred by (1) sovereign immunity, (2) failure to comply with the dictates of § 8.01-195.6 of the Virginia Code, (3) the applicable statute of limitations, and (4) the lack of a legal duty owed by these Defendants to these Plaintiffs.² The Court will address each of these issues.

I. Sovereign Immunity As to Defendant The Department.

The doctrine of sovereign immunity is firmly rooted in the law of the Commonwealth, Messina v. Burden, 228 Va. 301 (1984). Absent constitutional or statutory provisions providing otherwise, the Commonwealth is immune from liability for the tortious acts of its servants, agents and employees. Eriksen v. Anderson, 195 Va. 655 (1954). Assuming, without deciding, that The Department is an entity that may be sued, the doctrine of sovereign immunity bars the Plaintiffs' claims against it. See Maia v. Eastern Hospital, 97 Va. 507 (1899). A state agency would surely enjoy no less immunity than high level government officials and these officials have generally enjoyed absolute immunity. See Messina at 309.

(A) In 1982, the General Assembly statutorily created a partial exception to the doctrine of sovereign immunity when it enacted the Virginia Tort Claims Act, Virginia Code § 8.01-195.1 et seq (The Act). The Act, however, authorized suits to be brought against the Commonwealth, and transportation districts, not against agencies of the Commonwealth. Virginia Code § 8.01-195.3 and 195.4. Consequently, even if the Agency is sui juris, The Act does not abrogate the doctrine of sovereign immunity in a claim against a state agency. The plea in bar of sovereign immunity must be sustained as to the claim against The Agency.

II. Sovereign Immunity As To The State.

Section 8.01-195.6 of the Code sets forth the requirements for giving notice of a claim under The Act. A statement setting forth "the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable" must be filed with the Director of Risk Management or the Attorney General within one year after the

²As a result of the rulings set out herein, the Court need not rule on the other issues raised by these Defendants.

MPRAS, et al v. Community Living Alternatives

At Law No. 123573

December 2, 1994

accrual of the cause of action, if the claim is against The State.

On January 31, 1992 Plaintiffs forwarded a letter entitled Notice of Claim³ to the Attorney General, who received it on February 4, 1992. While listing the agencies alleged to be liable, the purported notice contains only the following statement as to the nature of the various Plaintiffs' claims:

These injuries are the result of activities, including but not limited to assault and battery, by residents of a group home for the mentally retarded/emotionally disturbed located until recently at 7705 Arlen Street in Annandale, Virginia. The group home was occupied by the residents in February, 1991 and vacated in October, 1991.

In Town of Crewe v. Marler, 228 Va. 109 (1984) our Supreme Court ruled on the sufficiency of a notice to make a claim against a city or town. The requirements of this notice under § 8.01-222 of the Code are virtually identical to the requirements of the notice under The Act. In Marler, the town claimed the notice was deficient only because the actual location of the tortious act was not set forth. While acknowledging that the town indeed had actual notice of the place of the injury within the time frame for the filing of the notice, the Supreme Court nonetheless held that the claim was barred. The Court declined to "place any limitation on the clear and comprehensive language of the statute, or to create an exception where none exists under the guise of statutory construction..." Id. at 114.

The January 31, 1992 notice forwarded by the Plaintiffs herein clearly fails to state at a minimum, either the time or place where injuries occurred. At the hearing on these pending motions, counsel for the Plaintiff alleged that an additional "notice" had been forwarded to The State. The Court granted counsel leave to present evidence in support of that allegation before ruling on the merits of the motions. Counsel subsequently forwarded to the Court Exhibit 2 titled "Chronology of events at 7703 Arlen Street, Annandale, Virginia 22003." Although no cover letter was presented to the Court by counsel setting forth the

³Exhibit Number 1-Appended to Plaintiffs' Opposition to Motion to Dismiss.

MPRAS, et al v. Community Living Alternatives
At Law No. 123573
December 2, 1994

date or place that this chronology was filed, the Attorney General acknowledges in his brief that the Division of Risk Management had received the chronology on August 19, 1992, as a Supplemental Notice of Claim dated August 12, 1992. Even if this Court were to decide that Exhibits 1 and 2 could be considered as one Notice properly received on August 19, 1992 and that the particulars of the alleged tortious acts set out in Exhibit 2 were sufficient to satisfy the Marler test, Plaintiffs claims would nonetheless be barred. Pursuant to § 8.01-195.7 of the Code, the notice of claim must be properly filed within one year of the accrual of the cause of action, or the claim will be forever barred. A review of Exhibit 2 belies any possible claim of tortious conduct occurring within this statute of limitation, as all acts which are even arguably actionable occurred more than one year prior to August 19, 1992.

Therefore, the Plaintiffs claims against both The State and The Department are barred for failure to comply with the requirements of The Act.

III. Demurrer - Whether these Defendants Owed a Cognizable Duty Of Care To These Plaintiffs.

In Count III of the Amended Motion for Judgment, Plaintiffs claimed damages from The Department and The State based upon an alleged breach of their duty:

to use reasonable care in licensing, regulating and otherwise supervising the activities of Community Living Alternatives and its agents, employees and contractors with regard to the residents at 7703 Arlen Street so as to protect the Plaintiffs and the community from foreseeable harm and criminal conduct.

Such a duty from these Defendants to these Plaintiffs does not exist under settled Virginia law.

In general, no person owes a duty to control the actions of a third party, Fox v. Custis, 236 Va. 69, 74-77 (1988). Klingbeil Management Group, Co. v. Vito, 233 Va. 445, 447-48 (1987); Gulf Reston, Inc. v. Rogers, 215 Va. 155, 158 (1974). An exception arises where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relationship exists between the actor and the other which gives to the other a right to protection." Restatement (Second) of Torts §315 (1965).

MPRAS, et al v. Community Living Alternatives
At Law No. 123573
December 2, 1994

In Marshall v. Winston, 239 Va. 315 (1990), the Supreme Court adopted the "public duty" doctrine, thereby limiting the instances in which the Restatement exception can apply. Pursuant to the public duty doctrine, a distinction must be drawn between the duty owed by a public official to the citizenry at large and a special duty that may be owed to a "specific identifiable person or class of persons." Id. at 319. Only a breach of duty to the latter will be actionable. Id. In Marshall, the Supreme Court held that a citizen had no cognizable claim against a sheriff who mistakenly released an inmate who injured the Plaintiff. Citing cases from other jurisdictions, the Court decided that holding public officials liable for violating a duty owed to the general public would potentially subject such officials to numerous claims and would be contrary to society's best interest. Id. at 319 (citations omitted).

Here, Plaintiffs cannot and do not attempt to distinguish themselves from the "community." Even if they were able to establish that these Defendants had a duty to regulate the activities at the group home on Arlen Street⁴, the public duty doctrine precludes them from advancing their claims against these Defendants. Therefore, the Amended Motion for Judgment fails to state a claim against these Defendants and the demurrer is sustained.

IV. Count IV - Nuisance.

In Count IV Plaintiffs allege damages based upon a theory of nuisance. Citing Taylor v. City of Charlottesville, 240 Va. 367 (1990), they claim that sovereign immunity does not apply to a claim sounding in nuisance. Plaintiffs misread Taylor. The claim in Taylor was against the City of Charlottesville, a municipality. In reversing the trial court's dismissal of the claim therein, the Supreme Court distinguished that case from its holding in Kellam v. School Board, 202 Va. 252 (1960) wherein it specifically held that governmental immunity did apply to a claim for nuisance against a state agent. Id. at 258. The claims against these Defendants in Count IV are barred by sovereign immunity.

V. Conclusion.

For the reasons set out in this opinion, the pleas in bar

⁴This Court does not rule or imply that such a duty exists. Exhibit 3 does not establish such a duty.

MPRAS, et al v. Community Living Alternatives

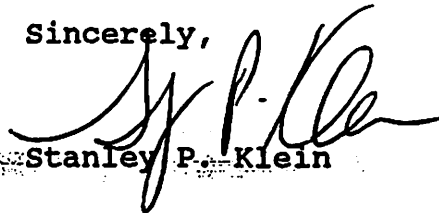
At Law No. 123573

December 2, 1994

based on sovereign immunity as well as the demurrer of Defendants Commonwealth of Virginia and Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services are sustained and all counts of this action are dismissed with prejudice as to these Defendants.

Mr. Wheeler should prepare an appropriate order, and after endorsement by counsel noting all exceptions, should forward it to my chambers for entry no later than December 16, 1994.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Stanley P. Klein', is written over the typed name.

Stanley P. Klein

SPK/plh

ent of Motor Vehicles
326 (1989)

Jennings v. Commonwealth
14 Va. Cir. 331 (1989)

331

0 of the Code. Unless that
to quash the subpoena for

CIRCUIT COURT OF THE CITY OF RICHMOND

May H. Jennings

v.

Commonwealth of Virginia
and L. Jarrett-Walton

February 16, 1989

Case No. LM1246-2

HEADNOTE: Before suing the Commonwealth under the Tort Claims Act, the injured party must give explicit notice of the place of the injury.

By JUDGE ROBERT L. HARRIS, SR.

This case is before the court on the Commonwealth's plea of sovereign immunity. Argument was heard on this issue on October 14, 1988, and a memorandum from the Commonwealth was considered. Counsel for Plaintiff chose not to submit a memorandum. It is the opinion of the court that the Commonwealth's plea must be sustained.

The plaintiff, May H. Jennings, filed suit against the Commonwealth of Virginia and others on April 27, 1988. Ms. Jennings claimed she slipped and fell on a puddle of liquid on the floor in Room 248 at the Medical College of Virginia hospital. Plaintiff alleges that she suffered injuries as a result of the fall and that Medical College of Virginia's negligence was the proximate cause of the fall.

Generally, the Commonwealth of Virginia is immune from suit. On July 1, 1982, the Virginia General Assembly enacted Section 8.01-195.1 (the Virginia Tort Claims Act) and thereby waived governmental immunity from suit in some limited situations in derogation of the common law. In these cases the plaintiff may only bring suit in the manner prescribed by the statute. It is well settled that litigants must strictly comply with the terms of statutes that remove the veil of immunity from suit from the Common-

wealth. See *Fugate v. Martin*, 208 Va. 529, 532 (1968); *Hicks v. Anderson*, 182 Va. 195 (1949); *Commonwealth v. Ferries Co.*, 120 Va. 827 (1917); *Dunnington v. Ford*, 80 Va. 177, 178 (1885). More recently, the Virginia Supreme Court, in *Town of Crewe v. Marler*, 228 Va. 109 (1984), wrote:

Unless explicit notice in writing of the time and place of an accident is furnished the proper official substantially in accordance with the statute, when there is a claim of municipal negligence, the likelihood of prompt attention to the matter to protect the interests of the municipality and the public is materially diminished. For this Court to place any limitation on the clear and comprehensive language of the statute, or to create an exception where none exists, under the guise of statutory construction, would be to defeat the purpose of the enactment and to engage in judicial legislation

Although the plaintiff in the case at bar did provide a hospital room number, that was not explicit notice of the place of the fall. Medical College of Virginia has many buildings and Room 248 could be in any of them. The affidavit of Phillip P. Woodson, Interim Risk Manager for Medical College of Virginia, notes that there are six buildings in which Room 248 could have been located.

Under these facts, the plaintiff's notice did not identify the location of her accident with requisite specificity under Virginia Code § 8.01-195.1. This case is dismissed as to the Commonwealth of Virginia/Medical College of Virginia.

10 VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

1-31-95 ✓

BARBARA HALBERTAM
versus
COMMONWEALTH OF VIRGINIA, et al

CASE NO. L135637

STATUS CONFERENCE ORDER

The Status Conference was held January 31, 1995. After discussing the various issues presented; it was ORDERED that:

A. Plaintiff's and Counter Plaintiff's experts must be identified on or before 90 days prior to trial. All opposing experts must be identified on or before 60 days prior to trial. Identification of experts must set out all information discoverable under Rule 4:1(b)(4)(A)(i) of the Rules of the Supreme Court of Virginia, or the expert may not be permitted to express any non-disclosed opinions at trial. All discovery except Requests for Admissions shall be completed 30 days prior to trial.

B. A Settlement Conference Date is July 18, 1995 w/ Judge, at 8:30 a.m. A factual statement of the case must be submitted to the Case Management Office on the 5th floor of the Judicial Center no later than five days before the Settlement Conference. Lead counsel for each of the parties and the parties (or if applicable, the insurance adjuster with authority to settle) must attend the settlement conference, unless excused in advance by the Judge or Evaluator conducting the conference. However, parties (or adjusters) who reside over 50 miles from the Fairfax Courthouse may be available by phone.

C. Counsel or pro se parties shall deliver to opposing counsel or party a copy of all exhibits and a list of names of witnesses proposed to be introduced at trial, on or before 15 days prior to trial. A list of exhibits and witnesses shall be filed with the Clerk of the Court simultaneously therewith but the exhibits shall not then be filed. No exhibit or witness not so identified and filed will be received in evidence, except in rebuttal or for impeachment. Any objections to exhibits except on relevancy grounds need to be filed with the Clerk of the Court and a copy mailed to opposing counsel or pro se parties no later than five days prior to trial or the objection will be deemed waived. Objections shall be to particular exhibit numbers and must state the legal reason for the objection.

D. Counsel shall exchange and confer about proposed jury instructions in advance of the trial date. At the commencement of trial, counsel shall tender to the Court the originals of all agreed upon instructions and copies of all contested instructions with appropriate citations.

E. Deadlines established in this Order may be extended or waived by the Court for good cause shown, but only after considering the extent to which the opposing party may be prejudiced thereby.

F. The Trial date is Aug. 21, 1995 / with a Jury ☒ without a Jury ☐
Estimated trial time is 2 days.

G. Motions in limine which require argument exceeding five minutes shall be heard on a motions day before the trial date.

H. All dispositive motions shall be presented to the Court for hearing as far in advance of the trial date as possible.

I. The Court's Case Management Instructions dated January 1, 1994 are incorporated herein by reference and the parties shall comply with each term thereof.

Entered this 31st day of January, 1995.

Unle S...
Counsel for Plaintiff(s)
Barbara Halbertam
Counsel for Defendant(s)
for Ann Berkeley

[Signature]
JUDGE
PK

2-21-95



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

(703) 248-2221

Fax: (703) 385-4432

COUNTY OF FAIRFAX

CITY OF FAIRFAX

RICHARD J. JAMBORSKY

F. BRUCE BACH

QUINLAN H. HANCOCK

J. HOWE BROWN

JACK B. STEVENS

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JAMES KEITH
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BURCH MILLSAP
BARNARD F. JENNINGS
LEWIS H. GRIFFITH
WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
RETIRED JUDGES

February 21, 1995

A. Ann Berkebile, Esq.
Assistant Attorney General
900 East Main Street
Richmond, Virginia 23219

Charles J. Samuels, Esq.
10615 Judicial Drive, Suite 103
Fairfax, Virginia 22030

RE: Halberstam v. Commonwealth of Virginia, et al.
At Law No. 135637

Dear Counsel:

The matter before the Court is defendants', the Commonwealth of Virginia and George Mason University, Demurrer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity.

The plaintiff in this case, Barbara Halberstam, alleges that she was injured on October 5, 1993, when she fell in a parking lot at George Mason University due to the defendants' failure to maintain the premises in a safe condition. Prior to filing this action, plaintiff corresponded in writing with employees at the Divisions of Risk Management at George Mason and in Richmond regarding the nature of her injury and the location at which it occurred. On March 14, 1994, plaintiff, through counsel, sent by certified mail to the Director of Risk Management in Richmond her notice of claim, as required by Virginia Code § 8.01-195.6. On September 19, 1994, the Division of Risk Management in Richmond denied in writing plaintiff's claim. Plaintiff thereafter filed her motion for judgment on October 4, 1994. Naming as defendants the Commonwealth of Virginia and George Mason University.

I find first that the plaintiff's suit against George Mason University is barred by the doctrine of sovereign immunity for the following reasons. The doctrine of sovereign immunity is

Halberstam v. Commonwealth of Virginia, et al.

At Law No. 135637

February 21, 1995

Page 2

firmly established in the Commonwealth of Virginia. Messina v. Burden, 228 Va. 301 (1984). Absent a statutory or constitutional provision abrogating this immunity, suit may not be brought against the Commonwealth for the tortious acts of its agents or employees. Eriksen v. Anderson, 195 Va. 655 (1954). While the General Assembly has created a partial exception to sovereign immunity through enactment of the Virginia Tort Claims Act, Va. Code § 8.01-195.1 et seq., Virginia law does not abrogate the immunity of the Commonwealth's agencies. See Va. Code § 8.01-195.3 and MPRAS, et al. v. Community Living Alternatives, Law No. 123573 (Cir. Ct. of Fairfax County 1994) (Judge Klein). George Mason's Plea of Sovereign Immunity must therefore be granted and George Mason dismissed from the case with prejudice.

Turning now to the remaining defendant, the Commonwealth contends that plaintiff's action against it is barred by her failure to comply with the notice requirements of Va. Code § 8.01-195.6. That section requires the claimant to file:

a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agency or agencies alleged to be liable. The statement shall be filed with Director of the Division of Risk Management or the Attorney General within one year after such cause of action accrued . . . The claimant . . . shall, in a claim cognizable against the Commonwealth, mail the notice of claim via the United States Postal Service by certified mail, return receipt requested, addressed to the Director of the Division of Risk Management or the Attorney General in Richmond.

The notice of claim filed by the plaintiff in this case reads, in pertinent part:

On October 5, 1993, Mrs. Halberstam, a student at George Mason University, was parking her vehicle in the school parking lot at approximately 7:45 p.m. She parallel parked alongside the curb and began to exit her vehicle. Due to the fact that the area where she parked was unlit, she did not notice a pothole or eroded area in the asphalt of the parking lot. Upon exiting her vehicle she stepped into this eroded area/pothole which caused her to lose her balance, fall and injure herself.

I find that this notice does not comply with the statutory requirements because it fails to sufficiently identify the

Halberstam v. Commonwealth of Virginia, et al.

At Law No. 135637

February 21, 1995

Page 3

location of the incident. Specifically, the notice does not state in which of many parking lots at George Mason plaintiff sustained the fall, at which of George Mason's campuses the incident occurred, and where in the parking lot she fell. See Town of Crewe v. Marler, 228 Va. 109 (1984) and Jennings v. Commonwealth, 14 Va. Cir. 331 (1989).

Plaintiff seeks to cure the infirmities in her written notice of claim on the ground that she has substantially complied with the statute. Citing the history of written correspondence between plaintiff and Division of Risk Management employees at George Mason and in Richmond, plaintiff first contends that the Director of Risk Management had actual notice of the true nature of her claim. Actual notice, however, is insufficient. Town of Crewe v. Marler, 228 Va. 109 (1984) (construing a similar notice provision in Va. Code § 8.01-22).

Further, it is not clear that substantial compliance with the notice provisions is sufficient. As a general principle, because the Tort Claims Act is in derogation of the sovereign's immunity at common law, the Act is to be strictly construed. See Virginia Board of Medicine v. VPTA, 13 Va. App. 458 (1991); Wilson v. State Highway Commissioner, 174 Va. 82 (1939) and Dunnington v. Ford, 80 Va. 177 (1885).

Even assuming *arguendo* that substantial compliance is sufficient, however, I cannot conclude that plaintiff has substantially complied with Va. Code § 8.01-195.6. Not only were the letters plaintiff would have the Court consider as part of her notice sent to the wrong party¹, but they were also not sent by certified mail, as required by the statute. See Lando v. City of Chicago, 470 N.E.2d 1172 (Ill. App. 1 Dist. 1984). See also Annotation, *Persons Upon Whom Notice of Injury or Claim Against Municipal Corporation May or Must Be Served*, 23 A.L.R.2d 969 (1951) and 18A Eugene McQuillin, *Municipal Corporations* §§ 53.160 and 53.162 (1993) and the cases cited therein.

Failure to comply with the notice requirements of Va. Code § 8.01-195.6 results in the claim against the Commonwealth being

¹The letters were sent to Claudia Young, a Risk Management employee at George Mason University, and to Donna Briggs, a Claims Management Specialist in the Division of Risk Management in Richmond, and not to the Director of Risk Management or the Attorney General.

Halberstam v. Commonwealth of Virginia, et al.

At Law No. 135637

February 21, 1995

Page 4

"forever barred." Accordingly, the Commonwealth's motions are granted and the case against the Commonwealth is dismissed. Counsel for the defendants is asked to draft an order in conformity with this decision, to forward it to opposing counsel for endorsement and then to the Court for entry by March 3, 1995.

Sincerely yours,



Rosemarie Annunziata

RA/cl

3-13-95



VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

BARBARA HALBERSTAM,

Plaintiff,

v.

Law No. 135637

COMMONWEALTH OF VIRGINIA,
and
GEORGE MASON UNIVERSITY,

Defendants.

O R D E R

Upon argument of counsel and consideration of memoranda submitted by the parties, it is hereby ORDERED that the defendants' Demurrer, Motion to Dismiss/Motion For Summary Judgment and Plea of Sovereign Immunity be sustained and that this action be dismissed with prejudice in accordance with the reasoning and analysis incorporated in this Court's letter opinion dated February 21, 1995.

Entered: March 13, 1995

Rodman Arnesen
Circuit Judge

I ASK FOR THIS:

A. Ann Berkebile

A. Ann Berkebile
Assistant Attorney General
Counsel for Commonwealth of Virginia
and George Mason University

SEEN AND OBJECTED TO:

Charles J. Samuels
Counsel for Plaintiff

ab\halberstam.ord

FILED

MAY 9 1995

JOINT. PREY
Clerk of the Circuit Court
of Fairfax County, VA

V I R G I N I A :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

BARBARA HALBERSTAM,

Plaintiff,

v.

COMMONWEALTH OF VIRGINIA

AND

GEORGE MASON UNIVERSITY,

Defendants.

LAW NO. 135637

PLAINTIFF'S STATEMENT OF FACTS AND

OTHER INCIDENTS OF THE CASE

COMES NOW the Plaintiff, Barbara Halberstam, by counsel, and pursuant to Virginia Supreme Court Rule 5:11(c), submits the following as her written statement of facts and other incidents of the case:

I. This case came to be heard on Defendant's Demurer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity. Both parties briefed their respective positions and submitted oral argument to the trial court. No court reporter was present, therefore, no transcript is available. At the conclusion of the hearing, the trial court asked the parties to re-brief the issues. The parties again submitted briefs stating their positions. After the second round of briefs, the trial court decided the case without further oral argument.

II. The pertinent documents which the court had available for consideration were as follows:

A. Motion for Judgment alleging, inter alia, that the Plaintiff was injured due to the negligent construction and maintenance of the premises of Defendant's, George Mason University ("GMU") and the Commonwealth of Virginia ("CW").

B. Defendant's Grounds of Defense denying the material allegations of Plaintiff's Motion for Judgment.

C. Defendant's Demurer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity with supporting memorandum, alleging that Plaintiff's Notice of Claim failed to comply with the requirements of the Virginia Tort Claims Act.

D. Fairfax County Circuit Court Status Conference Order establishing a trial date, deadlines for expert witness designation and discovery cut-off date of July 21, 1995.

E. Plaintiff's Motion and Memorandum in Opposition to Defendant's Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity.

F. Defendant's Supplemental Memorandum in Support of Defendant's Demurer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity.

G. Plaintiff's Supplemental Memorandum in Opposition to Defendant's Demurer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity.

H. Defendant's Reply Memorandum.

Thereafter, the trial court wrote a letter Opinion dated February 21, 1995, in which it indicated it would sustain Defendant's Motion to Dismiss.

On March 3, 1995, counsel for Plaintiff submitted Supplemental Points of Authority for consideration by the trial court. On March 9, 1995, counsel for Defendants submitted a letter in response to the Plaintiff's Supplemental Points of Authority. Nonetheless, on March 13, 1995, the trial court entered a final Order granting Defendant's Motion to Dismiss. On March 15, 1995, Plaintiff wrote a letter to the Court requesting, if not previously considered by the Court, that Plaintiff's final submission of Supplemental Points of Authority be considered as Plaintiff's Motion to Reconsider.

III. Attached as exhibits to the pleadings mentioned above were correspondence between the parties concerning the nature and location of Plaintiff's injuries. The following correspondence was submitted to the trial court for consideration:

A. Letter dated October 11, 1993, from Plaintiff to Claudia Young, Risk Management ("GMU"), giving date, time, location, nature of the claim, diagram and photographs of the location where this incident took place

B. Letter dated November 19, 1993, from Plaintiff's counsel to Dona Briggs, Division of Risk Management (Richmond). This letter of representation gives more details of the occurrence.

C. Letter dated January 12, 1994, from Plaintiff's counsel to D. Briggs, Division of Risk Management (Richmond). This letter provides medical records, bills and lost wage information.

D. Letter dated February 14, 1994, from Plaintiff's counsel to D. Briggs, Division of Risk Management (Richmond). This letter includes an updated Medical Itemization, medical records and bills and photographs of the accident scene.

E. Letter dated February 22, 1994, from D. Briggs to Plaintiff's counsel indicating that the Division of Risk Management is evaluating the case.

F. Letter dated March 14, 1994 from Plaintiff's counsel to Director, Division of Risk Management (Richmond).

G. Letter dated July 25, 1994, from Plaintiff's counsel to D. Briggs, Division of Risk Management (Richmond), providing further information concerning liability, a report from an expert witness, John B. Gooch, a licensed engineer, regarding the specific code violations proximately causing Plaintiff's injuries, additional photographs and diagrams of the accident scene.

H. Letter dated September 19, 1994, from D. Briggs, Division of Risk Management (Richmond), to Plaintiff's counsel denying Plaintiff's claim.

IV. Although an evidentiary hearing was not held, the parties agreed to stipulate the following facts: that there is more than one campus of "GMU" and that there is more than one parking lot at "GMU". Also, Claudia Young was present in court when Defendant's Demurer, Motion to Dismiss/Motion for Summary Judgment and Plea of Sovereign Immunity was argued. Ms. Young was recognized by the court. She stated to the trial court that she was an employee of "GMU" and that the Plaintiff had contacted her regarding injuries


that she allegedly suffered at "GMU". She also admitted that she received photographs and the diagram of the location of the occurrence which were attached to the Plaintiff's letter dated October 11, 1993. This is the same letter referred to in part III, A, of this Statement of Facts. Furthermore, Defendant's pleadings admit that both "GMU" and the "CW" had actual notice of this claim, including the actual location of this occurrence.

The above constitutes Plaintiff's written statement of facts and other incidents of this case.

RESPECTFULLY SUBMITTED:

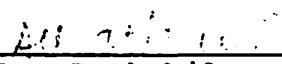
BARBARA HALBERSTAM

By Counsel



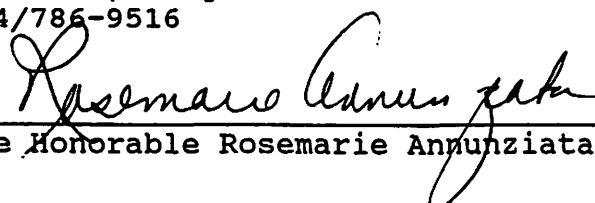
Charles J. Samuels
Counsel for Plaintiff
10615 Judicial Drive
Suite 103
Fairfax, Virginia 22030
703/591-9203
Virginia State Bar No. 20821

SEEN AND AGREED:

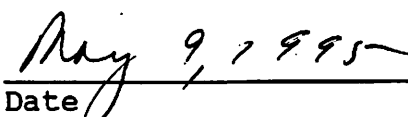


A. Ann Berkebile
Assistant Attorney General
Counsel for Defendants
101 North 8th Street
Richmond, Virginia 23219
804/786-9516

Date



The Honorable Rosemarie Annunziata



Date

Assignments of Error

Whether the Trial Court erred in dismissing Plaintiff's claims against the Commonwealth and GMU.

A. Whether the Trial Court erred in sustaining Commonwealth of Virginia's Demurrer, Motion to Dismiss/Motion for Summary Judgment, and Plea of Sovereign Immunity.

B. Whether the Trial Court erred in sustaining George Mason University's Plea of Sovereign Immunity.

C. Whether the Trial Court erred in ruling that the Virginia Tort Claims Act must be strictly construed in favor of the Commonwealth because it abrogates the Commonwealth's right of immunity at common law, even though the Commonwealth was engaged in ministerial and/or proprietary activities for which it was not immune at common law.

D. Whether the Trial Court erred in ruling that the injured party had not substantially complied with the Virginia Tort Claims Act, even though the injured party mailed numerous letters, photos and maps detailing the time and location of the occurrence and the Commonwealth admits having actual notice.

E. Whether the Trial Court erred by granting Defendant's Demurrer, Motion to Dismiss/Motion for Summary Judgment, and Plea of Sovereign Immunity when the injured party had substantially complied with the Virginia Tort Claims Act and Defendants had actual notice of this claim.

F. Whether the Trial Court erred in refusing to rule that the Defendants were estopped from raising the notice defense.

G. Whether the Trial Court erred in dismissing the injured parties' suit prior to the discovery cut-off date.